

# SOUND CHECK: BYLAWS, BUSKING AND THE LOCAL GOVERNMENT ACT 2002

*Fiona Wright\**

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*This article examines the law-making powers of local authorities under the Local Government Act 2002. It argues that there are insufficient checks and balances on local government law-making, which may lead to local government powers being misused. It also criticises the Act's processes of bylaw enactment and review, arguing that they may encourage local authorities to abandon bylaws in favour of the new power of general competence, under which local authorities can operate beyond the relative safety of many existing checks and balances.*

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## **I INTRODUCTION**

### **A The Problem with Busking**

The archetypal busker stands with her back to a shop window, strumming a guitar and singing. An open guitar case yawns at her feet. Most people hurry past but some throw a coin or two as they go by. On good days, a small crowd gathers. The archetypal busker is a street entertainer who provides entertainment for voluntary donations.

In 1898 a persistent hymn-singer called Mr Kruse challenged his conviction under a local busking bylaw.<sup>1</sup> A special court of seven judges was constituted to hear the case and one of them agreed with Mr Kruse that "a musical performance in a street is not a thing in its nature certain to annoy any one."<sup>2</sup> Unfortunately for buskers he went on: "It is only an annoyance if someone who hears it thinks it one to him."<sup>3</sup> Some buskers make noise rather than music, and shopkeepers and office workers, who cannot adopt the same avoidance measures as pedestrians, are most susceptible to poor quality and repertoire, or unpleasant volume. Buskers can affect retail sales, tourism and even health and safety if buskers or their audience block roads or footpaths.

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1 *Kruse v Johnson* [1898] 2 QB 91.

2 *Kruse v Johnson*, above n 1, 105, Sir F H Heune.

3 Mr Kruse's conviction was affirmed by a majority of 6:1, Mathew J dissenting.

Some busking may breach standards set by Parliament. Extreme buskers could be charged under the Summary Offences Act 1981 for offensive or disorderly behaviour or using offensive language,<sup>4</sup> or breach the Resource Management Act 1991 by making excessive noise.<sup>5</sup> But when busking is just annoying, it falls to local government to regulate that behaviour for the benefit of the whole community. Busking is only one of many activities regulated by local bylaws.

### ***B The Problem with Bylaws***

Bylaws are boring. If laws hung in a constitutional wardrobe, Acts would be sharp black suits, regulations would be zip and button, the courts would provide a full-length mirror and bylaws would be Grandad's flannelette pyjamas. Bylaws are not sexy. Not many commentators discuss their constitutional significance but they deserve more attention. There are three main reasons why they should be taken more seriously.

Firstly, we should be concerned with bylaws because they affect our day-to-day lives. Activities such as parking, eating out, walking the dog or planning a funeral are all regulated by local authorities, and every part of New Zealand is under the jurisdiction of a local authority with bylaw-making powers. Local authority bylaws can "require anything to be done in any manner, or within any time."<sup>6</sup> They can impose fees,<sup>7</sup> authorise entry onto private property<sup>8</sup> and authorise confiscation of personal property.<sup>9</sup> Non-compliance with bylaws is punishable on summary conviction with a fine of up to \$20,000.<sup>10</sup> Yet although they have wide impact, bylaws are made with minimal parliamentary supervision.

Parliament checks its own law-making by paying deliberate attention to the form, promulgations process and constitutional implications of proposed legislation. It imposes similar checks on some delegated legislation but not all delegated legislation gets the same level of scrutiny. Parliament largely ignores local authority bylaws. This raises several questions: Are local authorities inherently more responsible and trustworthy than other delegates? Do bylaws matter less than other subordinate legislation that they should be more loosely managed? Should a power to stop people singing ever be taken lightly? The source and scope of local government powers are explored in

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4 Summary Offences Act 1981, ss 3-4.

5 Resource Management Act 1991, ss 327-328.

6 Local Government Act 2002, s 151.

7 Local Government Act 2002, s 150.

8 Local Government Act 2002, ss 171-174.

9 Local Government Act 2002, ss 164-168.

10 Local Government Act 2002, ss 239, 242.

Part II of this article and Part III identifies the checks and balances that apply to local authority bylaws in comparison to other laws.

The second cause for concern is the lack of an obvious promulgation process for bylaws. The Local Government Act 2002 (LGA 2002) introduced a new system of passing and reviewing bylaws that requires local authorities to consult communities and abide by principles of local democracy and community accountability. Unfortunately, Parliament neglected to mention how a bylaw transitions from a draft to enforceable law.

Since statute law in New Zealand takes its validity from how it is made,<sup>11</sup> how can we judge the validity of a bylaw if Parliament has not specified an enactment process? The Act's silence with regard to due process limits the grounds on which a bylaw's validity may be questioned, which correspondingly increases the risk that local authorities may misuse their power. Part IV of this article deals with procedural shortcomings of the LGA 2002.

The final concern is the Act's potential to encourage local authorities to regulate in different ways. The LGA 2002 changed the nature of local government power by granting local authorities a limited power of general competence, which authorises them to do anything that furthers the purpose of local government.<sup>12</sup> At the same time it established complex and potentially costly systems for making and maintaining bylaws. As local authorities explore the extent of their power of general competence, they could be tempted to simplify their bylaws by relegating some regulation to the level of policy or practice. Such administrative common sense might put some regulation beyond the reach of current non-judicial checks and balances, again increasing the risk that local government power could be misused. The conclusion to this article explores some of the consequences that may arise from the law-making changes brought about by the LGA 2002.

## **II EMPOWERING LOCAL GOVERNMENT**

### **A Empowering Acts**

Local government has no independent constitutional status in New Zealand: all its power derives from Parliament. Before the reforms of 2002 local government authority came primarily from the Local Government Act 1974 (LGA 1974), a massive Act of 75 parts and 726 sections. Rather than providing a broad governing power the Act provided separate authority for each conceivable function of local government. For example, Part 23 authorised local government regulation of water supply,<sup>13</sup> Part 39 authorised regulation for fire prevention,<sup>14</sup> and Part 40 provided for such

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11 A Bill becomes law when it has been passed by the House of Representatives and assented to by the Sovereign or Governor-General, see Constitution Act 1986, ss 10, 15-16.

12 Local Government Act 2002, ss 10-12.

13 Local Government Act 1974, ss 375-397.

14 Local Government Act 1974, ss 645-650.

miscellany as the power to sell coal, coke and firewood<sup>15</sup> and the power to install, light and maintain public clocks.<sup>16</sup> It is no wonder that such a prescriptive Act filled nearly an entire volume of the Reprinted Statutes series.

Legislative reform in the late 1980s simplified local government structure and provided for two main categories of local authority:<sup>17</sup> regional and territorial.<sup>18</sup> Today, 12 regional councils have jurisdiction over almost every part of New Zealand.<sup>19</sup> Seventy-four territorial authorities form the backbone of local government,<sup>20</sup> comprising 16 city councils for urban areas and 58 district councils for rural areas.<sup>21</sup>

Local government law was subject to a more comprehensive review in 2000<sup>22</sup> and a public consultation document was released in June 2001.<sup>23</sup> Submissions were used to draft the Local Government Bill, which was introduced to Parliament on 18 December 2001. After a year with the Local Government and Environment Select Committee, the Bill sped through its second and third readings to receive royal assent only two weeks later, on 24 December 2002.<sup>24</sup>

The LGA 2002 is not the only source of local government power. In fact, more than 100 Acts empower local authorities in some way. Recent examples include the Dog Control Act 1996<sup>25</sup> and

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15 Local Government Act 1974, s 659.

16 Local Government Act 1974, s 663.

17 Reform between 1988 and 1992 also rationalised the number of local authorities. See Kenneth A Palmer *Local Government Law in New Zealand* (2 ed, The Law Book Company Limited, Sydney, 1993) 7.

18 The roles of regional and territorial authorities differ. Regional councils manage natural resources, environmental planning and regulations administered at a regional level. Territorial authorities provide local services, process building and environmental consents and administer other regulatory tasks. See <<http://www.govt.nz>>.

19 The Chatham Islands are not under the jurisdiction of a regional council.

20 Palmer, above n 17, 24.

21 The difference between city and district councils is primarily one of population. Districts with a population of more than 50,000 may apply for city council status. See the Local Government Act 2002, Sch III, Part 1, cls 6-7.

22 Department of Internal Affairs "Legislative Reviews: Local Government Act Review" at <<http://www.dia.govt.nz>> (last accessed 7 July 2004).

23 Department of Internal Affairs *Reviewing the Local Government Act 1974* (Wellington, 14 June 2001).

24 Three other Acts arose out of the same period of reform: the Local Electoral Act 2001, the Local Government (Elected Member Remuneration and Trading Enterprises) Amendment Act 2001 and the Local Government (Rating) Act 2002. See the Local Government and Environment Select Committee Report on the Local Government Bill (10 December 2002) 2.

25 Section 20 of the Dog Control Act 1996 authorises territorial authorities to make dog control bylaws.

the Prostitution Reform Act 2003,<sup>26</sup> which confer bylaw-making powers on territorial authorities but require them to follow the bylaw-making process specified in the LGA 2002.

### ***B Scope of Bylaw-Making Power***

Under the old regime local authorities could do only what was expressly authorised by statute. Councils' powers and obligations in respect of each of their functions were meticulously spelled out, including the power to make subordinate legislation. Section 684(1) of the LGA 1974 listed 53 purposes for which bylaws could be made. These were grouped into eight categories, the first of which was called "Constitutional and Management of District" and included a broad authority to make bylaws for "the good rule and government of the district."<sup>27</sup> This broadly defined power was still subject to parliamentary sovereignty and to judicial checks on administrative action. The validity of bylaws was, and still is, governed by the Bylaws Act 1910.<sup>28</sup>

Part 8 of the LGA 2002 outlines the current regulatory, enforcement and coercive powers of local authorities. Regional authorities have the power to make bylaws relating to council-owned or controlled land and property, flood protection and control, and water supply.<sup>29</sup> Territorial authorities are authorised to make and enforce bylaws for three general purposes:<sup>30</sup>

145 General bylaw-making powers for territorial authorities

A territorial authority may make bylaws for its district for 1 or more of the following purposes:

- (a) protecting the public from nuisance:
- (b) protecting, promoting, and maintaining public health and safety:
- (c) minimising the potential for offensive behaviour in public places.

Fourteen more specific bylaw-making purposes are authorised by section 146, and section 147 authorises territorial authorities to make bylaws for the purpose of liquor control.

Some have suggested that the LGA 2002 considerably simplified the bylaw-making powers of local authorities.<sup>31</sup> This is debatable. For a start, the LGA 1974 was not entirely repealed.<sup>32</sup> Local

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26 Section 12 of the Prostitution Reform Act 2003 authorises territorial authorities to make bylaws that regulate signage advertising commercial sexual services.

27 Local Government Act 1974, s 684(1)(1).

28 Local Government Act 1974, s 679; Local Government Act 2002, s 144.

29 Local Government Act 2002, s 149.

30 Local Government Act 2002, s 145.

31 Vivienne Wilson and Jonathan Salter *A Guide to the Local Government Act 2002* (Brookers, Wellington, 2003) 45.

authorities still have recourse to 11 bylaw-making purposes from the 1974 Act relating to roads<sup>33</sup> and licensing for activities on State Highways,<sup>34</sup> and regional councils retain the power to make navigation bylaws under section 684B-F of the 1974 Act.<sup>35</sup> The LGA 2002 fails to mention that parts of the 1974 Act still apply. As mentioned above, there are also more than 100 other Acts that empower local authorities in some way. Navigating the web of applicable Acts is not simple.

Secondly, the LGA 2002 does more than simplify. It grants a narrower bylaw-making power than the 1974 Act, which allowed bylaws to be made for the "good rule and government of the district"<sup>36</sup> as well as for many more specific purposes. It may be that the reforms have shifted the authority for some regulatory functions into local authorities' new power of general competence.

### ***C A Power of General Competence***

The LGA 2002 was intended to replace the prescriptive framework of the 1974 Act with an Act that was more empowering and reflective of a coherent overall strategy for local government.<sup>37</sup> To this end, section 12(2) of the LGA 2002 gives local authorities a partial power of general competence:<sup>38</sup>

12 Status and powers

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(2) For the purposes of performing its role, a local authority has—

(a) full capacity to carry on or undertake any activity or business, do any act, or enter into any transaction; and

(b) for the purposes of paragraph (a), full rights, powers, and privileges.

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32 Exceptions to the general repeal of the Local Government Act 1974 are listed in Schedule 18 of the Local Government Act 2002. The parts of s 684 that remain in force are listed in paras (v) to (z) under the Local Government Act 1974 heading.

33 Local Government Act 1974, ss 684(1)(13)-(20).

34 Local Government Act 1974, ss 684(1)(41)-(41A).

35 These sections were not repealed because those bylaw-making functions are awaiting further review. See Cabinet Policy Committee "Local Government Act Review: Paper 5 – Regulatory Functions" (1 October 2001) POL (01) 268, 4.

36 Local Government Act 1974, s 684(1)(1).

37 Ministerial Briefing 2002 on Local Government <<http://www.beehive.govt.nz/briefings>> (last accessed 2 July 2004).

38 Wilson and Salter, above n 31, 8.

A full power of general competence would allow local authorities to do anything that was not expressly forbidden by law or under another organisation's jurisdiction<sup>39</sup> but the Act only authorises that which gives effect to the purpose of local government.<sup>40</sup> That purpose involves "enabl[ing] democratic local decision-making and action by, and on behalf of, communities" and "promot[ing] the social, economic, environmental, and cultural well-being of communities, in the present and for the future."<sup>41</sup> These four heads of community well-being are so broad that they do not substantially limit the power of general competence. A clearer limitation is imposed by sections 12(4) and (5), which state that regional councils must act primarily for the benefit of the majority of their region and territorial authorities must act wholly or primarily for the benefit of their districts. It has also been suggested that the power of general competence cannot provide coercive powers.<sup>42</sup>

Section 12(3) states that the power of general competence "is subject to this Act, any other enactment, and the general law." If a local authority is empowered outside section 12(3), the restrictions concomitant with the power of general competence do not apply. This means that the bylaw-making powers in Part 8 of the Act are wider than the power of general competence framed by section 12(2), in that local authorities can make bylaws that do not further the purpose of local government.

Regardless of this, the Local Government Bill received far more submissions on the proposed power of general competence than on changes to bylaw-making powers and processes<sup>43</sup> – and nearly half the submissions on the latter were from councils. This supports the conclusion that bylaws are uninteresting and often ignored.

### **III MYOPIC SUPERVISION**

#### **A Categories of Delegated Legislation**

Parliament has to delegate some law-making functions in order to govern effectively but it usually delegates technical or operational regulation while retaining its power to implement substantive policy, levy taxes or amend primary law.<sup>44</sup> Law made under delegated authority must

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39 Geoffrey Palmer and Matthew Palmer *Bridled Power* (4 ed, Oxford University Press, South Melbourne, 2004) 250.

40 Local Government Act 2002, s 11(a).

41 Local Government Act 2002, s 10.

42 Cabinet Policy Committee, above n 35, 1.

43 Of 655 submissions received, 365 included comments relating to the power of general competence and 108 commented on the proposed bylaw-making powers and processes. See Department of Internal Affairs *Review of the Local Government Act 1974: Synopsis of Submissions* (Wellington, October 2001) 9, 21, 71.

44 Cabinet Office *Cabinet Manual 2001* (Wellington, 2001) para 5.46.

not exceed the limits dictated by Parliament<sup>45</sup> but there are interesting comparisons with regard to how different kinds of delegated legislation are checked.

Instruments made under delegated authority come in many forms and it is not always clear how they should be categorised.<sup>46</sup> The Regulations Review Committee (RRC)<sup>47</sup> is a parliamentary select committee with the specific objective of scrutinising regulations, draft regulations and regulation-making powers in Bills.<sup>48</sup> The RRC considers that delegated legislation falls into two categories: secondary and tertiary.<sup>49</sup>

Secondary legislation comprises instruments that fit within the definition of regulations in the Regulations (Disallowance) Act 1989: primarily "regulations, rules, or bylaws made under an Act by the Governor-General in Council or by a Minister of the Crown".<sup>50</sup> The definition also includes instruments that are deemed to be regulations for the purposes of the Regulations (Disallowance) Act 1989, the Acts and Regulations Publication Act 1989, or both. Examples include codes of welfare made under the Animal Welfare Act 1999 by the National Animal Welfare Advisory Committee<sup>51</sup> and lottery rules made under the Gambling Act 2003 by the Lotteries Commission.<sup>52</sup>

Tertiary legislation comprises instruments, other than regulations and deemed regulations, that are made under the authority of an Act of Parliament or used for executive administration. Examples include codes of practice, standards and guidelines, and certain notices, directions and bylaws.<sup>53</sup> Local government bylaws are a form of tertiary legislation. They are made by semi-autonomous corporate bodies<sup>54</sup> rather than by a Minister of the Crown and they are not deemed to be regulations by the LGA 2002. Even though bylaws can, collectively, affect all New Zealanders, they are subject to significantly fewer checks than secondary legislation.

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45 J F Burrows *Statute Law in New Zealand* (3ed, LexisNexis, Wellington, 2003) 13.

46 Regulations Review Committee "Inquiry into the principles determining whether delegated legislation is given the status of regulations" [2004] AJHR I.16E, 5.

47 Established in 1985.

48 Standing Orders of the House of Representatives (Wellington, 2004) SO 377.

49 Regulations Review Committee, above n 46, 5.

50 Regulations (Disallowance) Act 1989, s 2.

51 Deemed under s 79 of the Animal Welfare Act to be regulations for the purpose of disallowance but not publication.

52 Deemed under s 243 of the Gambling Act 2003 to be regulations for the purposes of disallowance and publication.

53 Regulations Review Committee, above n 46, 5.

54 Local Government New Zealand <<http://www.lgnz.co.nz>> (last accessed 25 June 2004).



## **B Parliamentary Scrutiny**

### *1 Drafting*

The Parliamentary Counsel Office drafts all statutory regulations,<sup>55</sup> which means that regulations are likely to be consistent in the way they impose obligations or create offences. Tertiary legislation, including local bylaws, is not drafted centrally. Because drafting personnel differ from council to council, it follows that there will be variation in the wording, style and effect of bylaws made by different councils. The following examples illustrate how differently councils approach busking regulation.

Manakau City Council applies noise restrictions to loud, disturbing and unnecessary noise, which includes "shouting or singing, so as to annoy or disturb the comfort or repose of persons in the vicinity" and "the use or operation of an electronic or musical instrument, radio, loudspeaker or music reproduction device whether amplified or not".<sup>56</sup> Dunedin City Council regulates busking as a form of mobile trading – along with hawking, peddling, trading from a mobile or travelling shop, or soliciting for orders – and requires all mobile traders to purchase an annual licence.<sup>57</sup>

Most councils include busking in a public places bylaw aimed at regulating activities which occur in public and may infringe upon the rights of others. Part 17 of the Wellington Consolidated Bylaw 1991, which deals with roads and public places, requires street performers to have the Council's prior written permission. Street performance is defined as:<sup>58</sup>

[M]usical, dramatic or other performance, (including busking) involving musical, theatrical or circus performance skills including playing musical instruments, dancing, singing, clowning or juggling, pavement art, poetry or doing other acts of a similar nature in public places.

On the other side of the harbour, the public places section of the Hutt City Council Bylaw 1997 also requires buskers to have a licence from the council.<sup>59</sup>

No person shall sing or play an instrument in a street or public place for gain unless the person is the holder of a licence from the Council.

There are curious differences between these bylaws. Firstly, Wellington City Council regulates a far wider range of activities, with the result that a non-musical clown can perform without a

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55 Philip A Joseph *Constitutional and Administrative Law in New Zealand* (2ed, Brookers, Wellington, 2001) 723.

56 Manakau City Consolidated Bylaw 1992, ch 13, cl 3.1.

57 Dunedin Consolidated Bylaw 1991, part 8. 'Busking' itself is not defined.

58 Wellington Consolidated Bylaw 1991, cl 17.1.

59 Hutt City Council Bylaw 1997, cl 1331.1.

licence in Lower Hutt but not in Wellington. Secondly, the definition in the Hutt City Council Bylaw includes a qualifier: 'for gain'. This means that busking *without* an open guitar case is unrestricted in Lower Hutt, but a licence is required to undertake the same activity in Wellington.

Variation among bylaws can be both a blessing and a curse – a blessing because the lack of standardisation allows councils to address problems that are specific to their communities. Where there are true regional differences, one standard would not suit all. However, variation can arise for reasons other than regional difference. For example, it is hard to imagine a regional difference that makes clowns more of a potential nuisance in Wellington than in Lower Hutt. Different bylaws may be a product of different drafting expertise within councils or different personalities, governing styles or preferences of local councillors.

Whatever the reason, the curse of a system that legitimises different rules in different places is that it creates uncertainty about what the rules actually are, particularly when the rules affect those who move from place to place. Buskers, mobile traders and vagrants are often itinerant, often the subject of bylaws, and therefore likely to be subject to more than one set of community standards.

Standards New Zealand has attempted to reduce unnecessary variation. In consultation with Local Government New Zealand it has developed Model Standard Bylaws: templates for local authorities to use to develop bylaws for their particular districts. With regard to busking, the Public Places Model Standard Bylaw provides that:<sup>60</sup>

202.1 Except with the prior permission of Council or an authorized officer a person shall not on any public place:

...

(g) Solicit any subscription, collection or donation, preach or undertake any busking;

Those who purchase a Model Standard Bylaw may use it as purchased, simply adding their council's name in the appropriate places, or they may amend it to suit their needs. Therein lies the problem. The standardised nature of the product vanishes as soon as it has been tweaked by a local authority to fit regional circumstances. Standards New Zealand track how many Model Standard Bylaws they sell but they do not record whether bylaws are used as purchased or updated first. Model Standard Bylaws provide only limited standardisation.

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<sup>60</sup> Standards New Zealand "New Zealand Standard Model General Bylaws, Part 2 – Public Places" (NZS 9201:Part 2:1999), s 202.1.

## 2 Publication

The Acts and Regulations Publication Act 1989 provides for laws to be printed, published and made available to the public.<sup>61</sup> The Act requires all regulations, as defined in the Regulations (Disallowance) Act 1989, to be forwarded to the Chief Parliamentary Counsel as soon as they are made.<sup>62</sup> Once regulations are printed and published, the Chief Parliamentary Counsel must publish a notice in the *Gazette* stating, among other details, the Act or other authority under which the regulations were made and where copies of the regulations may be purchased.<sup>63</sup> Regulations are sequentially numbered and published in the annual Statutory Regulations series.

Publication is important because it ensures that the law is ascertainable by all who may be affected by it and "[a]ccess to up-to-date legislation is a cornerstone of parliamentary democracy under the rule of law."<sup>64</sup> Access principles are also upheld by Cabinet's requirement that regulations should not come into force until at least 28 days after they have been notified in the *Gazette*.<sup>65</sup> This gives the public a chance to find out what the law is before they become subject to it.

Neither the Acts and Regulations Publication Act 1989 nor the 28-day rule applies to bylaws. The LGA 1974 stipulated that bylaws could not come into effect until at least seven days after the resolution of their confirmation<sup>66</sup> but no such requirement was carried through to the LGA 2002. Bylaws can now come into effect as soon as they are made, although the New Zealand Bill of Rights Act 1990 (NZBORA) should at least prevent local authorities from using bylaws to create retrospective offences.<sup>67</sup> Neither are bylaws notified in the *Gazette*. Instead, local authorities must give public notice of a bylaw, and the date it came into operation, as soon as practicable *after* it has been made.<sup>68</sup> The notice does not have to state the authority under which a bylaw was made.

Section 157(2) of the LGA 2002 deals with availability of copies of bylaws. Local authorities are required to make bylaws available for inspection at their offices during reasonable office hours and available for sale for a reasonable fee. This makes bylaws reasonably available for local citizens but less so for anyone else.

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61 Acts and Regulations Publication Act 1989, Long Title.

62 Acts and Regulations Publication Act 1989, s 5.

63 Acts and Regulations Publication Act 1989, ss 12(c), 12(e).

64 George Tanner, Chief Parliamentary Counsel (speech made on the occasion of the retirement of Hugh Douglas Turnbull, Assistant Compiler of Statutes 1950-2003, Wellington, 10 February 2003).

65 Cabinet Office, above n 44, paras 5.58-5.61.

66 Local Government Act 1974, s 681.

67 New Zealand Bill of Rights Act 1990, s 26(1).

68 Local Government Act 2002, s 157.

Publication and accessibility of bylaws fall short of the standards set for primary and secondary legislation. The result is that those affected by a bylaw may not have the opportunity to learn of it before it affects them. This could lead to harsh consequences in a legal system that holds ignorance of the law to be no excuse.

Central government is moving towards an online database of official New Zealand law to improve accessibility.<sup>69</sup> This is seen as necessary even though there are already several reliable, unofficial electronic sources of Acts and regulations.<sup>70</sup> The electronic availability of local government bylaws is poor by comparison. Most local authorities have websites but not all provide online access to bylaws.<sup>71</sup> Those that do, do so in a variety of ways including plain text or downloadable PDF files. Local government websites do not have a uniform design or structure, which can make it difficult to establish whether bylaws are there or not.<sup>72</sup> And when more than one claims that the source of their authority is still the LGA 1974,<sup>73</sup> the reliability of online bylaws has to be seriously doubted.

There is currently no central repository of local government bylaws – either paper or electronic. It has been suggested that central government's Public Access to Legislation project will encourage makers of tertiary legislation to improve its public accessibility. Local Government New Zealand or the Local Government Commission may be appropriate bodies to drive reform in this area.

### 3 Review

The Regulations Review Committee (RRC) scrutinises all statutory and deemed regulations. They are concerned with the wording and legality of regulations rather than policy implications.<sup>74</sup> They also assess whether a regulation ought to be drawn to the attention of the House of Representatives on one or more of nine grounds,<sup>75</sup> which include exceeding the scope of its empowering Act or impacting unduly on personal rights or liberties.

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69 Public Access to Legislation (PAL) project <<http://www.legislation.govt.nz/>> (last accessed 9 August 2004).

70 One example is The Knowledge Basket <<http://www.knowledge-basket.co.nz/>> (last accessed 25 August 2004).

71 Those that do not include Whakatane District Council <<http://www.whakatane.govt.nz/>> (last accessed 25 August 2004).

72 See for example Palmerston North City Council <<http://www.pncc.govt.nz/>> (last accessed 25 August 2004) and Carterton District Council <<http://www.cartertondc.co.nz/>> (last accessed 25 August 2004).

73 See for example Upper Hutt City Council <<http://www.upperhuttcity.com/>> (last accessed 25 August 2004) and Ashburton District Council <<http://www.ashburtondc.govt.nz/>> (last accessed 25 August 2004).

74 New Zealand Centre for Public Law *Regulations Review Committee Digest* <<http://www.vuw.ac.nz/nzcpl/>> (last accessed 3 August 2004) ch 3.

75 Standing Orders of the House of Representatives, above n 48, SO 378.

This is an important check on the exercise of delegated authority because it ensures that delegates do not exceed their authority or usurp Parliament's role in any way.<sup>76</sup> Unfortunately the RRC has limited jurisdiction. It can only examine regulations, deemed regulations and other instruments that come within the definition of regulations in the Regulations (Disallowance) Act 1989. It does not have jurisdiction to examine local government bylaws.

The RRC recognises that its jurisdiction is not wide enough. In a recent report<sup>77</sup> it pointed out that its jurisdiction is based on an instrument's nomenclature rather than its legislative effect. This provides less than optimum protection for the public as "the classification of instruments does not appear to be always determined on a principled or consistent basis."<sup>78</sup> Some tertiary legislation has legislative characteristics but is not subject to parliamentary scrutiny or publication requirements.<sup>79</sup>

The RRC recommended a law change to update the definition of regulations in the Regulations (Disallowance) Act 1989 to reflect that used in the Legislative Instruments Act 2003 in Australia. That Act defines legislative instruments by legislative character rather than by name.<sup>80</sup> This approach should encompass local government bylaws because they can create legal obligations and impose penalties for non-compliance,<sup>81</sup> but the RRC deliberately dispels any notion that local government bylaws be brought within their jurisdiction.<sup>82</sup>

We also wish to make it clear that we are not advocating that our jurisdiction be expanded to cover legislation such as bylaws made by local authorities. Our interest is in addressing those inconsistencies within the present model that may prevent us from scrutinising relevant instruments of a *law-making* character.

It is puzzling how the RRC can advocate a principled approach while at the same time maintaining that local government bylaws have insufficient legislative character to require scrutiny. On the other hand, the RRC's stance is understandable. Who would volunteer to scrutinise the sheer volume and variety of local government bylaws? Asking delegated law-makers to supervise themselves does not seem ideal, but this is precisely what Parliament expects of local authorities. The LGA 2002 requires them to consider NZBORA implications before they make bylaws.<sup>83</sup>

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76 Regulations Review Committee, above n 46, 5.

77 Regulations Review Committee, above n 46.

78 Regulations Review Committee, above n 46, 6.

79 Regulations Review Committee, above n 46, 6.

80 Regulations Review Committee, above n 46, 15.

81 Local Government Act 2002, part 8.

82 Regulations Review Committee, above n 46, 11 (emphasis in original).

83 Local Government Act 2002, s 155(2)(b).

### *C New Zealand Bill of Rights Act 1990*

Parliament passed the NZBORA to protect certain fundamental rights and freedoms and to confirm its commitment to the International Covenant on Civil and Political Rights. Although the NZBORA is not supreme law, and thus still subject to parliamentary sovereignty,<sup>84</sup> Parliament attempts to protect NZBORA rights and freedoms from being unintentionally eroded by other enactments. The Attorney-General has a statutory responsibility to examine Bills and bring any potential inconsistencies with the NZBORA to the attention of the House<sup>85</sup> and the RRC has a similar responsibility with regard to secondary legislation.<sup>86</sup>

Local authorities are expected to consider the implications of the NZBORA on proposed bylaws<sup>87</sup> and section 155(3) of the LGA 2002 prevents them from making bylaws that are NZBORA-inconsistent. This is a fitting restriction, as rights and freedoms protected by the NZBORA should only be subjugated by Parliament, not its delegates. The section 155(3) restriction operates "notwithstanding section 4" of the NZBORA, which prevents courts from striking down enactments merely for inconsistency with the NZBORA.

The reference to section 4 is interesting because it challenges the notion that the NZBORA is subordinate to all other law. However, it is unlikely that the courts would have considered themselves bound by section 4 in any case where a bylaw was in issue. Section 4 only applies to enactments, defined in the Interpretation Act 1999 as "the whole or a portion of an Act or regulations",<sup>88</sup> which again excludes local government bylaws. For that reason, the reference to section 4 in the LGA 2002 is arguably redundant.

Local authorities are still able to use bylaws to derogate from NZBORA rights and freedoms in ways that can be demonstrably justified in a free and democratic society.<sup>89</sup> If a bylaw was challenged as ultra vires because of section 155(3), a court would first attempt to find an interpretation that was consistent with the NZBORA<sup>90</sup> but could invalidate all or part of a bylaw if restrictions were unreasonable or unjustified.<sup>91</sup>

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84 New Zealand Bill of Rights Act 1990, s 4.

85 New Zealand Bill of Rights Act 1990, s 7.

86 Standing Orders of the House of Representatives, above n 48, SO 378(2)(b).

87 Local Government Act 2002, s 155(2)(b).

88 Interpretation Act 1999, s 29.

89 New Zealand Bill of Rights Act 1990, s 5.

90 *Quilter v Attorney-General* [1988] 1 NZLR 523, 541 (CA) Thomas J.

91 *Moonen v Film and Literature Board of Review* [2002] 2 NZLR 754.

#### ***D The Local Government Commission and the Minister of Local Government***

Local authorities are also subject to the scrutiny of the Local Government Commission. The Commission was established in 1912 as the Local Government Board<sup>92</sup> and is continued by section 28 of the LGA 2002. The Commission is effectively a Commission of Inquiry<sup>93</sup> and can report to the Minister of Local Government on matters related to local government.<sup>94</sup> Its specific functions are to provide information about local government and to promote good local government practice.<sup>95</sup> This could include scrutiny of how local authorities are exercising their delegated authority but the Commission sees itself as having a narrower function: "to make decisions on the structure and representation requirements of local government in New Zealand."<sup>96</sup> It does not directly monitor local authority law-making.

On a holistic level, if a local authority fails to perform its functions, duties and responsibilities the Minister of Local Government can order that it be reviewed<sup>97</sup> or replaced, either by appointing a person to take over the local authority's functions<sup>98</sup> or by ordering a new local body election.<sup>99</sup> These measures only apply if a local authority is experiencing significant failure, mismanagement or deficiency, or either wilfully refuses or is unable to perform its duties and exercise its powers.<sup>100</sup> A council that exceeds its bylaw-making powers, but is otherwise performing well, is unlikely to be reviewed or replaced.

#### ***E Community Scrutiny***

Perhaps the most effective check on local government is the power of local democracy. Councillors are elected representatives of their communities and are accountable to voters every three years. The theory is that councils will act responsibly because councillors want to be re-elected. The LGA 2002 emphasises the importance of community involvement by stating that one of the purposes of local government is "to enable democratic local decision-making and action by,

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92 Graham Bush *Local Government and Politics in New Zealand* (Auckland University Press, Auckland, 1995) 23.

93 Local Government Act 2002, s 34.

94 Local Government Act 2002, s 31.

95 Local Government Act 2002, s 30.

96 Local Government Commission <<http://www.lgc.govt.nz>> (last accessed 18 August 2004).

97 Local Government Act 2002, s 254.

98 Local Government Act 2002, ss 255-256.

99 Local Government Act 2002, s 257.

100 Local Government Act 2002, ss 254(2), 255(2), 256(2).

and on behalf of, communities".<sup>101</sup> Unfortunately the effectiveness of democracy as a check on the actions of local authorities is limited by the sector's historic problem of poor public participation.<sup>102</sup>

The LGA 2002 instigates several measures aimed at increasing community involvement, including requiring local authorities to undertake consultation<sup>103</sup> and consider community views when making decisions.<sup>104</sup> These measures are clearly aimed at the behaviour of councils rather than communities. You can lead a horse to water but you cannot make it drink; hence citizens cannot be forced to take an interest, no matter how publicly councils conduct their business.

Even if citizens do develop a thirst for local government and want to participate, councils are not obliged to base their decisions on the views of the majority. Their duty is to promote and sustain the social, economic, environmental and cultural well-being of their community<sup>105</sup> which may mean putting long-term goals ahead of short-term popular opinion. This duty could be in direct conflict with the political pressure to please the voting public. However local authorities decide to tread that line, they must conduct their business in an "open, transparent and democratically accountable manner".<sup>106</sup>

### ***F Remedies of Last Resort***

When non-judicial scrutiny fails and local government power is misused, those affected can apply to the High Court for judicial review. Actions in judicial review may be taken "in relation to the exercise, refusal to exercise, or proposed or purported exercise by any person of a statutory power".<sup>107</sup> Statutory powers include powers delegated under an Act to make bylaws or other subordinate legislation; to exercise a statutory power of decision; to impose a legal obligation or restriction; or to otherwise interfere with a person's legal rights.<sup>108</sup> Local authorities are subject to actions in judicial review whenever they make or enforce bylaws.

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101 Local Government Act 2002, s 10(a).

102 Hon Chris Carter MP, Minister of Local Government "Speech to Local Government Conference 2004" (2004 Local Government Conference, Auckland, 28 July 2004). Voter turnout statistics for the 2004 local body elections are not available at the time of writing, but the 2001 territorial authority elections showed the lowest voter turnout since 1989. See Department of Internal Affairs 'Local Authority Election Statistics 2001' at <<http://www.dia.govt.nz>> (last accessed 31 January 2005).

103 Local Government Act 2002, s 83.

104 Local Government Act 2002, s 78.

105 Local Government Act 2002, s 10(b).

106 Local Government Act 2002, s 14(1)(a)(i).

107 Judicature Amendment Act 1972, s 4.

108 Judicature Amendment Act 1972, s 3.



The field of judicial review is immense but the underlying principle can be stated simply: decisions or actions that are beyond the authority delegated for that purpose are ultra vires. Section 12(3) of the LGA 2002 expressly states that local authorities are not empowered to override any enactment or the general law, and an ultra vires bylaw can be quashed by the High Court.<sup>109</sup>

Given the changed approach to power delegation in the LGA 2002, the doctrine of ultra vires in relation to local authority bylaws may need to be reassessed by the courts. In pure form, a power of general competence is the antithesis of the ultra vires doctrine, because a power to do anything cannot be exceeded. However, as discussed above, the power of general competence defined by the LGA 2002 is limited to actions that further the purpose of local government.<sup>110</sup> A new body of case law may develop as the courts determine the purpose of local government by exploring the boundaries of social, economic, environmental and cultural aspects of community well-being.

Judicial review provides a backstop to other checks on local authorities' exercise of their delegated authority but it is not a realistic option for all citizens. Actions in judicial review are expensive. The archetypal busker may be a good example of a citizen who can ill afford to challenge a local authority in court.

If all else fails, the remedy of last resort is a complaint to the Ombudsmen. Ombudsmen, as Officers of Parliament,<sup>111</sup> can investigate the actions of local authorities once other avenues have been exhausted.<sup>112</sup> If the Ombudsmen investigate a council's decision, act or omission and find it to be, for example, unlawful or wrong, they can make appropriate recommendations to the body concerned. In the case of local authorities the Ombudsmen must also notify the Minister of Local Government.<sup>113</sup>

#### ***IV PROCEDURAL SHORTCOMINGS***

##### ***A Enacting Bylaws***

The LGA 1974 dedicated only one section to the procedure for making bylaws: they had to be made by special order, affixed with the council's common seal, and could not come into force earlier than seven days after the resolution of their confirmation.<sup>114</sup> The 1974 Act did not specify how a

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109 Palmer, above n 17, 86; Judicature Amendment Act 1972, s 4; Bylaws Act 1910, s 12.

110 As stated in the Local Government Act 2002, s 10.

111 Ombudsmen Act 1975, s 3(1).

112 Ombudsmen Act 1975, s 7(a); Sch I, Part 2.

113 Ombudsmen Act 1975, s 22(3)(g).

114 Local Government Act 1974, s 681.

bylaw got to special order stage but it did set out some general rules about council meeting procedures.<sup>115</sup>

In comparison, the LGA 2002 seems more rigorous but it achieves neither simplicity nor comprehensiveness. To make a bylaw, local authorities must refer to at least three different parts of the Act: the bylaw-making process is set out in sections 155-157 in Part 8 of the Act; local authorities must look to Part 6 of the Act for the mandatory 14-step consultation process in section 83 and the consultation principles in section 82;<sup>116</sup> and the entire process must be undertaken in accordance with the overarching principles in Part 2, section 14. The ruling principle in section 14 encourages local authorities to "conduct [their] business in an open, transparent, and democratically accountable manner".<sup>117</sup>

The process of making a bylaw under the LGA 2002 can be considerably simplified into 10 steps:

**Figure 1: Bylaw-making process**

1. Identify problem to be addressed [s 155(1)].
2. Check that a bylaw addressing this problem achieves an authorised purpose [ss 145-147].
3. Consider whether a bylaw is the most appropriate way to address the problem [s 155(1)]. Requires identification and cost/benefit analysis of all reasonably practicable alternatives [s 77] and consideration of community views [s 78].
4. Draft the bylaw.
5. Consider whether it is in the appropriate form [s 151(2)(a)].
6. Consider NZBORA implications [s 151(2)(b)].
7. Follow special consultative procedure in accordance with consultation principles [ss 156, 82, 83].
8. Enact the bylaw. [How? Act is silent.]
9. Publicise and make available [s 157].
10. Review the bylaw [discussed below].

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<sup>115</sup> Local Government Act 1974, part 5.

<sup>116</sup> Consultation is mandatory when making and amending bylaws, except where amendment is of a technical nature. See the Local Government Act 2002, s 156.

<sup>117</sup> Local Government Act 2002, s 14(2); s 14(1)(a)(i).

The LGA 2002 is curiously silent on the procedure for turning a draft bylaw into an enforceable one.<sup>118</sup> The requirements from the 1974 Act – that bylaws be made by special order and affixed with a Council's common seal – do not reappear in the LGA 2002. One might assume that bylaws should be passed at a council meeting by a majority vote as this would support one of the stated purposes of local government – "to enable democratic local decision-making and action by, and on behalf of, communities"<sup>119</sup> – but this assumption is not clearly supported by a closer analysis of the Act.

Schedule 7 of the Act deals with procedural matters, including voting provisions:<sup>120</sup>

#### 24 Voting

(1) Unless otherwise provided in this Act or in any standing orders,—

(a) the acts of a local authority must be done, and the questions before the local authority must be decided, at a meeting by—

(i) vote; and

(ii) the majority of members that are present; and

Schedules are legally enforceable, but they must be interpreted in the light of the Act to which they are appended.<sup>121</sup> Section 48 of the LGA 2002 lists activities that a local authority must carry out in accordance with the voting provisions. The list does not mention bylaws, which suggests that bylaws may be able to be made other than by majority vote. The voting provisions do apply to the conduct of council meetings<sup>122</sup> but the only express link between bylaws and council meetings is during consultation, when the statement of proposal must be included on a local authority meeting agenda.<sup>123</sup> Although Schedule 7 prohibits local authorities from delegating their bylaw-making power,<sup>124</sup> it does not specify that those powers must be finally exercised at a full and formal council meeting. The lack of a specified enactment process may make it difficult to challenge a bylaw's validity on the grounds that it has been improperly made. In my view, it is only by implication that

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118 See figure 1, step 8.

119 Local Government Act 2002, s 10(a).

120 Local Government Act 2002, Sch VII, cl 24.

121 Burrows, above n 45, 301.

122 LGA 2002, s 48(f).

123 LGA 2002, s 83(1)(b).

124 LGA 2002, Sch VII, cl 32(1)(b).

the Act prevents a bylaw from being made outside a council meeting. However, there is divided opinion on this point.<sup>125</sup>

The lack of process stipulated by the Act might be solved by convention. Statute law takes its validity from its source:<sup>126</sup> it is presumed to be valid law because it has been passed by Parliament.<sup>127</sup> Likewise, a bylaw might only be recognised as valid when it has been passed in a way that allows for the democratic accountability required by the Act. However, an implied enactment process does not convincingly protect the public from unrepresentative law-making:

### ***B Bylaw Review***

One measure of protection for the public is that bylaws must now be regularly reviewed. This should ensure that councils keep their bylaws relevant to changing communities. Bylaws that were validly made under the 1974 Act remain in force<sup>128</sup> but must be reviewed by 1 July 2008.<sup>129</sup> Bylaws made under the LGA 2002 must be reviewed within five years of being made.<sup>130</sup> After their initial review, all bylaws must be reviewed regularly at intervals of no greater than 10 years.<sup>131</sup> Bylaws continue to be effective until they are reviewed, expire or are repealed.

To review a bylaw, councils must revisit most of the matters required to make a bylaw in the first place<sup>132</sup> but they do not have to reassess a bylaw's purpose against the authorised bylaw-making purposes in the LGA 2002. There are two possible explanations for this. Parliament may have intended that local authorities could validate any existing bylaw by reviewing it properly, no matter what purpose it achieved. This would mean that bylaws passed before 1 June 2003 could be continued indefinitely, subject to the review process, while councils which had not already made such a bylaw would not be authorised to do so. This would create discrepancies between the powers of different local authorities, based only on when they needed to pass a particular bylaw.

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<sup>125</sup> Dean Knight, co-author of *LexisNexis Local Government* (LexisNexis NZ Ltd, Wellington, 2003) takes a contrary view, considering that the power to make bylaws is conferred on local authorities (Local Government Act 2002, ss 145-149) and cannot be delegated (Local Government Act 2002, Sch VII, cl 32(1)(b)), therefore bylaws can only be validly made by majority vote at a council meeting (Local Government Act 2002, Sch VII, cl 24). A bylaw made in any other way, he says, is not made by the local authority (interview with the author, Wellington, 5 May 2005). This interpretation is attractive in terms of practicality, but my point is that it requires some assumptions beyond what is apparent on the face of the legislation.

<sup>126</sup> Burrows, above n 45, 13.

<sup>127</sup> Constitution Act 1986, s 15.

<sup>128</sup> Local Government Act 2002, s 293.

<sup>129</sup> Local Government Act 2002, s 158(2); s 2.

<sup>130</sup> Local Government Act 2002, s 158(3).

<sup>131</sup> Local Government Act 2002, s 158(4); s 160.

<sup>132</sup> Local Government Act 2002, s 159.

A second interpretation is that Parliament never intended the review process to validate otherwise ultra vires bylaws. It may have intended that the LGA 2002 simplify, rather than change, the bylaw-making powers in the repealed LGA 1974. From that viewpoint all bylaws made under the LGA 1974 would remain within the bylaw-making powers in Part 8 of the LGA 2002. But as discussed above<sup>133</sup> the LGA 2002 does more than "simplify". Some of the bylaw-making powers from the LGA 1974 do not fit within the scope of the new Act. For example:<sup>134</sup>

684 Subject-matter of bylaws

(1) Without limiting the power to make bylaws conferred on the council by any other provision of this Act or by any other Act, the council may from time to time make such bylaws as it thinks fit for all or any of the following purposes:

...

(6) Protecting from damage, injury, or misappropriation any property, whether real or personal, belonging to the council or controlled by the council and whether situated within or outside the district:

A bylaw made for this repealed purpose does not obviously address issues of public nuisance, health and safety and offensive behaviour in public places.<sup>135</sup> Nor does it fit within the more specific purposes in sections 146 and 147 of the LGA 2002. But, under the review process established by the LGA 2002, local authorities merely have to ascertain whether it is still the most appropriate way to resolve the identified problem. It may be that an otherwise ultra vires bylaw will never be the most appropriate way to resolve a problem.

#### ***V UNINTENDED CONSEQUENCES?***

Any power to affect people's rights and restrict their behaviour should be delegated with care. In enacting the LGA 2002, Parliament has not been careful enough. There is merit in the view that the Act "goes to the core of the philosophical debate between the rights of the individual in society versus the power of the collective to restrict, control, direct, and influence our lives."<sup>136</sup> The Act has constitutional significance but is fundamentally flawed.

Parliament increased the empowerment and autonomy of local government by replacing a prescriptive Act with one that is more permissive. If absolute power corrupts absolutely then greater empowerment should have at least come with correspondingly stronger safeguards; this has not happened in the LGA 2002. The Act does require local authorities to consider alternative courses of

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133 See Part II B.

134 Local Government Act 1974, s 684(1)(6).

135 Local Government Act 2002, s 145.

136 Local Government and Environment Select Committee *Report on the Local Government Bill* (10 December 2002) 44, minority view of ACT New Zealand.

action and consult the public before making bylaws, and while reviewing them, but these requirements do not make the bylaw-making process sufficiently transparent or ensure that bylaws will be accessible to those affected by them. It cannot guarantee that local authorities will be democratically accountable for poor law-making.

What is more worrying is the likelihood that the Act will discourage local authorities from using bylaws – which do at least come with the limited safeguards of mandatory consultation, NZBORA assessment and eventual publication – in favour of methods of regulation that have no built-in safeguards at all. It is clear that Parliament intended local authorities to regulate by means other than bylaws. Part 8 of the Act, which sets out the regulatory, enforcement and coercive powers of local authorities, authorises enforcement of "all regulatory measures made under this Act, *including* bylaws and infringement offences".<sup>137</sup> The power of general competence makes bylaws only a subset of local authorities' regulatory powers.

Two factors combine to make bylaws a less attractive method of regulation. Mandatory public consultation and regular review are new administrative obstacles that local authorities have to overcome in order to make bylaws. At the same time the Act offers councils an easier option. Any sensible council would surely consider letting existing bylaws lapse, regulating instead under their power of general competence. This would be a valid option for anything that helped achieve the stated purpose of local government.<sup>138</sup> Alternatively, councils could transfer responsibility for some of their regulatory functions to their regional council. This is permitted by section 17(2) of the Act and could result in economies of scale and other benefits, but it may not be appropriate for activities that have different impacts on different communities in which they occur. Truly local issues should be addressed by local, rather than regional, authorities.

Regulation at a level below bylaws increases the risk that delegated power will be abused because fewer checks and balances operate below that level. It is therefore in the public interest that bylaws survive. Ironically though, the public are likely to provide the main pressure on councils to abandon bylaws. The costs of consultation and review fall on ratepayers, who are also the voting public. If ratepayers are more influenced by their wallets than by constitutional considerations, bylaws may be allowed to expire.

Without bylaws we could find ourselves subject to localised rules that change often and without notice. Such rules could become increasingly uncertain and inaccessible. At least when Mr Kruse wanted to protect his right to sing in public he had a local authority bylaw to challenge.<sup>139</sup> If he had been silenced under a less tangible power, he may not have found it so easy to make himself heard.

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<sup>137</sup> Local Government Act 2002, s 143(b)(i) (emphasis added).

<sup>138</sup> Local Government Act 2002, ss 10-12.

<sup>139</sup> The bylaw was made by a county council under the Local Government Act 1888 (UK), s 16.