# Part 2: Is exhortation the key?

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The classical description of legislation, still supported by legislators, is that legislation sets out 'commands'[1]. But what are the *functions* of such commands? In emergency management, the directives to educate the community do have some effect in law; in other words, one function of the provisions in question is to provide a basis for accountability in the courts. The extent of this accountability is the subject of Part 1 of this article[2]. It was argued that the effects in law are highly attenuated, due largely to the problematic nature of the subject matter of the provisions and the simple form of the provisions.

If I am right that the legal effect (in the above sense) of the legislation on community education is on the whole extremely limited, does this mean that the provisions are of little public interest and importance? One is reminded of the claim, made by some legal commentators, that law is of marginal utility or, viewed in comparison with other measures, is much more marginal[3]. If legislation on community education is to be judged solely according to whether legal action in a court can arise, it is not hard to make the case for marginality. But why should law be viewed solely in terms of the potential for adjudication? It is true that *lawyers* have traditionally had a court-centred view of the function of law[4]. Bell notes that the 'adjudication view', with the notion of 'ruled justice', dominates Anglo-American legal theory[5]. Tomasic labels this way of thinking the 'legalist paradigm'[6].

Legislation can have effects in forums other than courts and can be viewed from the perspectives of persons other than lawyers and their clients. Relevantly, laws can be the basis for political discourse and can influence administrative and political behaviour. Indeed, the less scope there is for legal checking, the greater scope there is for the provisions to have political impact.

The first section of this Part accordingly considers the political effects which the provisions have or could have. In the second section the article considers alternative legislative models. These alternatives are offered to stimulate reflection on the current offerings rather than as part of a case for necessary reform. The final section offers some conclusions from the study as a whole.

## Political role of provisions for community education

In light of the above, we may ask what is the political role—or at least the potential political role—of the community education provisions? The first piece of evidence, albeit indirect, is the manner and style in which the provisions themselves have been written. As was evident in Part One, they are not written to encourage their enforcement in the courts. They lack prescription and detail and are markedly different from the more common detailed, anticipatory and prescriptive approach to writing legislation[7]. Community education is commonly expressed as a mere function or power, rather than as a duty potentially capable of being enforced through legal mechanisms. Where community education is said to be a duty, it is in any case (as we have seen) not likely to give rise to obligations which will be enforceable in the courts. Further, a simple reference to 'education' is the common way by which the authorised area is marked out, rather than there being detailed provision for what constitutes 'education' or how it is to be conducted. The audience, too, is referred to simply as the 'community', 'members of the public' or not at all, rather than in more prescriptive terms. The lack of prescription is not made up by a strict 'framework' approach either. Framework laws comprise 'purposive programs with vague standards and generalized clauses'[8]. While such laws clearly lack the enforceable detail of 'anticipatory laws', they at least specify 'the ends to be promoted (or the evils to be eliminated); hence, 'the net is harder to evade'[9]. As noted in Part One, the provisions for community education do not specify the precise purposes to be achieved by education, except in terms of the general purposes of the Act.

The lack of prescription of rules and purposes combines with the provisions providing legal immunity to form a legal barrier. But, taken together, these features of the legislation do more than simply mute legal liability. They accentuate their political impact. Carney notes that procedures set out in legislation can have a political impact in the way they 'may shift power or politically empower particular interests'[10]. In the present case the bureaucracy is theoretically empowered, particularly in the case of jurisdictions which come under a duty to educate. It is 'theoretical' because it is obvious that without adequate resources an administrator will find their task severely circumscribed. In addition, because administrators would have a power (though not necessarily a duty) to educate without the relevant legislative provision, the political impact of the provision is not so much to shift power where none existed previously; rather it is to give the power a higher profile and greater legitimacy, and to stamp it with some urgency.

The second piece of evidence of the political role of the community education provisions is the *positive* fostering of political rather than legal use. This is evident in the requirements to report annually to Parliament, which apply in most jurisdictions.

The third piece of evidence comes from the annual reports referred to. Recent annual reports demonstrate that many authorities are engaging in extensive community education activities, whether or not they have a duty under the relevant Act to do so[11]. Only a small number of reports do not

Notes:

1 Robinson, 1994, p. 127 (fn 5).

2 See pp. 34–42 of this issue.

3 e.g. Unger, 1976, p.179 argued that, rather than the rule of law, 'the hierarchies that affect most directly and deeply the individual's situation are those of the family, the workplace, and the market'. Hutchinson, 1985, pp.315–18 saw the courts' role as marginal in policing the administration. Carney, 1991, p.58 saw the role of formal legal rules as much less than the fiscal decisions in determining 'the shape of programmes (and outcomes for affected citizens)'. Contrast Chisholm and Nettheim, 1997, p.3: 'In a sense . . . law is a pervasive influence in everyone's life'.

4 Bell, 1992, p.91.

5 Bell, 1992, p.89.

6 Tomasic, 1985, p.85, drawing on work of Richard Abel.

7 Carney, 1991, p.16.

8 Carney, 1991, p.18, citing Treiber.

9 Carney, 1991, p.18.

10 Carney, 1991, p.57, referring to the political impact of procedural protection.

11 Northern Territory Emergency Services, in Northern Territory Police, Fire and Emergency Services, 1997, pp.72–73; Department of Emergency Services and Office of Sport and Recreation (Qld), 1997, pp.38–39 (Emergency Services Division); State Emergency Service (Tas), in Department of Police and Public Safety (Tasmania), 1997, pp.39, 40; New South Wales State Emergency Service, 1997, pp.28, 86-87; Western Australia State Emergency Service, 1997; Country Fire Authority (Vic), 1997, pp.18, 19.

refer to activity, or do not refer to much activity, in the area of community education[12]. Further, bodies that have mere powers appear, on the basis of the reports, to be at least as active, if not more active, than bodies which have statutory duties to educate the community. Certain bodies with mere powers at least have more extensive reports in this regard[13]. The reports also demonstrate that, in jurisdictions where only a limited range of educational activities is referred to in the legislation, emergency authorities regularly exceed that minimum. The New South Wales State Emergency Service is one example. Its Act refers only to the dissemination of 'educational material on established emergency management policies and procedures'[14]. Analysis of the annual reports indicates that what is being achieved 'on the ground' is not a straight reflection of the legal requirements. Bodies without any statutory mandate (the Western Australia State Emergency Service[15]) engage in extensive community education. Bodies with a mere statutory power also engage in extensive community activity (for example, the New South Wales State Emergency Service and the Victorian Country Fire Authority). Bodies with a limited mandate (the last two mentioned) commonly exceed it. It would seem that administrators do not see their role as simply to implement the legislation. On one view, the legislation is not relevant; rather organisational factors predominate. This view has some merit and is discussed below. On another view, however, the legislation could be having the political effect of highlighting and promoting community education; the *particular* form of the legislation simply not being all that critical.

The fourth piece of evidence of political use is anecdotal. One administrator told the author that in his experience reference to the relevant legislative provisions regularly featured in reports made to his political and administrative superiors concerning obligations to educate the community in emergency preparedness. Other emergency management personnel are, however, not so aware. One administrator with experience in community education admitted to the author in confidence to being unaware of the provisions in his jurisdiction. The potential political use of the community education provisions was a topic of discussion at the Legal Issues in Emergency Management Workshop held at the Australian Emergency Management Institute, Mount Macedon, in February 1998[16]. It was apparent from the comments of several emergency management personnel who participated that the full use of the provisions in political circles may have been overlooked. Several participants acknowledged that account should be taken of the statutory duty to educate the community (where it exists) in government budgetary decision making. They thought that greater resources for community education might be obtainable as a result.

Finally, a potential political and administrative role for the legislation on community education is in providing a source and reference point for the preparation of written, bureaucratic guidelines. In most if not all jurisdictions there are no such guidelines at present, and this has been attributed to such factors as inadequate experience and lack of funding. But statements of proper conduct have appeared[17]. The key principles proposed and elaborated on by Keys are:

- *Plurality*. Community education should be sought by pursuing 'a range of devices of different sorts which can be layered upon one other'.
- *Timing*. Community education needs to take account of the fact that communicating with the public on the matters of storms and floods must be planned for strategic times.
- *Co-ordination*. The effectiveness of community awareness initiatives can be enhanced by creating partnerships of organisations with interests in heightening the community's understandings of hazards.
- *Evaluation*. Once the necessary expertise is developed, it will be necessary to determine the relative levels of cost-effectiveness of different approaches to the task in order to ensure that the expenditure of public money is soundly based.

The author was writing from experience in educating about storms and floods, but the lessons may reach further.

So far I have been mainly putting the case *for* the legislation having a political role, both in the present and in the future. But it is appropriate to note respects in which the legislation does *not* have a political role, or has a muted political role. It has already been mentioned that some administrators have until recently been ignorant of the provisions. The legislation has not been the source of delegated legislation or even formal guidelines of which the author is aware. Some of the provisions are clearly outdated in referring simply to the dissemination of educational material; in this respect the administrators must seek inspiration from elsewhere (as has occurred). In a volume on administrative discretion, Lempert noted that the mandate and clarity of the law as understood by the decision maker seem to be important in making a law influential[18]. In the case of the community education provisions, there is little or no specificity to provide the necessary clarity and strong influence.

Where law is not influential, extra-legal factors fill the void[19]. It is well documented in the literature that, in the space created by and vacated by law, a large range of cultural, social, political, psychological, institutional as well as doctrinal forces moderate discretion to a great extent[20]. In the area of community education it has already been noted that inadequate experience and lack of funding have affected the implementation of the law. An additional extra-legal factor pointed to in the literature is the culture of emergency management organisations which, it is said, tends to be 'hands-on and crisis-focussed in [its] stances'[21]. These factors are predominant partly because the law has not made its mandate sufficiently clear.

For all these reasons, it would seem that community education provisions have not fulfilled their potential to influence administrative behaviour.

## Alternative legislative models and approaches

### Assumptions and frameworks

It is now proposed to consider alternative legislative models and approaches to those currently generally applying throughout Australia. It is not assumed, at this stage, that any or all of the community education provisions require reform. Rather, it is suggested that a fuller appraisal of the current frameworks may be obtained by considering alternative legislative models of community education and comparing them to the model adopted in the emergency management area.

At first sight the statute book might appear to be nothing but a never ending series of ad

Notes:

12 See State Emergency Service South Australia, 1997, p.3 (function only); State Rescue Board of New South Wales, 1995.
13 New South Wales State Emergency Service, 1997, pp.28, 86-87; Western Australia State Emergency Service, 1997, pp.23-24; Country Fire Authority, 1997, p.18.
14 SERMA (NSW) s 15(2)(k).
15 A state emergency authority was established by FESAA (WA).
16 Following presentation of the paper upon which this article is based.
17 Keys, 1995, pp.9–10. See also Keys, 1995–96, pp.31–32, which is restricted to the use made of flood plans as educative devices.
18 Lempert, 1992, p.214.
19 Lempert, 1992, pp.213-214.
20 Schneider, 1992, p.87. His chapter sets out such forces at 79-87. Lempert, 1992 also provides a valuable case study of such forces. He also recognises that there is a social science bias in such studies 'not only because they focus on situational pressures that shape behaviour, but also because the rules they most predominantly discuss are frequently legal rules from which behaviour deviates': p.188.
21 Keys, 1991, p.13; Keys, 1995–96, pp.28, 31.

hoc responses to a multitude of policy issues, but on closer analysis it may be seen to contain a vast set of precedents for the policy maker. The statute book is an underrated resource for those whose task it is to evaluate the current law. It is greatly superior to secondary literature in one respect: it presents concrete solutions rather than broadly formed ideas. But—it might be objected—how useful can the experience of other areas of community education be? It is recognised that the emergency area has its distinct issues and problems. Is it, however, *unique* in having no comparable areas? This seems unlikely, for three reasons. First, the same language of 'community education' (and similar phrases) is used across various areas, connoting broadly similar tasks. Secondly, broad connections between emergency management and one other area —environmental management—have been made elsewhere[22]. Thirdly, since community education takes place *before* an emergency, the distinct qualities of emergency management, apparent in its response to an emergency, are less relevant.

In analysing the types of legislative or rule-based responses to community education in other areas, it is convenient to adopt Carney's typology of approaches to legal regulation by way of legislation[23]. That author posits that there are three basic approaches, which are no more than 'idealised abstractions'[24]. This article has already touched on two of the approaches, but it is convenient to briefly summarise all three models at this point. The first model or general approach he refers to is one which consists of 'anticipatory laws'. These are laws which contain 'detailed anticipatory and prescriptive rules'[25]. Contemporary income tax legislation would probably be the best example of this model. What Parliament is trying to do when using this approach, says Carney, is 'first, to envisage all the circumstances which might unfold in the future, and then to lay down, before they arise, what the precise legal consequence is to be in that particular event'[26]. He is critical of this style because the legislation becomes excessively large and (in his view) '(usually) so complex as to be almost intelligible'. Carney also draws attention to the inability of the legislature to be able to read and anticipate the future. Further, because such legislation is a 'static barrier', it can be side-stepped by those who might be tempted to avoid Parliament's will. But Carney acknowledges that anticipatory laws are 'grounded in the rule of law' in that [t]he rights of the citizen are charted well in advance of their decision to engage in particular conduct'[27].

The second model of legislation consists of what Carney calls 'framework laws'. These have been described as 'purposive programs with vague standards and generalised clauses'. This model 'allows for maximum flexibility and responsiveness to the dynamic of changing market and social conditions'. Yet, because it specifies 'the *ends* to be promoted (or the evils to be eliminated), the net is harder to evade'. An example of a law with some feature of a framework law would be the prohibition against corporations engaging in conduct that is misleading or deceptive in section 52(1) of the Trade Practices Act 1974 (Cth). Although there is some support for moving laws away from 'exhaustive, predictive and proscriptively framed rules'[28] and towards the framework model, 'paradise remains distant', in Carney's view, because of 'the risks of writing legislation in such platitudinous generality as to constitute a vacuous statement, or with such a lack of precision as to deprive it of its normative force'[29]. Even if such risks do not eventuate, framework laws 'substitute discretionary latitude in place of the prescriptive 'rules' in which 'conditional program' styles of legislation are expressed'[30].

The third model is dubbed 'responsive law'. Provisions which devolve planning or grievance resolution functions down to local communities or regionally - based special interest groups, such as validating the operation of neighbourhood mediation centres and other forms of alternative dispute resolution, are said to fit within this model[31]. This approach supposedly provides: 'greater opportunities for involvement by those people most closely affected by the law. Their values are more capable of being accommodated (even at the expense of allowing for significant differences to emerge between different localities); and their participation brings the law into closer conformity with the needs and aspirations of the particular community'[32].

At the heart of such provisions is a reliance on procedural norms to 'regulate processes, organization and the distribution of rights and competences'[33]. In short, this approach aims to '"proceduralise the solution" of issues'[34]. The responsive model differs from the other two in that it eschews 'both prescriptive rules *and* the laying down of ends and purposes (whether directly, or indirectly through their encapsulation in standards)'[35]. It does not take '*full* responsibility for substantive outcomes of social intervention'[36].

While Carney expresses a preference for the responsive model in the area of welfare law[37], it is apparent that no model is universally suitable; each has its strengths and limitations.

Most of the current community education provisions in the area of emergency management approximate (without fitting exactly)[38] the 'framework law' model, but this does not mean that this model is the only possibility. The current law demonstrates the truth of this proposition. A scheme in Victoria would seem to have the characteristics of 'responsive law'. Section 5(1)(a) of the Victoria State Emergency Service Act 1987 empowers the State Emergency Service to 'assist municipal councils . . . in relation to the performance and exercise of their duties and responsibilities under the Emergency Management Act 1986 by . . . providing advice, information, education and training in relation to emergency management'. The latter Act requires councils to prepare and maintain a municipal emergency management plan which must, among other things, contain provisions identifying the resources available for use in the district for emergency prevention (section 20(2)). A draft plan is to be prepared for consideration of the council by a planning committee, constituted by members and employees of the council, response and recovery agencies, and local community groups involved in emergency management

Notes:

22 Dovers, 1998.

23 Carney, 1991, ch 2. Although Carney's typology is useful, there is a certain confusion generated by differing terminology adopted in the work. He calls the chapter '*Styles* of Legal Regulation', but other words are used to convey the subject matter of the chapter: 'main *forms* in which [legislation] may be written' (p.15); '*ways*' in which the message may be conveyed (p.15) and '*approaches* to writing legislation' (p.16) (emphases added). 'Approaches' seems the most appropriate term for the following reasons: 'style' implies a linguistic analysis only; Carney leaves out of account Plain English styles which would be appropriately considered if that the manner of expression were to be included; and the author later discusses a more specific example of the form of new laws' -'de-legalization' (p. xiv), which indicates that it is an *approach to regulation*, rather than an analysis of simply the forms in which it is written, which is presented.

24 Carney, 1991, p.23. This seems more accurate than the statement on p.16 where '"anticipatory" approaches to writing legislation [are] those in which virtually all Australian legislation has been written over the years'. For discussion of different approaches, see Barnes, 1994, pp.303-304.

25 Carney, 1991, p.16.

26 Carney, 1991, p.16.

27 Carney, 1991, p.16.

28 Carney, 1991, p.: 19. Since this book was written there has been a flurry of writing about this approach, which has been dubbed 'fuzzy' law: see Green, 1991; House of Representatives Standing Committee on Legal and Constitutional Affairs, 1993, paras 8.36-8.57.

29 Carney, 1991, p.18.

30 Carney, 1991, p.19.

31 Carney, 1991, p.22.

32 Carney, 1991, p.21.

33 Carney, 1991, p.21, citing Teubner.

34 Carney, 1991, p.21, citing Teubner.

35 Carney, 1991, pp.20–21; emphasis in original.

36 Carney, 1991, p.20; emphasis in original.

37 Carney, 1991, p.25.

38 The community education provisions contain 'vague standards and generalized clauses', but they lack specificity of the *educative* purpose.

issues (section 21(3), (4)). This scheme can be seen to devolve community education down to local communities, namely councils, who in turn are to be advised by local community groups. The legislation does not prescribe the content or manner of the education, nor does it prescribe ends and purposes. But a municipal emergency management plan is expected to identify 'purposes, methods and systems' in respect of community information and warnings[39].

Other possibilities, drawn from the statute book, are now reviewed.

## Legislative precedents

One strategy pursued in non emergency areas is a more highly developed framework law approach than the one which dominates the emergency area. The following are instances:

- distinguishing education from related activities such as 'awareness strategies'[40]
- more elaborate general statements as to the educational role of agencies such as: 'promoting, conducting, commissioning and encouraging community educational activities'[41]
- specific reference to giving grants of money for the purpose of promoting the education of members of the public[42]
- being explicit about the goal of community responsibility[43]
- being more frank about the goals, such as in this contribution from the Litter Act 1979 (WA): 'To educate members of the public in, and to awaken, stimulate, encourage and maintain the interest of members of the public in, and to promote public knowledge of, the correct disposal of waste items' (Second Schedule)
- requiring the use of languages other than English[44]
- requiring specified programs to be developed and implemented.[45]

A second alternative approach, which is reasonably common, fits within the responsive law model. For instance, in environmental legislation there are provisions which require the preparation of 'strategy' documents setting out how the objects of the Act are to be achieved. In one case, the document must set out:

- a statement of objectives and performance targets of the Strategy
- a statement of the means by which the objectives and performance targets are to be achieved including a statement identifying persons and organisations requiring education and information
- a statement of the manner in which the named agency proposes to assess its performance with respect to the attainment of its objectives and performance targets[46].

In another piece of environmental legislation[47], the procedures are specified to an even greater degree. By a 1998 amendment Act[48], the NSW Council on Environmental Education is required to co-ordinate the preparation of 'State-wide 3-year plans for environmental education'. The plans must describe the contributions of public and private bodies, including local government, industry and community organisations. In preparing the plans the Council must consult with specified groups, including special needs groups. The plans must provide for objective monitoring by setting out performance indicators. A draft plan must be submitted to responsible Ministers (including the Minister for Education and Training) and, when completed, must be tabled in Parliament to ensure public and political scrutiny.

A third alternative approach employs the anticipatory laws model. Although not strictly legislative, the public education campaign rules developed by the then Australian Telecommunications Authority (AUSTEL) to regulate the use of the telephone caller number display service are nevertheless of considerable relevance[49]. The rules were made under legislation (section 53 of the Telecommunications Act 1991 (Cth)). Though expressed to be non binding, the 'guidelines' were written in the form of legislation[50]. Specifically, the rules required consumer, community and business representatives to be included in the process of developing and disseminating information (guideline 8). As regards the campaign itself, the rules required the campaign to:

- distinguish between an initial phase and an ongoing phase (guideline 9)
- contain information on specified matters (guideline 7)
- achieve awareness of certain issues (guideline 4)
- test (independently if necessary: guideline 15) achievement of a minimum 80% awareness of the key issues amongst general consumers and in the population of special needs groups (guidelines 6, 11)

The guidelines are interesting also for what is left out. They deliberately do not dictate the communications strategies to be employed because of the view that different consumer populations may require different strategies and media (p 46).

## Are more rules better?

### The rules/discretion debate

We have seen that the current community education provisions in the emergency area replicate a weak 'framework law' model. If any of these alternative approaches were adopted in the emergency area, whether a more highly developed 'framework law', or the 'responsive law' or 'anticipatory law' models, it would involve a greater level of rule specification than is currently the case. It might be objected that, as a general proposition, more rules are not necessarily better. This objection is one which should be taken on board.

Until recently it was widely thought amongst policy makers that broad legislative discretions should be 'structured'[51]. This was defined by one law reform outfit as 'the specification of principles and criteria relevant to the exercise of [certain] powers so that their exercise is not open-ended and without guidance'[52]. But recent research studies in administrative law have turned this assumption around.[53] On one view, discretion has been elevated from 'being the uninteresting 'hole' in the legal regulation' to 'the centrepiece of the institutional edifice to which the legal rules play a subservient role of setting the boundaries'[54]. The traditional Diceyan view of discretion—as 'automatically raising issues of confinement and control'[55]—has been severely questioned. Whereas the traditional view equated a government of laws with a government of rules, it is strongly argued that 'a system in which basic principles are set out in legislation and are implemented by discretion is also a government of laws'[56].

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Notes:

39 Co-ordinator in Chief of Emergency Management, 1997, para 3.4.2.
40 Environment Protection Act 1970 (Vic) s 49B(2)(e).
41 Australian Institute of Multicultural Affairs Act 1985 (Cth) s 4(1)(b).
42 Intellectually Disabled Persons' Services Act 1986 (Vic) s 6(2).
43 Environmental Protection (Water) Policy Act 1997 (Qld) s 6(d).
44 Residential Tenancies Act 1980 (Vic) s 11(1)(c).
45 Water Industry Act 1994 (Vic) s 11(4).
46 All from the Threatened Species Conservation Act 1995 (NSW) s 140 except that the 'identification of persons and organisations requiring education and information' is from the Environmental Protection (Water) Policy Act 1997 (Qld) s 46(3).
47 Protection of the Environment Administration Act 1991 (NSW) s 27.
48 Protection of the Environment Administration Amendment (Environmental Education) Act 1998 (NSW).
49 See AUSTEL Privacy Advisory Committee, 1996, Attachment B ('Calling Number Display (CND) Public Education Campaign Guidelines').
50 The document refers to the norms as a 'requirement' or as 'requirements' (p.63, guidelines 12, 13) and as a 'precondition' (p 6). The rules frequently employ compulsive terminology such as 'must' (7 guidelines). Specific, minimum requirements are also set, rather than simply considerations (eg guideline 6).
51 See Cooney, 1994, p.132.
52 Administrative Review Council, cited in Cooney, 1994, p.128.
53 Conveniently summarised and analysed in Cooney, 1994.
54 Bell, 1992, p.102.
55 Lacey, 1992, p.381.
56 Cooney, 1994, p.136.

Hence, administrative law literature now recognises that both 'rules' and 'discretion' have their strengths. Indeed, to talk of rules and discretion as discrete or opposing entities is obsolete in most contexts[57]; a more useful line of inquiry being to assume a continuum between rules and discretion[58] and to ascertain the *degree* of discretion which will be the most effective means of implementing policy goals[59]. Nevertheless it is convenient to use the language of 'rules' and 'discretion' to connote differing ends of the legal continuum and to examine their *general* strengths and limitations[60].

Rules can benefit from being written in a reflective atmosphere in which general principles can be established, whereas the exercise of discretions is constrained by looking at a particular controversy in the way it presents itself[61]. Rules are also relatively public in nature and therefore readily available; more certain; more likely to reduce the influence of an official's personal prejudice and ensure like cases are treated alike; more able to communicate information clearly and emphatically; and more efficient where they institutionalise experience. They therefore offer guidance; allow for justification after the fact; may protect officials from criticism in difficult cases; and contribute to the legitimacy of a decision.

But discretion also has substantial general advantages[62]. Discretion can fill gaps in rules and respond to situations too complex for effective rules to be written. Its main advantage therefore is to grant flexibility in application and allow the decision maker to do justice in the individual case—to take account of circumstances that could not be anticipated by rule makers. Discretion may also smooth law making by obscuring lack of consensus or ambiguities in policy. Discretion is said to be consistent with the magnitude of the tasks of the State; with the complexity of many tasks; and with the need for government to accommodate conflicting political interests of organised groups[63].

Both rules and discretion can be overused[64]. The literature cautions that evaluating what mix of discretion and rules is appropriate must be made case by case[65].

Applying these considerations to the emergency area[66], it can be seen that some considerations support lessening the degree of discretion (that is, support 'rules'). They include the following:

- the nature of the subject matter, in that 'an erroneous decision could lead to major disruption or danger'[67]
- effective control of review bodies, since 'the more detailed the legislative rules, the less opportunity for other institutions such as the courts to 'fill out' policy through the interpretation of statutes'[68]
- the existence of recurring and straightforward matters such as the dissemination of factual information
- community education is no longer a novel matter; there is possibly now sufficient experience to write rules.

On the other hand, considerations supporting a broad discretion are:

- the availability of mechanisms other than rules to regulate discretion, such as Freedom of Information
- the costs of rule making, including the problem of rules being expressed in language which is difficult for the non lawyer to understand

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- the complexity of emergency education
- the decision making process requires qualitative assessments, for example as to whether a risk is substantial enough to warrant being the subject of education
- the existence of political sensitivities, since discretion allows negotiated, participative solutions to develop.

These competing considerations suggest an accommodation is necessary. Since none of the legislative precedents are either extreme versions of 'rules' or 'discretion', none is inconsistent with the administrative law literature.

## Status of rules

If a greater specification of rules is thought to be desirable, the manner in which change is to be wrought, and the status of any new rules, needs also to be considered. Possibilities include amending the relevant Act, making delegated legislation under the Act (if power exists) and expressing policy in the form of a 'guideline' or other 'informal rule'[69].

Guidelines clearly have the most flexibility, and are increasingly popular[70], possibly because of the upfront way in which they accommodate the need 'to secure the advantages of *both* discretion and rules while avoiding their disadvantages'[71]. Adopting the analysis of Baldwin and Houghton[72], we may say that, like rules, guidelines guide untrained officials and facilitate planning and management; encourage consistency in bureaucratic decision-making; and inform the public of official attitudes. And like discretion, guidelines are flexible; can deal with matters that are not amenable to strictly legal language; are relatively free from judicial review; and allow control of official action where legislation is either inappropriate or politically undesirable.

But guidelines have all the virtues and vices of a half way house. Relevant problems referred to by Baldwin and Houghton include the way in which guidelines render the law 'most vague at the points where it should be clear'; the lack of any general law making provision for consultation or public input; the effect of undue lobbying influence of interest groups; the tendency for guidelines to be seen as abdication by the Parliament of making general policy in favour of the administration; and, if Parliament specifically provides for their making, difficulties in ascertaining their precise legal status[73]. The discussion of AUSTEL's 'guidelines' indicated some of the tensions which can arise when decision makers desire the certainty offered by rules but do not want the restrictions which normally accompany them[74].

Notes:

57 Hawkins, 1992, p.35. See also Schneider, 1992, p.49.
58 Schneider, 1992, p.50.
59 Cooney, 1994, pp.135, 140; Hawkins, 1992, p.35.
60 The following discussion draws heavily on Schneider, 1992, Hawkins, 1992 and Cooney, 1994.
61 Schneider, 1992, pp.72, 73.
62 Schneider, 1992, p.49.
63 A summary drawn from Cooney, 1994, Hawkins, 1992, pp.37, 39, Schneider, 1992, p.63 and McKay, 1997.
64 Cooney, 1994, pp.137–139 shows how rules may be overused.
65 Schneider, 1992, p.88.
66 Most of the general considerations are selected from Cooney, 1994.
67 Cooney, 1994, p.141.
68 Cooney, 1994, p.142.
69 Baldwin and Houghton, 1986, p.239.
70 Chin, 1995, p.97; Baldwin and Houghton, 1986, p.239.
71 Schneider, 1992, p.49. Emphasis in original.
72 Baldwin and Houghton, 1986, p.268.
73 Baldwin and Houghton, 1986, pp.267-268.
74 On the surface, the 'guidelines' adopted a rule-type mode.

## Conclusions

While community education is a familiar and widely accepted tool to achieve policy ends in various fields including emergency management, the role of legislation to date has been largely unnoticed. This is not surprising. Legislative provisions concerning community education adopt a low profile in the context of emergency management legislation. Yet, this legislation makes community education necessary in many cases. Even where community education is not in terms mandated, the provisions conceivably have effects in law, but these effects vary from jurisdiction to jurisdiction and in general are quite limited.

Despite these limitations, we ought not criticise or dismiss the provisions for community education as of 'marginal' utility or effect without considering the political and administrative effects. A strong argument can be put that the current crop of community education provisions were primarily designed for facilitative and exhortative purposes rather than for setting legally enforceable limits. Moreover, there is considerable evidence that the provisions, in their current form, have a predominantly political, rather than legal role. The political effects of the provisions—including the way the provisions have acted as a stepping stone for some adventuresome educators—indicate that the form of the legislation has not been crucial, or at least determinative, of the scope of educational activity.

Yet this finding does not mean that the form of legislation and administrative rules ought be ignored. Legislative provisions and administrative rule-making on the topic of community education in emergency management may well be underutilised, especially when regard is had to the use of legislation in other fields of community education, in particular environmental education. In determining the appropriate degree of discretion in legislative provisions for community education, it must be acknowledged that there are strong reasons for maintaining a high degree of discretion. Community education is still a developing area of knowledge and skills. But it is arguable that emergency management could benefit from legislation providing for the preparation of similar 'strategy' documents or educational 'plans' as are required under certain environmental legislation. The greater specification of objectives, procedures and performance indicators which would be required may well increase the legislation's 'exhortative effect'. These alternative models still retain a wide discretion for the administrator. A greater degree of accountability may also bring about the infusion of increased resources into community education. Finally, policy makers need to consider the dark horse of litigation. Increased legislative requirements would tend to make the provisions more justiciable in the courts.

## Abbreviations

FESAA (WA) Fire and Emergency Services Authority of Western Australia Act 1998

SERMA (NSW) State Emergency and Rescue Management Act 1989 (NSW)

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