

INTEGRITY AND LOCAL GOVERNMENT LAWS AND LAW-MAKING

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In his AIAL National Lecture Series, Chief Justice James Spigelman defined 'integrity' in the following way:

...institutional integrity goes beyond matters of legality. However, it is not so wide as to encompass any misuse of power. Beyond issues of legality, the integrity of a governmental institution is determined by two additional considerations. First, the maintenance of fidelity to the public purposes for the pursuit of which the institution is created. Secondly, the application of the public values, including procedural values, which the institution was expected to obey.¹

I shall endeavour to show that the review undertaken by the courts of the legality of local government laws has an effect in requiring local authorities to meet these integrity requirements. While the courts state that their review is limited to issues of power, ie the standard test of unlawfulness, the practical result of judicial intervention has been to require fidelity to the public purposes for which local authorities are established and adherence, particularly to the procedural requirements, that are required for the making of local laws.

Oversight of local laws is also undertaken by some parliaments. This too has the effect of requiring local authorities to comply with a certain level of integrity.

Colouring the attitude of the courts and the parliaments in their consideration of local government laws is the representative nature of the law-maker. Local government authorities are elected. They are answerable to their electorate for the laws that they pass. They can be taken also to be influenced by their knowledge of the local situation with which a law has to deal when considering its content. The courts take this into account in determining issues where the application of a law impinges on its validity. However, the courts have not allowed a 'we know best what is good for our community' argument to prevail over wider rule of law considerations.

The position with parliaments is less clear. Political assessments are likely to impinge on decisions as to the desirability of the laws.

Judicial review

Unreasonableness

Until the latter part of the nineteenth century, courts adopted a robust approach to the validity of local laws. Using the 'unreasonableness' ground of review, they demonstrated a willingness to second guess councils as to what were appropriate laws for their local government area. While disguised as judicial review, it was merits review that was really being followed.²

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The position changed with the judgment of the Privy Council on appeal from the Supreme Court of New South Wales in *Slattery v Naylor*.³ The Privy Council noted that 'in determining whether or not a bye-law is reasonable, it is material to consider the relation of its framers to the locality affected by it, and the authority by which it is sanctioned'. Further it noted:

Every precaution has been taken by the legislature to ensure, first, that the council shall represent the feelings and interests of the community for which it makes laws; secondly, that, if it is mistaken, its composition may promptly be altered; thirdly, that its bye-laws shall be under the control of the supreme executive authority; and, fourthly, that ample opportunity shall be given to criticize them in either House of Parliament. Their Lordships feel strong reluctance to question the reasonable character of bye-laws made under such circumstances, and doubt whether they ought to be set aside as unreasonable by a Court of Law, unless it be in some very extreme case, such as has been indicated.

In *Kruse v Johnson*⁴ the Divisional Court of the Court of Queens Bench said: 'in matters which directly and mainly concern the people of the county, who have the right to choose those whom they think best fitted to represent them in their local government bodies, such representatives may be trusted to understand their own requirements better than judges'.

This approach was endorsed soon after in Australia by the High Court in *Widgee Shire Council v Bonney*⁵.

Despite their assertion that the validity of the actions of local authorities should be approached with a light touch, the English courts had reserved the right to intervene should a by-law be such that no reasonable person could have made it. An element of merits review was thus retained.

Griffith CJ in the *Widgee Shire Council* case followed this approach in acknowledging that there was some basis for judicial oversight:

In my opinion, the legislature has deliberately and intentionally made the local authority, subject to the approval of the Governor in Council, the sole judge of such matters, subject only to this qualification, that, if a by-law is such that no reasonable man, exercising in good faith the powers conferred by the Statute, could under any circumstances pass such a by-law, it might be held invalid on that ground as being an abuse of the power, and therefore not within it.⁶

The approach was reiterated in *Williams v Melbourne Corporation*⁷ in what has come to be regarded as the foundation case on intervention by a court with local laws.

The approach endorsed in these cases seems to be an acknowledgment of an integrity standard. The status of the authority empowered to make laws is recognised. However, it is also said that there can be occasions when that authority has acted in a way that is unacceptable -- but unacceptable to whom? The court does not assert that it is to be unacceptable to it. That is the view that was abandoned with *Slattery v Naylor*. So it applies a 'reasonable person' touchstone, which is of course the judge by another name. But to stay within its constitutional/judicial power, it is necessary to dress up the conclusion as one that is based on rule of law grounds, namely, that the local law exceeds the power to make it.

However, the courts have seldom declared delegated legislation, including by-laws, to be invalid on the basis of unreasonableness. There was a period of over 50 years in Australia in which there was no reported case of a law being declared invalid on this ground.⁸ There has been some revival of use of the ground in more recent times but it is unlikely that it will ever be a basis for invalidity that will be adopted frequently. Courts do not want to become general merits reviewers. Nor, for the reasons set out in *Slattery v Naylor*, above, should they. Review for unreasonableness is akin to a reserve power for dealing with incidents of outrageous action or egregious error on the part of the law-maker – but this is another way

of saying that the court will intervene where there has been a failure to observe appropriate standards of integrity.

There is one group of cases that cuts across this approach to requiring a level of integrity in law-making. They suggest that, if more than one interpretation of a local law is available, it should be assumed that the local law will be reasonably enforced.⁹ This is not a justifiable assumption. Instances of petty enforcement of laws are all too well-known to those who have to deal with low level bureaucrats. A law that is capable of more than one interpretation should not be given the imprimatur of integrity if one of those interpretations would offend the integrity test. As was said by Thomas J in *Re Gold Coast City Council By-laws*,¹⁰ 'I am unimpressed with governmental authorities which create unreasonably wide prohibitions and justify them with the statement "Trust us"'.¹¹

It can be seen that the approach of the courts to the review of the validity of local laws based on the ground of unreasonableness parallels that adopted in regard to administrative decisions. Courts will be slow to find that an administrative decision is bad on its merits. It must be of such a kind that no reasonable person could have made the decision. The existence of such a decision indicates that the power to make the decision must have been misunderstood and the decision is thus beyond power.¹¹

Improper purpose

Another way in which it can be suggested that the courts adopt an approach to review of local laws that serves an integrity function is in regard to review on the basis of improper purpose – that a power to make laws for a specific purpose cannot be used to achieve another purpose. Most cases involving an allegation of improper purpose are concerned with administrative decisions. However, Dixon J in *Arthur Yates & Co v Vegetable Seeds Committee*,¹² the principal case applying the improper purpose test to delegated legislation, said that no difference in principle existed between legislative and administrative decisions. There have been a number of cases where the courts have considered the improper purpose test as a basis for holding local laws invalid.¹³ The problem for those making such an assertion is, of course, to identify what the purpose of the local authority was in making the law – an issue exacerbated by the fact that the law was made by a multi-member decision-maker. However, the more recent of the cases noted have not seemed to be as troubled with this issue as was apparent in earlier days.¹⁴

There can be no doubt that integrity, however defined, requires that a power to make local laws must be used for the purpose designated. Use to achieve another purpose, no matter that such action is taken with the best of intent and achieves a valuable end, cannot be regarded as acting with integrity. The willingness of the courts to review local laws on the improper purpose ground thus enforces an integrity criterion.

Interpretation of power

The courts have also been very attentive in their interpretation of the power that is being exercised to make local laws. This is exemplified by the scope ascribed to the commonly found power to regulate an activity. 'Regulation' has been said not to permit the prohibition of the relevant activity.¹⁵ And this has been extended to declaring invalid a by-law made under a power to regulate that requires approval from a local authority before it may be undertaken.¹⁶ This is because a court cannot effectively review a refusal to approve the activity if the local authority complies with the general administrative law decision-making criteria.¹⁷ The local law in practical terms therefore prohibits the activity.

This analytical approach to the interpretation of power has been reaffirmed in somewhat more recent times in *Foley v Padley*.¹⁸

The oversight exercised by the courts of the use of law making powers can also be seen in the refusal to uphold the validity of local laws that impose a penalty unless the power to do so is expressly provided: *Re Port Adelaide Corporation; Ex parte Groom*.¹⁹ There a power to impose a monetary penalty was held not to permit a law requiring the forfeiture of the goods, the improper branding of which attracted the penalty. Similar thinking has led to it being held that the power to create an offence does not carry with it the power to provide for the avoidance of civil liability for the conduct penalised.²⁰

Likewise the control of activities through a licensing system is only permissible if power is given so to act.²¹ Where licensing is permitted, any licence fee must reflect the cost to the local authority of the activity being regulated and not be a revenue raising device.²²

It can be seen that these cases, while being directed to confining the law-making function of the local councils concerned to the power given to them by the empowering legislation, have also had the effect of imposing integrity standards on the councils.

Compliance with making procedures

The cases referred to above have been concerned with the substantive law-making power vested in the local authority. The courts have also rigorously enforced compliance with the procedures specified for the exercise of the power to make local laws.

It is usual for detailed provisions relating to the formalities for making laws to be set out in the empowering legislation. Requirements relating to the form of council resolutions, notice of intention to consider such resolutions, confirmation of their passing, notification to the affected public and so on are commonly specified. In cases from the nineteenth century to the present day such provisions have been interpreted to be mandatory.²³

Failure to comply with requirements relating to the publication of local laws has resulted in the laws being unenforceable.²⁴

These various cases pick up the second part of Spigelman CJ's definition of integrity relating to procedural values. Presumably the procedure has been specified to serve a public purpose. The courts have recognised this by requiring mandatory compliance.

General empowering provisions

There are a number of other more general matters where the approach of the courts will have a significant impact on the integrity of local authority law-making.

In the past, local government legislation commonly conferred law-making powers on local authorities by enumerating a list of matters upon which laws could be made. This was often coupled with a general power, but it was the exercise of the specific powers that usually attracted the attention of the courts. In recent years the method of vesting law-making power in local authorities has changed dramatically. The practice now is for power to be vested in very general terms and for no specific powers to be included.²⁵ On the face of it, giving power to local authorities in these terms imposes fewer constraints on their law-making power with a consequent diminution in the oversight role of the courts.

The scope of a general power when it appears with a list of specific powers has been the subject of some difference of view over an extended period. The position is discussed in *Corneloup*. The power there was to make laws 'for the good rule and government of the area and for the convenience, comfort and safety of its inhabitants'. The conclusion reached by Kourakis J after an extensive examination of the competing authorities was that:

The subject matter of a by-law made pursuant to the convenience power need not be strictly analogous to the subject matter of one or more of the specific powers. That approach unduly restricts the naturally wide terms of the convenience power. The question is whether the by-law made pursuant to the convenience power addresses a municipal purpose having regard to the subject matters of the specific powers.²⁶

As to the convenience power:

The convenience power extends to regulating conduct which... is properly a matter of municipal concern and which, if left uncontrolled, will materially interfere with the comfort, convenience and safety of the city's inhabitants.²⁷

In reaching this conclusion, Kourakis J referred to the discussion in *Lynch v Brisbane City Council* by Dixon CJ of the power in the *City of Brisbane Acts 1924* (Qld) to make ordinances for 'good government of the City and the wellbeing of its citizens'. His Honour said:

[the words give] a power to lay down rules in respect of matters of municipal concern, matters that have been reasonably understood to be within the province of municipal government because they affect the welfare and good government of the city and its inhabitants. The words are not to be applied without caution nor read as if they were designed to confide to the city more than matters of local government. They express no exact limit of power but, directed as they are to the welfare and good government of a city and its inhabitants, they are not to be read as going beyond the accepted notions of local government.²⁸

It can be seen that the good government formula and its variants vest a much broader discretion in local authorities than the list of enumerated powers is likely to do. As such, it reduces some of the capacity of the courts to oversee the use by a local authority of its law-making power. The power enables an authority to make virtually any laws that have a connection with local government. When this is coupled with the reluctance of the courts to exercise too great a supervisory role over an elected body, it is apparent that there is likely to be a diminution in the role of the court as an overseer of integrity in the authorities' law-making.

The outcome in *Corneloup* reflected this. The Court concluded that a by-law that said 'No person shall without permission... on any road... preach, canvass, harangue, tout for business or conduct any survey or opinion poll' was a valid exercise of the convenience power. The court was not prepared to find that it was unreasonable to protect the convenience of road users in this way.

However, the Court did find that the by-law breached the implied Constitutional guarantee of freedom of communication.²⁹

Human rights issues: principle of legality

There has been an increasing community awareness of human rights issues. In one jurisdiction, human rights legislation applies to the content of local authority legislation.³⁰ Again this impacts on the integrity of local laws.

Apart from the ACT and Victoria, there is no statutory protection in Australian jurisdictions of human rights. However, the courts have laid increasing emphasis for interpretation purposes on what is called the principle of legality.³¹ This has effect independently of any statutory recognition of human rights. Under this principle:

Courts do not impute to the legislature an intention to abrogate or curtail certain human rights or freedoms (of which personal liberty is the most basic) unless such an intention is clearly manifested by unambiguous language, which indicates that the legislature has directed its attention to the rights or freedoms in question, and has consciously decided upon abrogation or curtailment.³²

On the abrogation of the rights:

... [it must be apparent that] the legislature has not only directed its attention to the question of the abrogation or curtailment of such basic rights, freedoms or immunities but has also determined upon abrogation or curtailment of them. The courts should not impute to the legislature an intention to interfere with fundamental rights. Such an intention must be clearly manifested by unmistakable and unambiguous language. General words will rarely be sufficient for that purpose if they do not specifically deal with the question because, in the context in which they appear, they will often be ambiguous on the aspect of interference with fundamental rights.³³

This approach impacts in two ways on local laws. First, it will be assumed that the Act giving power to make local laws will not carry with it the right to make laws that abrogate or curtail certain basic rights or freedoms. Secondly, local laws will be interpreted in such a way as not to abrogate or curtail such freedoms.³⁴

The question that next arises is: What is the position in regard to a local law the only possible interpretation of which is that it curtails a basic right?

There are a number of examples of courts holding delegated legislation (not just by-laws) invalid because it was contrary to a basic right. Examples include:

- reversal of onus of proof;³⁵
- obstructing the highway;³⁶
- excluding procedural fairness;³⁷ and
- acquisition of property without compensation.³⁸

Management of streets has been a fruitful source of cases where the invasion of rights by strictures included in by-laws has been considered. For example, laws have been upheld as valid which regulated or prohibited:

- the playing of musical instruments in the street;³⁹
- the driving of cattle through the streets of Melbourne;⁴⁰
- distributing handbills or pamphlets;⁴¹
- erecting signs or fixing advertisements to traffic signs;⁴²
- the giving out or distributing of anything to another person in the Rundle Mall;⁴³
- taking part in any public demonstration or any public address;⁴⁴
- using 'insulting' words;⁴⁵ and
- erecting a tent and displaying signs and banners.⁴⁶

In most of these cases the law permitted the proscribed activity to occur 'with the permission of' the relevant local government authority.

In contrast with these decisions, there have been cases where a prohibition on activity in a street has been held invalid:

- carting night soil where this prevented neighbouring council areas from disposing of the substance;⁴⁷
- taking part in a procession without the Council's approval;⁴⁸
- carrying on any commercial activity adjacent to a street.⁴⁹

The result in these cases turned on the interpretation of the power to make the law and its effect in the specific situation before the court. However, the fact that there was an invasion of a generally recognised right was referred to and the court took it into account in determining whether the by-law fell within the authorizing power.

Constitutional right of freedom of communication

In addition to this common law position in regard to invasion of rights, the implied constitutional right of freedom of communication must be taken into account when determining the validity of local laws that attempt to constrain citizens' activities.

The test for determining whether there has been a breach of the implied right involves two questions: first, does the law effectively burden freedom of communication about government or political matters either in its terms, operation or effect? Second, if the law effectively burdens that freedom, is the law reasonably appropriate and adapted to serve a legitimate end in a manner which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government and the procedure prescribed by s 128 for submitting a proposed amendment of the *Constitution* to the informed decision of the people.⁵⁰

Dawson J in *Levy v Victoria*⁵¹ noted that the freedom of communication which the *Constitution* requires is a freedom which is commensurate with reasonable regulation in the interests of an ordered society.

It has thus been considered that the constitutional freedom of communication is not an absolute right of the kind provided by, for example, s 92 of the *Constitution*. Reasonable regulation of speech and other elements of communication is permissible.⁵²

Recently, Basten JA in *Sunol v Collier (No 2)* set out the approach to be followed in determining the constitutional validity of a law in the following terms:

- (a) construe the impugned law;
- (b) determine whether, properly construed, it effectively burdens political discourse;
- (c) if so, determine whether it is nevertheless reasonably appropriate and adapted to serve a legitimate end in a manner compatible with the system of representative and responsible government prescribed by the *Constitution*; and
- (d) if it fails the foregoing test, whether it can be severed or read down in a manner which preserves validity of the law in part.⁵³

Applying the High Court cases that have considered and developed the constitutional right, the Full South Australian Supreme Court in *Corneloup* concluded that limiting the ability to speak in the street fell within the first part of the test in that it controlled communication on political and governmental matters. This is fairly obvious. However, it was the consideration of the manner in which that control was achieved that was more interesting. Kourakis J said:

...compatibility with the Australian system of responsible government requires that the legal and administrative burdens of any regulation of political speech fall on government and not the citizens who wish to engage in the political process. Members of a democratic society do not need advance permission to speak on political matters. The prohibition of disseminating a political message, unless permission of an arm of government is first obtained, is antithetical to the democratic principle.⁵⁴

His Honour rejected an argument that it could be expected that the proscription on speaking would be enforced reasonably:

... even if one were to assume that, notwithstanding the wide terms in which the discretion to give permission is expressed by the by-law, the officers of the City with authority to grant or deny permission honestly and diligently respected the constraints of the constitutional freedom on them, there remains a substantial likelihood that it will, from time to time, be infringed. Requiring applicants,

who have wrongly been denied permission, to take proceedings for judicial review would strangle political speech almost as effectively as an absolute prohibition.⁵⁵

This approach to the determination of validity had been rejected in *Meyerhoff v Darwin City Council* and *McClure v The Mayor and Councillors of the City of Stirling (No 2)*.⁵⁶ These decisions were not referred to in *Corneloup*. The two decisions in this respect do not fit altogether comfortably with the approach set out by Dixon J in the *Swan Hill* case⁵⁷ that it was relevant to take into account in determining validity that the need to seek permission from an authority is, in practical terms, a prohibition as the courts have only limited power to review the exercise of the discretion. Kourakis J was also influenced by the fact that having to seek permission to communicate was itself a constraint on the freedom guaranteed by the *Constitution*.

It is interesting to note that Kourakis J found that the by-law was a proportionate exercise of the 'convenience' power but imposed a disproportionate burden on constitutionally protected political communication. It is not immediately apparent why a different standard should apply.

Corneloup sets a clear integrity standard with which local authorities must comply.⁵⁸ However, it is apparent from the other cases referred to above that making out a claim that the control imposed on freedom of communication is not reasonable will not be easy. The circumstances in which the controls are imposed will be examined carefully and the rights of others, for example, to use public places, not to be subjected to offensive conduct by others and not to have to contend with littering, will be taken into account in determining the validity of the local law.

Ousting of judicial review

A further step by the courts in ensuring the integrity of local laws has been their attitude towards the interpretation of clauses that purport to limit review – ouster or privative clauses. As in regard to attempts to limit review of administrative decisions, such clauses have been construed narrowly to limit their effect on the power of the courts. For example, clauses saying that by-laws, once made, are 'to have the full force of law' or that the production of a copy was 'conclusive evidence' of the legality of the by-law have been held not to limit the courts' power to consider validity questions.⁵⁹

The former *City of Brisbane Acts 1924* (Qld) contained a section saying that ordinances made by the council were to be taken to have been duly made and to be within the powers of the council. Despite this apparently clear assertion of deemed validity, in *Lynch v Brisbane City Council* Dixon CJ, with whom the other judges agreed, said:

What the final words of subs (4) of s 38 require after the expiration of the period for the parliamentary disallowance of an ordinance purporting to have been made under the City of Brisbane Acts is that the ordinance should be deemed to have been duly made and to have been within the powers of the Council. It may be that an ordinance the object and operation of which, ascertained from its contents and the known facts to which it would apply, are found to lie altogether outside the province of the Council as a subordinate legislative body could not gain the benefit of the conclusive presumption which sub-section (4) provides. That might be because such a measure ought not to be considered to purport to be made pursuant to the Act or it might be because of the general principles governing the interpretation of an enactment like sub-section (4).⁶⁰

This approach of the courts has prevented the removal of the essential jurisdiction of the courts to require local authorities to justify their exercise of law making powers. The courts check on legality with its consequent requirement of integrity cannot be avoided in this way.

A similar approach has been adopted to suggestions that, because a local law is subject to tabling and review by the parliament, the courts should not review its validity once the tabling period is over. This argument has received short shrift.⁶¹

Charter of Human Rights

It would seem that the *Charter of Human Rights and Responsibilities Act 2006* (Vic) has relevance to issues of integrity in relation to local laws. Section 38 provides that it is unlawful for a public authority to act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right. It appears that this requirement is applicable to the making of laws by local authorities. However, I have not been able to find any examples of the operation of the Act in this respect.⁶²

Parliamentary review

One of the reasons given in *Slattery v Naylor* for courts to limit their review of local laws was that opportunity was given the parliament to review them.⁶³ However, parliamentary review of local laws is not universal in Australia.

The Northern Territory, South Australian, Tasmanian and Western Australian Parliaments are empowered to review local laws with a view to their possible disallowance. The vigour with which local laws are overseen in the four States varies (as does their oversight of other delegated legislation). However, it is noteworthy that the WA parliament disallowed two local laws in 2011.⁶⁴

In contrast, and rather surprisingly, the Parliaments of the three larger States do not review local laws. The Parliaments of NSW and Victoria have active committees that review other forms of delegated legislation. Why this review does not extend to local laws is not clear, particularly when regard is paid to the extent to which laws are made by local authorities.

Queensland is different in that it does not now have a scrutiny committee but entrusts the task of overseeing both bills and statutory instruments to the subject area committees of the Parliament. However, local laws are not required to be tabled and are therefore not subject to parliamentary review.⁶⁵ There is, however, a requirement that before a local law is made there must be consultation with relevant State government entities and the law cannot be made unless the Minister is satisfied that overall State interests are satisfactorily dealt with.⁶⁶

The absence of a scrutiny role for these parliaments is difficult to understand. It leaves a very considerable gap in the overall oversight of local laws in these jurisdictions.

Strengthening integrity obligations

How might the requirement that local authorities adhere to a standard of integrity in their law-making be strengthened?

(1) Review for uncertainty

One step that could be taken is for the courts to modify their approach to review of local law on the ground of uncertainty. While our constitutional theory does not contemplate the possibility of the courts declaring Acts of Parliament to be invalid because they are uncertain, no such constraint applies in regard to legislation made by the executive. If a court is satisfied that delegated legislation does not adequately state the obligations imposed on persons, there is much to be said for its declaring the legislation to be invalid. It seems that little harm would be done if local government authorities were required to state the obligations it imposes upon citizens in clear terms. This is of particular significance in the light of the growing

practice of prescribing obligations by incorporation of other instruments by reference. The courts have endorsed this practice⁶⁷, yet it can make it very difficult for a citizen to ascertain the law.

(2) Access to local laws

Access to local laws is essential if integrity in law-making is to be achieved. A person should simply not be subject to obligations if it is not possible for him or her to ascertain what those obligations might be. With this in mind, it is worth noting s 120(4) of the Victorian *Local Government Act 1989* which reads:

- (4) Even though a local law has come into operation-
 - (a) a person cannot be convicted of an offence against the local law if it is proved that at the time of the alleged offence a copy of the local law could not be purchased or inspected at the Council office during the Council office's office hours; and
 - (b) a person cannot be prejudicially affected or made subject to any liability by the local law if it is proved that at the relevant time a copy of the local law could not be purchased or inspected at the Council office during the Council office's office hours.

The inclusion of such a provision in other jurisdictions would be of value in ensuring the integrity of local laws.

(3) Availability of review action

The matters discussed in this paper are based on the review power of the courts. However, the number of cases that come before the courts is minimal. This is in part because action can usually only be brought by a person who is affected by the legislation. This restriction flowing from the law relating to standing to bring an action is overcome in Victoria and South Australia by provisions in the respective Local Government Acts that allow a 'person' in Victoria and an 'elector' or 'person with a material interest' in South Australia to try the validity of a local law.⁶⁸

The inclusion in the relevant law of a provision of this kind in other jurisdictions would assist in ensuring the accessibility of judicial review as a mechanism for ensuring integrity in local law making.

(4) Legislating for integrity

Is it possible to increase integrity obligations by legislating? In some jurisdictions an attempt has been made to do this.

The *Legislative Standards Act 2001* (Qld) sets out 'fundamental legislative principles' that are to be applied in the drafting of Queensland legislation and that guide the scrutiny of legislation in Queensland. Queensland committees, when examining delegated legislation, are required, under s 93(1)(b) of the *Parliament of Queensland Act 2001* (Qld), to consider the application of the fundamental legislative principles to delegated legislation. These principles apply to local laws. Section 4(3) of the Act requires legislation to have 'sufficient' regard to rights and liberties of individuals.

The section continues:

whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation—

- (a) makes rights and liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review; and
- (b) is consistent with principles of natural justice; and

- (c) allows the delegation of administrative power only in appropriate cases and to appropriate persons; and
- (d) does not reverse the onus of proof in criminal proceedings without adequate justification; and
- (e) confers power to enter premises, and search for or seize documents or other property, only with a warrant issued by a judge or other judicial officer; and
- (f) provides appropriate protection against self-incrimination; and
- (g) does not adversely affect rights and liberties, or impose obligations, retrospectively; and
- (h) does not confer immunity from proceeding or prosecution without adequate justification; and
- (i) provides for the compulsory acquisition of property only with fair compensation; and
- (j) has sufficient regard to Aboriginal tradition and Island custom; and
- (k) is unambiguous and drafted in a sufficiently clear and precise way.

It is not apparent what effect these requirements have had on the content of Queensland local laws. As they are not reviewed by the Queensland Parliament, it may well be that, in regard to local laws, they are no more than exhortatory.

A more positive attempt to impose integrity requirements in their law-making on local authorities are provisions to be found in the South Australian and Northern Territory Local Government Acts.

Sections 189-190 of the Northern Territory Act appear to have found their genesis in sections 247-249 of the South Australian *Local Government Act*. However, they impose greater integrity obligations on Northern Territory local authorities. The sections read:

189---Principles applying to by-laws

- (1) A by-law must conform with the following principles:
 - (a) a by-law must not exceed the power under which it is purportedly made;
 - (b) a by-law must not, without clear authority:
 - (i) operate retrospectively; or
 - (ii) impose a tax;
 - (c) a by-law must not shift the onus of proof to the accused in criminal proceedings unless:
 - (i) the offence is a parking offence or other minor traffic infringement; or
 - (ii) the shift of onus concerns only formal matters or matters peripheral to the substance of the offence; or
 - (iii) there is clear authority in the authorising legislation to shift the onus of proof to the accused;
 - (d) a by-law must not infringe personal rights in an unreasonable way or to an unreasonable extent.
- (2) A by-law should reflect the following principles:
 - (a) a by-law should be consistent with other legislation applying in the council's area;
 - (b) a by-law should not impose unreasonable burdens on the community;
 - (c) a by-law should not restrict competition unless the benefits of the restriction clearly outweigh the detriments;
 - (d) a by-law should avoid duplication of, or overlap with, other legislation;
 - (e) a by-law should be consistent with basic principles of justice and fairness;
 - (f) a by-law should be expressed plainly and in gender neutral language.

- (3) If a by-law infringes one or more principles stated in subsection (2) it is not necessarily invalid on that ground, but a court, in considering whether the by-law represents a reasonable exercise of the power under which the by-law was made, must take the infringement into account.
- (4) This section does not affect the validity of a by-law made before the commencement of this Act.

190---Making by-laws

- (1) Before a council makes a by-law:

....

(c) the council must obtain a certificate from a legal practitioner certifying that, in the legal practitioner's opinion, the by-law may be made consistently with the principles prescribed in this Part.

It can be seen that this provision provides a statutory statement of the integrity principles that should underlie the making of by-laws.⁶⁹ It may be thought to be merely words indicating a desirable end. However, it moves away from mere exhortation by inviting a court to take the principles into account in determining validity. This, together with the requirement for a legal practitioner's certification of consistency with the principles, gives teeth to the operation of the provision. It is a precedent that is well worth other jurisdictions exploring.

Obligations of Parliaments and other review bodies

Finally, it should be said that judicial review is a cumbersome method for securing a level of integrity in local government law making. It is therefore incumbent on bodies which have the power to review local laws, that is, Ministers and Parliaments, to exercise those powers carefully and genuinely. It should not be assumed that local authorities are only answerable to their electorates. They have a responsibility to exercise the significant law-making powers vested in them with integrity and their actions need to be constantly called to account on that basis.

Endnotes

- 1 AIAL National Lecture Series on Administrative Law No 2, Lecture 1, p 2.
- 2 This background is discussed in the judgment of Kourakis J (with which the other members of the Full Court agreed) in *The Corporation of the City of Adelaide v Corneloup* (2011) 110 SASR 334 (*Corneloup*). This decision is referred to throughout this paper. However, it should be borne in mind that leave to appeal against the decision of the Full Court was given by the High Court on 11 May 2012.
- 3 (1888) 13 App Cas 446: prohibition on using cemeteries that are within a specified distance of houses.
- 4 [1898] 2 QB 91: prohibition on singing and playing an instrument in a road after being requested to desist by a constable or a house owner.
- 5 (1907) 4 CLR 977: prohibition on driving a vehicle in a way that will damage a waterway or gutter.
- 6 At 983.
- 7 (1933) 49 CLR 142: prohibition on driving cattle through streets of Melbourne city.
- 8 See Dennis Pearce and Stephen Argument, *Delegated Legislation in Australia* (LexisNexis Butterworths, 4th ed, 2012) 21.5.
- 9 *Proud v City of Box Hill* [1949] VLR 208; *Southorn v Jovanovic* (1987) 63 LGRA 277.
- 10 [1994] 1 Qd R 130, 133: a law forbade the selling of goods or conducting of commercial activities from a road or from a building abutting a road without a licence. The effect of this would have been to require every commercial enterprise on the Gold Coast to obtain a licence. See also *Vanstone v Clarke* (2005) 147 FCR 299, 339.
- 11 Jenkinson J in *Octet Nominees Pty Ltd v Grimes* (1986) 68 ALR 571 at 573 seemed to suggest that a higher degree of unreasonableness would have to be shown to invalidate a regulation that had been tabled and not disallowed. In *Austral Fisheries Pty Ltd v Minister for Primary Industries and Energy* (1992) 37 FCR 463 at 477; 27 ALD 633 at 645 and *Donohue v Australian Fisheries Management Authority* (2000) 60 ALD 137 at 143 the courts referred to a challenge to the validity of legislation having to meet 'a much sterner onus' than that applicable where an administrative decision is under review.

- 12 (1945) 72 CLR 37, 80.
- 13 *Re the Mayor etc of the City of Hawthorn; Ex parte Co-operative Brick Company Ltd* [1909] VLR 27; *Re a By-Law made by the District Council of Prospect; Ex parte Hill* [1926] SASR 326; *Bailey v Conole* (1931) 34 WALR 18; *R v Toohey; Ex parte Northern Land Council* (1981) 151 CLR 170; *Kwiksnax Mobile Industrial & General Caterers Pty Ltd v Logan City Council* [1994] 1 Qd R 291; *Telstra Corporation Ltd v Hurstville City Council* (2000) 105 FCR 322; *Austral Monsoon Industries Pty Limited v Pittwater Council* (2009) 75 NSWLR 169.
- 14 See particularly the NSW Court of Appeal in *Austral Monsoon Industries Pty Limited v Pittwater Council* (2009) 75 NSWLR 169, 187; [2009] NSWCA 154, [99] where the direction of interrogatories to a decision-maker is mentioned as being among the judicial mechanisms that could be used for the ascertainment of the decision-maker's purpose in making a decision.
- 15 *Melbourne Corporation v Barry* (1922) 31 CLR 174.
- 16 *Swan Hill Corporation v Bradbury* (1937) 56 CLR 746.
- 17 That is, relevancy, procedural fairness, etc.
- 18 (1984) 154 CLR 349.
- 19 [1922] SASR 35.
- 20 *Henwood v Municipal Tramways Trust (South Australia)* (1938) 60 CLR 438.
- 21 *Re Glenelg Corporation By-Law No XXIII; Ex parte Madigan* [1927] SASR 85.
- 22 *Marsh v Shire of Serpentine Jarrahdale* (1989) 120 CLR 572; *Douglas Shire Council v Queensland Ombudsman* (2005) 141 LGERA 237.
- 23 See for example, *Re the Local Government Act 1874; Ex parte Taylor* (1885) 6 ALT 170; *Kwiksnax Mobile Industrial & General Caterers Pty Ltd v Logan City Council* [1994] 1 Qd R 291.
- 24 *Tucker v Bishop* [1936] SASR 345; *N Simms & Sons v Douglas SC* (1987) 63 LGRA 25.
- 25 NT: *Local Government Act*, s 188: 'good governance'; Qld: *Local Government Act 2009*, s 28: 'necessary or convenient for the good rule and government of [the] local government area'; SA: *Local Government Act 1999*, s246: 'by-laws that are within the contemplation of this or another Act'. However, a number of specific powers set out in the preceding 1934 Act have been continued in force; Vic: *Local Government Act 1989*, s 111: 'local laws for or with respect to any act, matter or thing in respect of which the Council has a function or power under this or any other Act'; WA: *Local Government Act 1995*, s 3.5: 'prescribing all matters required or permitted or necessary or convenient for it to perform its functions under this Act'.
- 26 110 SASR 334, 360.
- 27 At 361.
- 28 (1960) 104 CLR 353, 364.
- 29 See below.
- 30 Victoria: *Charter of Human Rights and Responsibilities Act 2006*. The ACT also has Human Rights legislation, the *Human Rights Act 2004*, but there is no local authority in the ACT.
- 31 See generally, DC Pearce and RS Geddes, *Statutory Interpretation in Australia* (LexisNexis, 7th ed, 2011) ch 5.
- 32 *Al-Kateb v Godwin* (2004) 219 CLR 562, 577 per Gleeson CJ.
- 33 *Coco v R* (1994) 179 CLR 427, 437 per Mason CJ, Brennan, Gaudron and McHugh JJ.
- 34 It should be noted that the principle of legality is an interpretation principle only and is different from any implied constitutional right.
- 35 *Willoughby Municipal Council v Homer* (1926) 8 LGR 3.
- 36 *Re The Municipal Corporations Act 1890; Ex parte Burford* [1920] SASR 54
- 37 *R v City of Whyalla; Ex parte Kittel* (1979) 20 SASR 386 (where the empowering provision did allow the bias rule of natural justice to be displaced).
- 38 *C J Burland Pty Ltd v Metropolitan Meat Industry Board* (1968) 120 CLR 400; *Re L H Hoare Pty Ltd's Application* [1976] Tas SR 156.
- 39 *Kruse v Johnson* [1898] 2 QB 91.
- 40 *Williams v Melbourne Corporation* (1933) 49 CLR 142.
- 41 *Samuels v Hall* [1969] SASR 296.
- 42 *Moule v Cambooya Shire Council* [2004] QSC 50; *Meyerhoff v Darwin City Council* (2005) 190 FLR 344; affirmed on appeal [2005] NTCA 8.
- 43 *Foley v Padley* (1984) 154 CLR 349. (Note that this decision was given before the decision in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 established the implied constitutional right of freedom of communication. It is questionable whether the same conclusion would now be reached. It is interesting to note that Murphy and Brennan JJ dissented from the majority.)
- 44 *Coleman v Sellars* [2001] 2 Qd R 565.
- 45 *Coleman v Power* (2004) 220 CLR 1.
- 46 *McClure v The Mayor and Councillors of the City of Stirling (No 2)* [2008] WASC 286.
- 47 *Ex parte Stafford; Re Shire of Boroondara* (1894) 20 VLR 23 and *Re Shire of Moorabbin; Ex parte McLorinan* (1895) 16 ALT 167.
- 48 *Melbourne Corporation v Barry* (1922) 31 CLR 174; *Barker v Carr* (1957) 59 WALR 7.
- 49 *Re Gold Coast City Council By-laws* [1994] 1 Qd R 130: see footnote 10.
- 50 *Lange v Australian Broadcasting Corp* (1997) 189 CLR 520, 568; 145 ALR 96, 108 as modified in *Coleman v Power* (2004) 220 CLR 1; 209 ALR 182.

- 51 (1997) 189 CLR 579, 608; 146 ALR 248, 262-3. For recent consideration of the tests see *Wotton v Queensland* (2012) 285 ALR 1; *Liu v The Age* (2012) 285 ALR 386, 391.
- 52 *Sunol v Collier (No 2)* (2012) 289 ALR 128; [2012] NSWCA 44 per Bathurst CJ at [47].
- 53 At [75]. See also the recent decision of Griffiths J in *Harbour Radio Pty Limited v Australian Communications and Media Authority* (2012) 202 FCR 525; [2012] FCA 614.
- 54 110 SASR 334, 374.
- 55 Ibid.
- 56 See footnotes 42 and 46.
- 57 See footnote 16.
- 58 However, it was on this issue that the State and the City Council based their successful application for leave to appeal to the High Court.
- 59 *Widgee Shire Council v Bonney* (1907) 4 CLR 977, 985; *Municipal District of Gundagai v Norton* (1894) 15 LR (NSW) 365, respectively.
- 60 (1960) 104 CLR 353, 365.
- 61 *Colman v Miller* [1906] VLR 622; *Costa v Shire of Swan* [1983] WAR 22, 29.
- 62 The operation of the section was discussed at the last AIAL National Conference by Joanna Davidson. Her paper is reproduced at (2012) 68 AIAL Forum 43.
- 63 See p 2.
- 64 See Joint Standing Committee on Delegated Legislation, *Report 46: City of Gosnells Waste Local Law 2011 and Shire of Derby/West Kimberley Waste Services Local Law 2011* (November 2011 (available at [http://www.parliament.wa.gov.au/Parliament/commit.nsf/\(ReportsAndEvidence\)/1BCB7CE6149A18E648257952000F8611?opendocument](http://www.parliament.wa.gov.au/Parliament/commit.nsf/(ReportsAndEvidence)/1BCB7CE6149A18E648257952000F8611?opendocument)), p 18.
- 65 *Statutory Instruments Act 1992* (Qld) s 9.
- 66 *Local Government Act 2009* (Qld) s 29A. See also the requirements of the Legislative Standards Act referred to below.
- 67 Dennis Pearce and Stephen Argument, *Delegated Legislation in Australia* (Lexis Nexis Butterworths, 4th ed, 2012) ch 24.
- 68 *Local Government Act 1989* (Vic) s 124; *Local Government Act 1999* (SA) s 276.
- 69 Cf also the Queensland *Legislative Standards Act 1992*.