



Cats (Confinement) Variation By-law - Legislative Review Committee

Originating Officer	Team Leader Community Safety - Luke Manuel
Corporate Manager	Manager Development and Regulatory Services - Warwick Deller-Coombs
General Manager	General Manager City Development - Ilia Houridis
Report Reference	GC200609F01

Confidential



Confidential Motion

That pursuant to Section 90(2) and (3)(h) of the Local Government Act 1999, the Council orders that all persons present, with the exception of the following persons: Adrian Skull, Ray Barnwell, Ilia Houridis, Tony Lines, Sorana Dinmore, Kate McKenzie, Jaimie Thwaites, Warwick Deller-Coombs, Luke Manuel, Sharon Perin and Craig Clarke, be excluded from the meeting as the Council receives and considers information relating to the Cat Curfew By-Law Update and Legal Advice, upon the basis that the Council is satisfied that the requirement for the meeting to be conducted in a place open to the public has been outweighed by the need to keep consideration of the matter confidential given the information relates to legal advice.

REPORT OBJECTIVE

The purpose of this report is to present Council with the outcome of the Legislative Review Committee's ('the Committee') review of the Cats (Confinement) Variation By-law where they raised several concerns about the By-law. Legal advice has been obtained giving Council several options to consider on how to proceed with the By-law.

EXECUTIVE SUMMARY

The City of Marion began the process to create the Cats (Confinement) Variation By-law over 12 months ago in an effort to address local cat management issues that were not sufficiently dealt with under the State Dog and Cat Management Act ('DCM Act'). The By-law removed duplication as a result of changes to the DCM Act, gave council the ability to create a flexible confinement period and practical enforcement powers relating to seizure and detention (similar to those in the DCM Act relating to dogs).

At the General Council Meeting held Tuesday 25 February 2020 (GC200225R07), Council made a resolution (Attachment 1) to progress the By-law to the Legislative Review Committee (LRC). The LRC reviewed the By-law on 29 April 2020 and subsequently wrote to Chief Executive Officer on 13 May 2020 (Attachment 2) raising several concerns with the By-law. The correspondence recommends Council revoke the Variation By-law and undertake a further review of the By-law in light of a number of comments made by the Committee.

Administration has obtained legal advice which outlines Council's options on how to progress the By-law based on the comments and objections made by the Committee (Attachment 3).

The Committee has since considered the By-law (Attachment 4) and provided comments to Council. Legal advice (Attachment 5) has been obtained in relation to the Committee's comments.

Additionally, the Committee wrote to Council on 3 June 2020 advising the outcome of their meeting on 3 June 2020 where they resolved to issue a procedural notice of motion to Parliament to disallow the By-law (Attachment 6).



This report provides Council with two options to consider to move forward following the feedback from the Legislative Review Committee.

RECOMMENDATION

That Council:

1. **Receives and notes this report, including the attached legal advice.**
2. **Endorses Administration to pursue one of the following two (2) options:**

Option 1:

Endorses Administration to write to the Legislative Review Committee reaffirming Council's position that the By-law should be progressed in its current form.

Option 2:

Endorses Administration to commence the process of making a further Variation By-law, taking into account the comments and objections made by the Legislative Review Committee; and write to the Legislative Review Committee, providing an undertaking that Council will take no action to enforce the provisions of the By-law the Committee finds objectionable until such time as Council has made amendments to the Variation By-law.

3. **In accordance with Section 91(7) and (9) of the Local Government Act 1999 the Council orders that this report, *Cat Curfew By-Law Update and Legal Advice*, and any associated appendices arising from this report having been considered in confidence under Section 90(2) and (3)(h) of the Act, except when required to effect or comply with Council's resolution(s) regarding this matter, be kept confidential and not available for public inspection for a period of 12 months from the date of this meeting. This confidentiality order will be reviewed at the General Council Meeting in December 2020.**

Valuing Nature:

The appropriate management of cats contributes to preserving and saving native flora and fauna.

Legal / Legislative / Policy:

Under the Dog and Cat Management Act ,1995, Council may make Bylaws for the control or management of cats within the Council area.

DISCUSSION

The Legislative Review Committee has reviewed Council's Cats (Confinement) Variation By-law and have raised several concerns. These concerns relate specifically to paragraphs 3, 6 and 11 of the By-law. The Committee was also critical of aspects of the community consultation process, despite the consultation being a thorough process, exceeding the legislative requirements, and a large number of people engaged in the consultation. Legal advice provided to the City of Marion indicates that the criticisms levelled at Council by the Committee relating to the community consultation are entirely unfounded.

Concerns with the By-law

Paragraphs 3 and 6

The Committee is critical of the use of the term 'effective control by means of physical constraint' in clause 3.10 of the By-law. The Committee is also critical of the provisions in paragraph 6 which empowers Council to fix periods of time when cat wandering is permitted.



These provisions are identical to equivalent provisions in the *Cats By-law 2018* made by the District Council of Yankalilla in February 2018. It is not known why the Committee has now taken issue with these provisions.

Paragraph 11

The Committee indicated it has concerns about the ability of a Council authorised person to seize a cat in circumstances where its owner cannot immediately be located, as provided for in paragraph 11.1.2.

Our legal advice maintains that this provision is entirely uncontroversial, as it does no more than state the general proposition that an authorised person can seize an unaccompanied animal found on a location in contravention of the By-law. It is equivalent to the power to seize a dog wandering at large (immediately upon detection) as provided for in the *Dog and Cat Management Act 1995*. In addition, the Committee indicated it is concerned with the manner in which paragraph 11.2 (pertaining to the seizure and destruction of unidentified cats) may be administered. Again, our legal advice maintains this provision is entirely uncontroversial, as it does no more than restate the general power available to Council's authorised persons under Sections 63(1)(d) and 63(2) of the DCM Act.

The Committee has indicated it is also concerned the 72 hour timeline for the destruction of identified cats provided for in paragraph 11.3, unduly trespasses on cat owners' rights in circumstances where they may be justifiably unable to respond within that time. Again, our legal advice maintains the provision is entirely uncontroversial as it is identical to the powers available to Council with respect to seized dogs under Section 62 of the DCM Act.

The Committee considers the scheme provided to destroy seized cats in paragraph 11.4 of the By-law is inconsistent with the DCM Act. The following legal advice was obtained in relation to this matter and was provided to Council on 27 August 2019 (GC190827F01):

The inclusion of such powers is entirely consistent with the legislative authority granted to the Council under both Section 90(1) and (2) of the DCM Act and Section 246(2) of the LG Act to make cat management By-laws. However, the risk that a Court might find the inclusion of these powers within the By-law is inconsistent with the provisions of Section 64(1)(b) of the DCM Act cannot be entirely discounted based on consideration of the relevant authorities – although our opinion is that the better view is that the By-law, when taken as a whole, is not inconsistent with the DCM Act.

The Crown Solicitors Office did not agree with the above legal opinion, however Council decided to proceed with the By-law as drafted. The Committee has indicated it prefers the advice obtained by the Crown, that the By-law is inconsistent.

Public Consultation Process

Criticism of Public Consultation Process

Council undertook a rigorous public consultation process that met and exceeded the statutory requirements under Section 249 of the Local Government Act. The Committee accepted that residents in the City of Marion were given a genuine opportunity to comment on the By-law and notes the participants were offered an opportunity to give further comments in relation to the By-law as a whole. However, the Committee felt that too little attention was given during the public consultation process to the more controversial parts of the By-law.

Our legal advice indicates that the criticisms levelled at Council by the Committee relating to the community consultation are entirely unfounded.



The Committee suggested Council engage with the Minister for Environment and Water to identify what actions may be possible to address community concerns. Council wrote to Minister Speirs on 9 September 2019, seeking amendments to the DCM Act and associated Regulations to put beyond doubt Council's ability to make comprehensive By-laws that deal with cat issues. The Minister provided a response on 23 January 2020 (Attachment 6) advising the Dog and Cat Management Board is recording all concerns in anticipation for the DCM Act to be reviewed in 2022.

Options for progressing the By-law

Council now needs to consider several options on how it would like to proceed to progress the By-law. Legal advice provided four (4) potential options for consideration. However, after review by the Administration and consultation with Elected Members at a recent Forum on 19 May 2020, two options have been identified as the preferred way forward.

Furthermore, as indicated in their recent letter to Council (Attachment 6), the Committee will be able to consider the resolutions of Council reached at this meeting, at their meeting on 17 June 2020.

Option 1 - Reaffirm Current Proposed By-Law (Recommended)

Under Section 10A of the *Subordinate Legislation Act 1978* the Committee has the statutory function to inquire into and consider all by-laws made by councils. While the Parliament is in session, if the Committee considers a by-law ought be disallowed, it must report the opinion and the grounds for the opinion to both houses of Parliament. Upon receipt of a report from the Committee, either House of Parliament is empowered to disallow the by-law.

If disallowed by either House of Parliament, the By-law would cease to have effect and, in accordance with Section 12 of the *Acts Interpretation Act 1915*, those provisions of the Council's *Cats By-law 2014* (the Cats By-law) varied by the Variation By-law would be reinstated. This would lead to the reinstatement of the original paragraphs, as made in 2014, and the removal of the new paragraphs and some associated formatting changes.

Should the Council choose not to take any action in response to the concerns identified by the Committee, the Committee will recommend disallowance. It is likely that either House of Parliament will subsequently disallow the Variation By-law. The CEO has written to the Committee requesting they take no action to recommend disallowance until council has had the opportunity to consider this report.

Council has already committed significant time and resources to create a By-law that the community supported. If a motion to disallow the By-law is presented to Parliament then this option allows Parliament the opportunity to debate the By-law and make the final decision. In the view of Administration this is the recommended option. It demonstrates Council has done everything within its remit to introduce a By-law to address cat issues in the local community however it places the final decision on the Parliament. Should council choose this option, the Administration will write to the Committee advising of the decision.

Option 2 - Further Variation By-law

Council could provide an undertaking to the Committee that it will take no action to enforce the provisions of the By-law the Committee finds objectionable until such time as it has made amendments to the Variation By-law in a form acceptable to the Committee. This approach would mean a further variation By-law is required to specifically address concerns held by the Committee which the Council is prepared to make.

In order to avoid disallowance, the further variation By-law would need to:

1. alter paragraph 3 to address the wording concerns identified by the Committee;
2. revise paragraph 6 to set a specified span of hours in the by-law itself that is consistent with the span of hours currently proposed by the Council; and
3. delete paragraph 11 in its entirety.

This approach (particularly with respect to paragraphs 6 and 11) is not optimal in terms of provision of flexibility (in the case of paragraph 6) and enforceability (with respect to paragraph 11). There would essentially be no ability for Council to review the confinement hours and make changes in the future via a resolution. Importantly Council authorised officers would not have any ability to seize and detain identified cats, making enforcement problematic. This option would present the most efficient manner of revising the Variation By-law in order to avoid disallowance however it is not recommended. In order to create another further variation By-law the Council would need to start the entire By-law making process again, including community consultation. This will take approximately 12 to 18 months. The DCM Act will be close to being reviewed by this time and there would be limited ability to actually enforce the confinement provision without seizure and detention powers.

Attachment

#	Attachment	Type
1	Attachment 1 - Copy of Council Resolution	PDF File
2	Attachment 2 - LRC Letter to Mr. Adrian Skull CEO City of Marion 13.5.2020	PDF File
3	Attachment 3 - Legislative Review Committee Comments (1)	PDF File
4	Attachment 4 - Cats Variation By-law No.7 2020 (Tabled to LRC)	PDF File
5	Attachment 5 - Legal Advice 15.3.2020	PDF File
6	Attachment 6 - Letter to Mr Adrian Skull CEO City of Marion - LRC030620	PDF File

Background and Copy of Council Resolution

At the General Council Meeting held Tuesday 25 February 2020, Council made the following resolution (GC200225R07):

1. Pursuant to Section 246 of the Local Government Act 1999:

1.2 having considered the:

- Cats (Confinement) Variation By-law 2020; (the By-law)

(reproduced at Attachment 1 to Item# on the agenda for the meeting of Council held on 25 February 2020) in light of the National Competition Policy and the Report prepared on the National Competition Policy with respect to the By-law (reproduced at Attachment 1 to Item # on the agenda for the meeting of Council held on 25 February 2020); and

1.3. having considered the public submissions made on the By-law and the recommendations made by the Dog and Cat Management Board, Council makes the By-law in exercise of the powers contained in the Acts Interpretation Act 1915, the Dog and Cat Management Act 1995 and the Local Government Act 1999.

2. The Chief Executive Officer be authorised to sign the By-law as made by Council.

3. The Chief Executive Officer be authorised to publish notice of the making of the By-law in The Advertiser newspaper.

4. The Chief Executive Officer be authorised to arrange for the By-law to be published in the Government Gazette.

5. The report to the Legislative Review Committee on the By-law (reproduced at Attachment 5 to Item # on the agenda for the meeting of Council held on 25 February 2020), be adopted and be signed by the Chief Executive Officer on Council's behalf.

6. The Chief Executive Officer be authorised to arrange for the By-law and all other necessary documentation to be provided to the Legislative Review Committee.

7. Endorse the establishment of a curfew time where wandering is not permitted between the hours of 9.00pm to 7.00am and then 10.00pm to 6.00am during the daylight savings period.

8. Endorse budget of \$2, 150 to initially procure microchip readers and cat cages and provide recurrent funding for ongoing maintenance and replacement of microchip readers and cat cages through Council's annual recurrent budget process.

9. Endorse budget of up to \$5,000 for a communications strategy including the development of promotional and advisory material and paid advertising.

10. A report be brought back to council after six months of operation providing a review of the Bylaw.



Mr Adrian Skull
Chief Executive Officer
City of Marion
(by email)

13 May 2020

Dear Mr Skull,

City of Marion Cats (Confinement) Variation By-Law 2020 - By-law No. 7

At its most recent meeting, the Legislative Review Committee ('the Committee') considered the above By-law against its scrutiny principles (attached).

The Committee is mindful of the City of Marion's right to make by-laws for the good rule and government of the area, and for the convenience, comfort and safety of its community. Further, the Committee acknowledges that the City of Marion by making the By-law is seeking to address matters of community concern in respect of the management of cats in the City of Marion area that, in its view, the *Dog and Cat Management Act 1995* does not.

Following its review of the By-law, the Committee has concerns both in respect of the text of the By-law and the report to the Committee on the consultation that occurred in relation to the By-law. These concerns are set out in an attached document titled 'Legislative Review Committee comments – City of Marion By-law No. 7'.

The Committee would appreciate the City of Marion's views as to why it has taken the approach that it has in paragraph 11 of the By-law. The Dog and Cat Management Board ('the Board') reports to the Committee that just over half of South Australia's Councils have cat by-laws that include provisions placing limits on cat numbers, curfews, containment, registration, nuisance and wandering at large. However, none of these Councils have adopted the approach taken by City of Marion in respect of paragraph 11 of the By-law. The Board also suggests to the Committee that other Councils have either considered provisions similar to paragraph 11 of the By-law, and decided against it, or are waiting on the outcome of the Committee's review of the By-law before deciding what steps to take, if any.

In the Committee's view, given Part 5A the *Dog and Cat Management Act 1995*, the most appropriate action for the City of Marion would be to revoke the By-law and undertake a review of its By-law, taking into consideration the Committee's comments. Further, the Committee recommends engagement with the Minister for Environment and Water, as the Minister administratively responsible for the *Dog and Cat Management Act 1995*, to identify what action may be possible to address community concerns about the management of cats, including those the City of Marion has sought to address in the By-law.

If you have any questions or would like to discuss the matter further, please contact Mr. Matt Balfour, Secretary to the Committee, on (08) 8237 9415. Otherwise, the Committee would appreciate the Marion Council's reply to seclrc@parliament.sa.gov.au on or before Thursday 28 May 2020.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'N. Centofanti', written in a cursive style.

Hon. Nicola Centofanti MLC
PRESIDING MEMBER

cc Hon. David Speirs MP, Minister for Environment and Water
 Hon. Stephan Knoll MP, Minister for Transport, Infrastructure and Local
 Government
 Ms. Allery, Manager, Dog and Cat Management Board

Legislative Review Committee comments – City of Marion By-law No. 7

Paragraph 3 (Interpretation)

The term '*effective control by means of physical restraint*' is defined for the purposes of paragraph 3.10. However, the term is not used in paragraph 3.10, which reads '*...effective control of the cat by means of physical restraint*'.

The Committee's scrutiny principle (e) requires the Committee to consider whether proposed by-laws 'are unambiguous and drafted in a sufficiently clear and precise way'. General drafting practice is that a defined term be used in the text of an instrument as stated in the definition provision.

Paragraph 6 (Cats not to Wander at Large)

The hours during which cats are not to wander at large are not specified in paragraph 6 of the By-law but left to be determined by Council resolution. Under scrutiny principle (b), the Committee must consider whether by-laws 'unduly trespass on rights previously established by law or are inconsistent with the principles of natural justice ...' In the Committee's view, paragraph 6, as drafted, permits the City of Marion, by resolution, to adopt a span of hours that may amount to an unreasonable burden on cat owners in the City of Marion area. For this reason, it would be more appropriate for the City of Marion to specify a span of hours in the By-law and seek a further variation By-law if the span of hours set in the By-law does not prove appropriate.

Paragraph 11 (Seizure, Detention and Destruction of Cats)

Subparagraph 11.1

Subparagraph permits that a cat 'wandering at large', whose owner cannot '*immediately*' be located, may be seized and detained. In the Committee's view, the use of the word '*immediately*' may lead to actions by an authorised person without affording a cat owner, or person responsible for a cat, a reasonable opportunity to respond to the seizure or detention of the cat. In the Committee's view, subparagraph 11.1 may unduly trespass on the rights of cat owners (see scrutiny principle (b)).

Subparagraph 11.2

Subparagraph 11.2 permits the disposal, destruction or injury of an unidentified cat that has been seized under subparagraph 11.1. In the Committee's view, subparagraph 11.1 is inconsistent with sections 63 (Power to destroy cats), 64 (Power to seize and detain cats) and 64A (Destruction or disposal of seized cat) of the *Dog and Cat Management Act 1995*. Section 63(1)(d) of that Act deals specifically with the circumstances in which an unidentified cat may be destroyed.

In addition, the lack of preconditions attached to the exercise of powers by an authorised person may lead to actions inconsistent with natural justice, including the destruction of a cat without an opportunity for an owner to claim the cat (see scrutiny principle (b)). Of wider concern to the Committee is the potential for a cat from a neighbouring Council to be inadvertently seized and destroyed under the subparagraph without notice to the cat's owner. The Committee considers that, aside from the inconsistency with Part 5A of the *Dog and Cat Management Act 1995*, the cross-border issues that may arise in the administration of subparagraph 11.2 of the By-law make the content of subparagraph 11.2 of the By-law a matter more appropriately dealt with by either the *Dog and Cat Management Act 1995* or regulations made under that Act.

Subparagraph 11.3

Subparagraph 11.3 permits an identified cat to be destroyed by an authorised person if the cat is not claimed 'within 72 hours from when notice of its detention is given under this By-law'. In the Committee's view, the proposed timeframe may unduly trespass on a complying cat owner's rights (see scrutiny principle (b)). Further, subparagraph 11.3 does not appear to the Committee to allow for the rights of a person who is responsible for a cat in circumstances where the cat owner may justifiably be unable to respond with 72 hours.

Paragraph 11.4

In the Committee's view, the destruction of a seized cat is dealt with in section 64A of the *Dog and Cat Management Act 1995*. If Parliament had intended for a cat to be destroyed other than as stated in section 64A it would have done so. Subparagraph 11.4 of the By-law in purporting to treat a cat as a dog in order to pick up the circumstances listed in section 60 of the *Dog and Cat Management Act 1995* disregards Parliament's legislative intent to treat the destruction, seizure and detention of dogs and cats differently, as evidenced by Divisions 1 (Destruction, seizure and detention etc of dogs) and 2 (Destruction and seizure etc of cats) of Part 5A of the *Dog and Cat Management Act 1995*.

Committee's consideration of the underlying Law

Delegated legislation 'must not conflict with or override the provisions of their enabling Act, unless the enabling Act so provides.' *Plaintiff M47 / 2012 v Director-General of Security* [2012] HCA 46 [434] per Keifel J. '[T]he question is whether the 'regulation' in question varies or departs from (in other words alters, impairs or detracts from) the provisions of the Act.' *Ibid* at [174] per Hayne J. In considering whether a by-law is consistent with the enabling legislation, it is important to consider the degree to which the Parliament has indicated its intention to deal with the subject matter. Where an Act deals specifically and in detail with a subject, it cannot be supposed that Parliament intended that delegated legislation should deal with the same matter in a different way. *Morton v Union Steamship Company of New Zealand* [1951] HCA 42; (1951) 83 CLR 402 at 410. See also *R v Commissioner of Patents; Ex parte Martin* [1953] HCA 67 at [12] per Fullagar J (with whom Kitto and Taylor JJ agreed).

The *Local Government Act 1999* states that by-laws must accord with the provisions and general intent of the enabling Act (see section 247(a) of the *Local Government Act 1999*). That Act also provides that ‘a by-law made by a Council must not be inconsistent with this Act or another Act, or with the general law of the State’ (see section 248(1)(b) of the *Local Government Act 1999*).

The Committee understands that the City of Marion considered whether paragraph 11 of the By-law was inconsistent with the *Dog and Cat Management Act 1995* but concluded, contrary to advice from the Crown Solicitor’s Office, that it was not. For the reasons above, the Committee agrees with advice from the Crown Solicitor’s Office insofar as that advice asserts that paragraph 11 of the By-law is inconsistent with Part 5A of the *Dog and Cat Management Act 1995*.

The Committee notes that Parliament in section 64(1)(b) of the *Dog and Cat Management Act 1995* has left open the possibility for additional circumstances, in which a person may seize and detain a cat, to be set out in regulations under that Act but, in the Committee’s view, not a by-law.

Committee’s consideration of the City of Marion’s report to the Committee about consultation

The Committee notes that the City of Marion’s report to the Committee states, in part:

‘482 unique participants made 513 survey submissions online.

- 74% of people who participated in the online survey indicated they either strongly support, or support the introduction of, a cat curfew at defined times under the By-law.
- 26% of people who participated either opposed or strongly opposed the proposed By-law.’

In the Committee’s view, the above reporting, while it may be a product of the City of Marion’s survey questions, does not give a proper account of the views received by the City of Marion about the By-law as a whole. To highlight that 74% of people support the introduction of a cat curfew does not give information about those people’s views about other aspects of the By-law, including paragraph 11 of the By-law.

For the Committee, information about consultation on a By-law forms an essential part of the Committee’s inquiry into and consideration of the By-law. In this instance, the Committee is concerned that too little attention was given, during the public consultation process, to the more controversial parts of the By-law. For example, no survey question sought feedback from the community of the City of Marion in relation to paragraph 11 of the By-law. That said, the Committee accepts that residents in the City of Marion were given a genuine opportunity to comment on the By-law and notes that residents of the City of Marion were offered an opportunity to give further comments in relation to the By-law as a whole.



*By-law made under the Local Government Act 1999
and the Dog and Cat Management Act 1995*

CATS (CONFINEMENT) VARIATION BY-LAW 2020

City of Marion By-law No. 7

To vary the Council's *Cats By-law 2014* and for related purposes.

Part 1 - Preliminary

1. Short title

This by-law may be cited as the *Cats (Confinement) Variation By-law 2020*.

2. Commencement

This by-law will come into operation four months after the day on which it is published in the *Gazette* in accordance with Section 249(5) of the *Local Government Act 1999*.

3. Variation provisions

In this by-law, a provision under a heading referring to the variation of a specified by-law varies the by-law so specified.

Part 2 - Variation to *Cats By-law 2014*

4. Variation of Paragraph 3

4.1 Paragraph 3.1 – delete the paragraph and substitute:

'3.1 authorised person has the same meaning as in the *Dog and Cat Management Act 1995*;

4.2 After paragraph 3.4 insert:

'3.4A effective control by means of physical restraint for the purposes of paragraph 3.10 means:

3.4A.1 the person is exercising effective control of the cat by means of a chain, cord or leash that does not exceed 2 metres in length restraining the cat;

3.4A.2 the person has effectively secured the cat:

3.4A.2.1 by placing it in a cage, vehicle or other object or structure; or



By Email: Luke.Manuel@marion.sa.gov.au
Ref: DZMM00293576F06262474.DOCX

15 May 2020

Mr L Manuel
Team Leader Community Safety
The Corporation of the City of Marion
245 Sturt Road
STURT SA 5047

Dear Luke

Cats (Confinement) Variation By-law

We refer to previous communications in relation to this matter.

You have sought our advice on the options available to the Council in relation to the *Cats (Confinement) Variation By-law 2020 (the Variation By-law)*, arising from the receipt of correspondence from the Presiding Member of the Legislative Review Committee of the Parliament of South Australia (**the Committee**), the Honorable Nicola Centofanti MLC.

In short, the correspondence recommends that the Council revoke the Variation By-law and undertake a further review of the By-law in light of a number of comments made by the Committee in relation to the content of the By-law.

We now provide our advice.

General Observations on Committee's Comments

Paragraphs 3 and 6

The Committee is critical of the use of the term 'effective control by means of physical constraint' in clause 3.10 of the Variation By-law.

The Committee is also critical of the provisions in paragraph 6 of the Variation By-law which empowers the Council to fix periods of time when cat wandering is permitted.

These provisions are identical to equivalent provisions in the *Cats By-law 2018* made by the District Council of Yankalilla in February 2018. It is unclear why the Committee has taken issue with these provisions now, in circumstances where that Council was permitted to make a by-law in identical terms.

Paragraph 11

The Committee has indicated it is concerned about the ability of a Council authorised person to seize a cat in circumstances where its owner cannot immediately be located as provided for in

Norman Waterhouse Lawyers Pty Ltd ACN 621 909 395

Level 11, 431 King William Street, Adelaide SA 5000
GPO Box 639, Adelaide SA 5001
www.normans.com.au

T +61 8 8210 1200



paragraph 11.1.2 of the Variation By-law. In our view, this provision is entirely uncontroversial as it does no more than state the general proposition that an authorised person can seize an unaccompanied animal found on a location in contravention of the By-law. It is equivalent to the power to seize a dog wandering at large (immediately upon detection) as provided for in the *Dog and Cat Management Act 1995* (**the DCM Act**).

The Committee has indicated it is concerned with the manner in which paragraph 11.2 of the Variation By-law (pertaining to the seizure and destruction of unidentified cats) may be administered. In our view, the provision is entirely uncontroversial as it does no more than restate the general power available to the Council's authorised persons under Sections 63(1)(d) and 63(2) of the DCM Act.

The Committee has indicated it is concerned the 72 hour timeline for the destruction of identified cats provided for in paragraph 11.3 of the Variation By-law unduly trespasses on cat owners' rights in circumstances where they may be justifiably unable to respond within that time. Again, in our view, the provision is entirely uncontroversial as it is identical to the powers available to the Council with respect to seized dogs under Section 62 of the DCM Act.

The Committee considers the Council's scheme provided to destroy seized cats in paragraph 11.4 of the Variation By-law is inconsistent with the DCM Act. On 6 August 2019, we advised the Council:

The inclusion of such powers is entirely *consistent* with the legislative authority granted to the Council under both Section 90(1) and (2) of the DCM Act and Section 246(2) of the LG Act to make cat management by-laws. However, the risk that a Court might find the inclusion of these powers within the By-law is *inconsistent* with the provisions of Section 64(1)(b) of the DCM Act cannot be entirely discounted based on consideration of the relevant authorities – although our opinion is that the better view is that the By-law, when taken as a whole, is not inconsistent with the DCM Act.

The Council proceeded to make the Variation By-law. We remain of the view as outlined on 6 August 2019. The Committee has indicated it prefers the advice obtained by the Crown that the By-law is inconsistent. We suspect the Committee is unlikely to adopt an alternative position.

Criticism of Public Consultation Process

In our view, the Council has undertaken a rigorous public consultation process that meets and exceeds the statutory requirements under Section 249 of the LG Act which merely require:

1. the making available of the proposed by-law on the internet and at the Council's principal office;
2. the placement of a public notice in a newspaper informing people about the availability of the proposed by-law and its nature and effect; and
3. the consideration of submissions received on the proposed by-law.

In our view, the criticisms levelled at the Council by the Committee are entirely unfounded.

Option 1: Take No Action

Under Section 10A of the *Subordinate Legislation Act 1978* (**the SL Act**), the Committee has the statutory function to inquire into and consider all by-laws made by councils.

While the Parliament is in session, if the Committee considers a by-law ought to be disallowed, it must report the opinion and the grounds for the opinion to both houses of Parliament. Upon receipt of a report from the Committee, either House of Parliament is empowered to disallow the by-law.

If disallowed by either House of Parliament, the Variation By-law would cease to have effect and, in accordance with Section 12 of the *Acts Interpretation Act 1915 (the AI Act)*, those provisions of the Council's *Cats By-law 2014 (the Cats By-law)* varied by the Variation By-law would be reinstated.

Ostensibly, this would lead to the reinstatement of paragraphs 3.1, 6, 7 and 8.3 in their form, as made in 2014, the removal of the new paragraphs 3.8, 3.9, 3.10 and 11 and some associated formatting changes. The revival of paragraphs 3.1, 6 and 7 would be problematic as the provisions are obsolete given changes made to the DCM Act in July 2017.

In our experience, should the Council fail to take any action in response to the concerns identified by the Committee, the Committee will recommend disallowance. It is highly likely that either House of Parliament will subsequently disallow the Variation By-law.

Option 2: Revoke and Remake

The Committee has suggested the Council revoke and remake the Variation By-law. The Council is empowered to revoke the Variation By-law under Section 39 of the AI Act by following the same process it adopted to make the by-law (by undertaking public consultation etc).

Under this approach, the Council would need to specifically provide¹ for the revival of the previously varied/revoked provisions of the Cats By-law which are (subject to our comments above) deemed necessary.

Council would then need to make a further variation by-law to address the matters it wished to address that the Committee is unconcerned with, as contained within the Variation By-law.

This approach would require two separate by-law making processes to be completed, which is undesirable from a cost and efficiency perspective.

Option 3: Further Variation By-law

Under this option, the Council could provide an undertaking to the Committee that it will take no action to enforce the provisions of the Variation By-law the Committee finds objectionable until such time as it has made amendments to the Variation By-law in a form acceptable to the Committee.

This approach would mean only one further variation by-law is required to specifically address concerns held by the Committee which the Council is prepared to make.

In order to avoid disallowance, we would suggest the further variation by-law would:

1. alter paragraph 3 to address the wording concerns identified by the Committee;
2. revise paragraph 6 to set a specified span of hours in the by-law itself that is consistent with the span of hours currently proposed by the Council; and
3. delete paragraph 11 in its entirety.

While this approach (particularly with respect to paragraphs 6 and 11) is sub-optimal in terms of provision of flexibility (in the case of paragraph 6) and enforceability (with respect to paragraph 11) it

¹ See Section 17 of the AI Act.

would, if accepted by the Committee, present the most efficient manner of revising the Variation By-law in order to avoid disallowance. We have had success in the past using this method to avoid disallowance of other council by-laws the Committee has found to be objectionable.

Option 4: Revoke Variation By-law or Cats By-law

The Council always retains the ability to revoke either the Variation By-law or the Cats By-law in their entirety and impose no restrictions in their place. This would leave the regulation of cats in the Council's area subject to the bare minimum requirements contained in the DCM Act.

As identified above, the revocation by-law must be made by the same process as the Variation By-law and, somewhat ironically, would be subject to review by the Committee.

While this option is always available from a delegated legislation making perspective, in light of the overwhelming response to the public consultation on the Variation By-law there is a risk this approach would not be acceptable to the Council's community.

Next Steps

On balance, it is our view the most appropriate option for the Council to pursue in the circumstances is option 3. This option balances the concerns of the Committee and the views of the community and would enable the vast majority of the Variation By-law to continue in operation. While less than ideal, the Council would retain some enforcement options with respect to the Variation By-law under Sections 261 and 262 of the LG Act.

The Council should consider the correspondence from the Presiding Member of the Committee at a future Council meeting and determine what approach it wishes to take. We would be pleased to attend such a meeting either electronically or in person, if requested.

Regardless of the option pursued, we note the Committee has suggested the Council liaise with the Minister for Environment and Water with a view to addressing the concerns identified by the Council's community with respect to the management of cats. This could result in long-overdue State-wide improvements to cat regulation.

Pending Council's determination of a way forward, we recommend the Chief Executive Officer write to the Presiding Member of the Committee to indicate that the Committee's concerns will be considered at a future meeting of the Council and requesting the Committee take no action to recommend disallowance in the interim.

Please do not hesitate to contact the writer with any queries.

Yours faithfully
Norman Waterhouse



Dale Mazzachi
Principal

T 08 8210 1221
dmazzachi@normans.com.au



Mr Adrian Skull
Chief Executive Officer
City of Marion
(by email)

3 June 2020

Dear Mr Skull,

City of Marion Cats (Confinement) Variation By-Law 2020 - By-law No. 7

Thank you for your letter dated 26 May 2020.

At its meeting today, the Legislative Review Committee resolved to give a notice of motion in each House of Parliament to disallow the above by-law. The notice of motion is a procedural step routinely taken by the Committee in circumstances where it has not concluded its inquiry into, or consideration of, a regulation, rule or by-law within 14 sitting days of the tabling of the regulation, rule or by-law in the Parliament.

Importantly, the earliest that the notice of motion to disallow the by-law may be moved in either House of Parliament is 17 June 2020. This timeframe will allow the City of Marion Council to consider the matters raised by the Committee at its meeting on 9 June 2020 and for the Committee to consider the position of the City of Marion Council before the Committee's representatives in the Parliament take any further steps in relation to the by-law.

If you have any questions or would like to discuss the matter further, please contact Mr. Matt Balfour, Secretary to the Committee, on (08) 8237 9415.

Yours sincerely,

A handwritten signature in blue ink, appearing to read 'N. Centofanti'.

**Hon. Nicola Centofanti MLC
PRESIDING MEMBER**