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Duncan Lawyers
Newsletter

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Evidence-based policy decisions

With all the talk about data-driven responses to the current COVID 19 pandemic we thought it was timely to have a look at evidence-based policy decisions. Our angle is constitutional: if legislation expresses Parliament's policy, and if the exercise of powers under legislation must occur within the scope of that legislation, is there room in our constitutional system for evidence-based policy decisions by administrators? Who is driving this tram - Parliament or administrators?

Mandates - whose policy?

Governments are elected to implement policies. The concept of an *electoral mandate* is sometimes used. The Australian Parliament website (www.aph.gov.au) puts it this way:

> "... the mandate theory asserts that the government has both the responsibility and the right to have the Parliament enact the legislative proposals that its party or parties had championed during the preceding election campaign."

As we have commented in earlier *Newsletters,* legislation is an expression of policy. An Act is made by Parliament so the policy it expresses is by definition Parliament's policy. The concept of an electoral mandate takes us back a step: should Parliament implement, modify or reject the policies advanced by the successful party or parties at the time of the election.

Policy processes

There is an increasing emphasis in Australia and elsewhere on evidence-based decision making in guiding policy processes.[1] The principle has found its way into legislation. Section 5 of the *Public Health and Wellbeing Act 2008* (Victoria) is headed "Principle of evidence based decision-making." It provides that decisions on resource allocation and health interventions:

> "should be based on evidence available in the circumstances that is relevant and reliable."

This is consistent with the current data-driven response by executive government to the COVID 19 pandemic. But how does this sit with the legislative power of Parliament? Shouldn't it be Parliament that makes the key decisions?

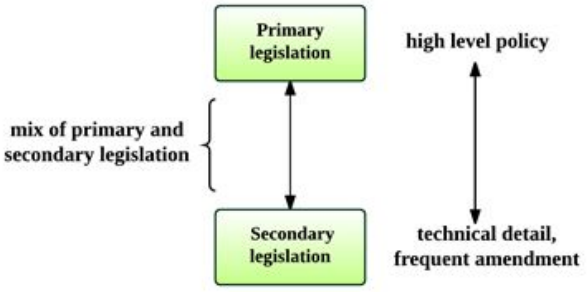
Constitutional theory acknowledges that Parliament cannot do everything. The separation of powers doctrine provides for a three-way division of powers with one of the three arms of government - the courts - needing no prompting to base its decisions on evidence. Courts are the ultimate evidence-based decision makers, following a formal process for receiving, testing, evaluating and even excluding evidence. It is arguable too that in a common law system their evidence-based decisions feed into policy formulation.

Executive government also makes policy decisions.

[1] OECD *Statistics, Knowledge and Policy: Key Indicators to Inform Decision Making* 2005 (cited in ABS 2010 *A Guide for Using Statistics For Evidence Based Policy)*.

Acts (primary legislation) set out high level policy, but they do not set out detail - that is left to executive government. There is a time lag between new circumstances arising and Parliament's response in the form of new legislation - during that period it is for executive government to respond to emerging circumstances.

In most jurisdictions executive government is empowered to make secondary legislation (regulations, sometimes called "implementing regulations") within the scope of empowering primary legislation.



Other important executive government decisions include entering into contracts, spending budgeted funds, employing staff, engaging in litigation and issuing of permits in accordance with guidelines which have been established by … executive government.

The exercise of these powers in a modern liberal democracy is reconciled with constitutional theory largely by requiring accountability and ensuring that good "processes" are followed.

A provision such as section 5 of the PH&W Act requires that decisions be based on evidence. It implies a process in which evidence is obtained, considered and used in the development of policy.

This is one of many provisions in legislation dealing with the decision-making processes of executive government.

Regulatory impact analysis

Victorian agencies are required (with some exceptions) to analyse the impact of proposed regulations. Regulations have a life of ten years (again with some exceptions). This limited life, combined with the requirement for a RIS for replacement regulations, can constitute an incentive to find other ways to achieve desired goals such as by:

- transferring provisions to primary legislation so that supporting regulations are not needed; or
- making people's rights and responsibilities contingent on administrative decisions.

The former course is now not so attractive as legislative impact statements are required in Victoria for primary legislation. The latter course is no longer the easy way out that it once was - regulatory impact analysis is now required for all "legislative instruments" and not just regulations.

These reforms indicate a desire to embed evidence-based decision-making processes into the functioning of government. To this end the Victorian Commissioner for Better Regulation has produced a *Victorian Guide to Better Regulation: A Hand-book for Policy-Makers in Victoria.* It provides guidance to policy makers about how to create "an objective decision-making framework" to identify a preferred option and how to demonstrate why the preferred option is superior to alternative options.

The impossibility of knowing the future

A characteristic of decisions about new regulatory requirements or new expenditure is that they operate in the future - a decision is made and consequences follow. Even the re-making of existing regulations involves decisions about the future, even if those decisions are informed by the past operation of the sunsetting regulations. It can be asked therefore whether regulatory impact analysis is evidence-based decision-making. Or is it only an attempt to predict the future?

The problem is that there can be no evidence for options which have not been implemented. At best

there are estimates and projections.

Not surprisingly the Victorian *Guide* offers advice to agencies on how to "build a credible estimate" of the effects of each option.[2] They can "build" a credible estimate by explaining any assumptions and uncertainties about the size of effects and the potential ranges of effects.

In 2009 the Australian Public Service Commission released a discussion paper on the *Challenges of Evidence-based Policy-making*[3] written by the chair of the Productivity Commission. The paper identified the many problems of obtaining the "essential ingredients" of evidence-based policy-making, including the need for good data. It noted that any model comprises many assumptions and judgments which can significantly influence the result.

The paper has not aged well. The paper is particularly critical of the "rubbery computations" which were "endemic" to railway investment proposals. It singled out "such old chestnuts as a light rail system for the ACT", suggesting that it evoked "past follies." A light rail system has since been established in the ACT and has operated with great success. It leads one to question how the paper was able to suggest that the proposal was a folly: was this a judgment or was the suggestion based on evidence?

The problem of populism

Politicians sometimes choose policies that will have popular appeal. Parliament might, for example, respond to a perceived increase in crime by legislating for increased penalties for offences. There is an assumption here that increased penalties will bring about a decrease in crime: but even if the assumption is sound there is a second assumption embedded in the measure - that penalties which are imposed will increase in accordance with the new legislation. Is *this* assumption sound? Not all criminal activity leads to sentencing by a court, and not all sentences are imposed at the maximum possible level. A court, having heard evidence, may decide on penalties which are different from, and possibly lighter than, those envisaged by Parliament. Possibly it will be influenced by the increased severity of the possible punishments, in which case the measure will have had some effect - but not necessarily as assumed.

There may be unintended consequences of a populist measure of this type. Heavy maximum penalties may lead to an increase in informal "penalties" being negotiated with law enforcement agencies. An increase in penalties for traffic offences (for example) would make a roadside payment of cash to an enforcement official a relatively attractive option for a member of the public. In some countries, where the practice is prevalent, this will almost certainly be the case. In that scenario penalties (albeit informal penalties) will have increased - but transparency will be made even more elusive and corrupt behaviour will have been incentivised.

Returning to the APS paper, another item might be added to the list of adverse consequences of populist measures - "perverse incentives." The paper recounts a finding on a field trip that children had taken up petrol sniffing so that they could qualify for benefits from a program intended to eradicate it. Conversely (the paper mentions) a tax incentive for research and development can act as a reward for companies that would have invested in R&D anyway.

These are issues of cause and effect, incentives and disincentives. Evidence can be more easily obtained *after* a decision has been made and implemented: or to put it another way, we are all wise after the event!

[2] See page 36. The Guide is available at www.vic.gov.au/how-to-prepare-regulatory-impact-assessments

[3] The paper is available at www.apsc.gov.au/challenges-evidence-based-policy-making