EXECUTIVE SUMMARY

There are no legal impediments to expanding on Council's present youth initiatives, even to the extent of having a full-blown unit or division dedicated to the provision of youth services in Alice Springs, as contemplated by the resolution. In its connection to community safety, legitimate functions might include anti-social reduction strategies and, with appropriate safeguards, diversionary measures.

Beyond that, however, a council has only the functions allowed it by the Local Government Act. Its powers to make by-laws to support those functions are also legislatively constrained including that proposed by-laws should align with the principles set out in s189. Any proposed by-laws purporting to give Rangers or other council officers powers to apprehend and move a potential young offender or person at risk, would almost certainly be inconsistent with some of the principles – to the extent that they would not be a valid expression of a council's by-law making powers. Any lesser proposal would require careful examination according to its specific features.

RECOMMENDATIONS

That it be a recommendation to Council:

That this Report is noted and received.

REPORT

1. BACKGROUND

At its July 2018 Ordinary meeting, Council resolved to investigate the creation of a new division in the area of youth services that looks at community safety and as the first step requested a report from the Council's Solicitor as to the legal implications of such action.

This Report responds to the resolution.

2. DISCUSSION

Preliminary remarks

Directly referring to the resolution, two comments should be made. First, the resolution links two distinct areas of focus – youth services and community safety. The link is unquestionably motivated by the heightened community concern around youth anti-social and criminal behaviour in Alice Springs. This linkage is legitimate given its wide media coverage. However, these two subjects must be kept separate for the purpose of this advice, as different legal considerations apply.

The second comment to make is that the broad framing of the resolution necessarily means that the legal advice I give can only be in the most general of terms – a loose brushwork if you like of the legal boundaries in which Council is able to act in terms of the resolution.
Council functions

Any local council is a creature of legislation and as such is a slave to its enacting statute. It cannot act outside the powers and responsibilities conferred upon it by the legislature. This is simple, immutable fact. The functions of the Alice Springs Town Council (as with every other council in the Territory) are listed at s12 of the Local Government Act. It is I think instructive to here reproduce the section in full:

12 Functions of a council

(1) The functions of a council include the following:
   (a) to plan for the future requirements of its area for local government services;
   (b) to provide services and facilities for the benefit of its area, its residents and visitors;
   (c) to provide for the interests and well-being of individuals and groups within the council area;
   (d) to carry out measures to protect its area from natural and other hazards and to mitigate the effects of such hazards;
   (e) to manage and develop council facilities and services in its area in a sustainable way;
   (f) to manage and develop for the benefit of its area all the resources available to the council;
   (g) other functions assigned to the council under this or any other Act.

(2) The functions of a council may (if the council chooses to perform them) include the following:
   (a) to promote its area as a location for appropriate industries or commerce or as an attractive tourist destination;
   (b) to establish or support organisations or programs that benefit the council area.

A perusal of these functions readily shows that the provision of youth services and the protection of community safety are not listed. However, it is not too hard to see that either or both could easily be an element of virtually any of the functions conferred on local government.

Youth services

Clearly, a youth representative group under the aegis or sponsorship of a council aligns with legitimate council functions. Indeed, this Council has its own Youth Service Officer and Youth Action Group.

I do not see any legal impediment to expanding on these initiatives, even to the extent of having a full-blown unit or division dedicated to the provision of youth services in Alice Springs, as contemplated by the resolution. In its connection to community safety, legitimate functions might include anti-social reduction strategies and, with appropriate safeguards, diversionary measures.

Further measures

The question then turns on the extent a council is legally clothed to give active, real and tangible expression to protection of community safety, in the context of youth offending. The answer depends on the extent, if any, a proposal requires contact and physical engagement with young people including perhaps apprehending them to return to their parents or transfer to police custody. In other words, what are a council’s powers to ‘enforce’ an initiative such as perhaps a Ranger youth patrol or curfew?

Legislative principles applying to by-law making
Part 13.1 of the *Local Government Act* enables a council to make by-laws for the good governance of its area. However, the ambit of the power is limited by s189. Again, I think it is useful to set out the section in full.

189 Principles applying to by-laws

(1) A by-law must conform with the following principles:

(a) a by-law must not exceed the power under which it is purportedly made;

(b) a by-law must not, without clear authority:

(i) operate retrospectively; or

(ii) impose a tax;

(c) a by-law must not shift the onus of proof to the accused in criminal proceedings unless:

(i) the offence is a parking offence or other minor traffic infringement; or

(ii) the shift of onus concerns only formal matters or matters peripheral to the substance of the offence; or

(iii) there is clear authority in the authorising legislation to shift the onus of proof to the accused;

(d) a by-law must not infringe personal rights in an unreasonable way or to an unreasonable extent.

(2) A by-law should reflect the following principles:

(a) a by-law should be consistent with other legislation applying in the council's area;

(b) a by-law should not impose unreasonable burdens on the community;

(c) a by-law should not restrict competition unless the benefits of the restriction clearly outweigh the detriments;

(d) a by-law should avoid duplication of, or overlap with, other legislation;

(e) a by-law should be consistent with basic principles of justice and fairness;

(f) a by-law should be expressed plainly and in gender neutral language.

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

(4) This section does not affect the validity of a by-law made before the commencement of this Act.

I would urge that this section be read in its entirety. However, ss(1)(d) and 2(d) are particularly relevant to this discussion. Others may also have application including ss2(e).

**Personal rights**

Deprivation of liberty, even for a short period, is a most serious infringement of a personal right. Thus, I would have to respectfully but firmly advise any proposed by-law purporting say to give a Ranger the power to apprehend a young person for the purposes outlined previously, however benevolent in intent, would necessarily offend against ss(1)(d). The gravity of the action contemplated must surely overwhelm any argument to excuse it as a reasonable infringement of a personal right.

This is not to suggest of course that any common law right or power to intervene in the immediate commission of a crime or to protect human life and limb would not be available to a Ranger equally
as it would be to a member of the public. In some cases, there may be even a common law or statutory duty to intervene.

Other legislation

Another principle to which a by-law should align is that it should avoid duplicating or overlapping other legislation. By-laws are a species of legislation called subordinate legislation. This means that a statute of the Northern Territory Legislative Assembly will always prevail over a by-law to the extent of any inconsistency.

This principle however does no merely restate the supremacy of Territory law over a by-law. It goes further by saying that a by-law should avoid a subject matter where the paramount law in its design and operation evinces an intention to essentially ‘cover the field’. In this respect, there are at least 2 pieces of relevant Territory legislation which would in my opinion preclude by-laws of the substance discussed from abiding by this principle.

Police Administration Act

This statute deals with the establishment, staffing and operation of the Northern Territory Police Force in all its aspects. Relevant to this discussion is Part VII which sets out the powers of members of the Force. In exquisite and extended detail over 15 odd Divisions, it deals with all the powers that members can employ in the course of carrying out their duties and in what circumstances: among them, powers of search and entry, arrest, apprehension without arrest, furnishing of name and address, forensic examinations and closing of public places.

Crucially, in the context of the rule of law, the exercise of these powers is overseen internally by the Police Force itself and externally by the Court system and the Ombudsman. Checks and balances are always in place. They are for these reasons and others the exclusive preserve of police.

It follows that if it was sought to give Rangers or other officers some powers akin to those held by police, say to apprehend without arrest, the only means to accomplish this would be by legislative intervention. Even if the legislature might be moved to consider a proposal of this sort, Rangers or other council officers would as part of any change to the law surely be required to complete training on par with that of police. Other considerations would have to be in play such as protecting the legal liability of council officers who in good faith carry out these new duties.

Care and Protection of Children Act

A further layer of complexity is introduced when any proposal involves dealing with a child or young person, even more so if the person is Aboriginal. The Care and Protection of Children Act sets out a comprehensive legislative framework for dealing with children at risk. The Chief Executive Officer of Territory Families has a pivotal role in this framework.

Division 8 (Powers of authorised persons) is especially germane. The object of Subdivision 1 (Moving child to safe place) is to empower an authorised officer to take action, on a temporary basis and only in limited circumstances, to remove a child from a place where the wellbeing of the child is at risk. An authorised officer here is a police officer or a person appointed by the CEO of Territory Families as an authorised officer. To be clear, the term does not include an authorised person appointed under the Local Government Act as a Ranger.

Again, it is worthwhile to extract ss56 and 57 in full:
56 Application

This Subdivision applies to a child if:

(a) the child is found at a place other than the child's usual place of residence; and
(b) the child is not under the direct supervision of:
   (i) a parent of the child; or
   (ii) a family member of the child; or
   (iii) an adult capable of adequately supervising the child; and
(c) an authorised officer:
   (i) does not believe the child is in need of protection; but
   (ii) having regard to the circumstances in which the child is found – reasonably believes there is a risk to the wellbeing of the child if the child is not removed from the place.

57 Authorised officer may move child

(1) The officer may apprehend the child.

(1A) For the purpose of doing so, the officer may enter the place where the child is found.

(1B) If the officer apprehends the child, the officer must:
   (a) return the child to the child's usual place of residence; or
   (b) if it is not practicable or appropriate to do so:
      (i) move the child to a safe place; and
      (ii) keep the child at the safe place; and
      (iii) make any arrangement for the care and protection of the child at the safe place.

(2) The officer may use any reasonable force or assistance in acting under subsections (1) to (1B).

(3) The child may be cared for at the safe place until the resumption of the care of the child by a person (a responsible person) who has daily care and control of the child.

(4) The officer must, as soon as practicable after moving the child:
   (a) take all necessary steps to inform a responsible person about moving the child; and
   (b) if the officer is a police officer – inform the CEO about moving the child.

(5) The exercise of the officer's powers under subsections (1) to (1B) does not:
   (a) affect any power, right or responsibility of a responsible person in relation to the child; or
   (b) prevent the officer or any other person from holding, at a later time, the belief that the child is in need of protection.

(6) In this section:

   safe place:

   (a) includes:
      (i) a place where the child may be temporarily kept for the child's safety (including a Part of a police station not normally used to detain a person); and
(ii) a place specified by regulation; but

(b) does not include a custodial correctional facility (as defined in section 11(1)(a) of the Correctional Services Act), lockup or any other place that a person may be remanded in custody.

Subdivision 2 then goes on to provide, again in much detail, an authorised officer's powers of restraint, search and seizure.

In my opinion, the conclusion is irresistible that this Act (read in conjunction with the Children's Commissioner Act) is intended to 'cover the field' with respect to children and young people at risk. Any proposed by-law that might seek to give powers to Rangers or other council officers similar to those entrusted to authorised officers under the Act would necessarily overlap the legislation if not duplicate it.

**Inconsistency with principles**

As previously stated, Part 13.1 of the Local Government Act provides the mechanism for making a by-law. The initial step requires a council going through a public consultation process including giving notice of the proposed by-laws in a local newspaper. However, because a by-law is subordinate legislation, there are a series of legal requirements that must be met before proposed by-laws can have the force of law. Crucially, satisfaction of each of these requirements is outside the control of the council.

**Legal practitioner’s certificate**

S190(2) provides that a special resolution of the council is required to make by-laws. (A special resolution is a resolution supported by the votes of at least three-quarters of the total members of the council.) However, s190(1)(c) mandates that before making the by-laws, the council must obtain a certificate from a legal practitioner certifying that in their opinion the by-laws may be made consistently with the principles set out in s189. By-laws purportedly made without this certificate being provided will not be validly made.

As a legal practitioner having practised for more than 40 years, and holding a current practising certificate, I certainly would not provide this certificate for proposed by-laws having any of the features discussed above.

**Notification in Gazzette**

Once made by a council by special resolution, the by-laws are then signed by the CEO and forwarded to the Minister responsible for Local Government. Under s63(3) of the Instruments Act, the Minister must cause the by-laws to be notified in the Gazette. Importantly, however, The Minister may return the by-laws to the council with recommended amendments. This ‘back and forth’ process may continue indefinitely unless and until the Minister accepts the by-laws. Clearly, any inconsistency with the principles set out in s189 of the Local Government Act would play a large part in the Minister’s decision.

**Disallowance by Legislative Assembly**

Once the by-laws are notified in the Gazette, s63(3) also requires the Minister to lay them before the Legislative Assembly. The Assembly may, by resolution passed within 12 sitting days of the by-laws being tabled, disallow the by-laws or any provision in them. Again, inconsistency with the principles might be a substantial cause for the resolution being passed, although no reasons are needed to be given.
Strike down by Court

Even after by-laws have travelled through all these hurdles and are in effect, an aggrieved person may still have recourse to a Court to set them aside. The argument might be put that they are beyond the power of a council to make, in that they were not consistent with the s189 principles.

To be sure, ss(3) provides:

If a by-law infringes one or more principles stated in subsection (2) it is not necessary invalid on that ground, but a court, in considering whether the by-law represents a reasonable exercise of the power under which the by-law was made, must take the infringement into account.

I again suggest however that the effect of by-laws of the nature previously considered is so serious that a Court would find them to be unquestionably an unreasonable exercise of power. Consequences of such a finding might include an action for damages for false imprisonment or a complaint to the Ombudsman or Children’s Commissioner.

Summary

A council has only the functions allowed it by the Local Government Act. Its powers to make by-laws to support those functions are also legislatively constrained including that proposed by-laws should align with the principles set out in s189. Any proposed by-laws purporting to give Rangers or other council officers powers to apprehend and move a potential young offender or person at risk, would almost certainly be inconsistent with some of the principles – to the extent that they would not be a valid expression of a council’s by-law making powers. Any lesser proposal would require careful examination according to its specific features.

That said and within those limits, there are no legal impediments to expanding on Council’s present youth initiatives, even to the extent of having a full-blown unit or division dedicated to the provision of youth services in Alice Springs, as contemplated by the resolution. In its connection to community safety, legitimate functions might include anti-social reduction strategies and, with appropriate safeguards, diversionary measures.

3. ATTACHMENTS

Nil

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