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Forum Editor:
Kathryn Cole
(06) 270 1430

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LEGISLATION

*Hilary Penfold**

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My topic is "legislation". This is a topic on which people have written whole books (although fortunately not very often), and it's quite a challenge to work out what one could usefully say on this topic in the 15 or 20 minutes allowed today.

What I'd like to do is to try to answer some of the basic questions about legislation, the what, why, who, how and when kinds of questions, from a generally theoretical viewpoint, with a few practical interpolations. The idea is to give you some conceptual frameworks within which to consider legislation that you meet in the future, but also against which you can measure some of the issues raised by later speakers today.

The questions I proposed to focus on are these:

- **What is legislation?** What forms does it take?
- **Why do we need, or why do we get, legislation?** In other words, what does legislation do? What is it for?

The questions I will not address other than incidentally are these:

- **Who makes legislation?** This question will be dealt with indirectly in the context of my discussion of "what" legislation is. I expect that it will also be relevant to some of the other presentations today.
- **When is legislation made?** Anyone who has ever been involved in any part of the legislative process knows that there is only one answer to this question these days, and the answer is "constantly" or "all the time", or possibly even "*ad nauseam*". This in itself might be a fruitful subject for debate, but I don't propose to get sidetracked by it at this stage.
- **How it legislation made?** This question is central to much of the rest of today's discussion, so I don't propose to deal with it at all.

First, then, what is legislation? The word is apt to describe the process of making law, although these days it is not often used in that sense. The word is also apt, and is more commonly used, to describe the body of law which results from the legislative process. It is, however, not all that easy to define legislation without either using some other form of the word like "legislating" or "legislature", or referring to identifiable bodies which have legislative power (eg the Parliament). Indeed, it has been said that "the properties of legislation defy precise definition".[1]

Attempts have been made to characterise legislation in the following ways, among others:

- legislation is general in application;
- it is abstract;
- it is prospective in operation;

* Hilary Penfold is First Parliamentary Counsel, Commonwealth of Australia.

- It is innovative.

Another approach to explaining the concept suggests that the meaningful use of the expression "legislation" assumes several premises are accepted by the society concerned. These premises may be expressed as follows:

- there is a recognised distinction between general rules and individual rules or commands;
- there has been a vesting of the power to make general rules in a particular person or body within the society concerned;
- there is agreement that general rules made by this person or body rank above most, if not all, other rules found in the society.

On this basis, legislation could be defined as follows:

- rules of general application;
- that are made by a person or body vested by society with the power to make such rules;
- being rules recognised as outranking most if not all other rules found in the society.

All these suggestions are valuable in thinking about legislation, but none provides a foolproof test for identifying, or describing, "legislation". It is often easier, and just as useful, to adopt a practical, "I know one when I see one", approach, although this can also prove inadequate sometimes.

In Australia, much legislation is easy to recognise, but some instruments are not easy to classify.

- Acts are laws made by federal, state and territory parliaments or assemblies. As a class, they are recognised as outranking all other rules except the Constitution. Most of them are of general application, many are abstract, many are largely prospective in operation and a lot of them aren't particularly innovative at all - but no-one would dispute that they are legislation.

- Rules, regulations and by-laws made under the authority of an Act are made by a person or body indirectly vested by society with appropriate powers and they outrank most other rules apart from Acts and the Constitution. These instruments are also generally accepted as legislation, although they are often of less general application, are generally less abstract and are less commonly innovative. For legal reasons, however, they are almost always prospective.

- Ministerial determinations, directions guidelines and the similar "rules" made by other people or bodies under Acts or regulations are less obviously "legislation". Often they would fail the "general application" test. They are also likely to be less abstract. On occasions they are retrospective and sometimes they are unfortunately too innovative. Alternatively, for instance in the case of guidelines, their status as rules may be unclear.

- Decisions made in individual cases by ministers or other elected or non-elected officials are fairly clearly not "legislation".

- Decisions made in individual cases by judges and other quasi-judicial bodies are not legislation in the normal sense. On the other hand, judges are sometimes accused of "judicial legislating",

either because their decisions break new legal ground (eg Mabo) or because the theory of precedent means that a judicial decision in a particular case becomes a rule of wide or general application.

We could, I think, talk for the rest of the day and still not be any closer to pinning down the meaning or significance of the expression "legislation". Fortunately, it's not a matter of raging importance to most of us most of the time. It is worth mentioning, however, that this kind of question has recently been relevant in the context of the recommendations of the Administrative Review Council for the establishment of a register of legislative instruments.

As I've already mentioned, legislation comes in various forms. One of the most obvious distinctions between different kinds of legislation is that between primary legislation and secondary or subordinate legislation. Acts are primary legislation, most of the other instruments I have mentioned, in particular statutory rules, regulations and by-laws, are subordinate legislation.

What is the significance of this distinction? Primary legislation is the only kind of legislation that is directly made by the people's elected representatives, the Parliament. The nature of parliamentary scrutiny of Bills before they are enacted will be dealt with by later speakers. They may or may not agree with my suggestion that parliamentary scrutiny of most legislation is not particularly intensive, although this may be changing. Nevertheless, it is true that Acts are the only form of legislation that are, as a matter of procedure, scrutinised by the Parliament clause by clause, and that require a formal, positive vote by each house of the Parliament (indeed, 3 such votes) before they become law.

The procedures for enactment of subordinate legislation vary from instrument to instrument, and from jurisdiction to jurisdiction. However, the Commonwealth method of enacting regulations is sufficiently typical for our purposes:

- Regulations are made by the Governor-General with the advice of the Executive Council (ie Ministers).
- They are tabled in each house of the Parliament within a fixed period after being made.
- They may be disallowed within a fixed period by resolution of either house of the Parliament, or as a result of the house's failure to deal with a notice of motion to disallow the regulations.

Technically, therefore, a regulation may be "enacted" without any consideration by any member of Parliament other than the several ministers involved in recommending the making of the regulation, participating in the relevant Executive Council meeting and tabling the regulation in the Parliament - and in my cynical view, it's a fair bet that at most one of those Ministers would actually have read the regulation. (Since my Office does not draft regulations, however, I admit I'm speaking from a position of ignorance.)

This distinction between primary and secondary legislation means that it is a question of some philosophical or ideological significance whether particular material is included in primary or subordinate legislation. In other words, a decision should be made whether, as a matter of principle, the material involved should

receive full parliamentary scrutiny. There are also practical considerations relating to how material is allocated between primary and subordinate legislation.

Arguably legitimate considerations are:

- **The accessibility of material to the public.** Currently, Acts are more accessible than regulations, being published in a single series with consecutive numbers, although regulations at least will become much more accessible when the Commonwealth register of legislative instruments is established.

- **The likely need to change material frequently or quickly.** Matters of detail that are likely to change frequently (eg benefit amounts indexed to the CPI) or that may need to be dealt with quickly (eg lists of dangerous toys that may not be imported) are often regarded as suitable subjects for regulations, having regard to the relatively slow process of getting a Bill enacted and the shortage of parliamentary time.

- **The desirability of enacting primary legislation that is reasonably comprehensible by both members of parliament and members of the public.** It is usually far more difficult to obtain a sound understanding of the underlying principles of an Act, and of the conceptual structure of a legislative scheme, if the Act is cluttered up with too many matters of detail.

- **The possible effect of disallowance of subordinate legislation.** Much subordinate legislation comes into effect upon notification in the *Gazette* and ceases to have effect if it is disallowed. Disallowance does not generally affect the operation of the legislation in the period before disallowance. Thus, the use of disallowable legislation in a controversial area may lead either to unacceptable administrative inconvenience or to windfall gains or losses for those affected by the legislation during its brief period of operation. These problems could be avoided by postponing the commencement of the subordinate legislation, but this may delay its commencement even longer than using primary legislation would.

Less obviously legitimate or appropriate considerations may be:

- **A desire to legislate before the details of the legislative scheme have been fully worked out.** I was once involved in drafting a provision along the following lines:

> "Prescribed persons may apply, in the prescribed manner and within the prescribed time, for review of prescribed decisions."

This provision attracted a lot of criticism in the Parliament, to the effect that it was badly drafted. In fact there was nothing at all wrong with the drafting, although there were other ways in which the provision could have been structured. The problem was the scheme for review of decisions. More accurately, the problem was that at the time Bill was drafted the department had made virtually no progress in working out the details of the scheme. They couldn't say which decisions were to be reviewable, who could seek review, or how and when people would have to exercise review rights. It's hardly surprising that the provision was not very informative.

- **Considerations related to the existance of 2 Commonwealth drafting offices.** As most of you probably know, Commonwealth Bills are drafted in the Office of Parliamentary Counsel, while most subordinate instruments are drafted or settled by the Office of Legislative Drafting within the Attorney-General's Department. Some instructing officers resist leaving otherwise appropriate matters to the regulations because they would prefer to have the total legislative package drafted in our Office, and there may be efficiencies in this from the client's point of view, in that they don't have to explain their scheme to a second drafting team in order to get their regulations drafted. As well, a client who can get all necessary provisions included in the Bill is not then faced with the need to queue up a second time for drafting priority in the Office of Legislative Drafting.

I move now to the second of the questions I posed at the beginning of this talk, namely why do we need, or why do we get, legislation? What does legislation do? What is it for?

A number of writers have attempted to answer this question by describing functional categories of legislation. I shall look at two.

One "functional" approach examines the effects of law in society[2]. Several significant effects can be identified.

- **Law supports order in society.** Law, and legislation in particular, legitimates particular policies by embodying those policies in a form that society accepts as authoritative. Legislation in particular is accepted as authoritative, at least in countries with systems of government like ours, because its source, namely a democratically elected parliament, is accepted as authoritative. Law is able to order society because, in general, even those members of society who do not like particular laws recognise them as authoritative and comply, even while working for changes in the law.

- **Law details public policy.** That is, law (and legislation in particular), spells out in detail, and authoritatively, how the public policies that are legitimated by law are intended to work in practice. The extent to which legislation should spell out policy details and the extent to which those policy details should be filled in by non-legislative government instruments (eg ministerial guidelines), by administrative discretions and by the courts, is a matter for ongoing debate, which has been fuelled in recent years by the "plain English" movement.

Here I would like to digress briefly to comment on the regular public criticisms of legislation, in particular the "plain English" Social Security Act, which are made by various public figures purporting to have at heart the best interests of social security recipients, or social security administrators. Recently, for instance, a senator issued a press release complaining that the "plain English" Social Security Act has 38 chapters and runs to nearly 2000 pages. Without expressing either a personal or official position in this area, I point out that criticisms of this sort are easy to make, but not nearly as helpful as would be a recognition of the conflicting interests that need to be accommodated and a thoughtful discussion of which interests should be favoured in particular cases. In the social security area, for instance, the following points could be made:

- The length of the Social Security Act could be reduced by splitting it into 25 or so different Acts each dealing with a single pension or benefit. Would this be an improvement?

- The length of the Social Security Act could be reduced by reducing the number of different benefits available in the social security system. An Act providing for a single type of payment would be easier to draft and easier to administer - as long as it didn't allow for the "targeting" which is currently regarded as an important aspect of providing an effective social safety net while keeping social security expenditure within manageable proportions.

- The length of the Social Security Act could be reduced by removing a vast amount of detail from the legislation and either including it in subordinate legislation (which simply relocates the problem) or leaving the working-out of such details to individual bureaucrats or to the courts. Would this really be an advantage to the millions of Australians who currently have entitlements under the Social Security Act (even if they can't personally work out exactly what those entitlements are)? Would it even be an advantage to the bureaucrats who would have to exercise those discretions? Would it in fact be an advantage to anyone except lawyers?

I wouldn't claim for a moment that the Social Security Act is a perfect piece of legislation, but I think it's about time drafters stopped having to carry the can for all the other conflicting interests which play a vital role in determining the contents and the form, of the legislation that we have to draft.

- **Another function of legislation is an educative one.** Not all laws are intended to have an educative function and there may be debate about the educative value of some laws that are intended to operate in such a way. For instance, the proponents of anti-discrimination legislation often argue that, as well as changing behaviour, such laws will lead to changes in attitudes which will eventually render the legislation unnecessary. Opponents of such legislation may claim that it is more likely to create a backlash which hardens discriminatory attitudes than to change those attitudes.

The Training Guarantee legislation is an interesting example of an "educative law". As most of you will know, the legislation imposed a tax and then provided tax relief structured so as to encourage employers to devote more resources to training their employees. Recently it was announced that the tax is to be suspended for 2 years, even though training continues to be seen as a major part of the attack on unemployment, on the basis that employers are now presumed to be so convinced of the benefits of training that they no longer need to be statutorily steered in that direction.

The legislation is particularly interesting for 2 reasons. First, it does not fit the normal mould of "educative laws", relating as it does more to business practices than to issues of morality and attitudes. Secondly it operated for only a relatively short time (4 years) before its sponsors decided that it had done its educative work. It seems that it is easier to teach people sensible practices than to teach them "acceptable" attitudes.

- Finally, some analysts see law in general as having an ideological function. This analysis is not all that easy to pin down, but it seems to relate to the role of law in maintaining fundamental ideological assumptions such as equality before the law or, depending perhaps on your political perspective, maintaining underlying power structures.

Another functional analysis of law in general divides it into 5 categories[3]. Law is seen as aimed at the following:

- **Remedying grievances.** As far as individual grievances are concerned, this is more a function of the courts than of the legislature. Some legislation (generally fairly modern) could also be seen as remedying grievances, for instance privacy laws.

- **Prohibiting, prosecuting and punishing unacceptable conduct.** Most criminal law falls into this category.

- **Regulating essentially acceptable conduct.** These laws often relate to business activity (for instance, food standards legislation).

- **Ordering or legitimising government conferral of substantial benefits** (social welfare legislation, bounty legislation, legislation conferring tax advantages).

- **Facilitating and effectuating private voluntary arrangements** (marriage and family law). Increasingly such "private" legislation also concerns itself with the content of private voluntary arrangements (for instance, family and divorce law, employment law, landlord and tenant laws).

This is a UK analysis. In the Australian context I suggest we need to add at least 2 further categories to this list:

- **Legislation dealing with government revenue.** All governments need some fiscal or revenue law, but the complexities of the Constitution and of Commonwealth/state financial arrangements mean that the Australian Parliament passes more of this kind of legislation than some other parliaments.

- **Legislation to encourage desirable activities.** (For instance, the Training Guarantee legislation or legislation providing 150% tax deductibility for certain forms of investment.)

One of the interesting aspects of this categorisation is that, although the categories can be described in a way which makes them appear to be quite independent, it can be very difficult to identify particular pieces of legislation as falling clearly within one category.

This is to some extent because legislation often contains provisions of several kinds (for instance, many laws which are not primarily aimed at unacceptable conduct contain some offence provisions as part of the total legislative scheme).

More significantly, it may be difficult to identify the legislation as having a particular purpose because the real purpose has never been properly analysed and formulated. For instance:

- Is the Trade Practices Act aimed at prohibiting unacceptable conduct, or at regulating acceptable conduct?

- Is the Child Support legislation aimed at encouraging desirable behaviour (ie parental responsibility) or at protecting the revenue?

- Is the Migration Act aimed at getting Australia the best quality migrants available, or is it aimed at keeping as many foreigners as possible out of the country, or is it, even, aimed at giving some sort of a "fair go" to the millions of people outside Australia who dream of emigrating here?

It is, I think, arguable that a lot of legislation that is difficult to administer, or whose operation is controversial, creates that kind of problem because the underlying rationale of the legislation has never been properly formulated. This in turn means that the guidance that such formulation would provide about how the legislation ought to be structured and administered has not been available to policy-makers and legislators, often with unfortunate consequences. There are at least two reasons for this, neither of them easy to solve:

- policy-makers are rarely philosophers;

- even if they were, policy-making, like all other aspects of law-making, is invariably done under unreasonable time pressures which encourage those involved to "hit the ground running", rather than to start off by sitting and thinking for a while.

Finally, I would like to mention an interesting study I came across while doing some work on this paper. Unfortunately it is a British one, and I am not aware of any Australian equivalent, but the results still provide food for thought.

This project involved the analysis of Bills introduced by the UK Conservative Government between 1970 and 1974 and by the UK Labour Government between 1974 and 1979[4]. The Bills were divided into those attributable to election manifestos, those attributable to proposals put up by government departments and those introduced in response to unforeseen circumstances (including, of all things, a Drought Act in 1976!).

The statistics were revealing: manifesto commitments accounted for only 8% of the Conservative Bills and 13% of the Labour Bills, while the "public service" accounted for 81% of Conservative Bills and 75% of Labour Bills.

I do not know how the statistics would come out in Australia, but I suspect that they would still reveal a significant public service impact. At the same time, I also suspect that if you include another category along the lines of "ministers' bright ideas that have never been near an election manifesto", you would find that the basic division between political and public service legislation would not be weighted nearly as heavily in favour of the public service. Perhaps this is why in Australia we laughed at "Yes Minister", whereas in the UK they thought of it as a documentary.

Endnotes

1 Miers and Page, *Legislation* (1990), p2.

2 Cranston, *Law, Government and Public Policy* (1987), p x.

3 Summers, referred to in Bennion, *Statute Law* (1980), p 8.

4 Rose, referred to in Miers and Page, *Legislation* (1990), pp 19-20.

LEGISLATIVE PROCESS - PUBLIC PARTICIPATION AND GOVERNMENT ACCOUNTABILITY

*Daryl Williams**

Paper presented to AIAL seminar, Parliament and the Legislative Process, Canberra, 2 June 1994

Legislation is one means by which the state directs and controls its citizens. Essentially, legislation constitutes general rules of conduct, usually operating prospectively. That may be contrasted with the exercise of non-legislative power, which, broadly, involves an executive, bureaucratic determination affecting an individual or a limited class of individuals.

In her paper Hilary Penfold has referred to five categories of instrument, some of which are, and some of which are not, legislative instruments. These are, in general terms, acts, regulations, policy directions, administrative decisions, and judicial decisions. Hilary Penfold has made clear that the dividing line between legislation and less formal policy devices governing discretionary power is very unclear. Non-primary legislation - mostly delegated legislation - and discretionary power are pervasive in their impact on citizens.

The title of this seminar is "Parliament and the Legislative Process". As a means of providing some perspective on that subject, I wish to examine briefly how the functions of Parliament in legislating compare and relate to the exercise of other forms of power.

In principle, the introduction of significant new policies, or fundamental changes to existing policy, should be achieved through an Act of Parliament. Numerous inquiries - from the 1932 United Kingdom Committee on Ministers' Powers[1] to the recent Report of the Administrative Review Council on Commonwealth rule-making[2] - have recommended that wide policy delegations be limited.

This should be the case because the parliamentary process offers the most direct means of public participation in the law-making process and the best means of making the executive accountable for its legislative proposals. These twin hallmarks of our democratic system have been much discussed recently. The fundamental right of the public to participate in decision making and policy making has been emphasised by the High Court's decision in the Political Advertising case that the Constitution implies a right of political expression.[3] Numerous Royal Commissions and public inquiries into government activity have highlighted the lack of accountability for government action taking place outside the parliamentary arena.[4]

The enormous growth of the adminstrative state in the last 50 years renders the principle that significant policy should be contained in primary legislation something of a pipedream. The reality, which is unlikely to be reversed, is that much of government policy and decision making takes place beyond the detailed scrutiny of Parliament.

Some committees of the Parliament are designed to support and enforce

* Daryl Williams AM QC is a member of the House of Representatives. He is a former Shadow Attorney-General.

the principle. The Senate Standing Committee for the Scrutiny of Bills examines Bills to ensure that they do not inappropriately delegate legislative powers. The Senate Standing Committee on Regulations and Ordinances, in dealing with delegated legislation, has the correlative function of ensuring that regulations do not contain matters more appropriate for parliamentary enactment.

Despite the good work performed by these Committees, their ability to enforce the principle referred to is constrained by powerful forces. The forces include the power of the executive over the Parliament and the nature of the administrative state.

An example of the former can be seen in a Bill recently introduced into the House of Representatives. The Bill is the Corporations Legislation Amendment Bill 1994.

It seeks to make a variety of amendments to the Corporations Law. In at least two significant respects, the Bill unashamedly attempts to delegate the power to make significant policy.

The Bill seeks to make some changes to a body called the Corporations and Securities Panel. That body investigates takeover activity under the Corporations Law. The Bill seeks to abolish the application of the rules of natural justice to the proceedings of the Panel. Power is given to implement substitute rules by regulation. Additionally, the Bill allows the definition of "securities" and "futures contract" to be changed by regulation. That would allow the executive and the bureaucracy partly to restructure the existing regulatory regime governing trading on the Australian Stock Exchange and the Sydney Futures Exchange with only indirect reference to Parliament.

In this forum I do not use the examples for the purposes of criticising the government. It is hardly surprising that an executive which has significant control over the legislative process should attempt, in drafting legislation, to delegate power to itself.

The committee system and the parliamentary process can be of use to curb such attempts to reserve power. And, in fact, they did have an impact with the Bill that I referred to. As a result of institutional and opposition pressure, the government has indicated it intends to withdraw the amendments relating to securities and futures. And the proposal to substitute by regulation rules of natural justice was subject to comment by the Senate Standing Committee for the Scrutiny of Bills. The Committee reported that those provisions, together with a number of others, inappropriately delegated legislative power.

For each transgression that is identified and highlighted, there are many others that are overlooked. In addition, there is no guarantee that the government will respond to a recommendation of the Senate Committee for the Scrutiny of Bills.

In the scheme of things, I think it is fair to say that those institutions provide only token resistance to the deluge of delegation. This has been recognised and other means have been harnessed to redress what may justifiably be seen as a threat to responsible government.

Breach of the principle that significant policy should be made by Parliament would be less objectionable if the features of the legislative process under our parliamentary system - public participation and accountability - applied to the making of regulations and to the making of significant policy by the executive. Dangers do not

arise from the delegation of legislative power as such but from the exercise of power in general, whether in relation to legislation, delegated legislation or less formal policy making devices.

Developments in administrative law in the last two decades have resulted in the dangers being partially redressed. Developments were initially directed towards discretionary power. In the 1970s, the federal government introduced a raft of reforms that have become known as the "new administrative law". The reforms have streamlined judicial review, and have provided a less cumbersome form of review through the Administrative Appeals Tribunal (AAT).

The primary purpose of the reforms was to enhance administrative justice. Administrative justice is, in the words of Sir Anthony Mason "as important to the citizen as traditional justice at the hands of the orthodox court system".[5] One beneficial side effect the new administrative law has had is that it enables the executive to be accountable directly to the individual. The individual is given access to information and may require administrators to give reasons. The AAT procedures provide a means whereby informal policy guiding discretionary power can be exposed and examined. Despite its inconsistency with the traditional Westminister model, the policy review function of the AAT is generally accepted, a consequence of the pragmatic (albeit innovative) nature of the reforms.

The accountability deriving from the new administrative law was primarily directed to discretionary power and the informal policy guiding it, as opposed to formal regulations. Regulation making was left somewhat in the dark. At the Commonwealth level, it appears that that may be changing. In 1992 the Administrative Review Council (ARC) issued a report "Rule Making by Commonwealth Agencies".[6] That report recommended that a new regime be established at the federal level for the making, publication and scrutiny of delegated legislation. The ARC's recommendations are designed to stamp upon the regulation making process the openness, accountability, and participation that are found in relation to legislation made by Parliament.

The ARC proposes the implementation of a formalised system of consultation, whereby the bureaucracy is required to provide notice of most rule-making to interested parties and to consider any comments they may make. In addition, a regulation impact statement must be prepared, stating the objectives of the rule, looking at alternative ways of achieving the objective, providing an estimate of financial and social costs, and providing reasons for the preferred approach.

Other key ARC recommendations are that regulations be sunsetted after 10 years. It also recommends improvements in the publication of regulations to allow ready access by the public.

The principal benefits of the recommendations of the ARC - if appropriately implemented and enforced - will be to enhance public participation in rule-making and the accountability of the rule-makers. Participation would be significant given that the department or agency must listen to the views of interested parties. Accountability would be enhanced because the government department must explain why the regulation is being proposed and that its benefits exceed its cost. The government would thereby be

accoutable directly to the citizens who may be affected by the regulation. The department would also be accountable to the Parliament. The ARC anticipates that the procedures will be subject to review by the Senate Standing Committee on Regulations and Ordinances.

It was coalition policy at the last election to implement the ARC recommendations. I note that the government has just announced in the White Paper its intention to introduce procedures in relation to regulation making. It is not stated to what extent the government will follow the ARC's recommendations.

While the reforms have been, and will continue to be, incremental in nature, a common thread is discernible. That thread is the consistent goal of countering the deficiencies and limitations of the parliamentary system by means of other devices. The first phase was the attainment of accountability for administrative discretion. This was a side effect of the new administrative law.

At the federal level, we appear to be at the beginning of the second phase: procedural devices in rule-making to enhance accountability as well participatory objectives. If the second phase is implemented, there may need to be a third phase.

The need for a third pahse may result from the difficulty of determining the ambit of non-primary legislation subject to ARC-like procedures. Practical difficulties are such that the procedures are only applicable to fairly formal instruments. That will leave a great deal of agency policy-making unaffected by the requirements. A wide range of policy instruments define, guide and influence executive action and decision. The instruments can be variously described, including as guidelines, administrative rules, codes, directives and strategies. While generally not appropriately described as legislation, this body of internal "law" will be completely untouched by the ambit of the ARC-like reforms. Only a small proportion is likely to be categorised as legislative instruments for the purpose of the ARC recommendations. The other instruments, however informal and non-binding, have a significant and real impact on those who are affected by its application.

It must be taken into account that in may instances government can choose whether to promulgate a policy through a formal regulation or by a less formal method. If formal regulation making means the government agency must jump through procedural hoops, government will promulgate policy through a less formal means.

The new administrative law provides some scope for the illumination of formal policy shaping discretionary power, particularly through AAT review. However, the ambit is narrow and to date has not generally involved examination of the process by which the policy is developed.

Any third phase will be very difficult to devise. Its object would be to impose or encourage openness, accountability and participation in the process of making significant policy - in the drafting, settling and approving of significant policy directions and guidelines. It would have to be of such a nature that it did not strangle the executive in its day to day administration by imposing excessively burdensome procedures on policy development. It would also have to involve a means of distinguishing between significant policy making and administrative decisions.

The means by which policy making could be made to involve consultation and by which policy-makers could be made more accountable are not obvious. The judicial review/administrative appeal route appears to be unsuitable because policy deals with the general rather than the particular or individual. A model based on the ARC's proposed regulation procedures would also not be suitable given that the ultimate effectiveness of the procedures depends on the power of a house of Parliament to disallow the regulation.

The task of identifying an appropriate mechanism still lies ahead.

The subject of this paper serves to emphasise that while Parliament plays only a part, albeit significant, in government policy-making, the principle features of parliamentary process can, to an extent, be distilled and applied to other less apparent methods of exercising power.

Endnotes

I am indebted to my research officer, Mr David McCulloch LLM, for his work on this paper.

1 Cmd, 4060 (1932).

2 Report No. 35, March 1992.

3 See Australian Capital Television Ltd v Commonwealth of Australia (No 2) (1992) 177 CLR 106; and Nationwide News Pty Ltd v Wills (1992) 177 CLR 1.

4 See, for example, "Report of the Royal Commission into Commercial Activities of Government and other Matters", Part II, November 1992.

5 Sir Anthony Mason, "Administrative Review - The Experience of the First Twelve Years" (1989) 18 F L Rev 122, 130.

6 Supra n 2.

MANAGEMENT OF LEGISLATION IN THE HOUSE OF REPRESENTATIVES

*Daryl Melham**

Paper presented to AIAL seminar, Parliament and the Legislative Process, Canberra, 2 June 1994

The role of the House of Representatives in the legislative process

The comment is often made that the House of Representatives is the rubber stamp of the executive in the processing of legislation. While the House of Representatives is by definition that part of the legislature in which the majority support the executive, to subscribe to the "rubber stamp" theory is to adopt a much too simplistic approach.

In his recent work *Does Parliament Matter*[1], Philip Norton argues that the generic name applied to legislatures masks rather than illuminates what they actually do. He states a view that parliaments are not simply law-making bodies; indeed most are not even predominantly law-making bodies. Their core defining role is not to make law, but to approve it, to give legislative assent. While space and time prevent a detailed examination of Norton's arguments, for the purposes of the issues considered in this paper, I would endorse this key defining role he has identified, and indicate that the basis for determining whether this approval should be given, should be the widest possible consultation with the community at large in general and specific interest groups in particular.

Moreover, it is a mistake to believe that the approval is automatic. Draft government legislation has its usual sources either from within the ministry (or departments of state), or in response to an assessed need arising in the community and channelled to the ministry by means of members of parliament or others. However, it is a major misapprehension to conclude that the government's first attempts to provide a legislative response is the final agreed solution.

Within the framework of the legislature there are evaluation and refining bodies - eg caucus committees examine draft legislation before its introduction. There are numerous instances where caucus committees have influenced the content of draft bills. For example, during consideration of the Crimes (Investigation of Commonwealth Offences) Amendment Bill 1991, one pivotal consideration was the authority of law enforcement agencies to detain suspects for interrogation or investigation. The extent of the maximum period before a suspect was taken before a magistrate was a central issue - whether a reasonable time or a fixed time should be specified and if the latter, its extent. There was a significant body of persuasive thought that a six hour maximum period (extendable on application to a magistrate with the consent of the arrested person) should be set legislatively. However, the caucus committee was more persuasive in achieving a four-hour

* Daryl Melham MP, Chair, House of Representatives Standing Committee on Legal and Constitutional Affairs.

period (extendable, and with due provision for "dead" time travelling to police station periods, time communicating with family, friends or lawyer etc). The result was an advance in the protection of civil liberties and the rights of the individual.

Also, due credit should be given to private members' legislation. Procedural reforms in place for some time now have meant that every private member (defined as any member other than the Speaker or a minister/parliamentary secretary) who has a special interest is guaranteed the right to introduce a bill into the legislative forum and to be able to give a brief explanation as to its purpose. After introduction the future progress of the bill is usually in the hands of a committee of the House (the Selection Committee). While passage through the House of a private member's Bill is rare, it has happened. Moreover, by introducing the concept and arguing for it, the member has the opportunity to influence the government. On a number of occasions the concept embodied in a private member's bill has been taken up in government amending legislation, and achieved legislative effect in that form.

A Senate in which the government does not control a majority is a complicating factor. There is the impact of what has become known as the "Macklin motion" - the setting of dates in relation to the receipt by the Senate (and more latterly, introduction in the House of Representatives) after which the Senate will not, in the normal course, consider bills. There is also the prospect of a bill referred to a Senate committee, which increases the time for its passage. Another consideration is the uncertainty of the ultimate content of legislation in the light of third party or independent group attitudes and amendments they may support. Because of the greater preponderance of ministers from the House of Representatives, historically the lion's share of legislation is introduced in the House. The government can usually rely on House endorsement and Senate consideration occurs subsequently.

All this means that there is an understandable temptation to streamline legislation's passage in the House to move it to the second phase in the legislative process. An observation that could be made is that frequently the opposition is equally keen to move debate to the Senate. Nonetheless, there are some offsetting considerations:

- The calendar year is being divided into three sitting units to facilitate consideration of legislation by the House.

- More legislation is being introduced in the Senate by the minister representing the "principal" minister in that House, enabling subsequent consideration in the House of Representatives.

- The majority of opposition amendments are first "aired" in the House.

  Frequently, with agreement of government and opposition, the minister (who often has only just seen the amendments for the first time) will take proposed amendments into consideration, on the understanding that the matter may be progressed in the Senate.

- Procedural reforms have been implemented to facilitate consideration of legislation.

Recent procedural reforms

A number of procedural reforms were introduced with effect from 21 February 1994, designed to facilitate greater in-depth consideration of legislation where this was considered appropriate. These reforms may conveniently be discussed under the headings of general, main committee and standing committee consideration

General consideration

Bills are given a first reading when presented or when received from the Senate. The motion for the second reading (ie the beginning of the in-principle consideration) is set down for a future day. (Previously both these steps normally occurred on the same day.) The Bill is therefore in the public arena for a period before any formal decision is made as to how it will be treated or before anyone (including the minister, apart from sanctioning the contents of an explanatory memorandum) has declared formally a position in relation to it. The available options are consideration in the chamber, in the Main Committee or by a House standing committee. In the chamber, consideration can continue immediately after the minister has moved the second reading and provision has been made for formally bracketing together consideration of related measures (cognate debates).

The stage previously know as consideration in committee of the whole has been abolished and consideration in detail has been substituted. Most of the procedures in the abolished stage apply, however, order is maintained from the Speaker's Chair (there is no longer an office including the title of Chairman of Committees) or from the Main Committee Chair. More significantly, each member may speak to every question before the Chair for an unspecified number of periods, each not exceeding five minutes. Previously the provision was for two ten-minute maximum periods. This provision facilitates greater in-depth consideration, should this be desired.

Main Committee consideration

Provision has been made for a second (and parallel) legislative stream in the creation of the Main Committee.

- The Main Committee is in fact a second legislative chamber to consider non-controversial bills.
- At least seven days after the first reading but before the second reading is moved, a Bill (or a number of Bills on a tabled list) may be referred to it.
- It may meet only when the House itself is actually sitting.
- All members are members of the Main Committee and may participate in its proceedings; it is chaired by the Deputy Speaker or one of his deputies.
- The Main Committee in its legislative function will deal with the following stages:
  - minister's second reading speech;
  - second reading debate;
  - consideration in detail.

  (It may also consider orders of the day for resumption of debate on motions moved in connection with committee and delegation reports and motions to take note of papers.)
- There is no provision for divisions to be called for in the Main Committee. Unless the

Committee can proceed without resolving the question, any matter not determined on the voices must be referred to the House for determination. Similarly, provision is made for consideration to be returned to the House should any members so wish (eg if proposed amendments would affect the non-controversial nature of a bill).

- After completing consideration in detail stage (or deciding that this stage is not required in respect of a particular bill), the measure must be reported to the House for report and third reading stages.

- At the time of preparation of this paper, the Main Committee had not yet met. However, it is expected to meet in the near future.

Standing Committee consideration

In relatively rare instances, a Bill may be referred to one of the House standing committees for consideration and advisory report. In the normal course, the motion of referral is moved at least seven days after the first reading but before the second reading is moved. Consideration in detail is not involved - the Bill would not have received in-principle agreement indicated by the second reading. Rather, consideration centres on implementation of the purposes of the Bill as outlined in the explanatory memorandum:

- Changes could be recommended to the terms of a Bill, but alterations to the text could not actually be made by the committee.

- Submissions may be invited and witnesses heard.

- Reporting deadlines may be set by the House.

- After an advisory report, a bill may be considered in the House or in the Main Committee.

The first such reference (the Crimes (Child Sex Tours) Amendment Bill) was made to the Legal and Constitutional Affairs Committee which I chair. (Because the House is still settling in to the new procedures, the reference was made after the second reading debate - standing and sessional orders were suspended.) Harking back to my earlier comments on the influence of the Senate in the overall legislative process, the minister agreed to the reference after ascertaining that it was not the intention to seek its referral to a committee in the Senate.

In view of my experience in relation to the inquiry on that Bill, perhaps I can point to some conclusions as to where I see the new procedures going and what is necessary for their continued success, and for a consequential improvement in the quality of legislation.

An appropriate commencement point is to assert the importance of consultation in the legislative process and to assert the role committee inquiry might play in influencing cultural change in relation to consultation. The committee I chair has long been an advocate of consultation in this regard. In its report last year on *Clearer Commonwealth Law*[2] the committee identified the following six factors which could affect the quality of parliamentary scrutiny of primary legislation (and, except the fourth, to subordinate legislation):

- the volume of legislation to be scrutinised;

- the readability of legislation to be scrutinised;
- the mixture of subjects in legislation to be scrutinised;
- the time between introduction of legislation and its passage;
- parliamentary time allocated to scrutiny of legislation; and
- use of parliamentary committees to scrutinise legislation (para 10.29).

A number of these factors (albeit in some instances in a modified form from that envisaged by the Legal and Constitutional Affairs Committee) have been addressed by the recent procedural reforms.

The Committee also stressed the importance of consultation to gain acceptance of policy - changes to policy and therefore complication of legislation, are likely to be minimised if the policy is widely accepted: an important way of generating acceptance of a policy is to consult widely about the policy when it is being formulated (para 2.24). It also saw consultation as minimising complexity in legislation. It recommended consultation within and outside the government at various stages in the preparation of legislation (with specified exceptions).

The consultation theme in the report of my committee, in the report of the Administrative Review Council, *Rule Making by Commonwealth Agencies* (1992) and in that of the Senate Standing Committee on Legal and Constitutional Affairs, *The Cost of Justice, Second Report. Checks and Imbalances*[3] has been endorsed by the Access to Justice Advisory Committee in its report, *Access to Justice: an Action Plan*, released last month. In its summarising overview, that committee proposes that:

- the government should introduce a general requirement for consultation to occur during the process of making legislation;
- legislation should be updated and redrafted in accordance with the new, clearer drafting style that has been adopted for Commonwealth legislation;
- resources should be provided to parliamentary committees to scrutinise closely legislation in the course of its passage through Parliament; and
- the Commonwealth's computerised database for legislation should be as comprehensive as possible and access to the database as inexpensive as possible (page 18).

The Access to Justice Committee also recommends implementation of reforms advocated by the three bodies mentioned above (Action 21.1).

One principal way to facilitate consultation is to slow the process down a little. to make greater use of exposure drafts, to allow proposals to lie on the table and reach into the community for comment. The standing orders establishing House general purpose standing committees have for some time empowered these committees to examine pre-legislative proposals. The recent reforms I have outlined enable committees to take on Bills for consideration and to make an advisory report after introduction. So the machinery is there.

When such a reference is made, two important considerations come into play. One is that the Government members of the committee,

particularly the Chair, must not be seen or see themselves to be the defenders of the legislation. The Crimes (Child Sex Tourism) Amendment Bill is one on which there is bipartisan support as to the central concept. However, the opposition expressed in the House some concern with the detail. I embarked on the inquiry with an open mind, but with experience as a public solicitor with the NSW Legal Aid Commission, a barrister and public defender in NSW specialising in criminal law, I sought to bring a litigation practitioner's view to the inquiry and attempted to establish the extent to which practitioners had been involved in the preparation process. My experience reinforced my belief that the culture must be changed so that it is recognised that all knowledge on a subject is not limited to Canberra.

The very process of involving committee members brings to bear a balance of a wider cross-section of Australian society which members of parliament constitute. This plus the wider community and practitioner involvement will enable the legislature to discharge the core function described by Professor Norton at the beginning of this paper, that of approving legislation, with the widest possible consultation in the approval process.

The second consideration is that committees undertaking such inquiries must be adequately resourced, as the Access to Justice Advisory Committee has recommended. Electorate demands upon members of the House of Representatives are great. The additional workload imposed by legislative inquiries are not insignificant and usually set a tight deadline for reports. My committee in particular has attracted a number of additional inquiries in the recent past. It is essential that the staffing support is sufficient to keep pace with the demands of members.

Other initiatives to improve legislative functions of the House of Representatives

It may well be that additional measures would assist the House of Representatives to perform its legislative function more effectively. However, the recently instituted procedural changes outlined above in part (ie as specifically related to legislation) represent the most significant reform of House procedure in recent years. It will be first necessary to evaluate their impact and the next phase could well be an increase in the frequency of the use of the new procedures (eg of referrals for advisory report), rather than additional reform relating to basic procedural character.

In this regard, I would request a fair evaluation of the procedural reforms. In 1987 the House introduced a revised committee system with a completely different emphasis. Since then the committees have proceeded with valuable work, albeit because of the typical nature of the House, mostly with not so high a profile as compared to committees in the Senate. Reports have dealt with government policies on small business (the Beddall report) government purchasing policies (the Bevis report); the status of women, biodiversity (a report being published in the US, such is its standing); the banking industry (the Martin report); violence in schools, and the print media. Many of the recommendations have found their way into legislation. Some major achievements have been, apart from the subject areas, development of a number of ways to make committee inquiries more "user friendly" - workshops, forums etc. Yet academia and the media, have tended to concentrate on more high profile Senate inquiries. I would suggest that

we need to judge the legislative reforms as a matter of substance and then after evaluation , ask "where next?".

Conclusion

The House of Representatives, like the Senate, is a complex institution. Members of all persuasions have grappled with the issue of improving the way the House considers legislation. We have made similar - and successful - reforms to give greater opportunities to private members and to create a system of investigatory committees. The record on these matters speaks for itself. There are elements in the work of the House which give the impression the House could be a rubber stamp - but it now has what must be the thorniest and most dangerous handle of any rubber stamp ever made! Many ministers, and former ministers, would be able to attest to that, as would former opposition people. If this situation continues, the procedural reforms are doing their job.

Endnotes

1 Harvester/Wheatsheaf (UK) 1993, p 5.

2 Parliamentary Paper No 127 of 1993.

3 Parliamentary Paper No 128 of 1993.

PARLIAMENTARY MANAGEMENT OF LEGISLATION

*Kay Patterson**

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Introduction

The purpose of my contribution to this seminar is to outline the role which the two legislative scrutiny committees of the Australian Senate, the Senate Standing Committee for the Scrutiny of Bills and the Senate Standing Committee on Regulations and Ordinances, play in the legislative process and the impact they have on the quality of legislation.

The role of the Senate Standing Committee for the Scrutiny of Bills, is to assist the Senate in its function as a house of review by drawing attention to certain types of provisions in legislation which might otherwise go unnoticed in the passage of Bills through the chamber.

At the time that the Committee was set up (in 1981) it was thought that while the main policy of a bill is generally the subject of adequate debate, matters of detail were often escaping adequate attention, particularly, the gradual encroachment on personal rights and liberties and the erosion of the legislative function of Parliament.

These became the responsibility of the Committee. The Senate, essentially, gave the Committee a watching brief. Its task is to alert the Senate to the possibility that the clauses on which it comments may infringe personal rights and liberties or may erode parliamentary legislative power.

Standing Order 24 empowers the Committee to report on Bills introduced into the Senate as well as on Acts of the Parliament which infringe the principles which are enunciated in the Committee's terms of reference. Those terms of reference require the Committee to report on whether a piece of legislation:

- trespasses unduly on personal rights and liberties;
- makes rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers;
- makes rights, liberties or obligations unduly dependent upon non-reviewable decisions;
- inappropriately delegates legislative powers; or
- insufficiently subjects the exercise of legislative power to parliamentary scrutiny.

Note the qualifications in the terms of reference: unduly, inappropriately, insufficiently. Almost every Bill empowers the Governor-General to make subordinate legislation. Not every Bill, however, will delegate this legislative power inappropriately.

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* Senator Patterson has been a member of the Senate Standing Committee for the Scrutiny of Bills and the Senate Standing Committee on Regulations and Ordinances.

There is not time to give examples of all of the terms of reference. However, to focus on the role of the Committee in the legislative process and its impact on the quality of legislation I will discuss the way the Committee operates by referring to a specific example.

The way the Committee operates

The Committee's role in the legislative process begins with the introduction of a Bill. Once a Bill has been introduced in the Parliament, the Committee has access to it. Once a Bill is introduced in the Senate (whether or not it has first been passed by the House of Representatives), the Committee can report on it.

When a Bill is introduced in either place, a copy is provided to the Committee, together with the explanatory memorandum and the second reading speech. As by far the greater proportion of Bills are introduced in the House, this means that they first come to the Committee's attention well before their introduction into the Senate. This feature is a significant factor in the two stage process by which the Committee deals with a Bill.

I thought it might be both useful and topical if I illustrated the Committee's processes by reference to a recent piece of legislation. The particular example that I have chosen is Student Assistant Amendment Bill 1994.

The Bill was introduced into the House of Representatives on 24 March 1994, the last day of the autumn sittings. It was passed by that House on the third day of the winter sittings, 5 May, and introduced into the Senate on 9 May. On 11 May it was debated, amended and passed.

The Scrutiny of Bills Committee usually meets on the Wednesday morning of each sitting week to consider all Bills introduced into a house of Parliament during the previous sitting week. So the first opportunity the Committee had to examine the Bills introduced in the last week of the autumn sittings was Wednesday 4 May. On that day the Committee scrutinised, along with 25 other Bills, the Student Assistance Amendment Bill and tabled that afternoon in the Senate the results of its scrutiny in Alert Digest No 6 of 1994.

I should indicate here that the Alert Digest is the first stage in the Committee's reporting process. As the title suggests, its primary function is to ALERT senators to provisions in Bills which may (and I would also emphasis the **may**) infringe the Committee's terms of reference.

The final product identified some possible transgressions in the Bill: namely, that the Bill may have left too much of important parts of the legislative scheme to be prescribed by regulation, thereby perhaps inappropriately delegating the legislative function; secondly, the Bill, by imposing a strict criminal liability on an administrative matter, may have unduly trespassed on personal rights and liberties.

This particular Digest was tabled on the afternoon of Wednesday 4 May, printed overnight and the next morning copies were distributed to senators and to the various individuals and organisations on the Committee's mailing list.[1]

As is its practice the Committee sent a copy of the Digest to the responsible minister, in this case the Minister for Schools, Vocational Education and Training, inviting a response and pointing out that a timely response

can generally be included in the Committee's Report for the following week.

A Report on a Bill is the second stage of the Committee's process and will contain any ministerial response to the Digest comments and the Committee's assessment of that response. It may also contain the Committee's further thoughts on a piece of legislation.

What happens, under the existing system, in relation to matters raised in Alert Digest and Reports?

To a large extent, this depends. Often, the Committee having identified a particular problem, ministers respond by indicating that the legislation will be amended to correct the problem. On other occasions, however, it is left to individual senators, not necessarily those on the Committee, to raise these issues in the course of debate on the legislation, usually at the Committee stage, where amendments may or may not be moved.

With the Student Assistance Amendment Bill, for example, no response was received from the minister before the next meeting, on Wednesday 11 May but the two matters which attracted adverse comments by the Committee were taken up that morning in debate on the second reading speech by the Australian Democrats and the coalition. Amendments were proposed to delete clauses which would have impose a criminal offence of strict liability for receiving an incorrect payment. The government agreed and the amendments were passed.

The other matter was not resolved in the chamber. The issue was whether there was an inappropriate delegation of legislative power because too much of the content of two of the student assistance schemes was to be provided by regulations. The Bill provided only the barest minimum in respect of the schemes leaving virtually everything to be prescribed by regulation. The Committee pointed out that the proposed section giving legislative backing to the Assistance for Isolated Children Scheme enabled a benefit to be granted without requiring the child to be isolated. Even a central matter like that would be left for the regulations. The Committee sought the minister's advice on how an appropriate balance could be achieved between what ought, because of its importance to the scheme, to be in the Act and the administrative detail which is the function of regulations.

In these circumstances amendments in the chamber are not possible. The Committee is awaiting the minister's response. If the minister agrees, the department will need to issue fresh drafting instructions for Parliamentary Counsel. The minister, on the other hand, may outline reasons for leaving it as it is - which the Committee will publish in a future Report together with whether the Committee agrees with those reasons or not.

Conclusion

Generally, the Committee's success rate is reasonably good. In addition to a not insignificant number of amendments promised, moved and even passed, the Committee also believes it has an ongoing educative role as well as being a watchdog. This educative role also has an impact on the quality of legislation. The Committee discerns from time to time that its perseverance with particular points of concern is noted by Parliamentary Counsel (who clearly follows the Committee's Digest and Reports with some interest) and by those people out in the general

bureaucracy who issue drafting instructions.

I would like to leave you with a quotation which illustrates this point. It is from the (then) First Parliamentary Counsel of the Commonwealth, Mr Ian Turnbull QC, who told the Scrutiny of Bills Committee's tenth anniversary seminar that it was, in his view,

> safe to say that the provisions that get in to Bills and come before the Scrutiny of Bills Committee are the tip of the iceberg. I think that a far greater number that would have offended have not been put in the Bills because [the drafters] have advised the departments and the departments have had the sense to withdraw them. After all, when we say that the Scrutiny of Bills Committee does not like something, that is a very powerful weapon in our armoury.

Senate Standing Committee on Regulations and Ordinances

The influence of the Senate Standing Committee on Regulations and Ordinances on the quality of delegated legislation can be seen in the extent and variety of its activities during just one year, 1992-93. The annual report for that year sets out those activities in considerable detail, but the following summary gives an idea both of the number of defects in delegated legislation and of action by the Committee to remedy these defects. The summary concentrates on cases where the relevant minister has undertaken to amend legislation at the suggestion of the Committee and is set out under its four terms of reference, which are now included in the Standing Orders of the Senate.

(a) Is delegated legislation in accordance with the statute?

One of the most important tasks of the Committee is to ensure that delegated legislation was made validly under both its parent Act and any other legislation such as the *Acts Interpretation Act 1901*. During the year the relevant minister acknowledged that one instrument was void because it invalidly purported to incorporate certain material. Another minister accepted that there were incorporation problems with three instruments and made a fresh instrument to correct this. The Committee was not satisfied with this further instrument and suggested that advice be sought from the Attorney-General's Department. The advice was that there was a defect in the authorising provisions of the parent Act, which would be amended. Another minister accepted that four separate instruments were invalid because they purported to subdelegate legislative power. Another instrument was invalid because of drafting defects.

The Committee believes that the standard of drafting of delegated legislation should be equal to that of Acts. This is a standard which is usually met by the regulations drafted by the Office of Legislative Drafting, but which unfortunately is not always met by instruments drafted in individual agencies. Ministers undertook to amend eight instruments to meet the concerns of the Committee about drafting and explained other apparent deficiencies to its satisfaction.

Largely as a result of the efforts of the Committee it is now accepted that each instrument of delegated legislation should be accompanied by a full explanatory statement or other explanatory material. The Committee wrote to ministers about some 18

instruments seeking further information not included in the explanatory material. Often these inquiries related to increases in fees and charges which were insufficiently explained. Also, the Committee was advised that the Department of the Prime Minister and Cabinet was considering whether Committee requirements in this area should be included in the next revision of the *Federal Executive Council Handbook*.

Numbers of instruments operate retrospectively. Even where this retrospectivity is not prejudicial and therefore void, the Committee often asks for reasons for unexplained retrospective legislation. The Committee wrote to ministers about 10 of these instruments, including one with six and one with three years retrospectivity.

Many instruments provide for a decision maker to delegate his or her powers. The Committee ensures that these delegations are appropriate. In one case the delegated powers were so important and sensitive that the minister agreed with the Committee that the power to delegate should be removed; the minister would amend the parent Act to do this. In three other cases ministers undertook to amend instruments to restrict the level of delegation. In 9 other cases Minister undertook to take administrative action to restrict delegations.

Sometimes instruments provide for further legislative or quasi-legislative instruments. After ascertaining that these are not invalid subdelegations, the Committee ensures that in appropriate cases the further instruments are subject to tabling and possible disallowance. One single instrument provided for determinations, permits, directions, signs, notices, declarations, authorities, approvals and lists. The minister undertook to amend the instrument to provide for disallowance of some notices and declarations.

As with drafting, standards of access, presentation and publication of delegated legislation should not be less than those of Acts. These standards are met by regulations and other statutory rules, but usually not by the many other series of delegated legislation. One amending instrument made 49 pages of amendments to the principal instrument and renumbered existing complex regulation numbers such as regulation 2AAAA. The minister agreed with the Committee that a reprint would assist the public.

Also, as with Acts, instruments of delegated legislation should include a system of citation and numbering, to assist users. Often this requirement is neglected when instruments are first made under the increasing numbers of newly enacted enabling provisions in Acts. During the year ministers undertook to provide proper citation for 13 instruments.

(b) Does delegated legislation trespass unduly on personal rights and liberties?

There is no part of the work of the Committee more important than the protection of personal rights. The Committee interprets this mandate from the Senate in the broadest way to cover every aspect of personal rights and liberties.

Protection of privacy is a major area of concern to the Committee. One set of regulations extended the circumstances under which the Australian Postal Corporation may disclose personal information about its customers. In this case the Committee heard evidence from members of the relevant department, consulted the Privacy Commissioner and received an undertaking from the

minister to repeal and remake the regulations to limit and narrow the new scheme and to introduce a Bill in the next sittings so that Parliament could debate the whole issue. The Committee nevertheless asked for further safeguards and the minister undertook to include a sunset clause in the legislation and to make the new regulations as soon as possible. In a special statement to the Senate the Committee also expressed its concern at the tendency by departments, as in that case, to adopt the lowest common denominator of disclosure under the *Privacy Act 1988*. The Committee also wrote to ministers about privacy aspects of a number of other instruments.

The Committee ensures that personal rights are not affected by the arbitrary grant of power to public officials. Here, the Committee questioned one instrument which authorised the giving of compulsory medical treatment to people in custody, another which required certain fines to be paid immediately and another which authorised the departmental Secretary to determine who was a fit and proper person for the purposes of a legislative scheme.

The Committee during the year raised with ministers a number of instruments which appeared harsh or oppressive. These included increases in fees which seemed to be a penalty for exercising rights conferred by legislation, apparently unreasonable testing requirements imposed upon small manufacturers of outback tourist vehicles, harsh provisions for impounding stock and ceasing existing refunds for fees.

In one of its most important actions of the year the Committee took action on determinations which, made by an official without adequate consultation, entrenched an injustice for some 30,000 former members of the Australian Public Service. This injustice was described by the Merit Protection and Review Agency as "unfair and inequitable" and "obviously anomalous". The explanatory statements which accompanied the determinations were inadequate and possibly misleading. Following actions by the Committee, special allocations of $4.1 million were included in the 1992 Budget to cure this situation.

(c) Does delegated legislation make rights unduly dependent on administrative decisions which are not subject to independent review of their merits?

Delegated legislation often provides for discretions which affect business operations, the right of a person to practise a trade or profession, or other personal rights. These are too numerous to mention individually but the results of the inquiries of the Committee are instructive. During the year ministers undertook to amend four instruments to provide AAT review of decisions, to amend two others to remove defective criteria from another and to provide criteria from another. Ministers also undertook to provide that one discretion would be temporary and another interim pending a reference to the Australian Law Reform Commission.

(d) Does delegated legislation contain matter more appropriate for parliamentary enactment?

This is a principle not often raised by the Committee. Nevertheless, it is a breach of parliamentary propriety if matters which should be subject to all of the safeguards of the parliamentary passage of a Bill are included in delegated legislation. The most important action by the Committee in

this area during the year was a special report on Australia's implementation, by regulations, of United Nations' sanctions against Iraq, Kuwait, Libya and Yugoslavia. This report was favourably mentioned by the Minister for Foreign Affairs in both the second reading speech and explanatory memorandum for the Bill which became the *Charter of the United Nations Amendment Act 1993*.

Conclusion on role of Standing Committee on Regulations and Ordinances

During the year the above undertakings and others from earlier years were implemented by 39 separate instruments, numbers of which implemented more than one undertaking. This does not include the many undertakings to provide citation and numbering of explanatory statements. At the end of the year this left 28 undertakings to amend Acts or instruments which had not yet been implemented. All of these changes had a direct effect on the quality of delegated legislation.

The Committee, however, also influences the legislative process in less direct ways. The Committee has found that departments have generally accepted its views on appropriate standards for delegated legislation and have adopted these standards when making new legislation. These views of the Committee were disseminated through the year by four reports, by six special statements to the Senate and by incorporating in *Hansard* statements of its concerns and correspondence whenever the Committee gives one of its many protective notices of disallowance of an instrument. The Committee also met with numbers of statutory officers and departmental officials.

Endnotes

1 Anyone wishing to be on that mailing list should contact the Committee's secretariat on 06-277 3050.

TWO STYLES OF PARTICIPATING IN EDUCATIONAL POLICY DEVELOPMENT: THE STANDING COMMITTEES OF THE SENATE AND THE HOUSE OF REPRESENTATIVES COMPARED

*John Power**

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For the student of processes of institutionalisation within legislatures, the standing committee systems of the two Houses of the Australian Parliament are promising fields of investigation. While their formal structures are very similar[1], the political logics of the Houses from which they derive are strikingly different. While one would expect the personal predilections, interests and even whims of individual parliamentarians (especially those of the committee chairs) to loom large in the early days of the committee systems, over time the differing political logics should come to prevail. The Senate system has now been functioning for just on a quarter of a century and that of the House of Representatives for nearly a third of that time. Has this been long enough for the influence of the two political logics to be discernible?

In recent paper (Power 1994), I have argued that notably different styles may now be observed, at least in the policy domain of public service reform. Indeed, on the basis of experience in that domain, it is possible to construct two contrasting ideal types of parliamentary committees. The typical Senate committee looks to one or more policy communities, made up of organisations (both public and private), professional bodies, academics and interested citizens.

The typical House of Representatives committee looks first and foremost to the bureaucracies.

This fundamental difference is far from surprising, given the differing compositions and auspices of the two bodies. The Senate committee emanates from a multi-partisan chamber, in which the Government normally lacks a majority. It is not dependent on the Government for all its references, with the result that it may range widely. In part because of the multi-partisan nature of its parent body, in part because that parent body has had a much longer and diverse experience with committee systems and tends to insulate contentious and divisive issues by referring them to select committees, the Senate committee may often undertake reviews in areas of considerable political sensitivity and handle them skilfully, in a relatively consensual manner.

The House of Representatives committee, by contrast, emanates from a chamber dominated by the government of the day. It is dependent on that government for its references and the government party provides the substantial majority of its

* Professor John Power is the Director of the Australian National Internships Program, Australian National University.

members. It thus can come closer than its Senate counterpart to work on the coal-face of policy development, in those areas - usually modest and instrumental and sometimes technical - where government wishes to build a bipartisan consensus. The consensus sought in this way differs from that which characterises the Senate committee, for it is more or less automatically generated by the nature of the inquiry, rather than attained through skilful and continuing negotiations.

To what extent have the two Standing Committees on Employment, Education and Training conformed to these two types?

An obvious point of departure for the making of such a comparison is provided by the policy domain of higher education, for it is here - and only here - that the two committees have each prepared a major report. In this domain the expected difference is indeed readily discernible.

The first Committee report to appear was the House of Representatives Committee's Setting the Course: Report on the Efficiency and Effectiveness of Institutional Practices in the Higher Education Sector (May, 1988), which was published in the crucial period between the government's green paper (Higher Education: A Policy Discussion Paper, December, 1987) and its white paper (Higher Education: A Policy Statement, July 1988). In the latter document, the Minister, Mr Dawkins, saw fit to cite the Committee's views on the vexed question of minimal institutional size, no doubt with a view to securing bipartisan support in a politically sensitive area.

In contrast, the Senate report, Priorities for Reform in Higher Education (June 1990) came two years after the white paper and claimed to go beyond the agenda set by that document:

> The recent debate about higher education stimulated by the Government's Green Paper and White Paper has missed a point of crucial importance. The debate has focussed almost exclusively on the way the higher education is to be structured and how it will be controlled. In the Committee's view, the central consideration in reforming higher education must be the quality of the education which students receive - what they learn, how effectively they are taught and how well they are prepared to live and work in a world of rapid change. The preoccupation with the way the system operates rather than what it is intended to achieve, has excluded these issues from the agenda of the debate. The Committee believes it is time to correct this imbalance. There is little point in devoting energies and resources to increasing the number of graduates - one of the major goals of the White Paper - if questions are not asked about the quality of those graduates and the ways in which they are educated.

Mr Dawkins was stung by this critique into an intemperate attack on the Committee 'two years wasted time on the part of some senators who obviously have too much time on their hands' and thus had made a 'totally useless contribution' (Millett & Totaro, 28th June 1990). The later official government response by Mr Baldwin (1990) was more measured but, unsurprisingly, generally negative.

Mr Dawkins's displeasure may have been due in part to a recognition that the Senate Committee had penetrated an area of deep concern to the higher

education policy community. The Committee certainly obtained much more input from that policy community than its House of Representatives counterpart had done; (267 as against 62 submissions; 80 as against 65 witnesses), and more varied sets of submissions and testimony from witnesses. The plurality of submissions to the Senate inquiry - 118 or 44% - came from the individuals (most of these academics), while individuals provided a much smaller percentage - 20 or 32% - of submissions to the House of Represenatives inquiry. Furthermore, several prominent researchers in the field of tertiary education made submissions to the Senate but not to the House of Representatives Committee.

Universities and their administrators made up the majority of those submitting - 32 or 52% - or giving testimony - 44 or 68% - to the House of Representatives inquiry. They were relatively less prominent in the Senate exercise, providing only a third of - 97 or 36% - of submissions and an eighth of witnesses - 10 or 13%. Overall, the Senate inquiry attracted input from a much wider range of interests - businesses and labour groups, minority interests, professional associations and indeed, Commonwealth agencies themselves.

Although the performance of the two Committees in the domain of higher education policy has been in accordance with expectations generated by the ideal types, it cannot be claimed that this domain has been of central concern to either Committee. However, it is relatively easy to identify the respective policy domains which have attracted the strongest attention by each of the Committees. These have been the ones in which interest was sustained through a period long enough to witness the production of both initial and follow-up reports: on active citizenship (Senate) and literacy (House of Representatives).

In its treatment of its favoured policy domain, the Senate Committee appears to have conformed to type. Its two reports, Education for Active Citizenship (February 1989) and Active Citizenship Revisited (March 1991), attracted substantial and varied inputs from community interests - with 134 and 146 submissions, respectively and 67 witnesses from 26 organisations appearing before the Committee in its hearings during its first inquiry. (No hearings were held during the second).

The Committee experienced great difficulty in engaging Commonwealth government. Its first report contained only six largely hortatory recommendations, which received vague responses. In its second attempt, the Committee produced 23 more detailed recommendations, but the government response was scarcely more encouraging. As a result, the promising if still embryonic policy community which had grown up around the Committee during its three years of investigations into active citizenship soon came apart after March 1991.

The House of Representatives Committee provides a seemingly sharp contrast, for in some important respects it has not conformed so closely to type. In its preferred policy domain, it does appear to have attracted the attention of a large and varied policy community. Its two reports, Words at Work: A Report on Literacy Needs in the Workplace (March 1991) and The Literacy Challenge: Strategies for Early Intervention for Literacy and Learning for Australian Children (December 1992), attracted inputs which more than matched those received by its Senate counterpart: with 107 and 567

submissions respectively and 63 witnesses from 23 organisations appearing before the Committee during its first inquiry and 97 witnesses from 36 organisations during its second. However, governments and public bodies (especially schools) figured most prominently in the making of these inputs, with the unsurprising result that the recommendations of the first report were warmly received by the Commonwealth Government. Indeed, as with the House Committee's reports on public service reform, Words at Work was speedily integrated into ongoing policy development...

> The report informed the development of the Policy Information (White) Paper on an Australian Language and Literacy Policy (ALLP), which was released by my predecessor on 2 September 1991. The policy responded to many of the issues of concern which were raised in the report. (Beazley 1992).

The fate of the second report, however, remains to be determined, as the government has still not responded to its recommendations, eighteen months after they were made. How might one explain the strikingly different responses accorded the two reports? The answer, not surprisingly, lies substantially in the nature of partisan politics in the House of Representatives.

Even in the first report, the opposition members of the Committee had entered a dissent, in which they expressed concerns about the allegedly growing problem of illiteracy in schools and urged the adoption of standard, internationally comparable testing of all students' literacy and numeracy skills.

Again in the second report, the opposition members entered a similar dissent, but the main report itself also reflected some of their concerns:

> It is unacceptable that ten to twenty percent of children finish primary school with literacy problems ..... it seems that a figure of twenty-five percent of students at risk may be a more accurate figure for many education districts (pp.V,3).

These speculations had appreciable effects both at the political level, where they were heavily used by the opposition in the 1993 election campaign and at the bureaucratic level, where they were accorded the status of 'fact' by EPAC in its report, Education and Training in the 90s (1993). Most recently, the speculations have been trenchantly criticised in a response to The Literacy Challenge by the Language and Literacy Council and the Schools Council of the National Board of Employment, Education and Training. Small wonder that the government has not yet provided its public response!

The case of The Literacy Challenge thus suggests an important modification to the characterisation of the House of Representatives committee ideal type with which this paper commenced. While it would still appear to be the case that the inquiries of House of Representatives committees are more closely linked than those of their Senate counterparts to executive branch policy development, it does not necessarily follow that this linkage will always take the form of smooth integration. Indeed, it may only be the case that House of Representatives committees become fully linked to such policy development when their reports come to figure in intra-bureaucratic conflicts! Further, the

House of Representatives committee's treatment of literacy strongly suggests that close relations with government interests does not necessarily preclude similarly close relations with 'outside' interests in a relevant policy community. The principal difference between House of Representatives and Senate committees at this point is that House of Representatives committees may (or may not) engage such 'outside' interests, whereas Senate committees seem invariably to do so.

The propensity of House of Representatives committees to engage wider policy communities may be, at least in part, a function of the styles of their chairs. Some observers believe that the pacesetter in this respect was Jeannette McHugh, who in her two years as Chair of the House Committee on Environment, Recreation and the Arts oriented its work strongly to relevant policy communities, before ascending to the ministry in mid-1992. This style was emulated by later entrants to the ministry, such as Michael Lee and Gary Punch.

It is thus possible that we may be witnessing the gradual institutionalisation of two types of House of Representatives committee chairs. The first are those who, in response to the apparent parliamentary 'policy paradox' (Uhr, 1993), prefer modest policy influence to personal preferment. The committees chaired by this type will remain close to the ideal type I have sketched, being much more heavily oriented to bureaucracies than to wider policy communities. An outstanding representative of this type of 'career' chair has been Sir Hugh Rossi, long time leader of the House of Commons Environment Committee, whose strategy has been to '"get in early" with a searching factual review which can be respected, non-partisan, well-researched and constructive in its recommendations'. (Hawes 1993, p.32).

The second type is made up of those who are ambitious to proceed to ministerial rank. Such chairs are more likely to take risks with projects which may well stimulate the preparation of dissenting reports, but which are likely to attract headlines and to energise wider policy communities.

Committees led by this type of chair will more closely resemble their Senate counterparts in their 'external' relations, but will be more likely to divide internally. It may well be that strong partisanship in a House of Representatives but not a Senate chair is a decided advantage in career progression, whatever it might do to the functioning of the Committee concerned. Of the fourteen parliamentarians who have followed Ms McHugh into the ministry in the past two years, six had chaired House of Representatives committees, and only two (Bob McMullan and Rosemary Crowley) have chaired Senate committees.

As the Table below strongly indicates, committee chairs have in recent years become an important stage in the career paths of rising ALP parliamentarians. However, only a minority of chairs end up making it into the ministry and a substantial number of House chairs still prefer to steer their committees into modest projects of little salience to external policy communities.

TABLE[1]

Keating Administration - June 1994

Parliamentary Committee Chair Before Entering Ministry

	No	Yes
Cabinet	9	8
Outer Ministry	3	10
Parliamentary Secretaries	2	8

The longer-term effects of having a ministry composed mainly of former parliamentary committee chairs could be significant. As Hamburger (1993, p.149) has pointed out, a major barrier to parliamentary reform to date has been the fact 'that most members of parliament persists in seeing themselves less as a check on the executive than as prospective members of it'. While this barrier will no doubt remain in the foreseeable future, its nature could already be changing. The roles of committee chairs are by now salient in the politics of the governing party, in part because the current batch of incumbents may have developed close relations with previous incumbents now in the ministry, and in part because that batch is highly likely to provide ministers of the future. Inevitably this increasing role salience is impacting on the relationships between the Parliament, the government and interested policy communities in ways which can only strengthen the former.

Endnotes

1 Source: Individual entries in Department of Parliamentary Library Parliamentary Handbook (1993)

It should be noted that the five most senior members of Cabinet (Keating, Howe, Evans, Beazley and Willis) had virtually no opportunity to serve as chairs, having proceeded directly from the Opposition to the Ministry in 1983.

A COMPARISON OF THE QUEENSLAND AND COMMONWEALTH APPROACHES TO THE LEGISLATIVE PROCESS

*David Solomon**

Paper presented to AIAL seminar, Parliament and the Legislative Process, Canberra, 2 June 1994

It is necessary to begin by making an obvious point: the fundamental difference between the Queensland and Commonwealth parliaments is that the former is unicameral, the latter bicameral. This means, among other things, that the opportunity for Parliament to review and revise legislation as it processes it, is substantially less in Queensland. It also means that the ability of the Queensland Parliament to establish committees which might have an input into the legislative process is considerably less than that of the Commonwealth Parliament. And of course it means that the government in Queensland is always in control of the legislative process in Parliament: the government is the government because it has majority support in the one and only House of the Parliament.

Until 1989 this meant that legislation was almost exclusively the preserve of the cabinet. Passage by Parliament was essentially a formality. There were no parliamentary committees to which a Bill might be referred, nor to comment on its content, and little time was made available for debate.

But 1989 was an important year. There were three not unconnected events. The Fitzgerald Commission reported: the National Party government established a series of parliamentary committees and independent commissions; and the Labor Party won the State election.

One of the independent Commissions was the Electoral and Administrative Review Commission (EARC). Its Act gave it a broad agenda to review the public administration of the State, including the operation of the Parliament.[1] One of its early reviews was focused on a "review of the role and functions of the Parliamentary Counsel", one of the problem areas which Mr Tony Fitzgerald QC had highlighted.[2] He had noted that the Parliamentary Counsel was attached to the Premier's Department and was not independent. The Report also said, "The Parliamentary Counsel obviously should not tailor advice to political expediency or fail to point out fundamental errors in principle or obligation in any proposed course. The present role and functions of the Parliamentary Counsel should be reviewed (in the light of other matters, identified in this report) to ensure its independence."[3]

EARC produced its report on its Review of the Office of the Parliamentary Counsel[4] in May 1991. Its recommendations were largely supported by the Parliamentary Committee on Electoral and Administrative Review which reported

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* David Solomon is Contributing Editor, *The Courier-Mail*. He is the former Chairman of the Queensland Electoral and Administrative Review Commission.

two months later and were implemented for the most part in the *Legislative Standards Act 1992*.

That Act was concerned primarily with the creation of the Office of Parliamentary Counsel (OPC) but the first operative part of the Act deals with Legislative Standards, and in particular with what are described as "fundamental legislative principles".

PART 2 - LEGISLATIVE STANDARDS

Purpose of Act

3.(1) The purposes of this Act include ensuring that -

(a) Queensland legislation is of the highest standard; and

(2) The purposes are primarily to be achieved by establishing the Office of the Queensland Parliamentary Counsel with the functions set out in section 7.

Meaning of "fundamental legislative principles"

4.(1) For the purposes of this **Act, "fundamental legislative principles"** are the principles relating to legislation that underlie a parliamentary democracy based on the rule of law.

(2) The principles include requiring that legislation has sufficient regard to -

(a) rights and liberties of individuals; and

(b) the institution of Parliament.

(3) Whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation -

(a) makes rights and liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review; and

(b) is consistent with principles of natural justice; and

(c) allows the delegation of administrative power only in appropriate cases and to appropriate persons; and

(d) does not reverse the onus of proof in criminal proceedings without adequate justification; and

(e) confers power to enter premises and search for or seize documents or other property, only with a warrant issued by a judge or other judicial officer; and

(f) provides appropriate protection against self-incrimination; and

(g) does not adversely affect rights and liberties, or impose obligations, retrospectively; and

(h) does not confer immunity from proceeding or prosecution without adequate justification; and

(i) provides for the compulsory acquisition of property only with fair compensation; and

(j) has sufficient regard to Aboriginal tradition and Island custom; and

(k) is unambiguous and drafted in a sufficiently clear and precise way.

(4) Whether a Bill has sufficient regard to the institution of Parliament depends on whether, for example, the Bill -

(a) allows the delegation of legislative power only in appropriate cases and to appropriate persons; and

(b) sufficiently subjects the exercise of a delegated legislative power to the scrutiny of the Legislative Assembly; and

(c) authorises the amendment of an Act only by another Act.

(5) Whether subordinate legislation has sufficient regard to the institution of Parliament depends on whether, for example, the subordinate legislation -

(a) is within the power that, under an Act or subordinate legislation (the **"authorising law"**), allows the subordinate legislation to be made; and

(b) is consistent with the purposes and intent of the authorising law; and

(c) contains only matter appropriate to subordinate legislation; and

(d) amends statutory instruments only; and

(e) allows the subdelegation of a power delegated by an Act only -

(i) in appropriate cases and to appropriate persons; and

(ii) if authorised by an Act.

This is obviously a very important piece of legislation but it would be counter-productive to overstate that importance. It is not a mini Bill of Rights. Nor was it intended to be. EARC noted in its report that it would be dealing with the question of a Bill of Rights for Queensland at a later time.[5] That it did last year.[6] The Fundamental Legislative Principles (FLPs) in the *Legislative Standards Act* were not intended to be enforceable. They were not absolute, as EARC noted and "there may be circumstances where the public interest justifies or even requires that a principle be modified or displaced ... The principles are, however, of sufficient importance that there should exist mechanisms to ensure that departures from the principles are explained or justified."[7]

The FLPs are an important checklist, more extensive than those which are monitored by the Senate Standing Committee for the Scrutiny of Bills. And more importantly, they are applied at the drafting end of the legislative process and in the processing of Bills by cabinet and its committees, rather than after Bills have been introduced into the Parliament.

As they presently stand, the FLPs fall within the responsibilities of the Parliamentary Counsel. The Office of the Queensland Parliamentary Counsel is required, by s.7 of the *Legislative Standards Act*, to provide advice to ministers and units of the public sector on the application of fundamental legislative principles in relation to the drafting of government Bills, amendments and subordinate legislation (s.7(g)(ii)). It similarly advises members of the Legislative Assembly of those principles in

relation to private members' Bills and amendments (s.7(h)(ii)).

The government has set in place procedures which are designed to ensure that the cabinet is aware of whether proposed legislation infringes any of the FLPs. The principal features of the system adopted by the government are set out below.[8]

Cabinet first approves the preparation of a Bill on an "authority to prepare" submission. The cabinet handbook requires drafting instructions to be attached to the submission. The drafting instructions enable the details of the legislative proposal to be examined for its impact on fundamental legislative principles before cabinet gives approval to prepare the Bill.

When the drafting of the Bill has been completed, cabinet approves the introduction of the Bill on an "authority to introduce" submission. The Bill must be attached to the submission.

All proposed subordinate legislation (other than exempt instruments) is drafted by the OPC. The cabinet handbook requires subordinate legislation with a "significant" regulatory impact to be submitted to cabinet on an "authority to forward significant subordinate legislation" submission. The draft subordinate legislation must be attached to the submission.

As a safeguard, the Office of the Parliamentary Counsel has been instructed to certify subordinate legislation only if it is satisfied that the subordinate legislation does not infringe fundamental legislative principles.

A crucial aspect of the process is that the Parliamentary Business and Legislation Committee of the Cabinet (PBLC) considers each "authority to prepare" submission, each "authority to introduce" submission and each "authority to forward significant subordinate legislation" submission immediately before it is considered by cabinet. Although the PBLC has a broad range of functions, in practice it devotes most of its attention to the consideration of the impact of legislative proposals on FLPs.

Insiders say the system works. Mr Mackenroth, who chairs the PBLC, says the Committee now rarely sees provisions that were once standard in Queensland: for example, unfettered search and seizure provisions, exempting public officials from liability and general penalty provisions.

The PBLC has a small membership and meets immediately before cabinet does. It is chaired by the Leader of the House, and includes the Attorney-General and one other minister, plus the Parliamentary Counsel, a nominee of the Premier and a senior officer of the Premier's Department. The Attorney-General and the Parliamentary Counsel attend all meetings. Any issues concerning FLPs which are raised in the Committee by the Attorney-General or the Parliamentary Counsel are taken to cabinet by the Leader of the House.

There are two other bodies which may examine legislation after it has been through cabinet but before its introduction to the House. The Labor Government has established a series of ministerial committees shadowing each minister, and virtually all legislation goes to the relevant ministerial committee. Additionally, any legislation affecting the courts or the legal system must be considered by the Litigation Reform Commission a body consisting mainly of judges of the Court of Appeal.

Once a Bill is introduced in Parliament, the opposition normally

has the opportunity to use the OPC to draft amendments. But of course those amendments will be adopted only if the government decides to accept them.

There can be no doubt that the government has taken the concept of FLPs very seriously and is concerned to ensure that public servants also take them seriously. The material on the processes developed by government which I have been quoting is taken from a speech given by Mr Mackenroth to a seminar and workshop conducted in April last year by the Office of Parliamentary Counsel and RIPAA, primarily for public servants. It is probably worth directly quoting the Minister's concluding remarks:

> The processes are designed, among other things, to identify potential breaches of fundamental legislative principles, and ensure that departures from fundamental legislative principles are properly justified and are approved by cabinet. It is the role of those assisting the government in developing policy to ensure that the processes are complied with, to assist in the identification of issues involving FLPs, and to provide the government with high quality advice on all aspects of policy, including the application of FLPs to proposed legislation. The proper carrying out of the role will ensure efficient, fair and democratic government. It will also, of course, assist in avoiding embarrassment to the government, and yourselves, by unintended and unjustified breaches of fundamental legislative principle.[9]

On a personal note, I should add that in my own contact with the OPC I found that the FLPs had become an essential part of the culture. In one of the Bills we wanted prepared there was a reference to the possibility of obtaining documents compulsorily. We were quickly put right about the proper processes which were required in order to conform with the FLPs, though we did negotiate a procedure slightly amending what had become a standard format in the OPC in relation to such matters.

Now, while it is true that the new system is working well, I must say that in my view it is not yet adequate. EARC, in its report on the OPC and in a subsequent report on parliamentary committees[10] thought it essential that there should also be a Scrutiny of Legislation Committee which would examine all legislation, including subordinate legislation, to ensure that it did conform with the FLPs, or if not, why not. The creation of this Committee has not been rejected by government. There is a possibility that the Committee will come into being later this year.

That Committee, however, would not have the capacity or sufficient resources to be able to subject all legislation to detailed scrutiny. What is necessary is that the Parliamentary Counsel should have to report to the Committee about breaches or compromises of the FLPs. Departures from the principles should be explained or justified in public and not merely in secret to cabinet and its committees.

In the absence of these two developments (ie the creation of a Scrutiny of Legislation Committee and the publication by the OPC of its assessment that a Bill contains provisions contrary to an FLP) it remains the case that the crucial beneficial aspects of the Queensland legislative process occur before legislation is presented to the Parliament.

That applies, too, in relation to a matter which featured significantly in the report of the Sackville Committee on Access to Justice.[11] I have included the recommendations the Committee made in relation to the drafting and availability of legislation as an appendix. What I want to comment upon here is its proposal that the Commonwealth should undertake more consultation before it introduces legislation.

This is an area where there has been considerable movement in Queensland already. More often than not, explanatory memorandums now include an account of what consultation has taken place. Let me quote from just two recommendations which accompanied Bills introduced into Parliament in the last sittings:

JUSTICE AND ATTORNEY-GENERAL (MISCELLANEOUS PROVISIONS) BILL 1994

EXPLANATORY NOTES

Consultation

Consultation was conducted with relevant government agencies, the Courts, the Litigation Reform Commission, the Queensland Law Society and the Bar Association of Queensland in relation to particular amendments in which they had an interest.

RACING AND BETTING AMENDMENT ACT 1994

EXPLANATORY NOTES

Consultation

The Review of the *Racing and Betting Act 1980* Discussion Paper was released to Government Departments, racing industry organisations and community and business groups in September 1993. A range of policy issues arising from the review of the Racing and Betting Act was further discussed with a committee of racing industry administrators. The changes to the structure of the Queensland Principal Club and the reform of the Racing Industry Advisory Committee reflect the responses and consultation with the racing industry bodies.

I must add, that although all Bills are supposed to be accompanied by explanatory memorandums which include such details, not all departments or agencies yet comply. This is not because there is no consultation (though it may not be fully adequate). It is just, I believe, that this particular change does not seem as urgent or important as many others. And it must be recalled that before 1989 Parliament (not to mention cabinet) was not given the benefit of any explanatory memorandums at all.

One of the benefits of Parliament being given information about the consultation process is that it should be in a better position to explore the adequacy of that consultation, noting which interested groups were not consulted and using the evidence of those affected to measure the benefits or deficiencies of the proposed legislation. That kind of function could only be carried out by legislation committees. Their creation was also recommended by EARC[12] but unfortunately there is no immediate prospect of that recommendation being implemented.

The consultation issue highlights what I sought to emphasise in relation to the fundamental legislative principles. What has happened in Queensland is that the focus of the legislative process has moved away from Parliament to the executive. Sound legislation is dependent in part on adequate consultation and the

application of proper principles. The application of this discipline has undoubtedly been beneficial. But it ought not to be regarded as sufficient. Parliament also must have a role, other than as a rubber stamp. This is not easy in a unicameral Parliament. But it is not impossible if an adequate parliamentary committee system is created to ensure that government performs its legislative task properly.

Footnotes

1 *Electoral and Administrative Review Act 1989*, s2.10(1)(A).

2 Report of the Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct (the "Fitzgerald Report") p.371, rec. 11f.

3 ibid. p.140.

4 91/R2.

5 ibid.pp.25-26.

6 Report on the Preservation and Enhancement of Individuals' Rights and Freedoms. 93/R5.

7 91/R2, p.26.

8 This is an edited extract from part of a speech given by the Hon Terry Mackenroth, Leader of the House, to a seminar and workshop on "Fundamental Legislative Principles: new policy processes", 2 April 1993.

9 ibid. p.8.

10 Report on Parliamentary Committees, 92/R4.

11 Access to Justice.

12 92/R4, Chapters 4-5.

Appendix

Access to Justice

Extracts from the Action Plan concerning legislation

Action 21.1

The Commonwealth should implement the reforms proposed by the Administrative Review Council, the Senate Standing Committee on Legal and Constitutional Affairs and the House of Representatives Standing Committee on Legal and Constitutional Affairs designed to improve consultation in the making of legislation. In particular, the Commonwealth should introduce by legislation, or other appropriate means, a general requirement for the Government to consult in the process of making legislation, subject to appropriate specified exceptions.

Action 21.2

The Commonwealth should adopt a policy for the updating of its primary legislation to ensure that all Acts that are widely used are put into the new and better drafting style currently being developed by the Office of Parliamentary Counsel in light of the recent reports by the Senate Standing Committee on Legal and Constitutional Affairs and the House of Representatives Standing Committee on Legal and Constitutional Affairs.

Action 21.3

The Commonwealth should, in accordance with the recommendations made by the Administrative Review Council, introduce a scheme for the sunsetting of all delegated legislation on a ten-year rotating basis to ensure that delegated legislation is a high quality, and up to date if it is required at all. If the cost of this proposal is too high, at the very least, the Commonwealth should adopt a similar policy for the updating of delegated legislation as proposed earlier for primary legislation.

Action 21.4

The Commonwealth should provide additional resources to parliamentary scrutiny committees to ensure that they are capable of fulfilling their functions as the volume of legislation, both primary and delegated, increases.

Action 21.5

The Commonwealth should ensure that its computerised database for legislation is as comprehensive as possible and, in particular, it should contain relevant explanatory and other information to assist in the interpretation of legislation.

The Commonwealth should negotiate with the States to obtain permission for its computerised database to include or have access to State information.

Access to the database and to printed versions of legislation should be as inexpensive as possible.

THE FUTURE

*John Coates**

Paper presented to AIAL seminar, Parliament and the Legislative Process, Canberra, 2 June 1994

Thank you for asking me to speak today and for giving me such a broad topic as "The Future". It is tempting to range far and wide espousing my prescriptions for changing the world. However, I will avoid this once-in -a-lifetime opportunity and control myself. I'll stick to the general areas you have been discussing today. I am sorry not to have been able to be here for all the other papers, because many of them sounded as though they would be interesting and challenging.

I'll take the opportunity to get a few complaints off my chest about how things have worked in the past, and still do, which I guess clearly implies that I think they ought to change in the future. But, optimist though I generally am, I have to be realistic and accept that the necessary changes won't always happen, or at least won't happen very quickly. That's mostly because of the inherent nature of politics, which does not encourage trust of, or cooperation with, the other side, and which demands that every little change be taken to win in the political point-scoring game.

First, as you were dealing with the processing of legislation by Parliament earlier today, I should go back a step and tell you of my dissatisfaction with the way in which Bills are sometimes considered within the government.

Time after time, a Bill arrives at the weekly Tuesday morning caucus meeting without its having been to the relevant caucus committee as it is supposed to under our rules. It is okayed by caucus virtually sight unseen, perhaps just subject to check by the caucus committee at its meeting later in the week. Often the parliamentary program demands that the Bill be introduced into the House before then anyway, or we are told that has to happen even if the committee discovers the odd flaw in the drafting, or even if there is more substantial objection.

We approve the Bill at caucus partly because it was long ago deemed unacceptable to roll the cabinet, but perhaps more so because we do trust the minister concerned. But then you get an uncomfortable feeling when you discover that the minister received the Bill only late on the Monday night, and the Office of Parliamentary Counsel (OPC) was still desperately working on the drafting that afternoon. The minister trusted his or her staff, who trusted the department and OPC to get it right. I have nothing but admiration for the very professional job done by our legislative drafters, but I know that they are put under such time pressures that their product is sometimes inevitably far from perfect, which is very sad for a pedantic bastard such as I am often accused of being.

It is entirely within the hands of my fellow caucus members and me to fight for fuller involvement, to insist on the correct processes. But, of course, everyone is so busy themselves that there aren't enough hours in the day to be involved at a level which I would regard as satisfactory. So we keep our fingers crossed and hope that

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* Senator John Coates is the Chair of the Senate Standing Committee on Finance and Public Administration.

someone else who did have time to look at the Bill, did so thoroughly and was approving of its provisions. Of course just as important an involvement should occur at earlier stages of the process, when drafting instructions are prepared, and before that when the policy is developed. And there the appropriate involvement is very uneven. Some ministers are great in ensuring caucus committees are fully involved - and some even ensure it's all in accordance with the Party platform!! - but others remember only at the last minute.

All this should not matter too much to someone outside the caucus, except that there is a tendency, once a Bill has been introduced, to defend its every detail as if it were holy writ, instead of merely the best attempt in the time available to translate an intention into legal words. This is where it gets very galling - the government fights tooth and nail against opposition amendments in the House of Representatives, and then the non-government majority in the Senate make heroes of themselves by sometimes appropriate amendments to the Bill, when we should have fixed it up ourselves in the first place before even introducing it. I'm very happy defending the collective government position on a Bill, provided we've all been fully involved in the process (with enough time) and the decision really is truly collective.

Mostly, of course, opposition amendments are based more on a difference in attitude to the policy of the Bill. There are of course exceptions, such as when amendments are suggested by Liberal Senator John Watson, who is the deputy chair of the committee I chair. He is usually genuinely helpful in trying to improve legislation in areas such as tax and superannuation in which he takes a close and expert interest. He is often accepted by ministers as being correct on a matter, and his amendments are sometimes readily agreed to. I suspect he often gets into hot water with his colleagues, most of whom think that he is far too helpful to the government and that he really should let us stew in our mistakes!

I emphasise I'm not talking about amendments involving significant differences on policy or basic ideology, where I'm as keen as anyone to hold the line against the forces of darkness. I'm just talking about sensible amendments to improve the Bill or to avoid problems which will eventually arise. I think there are times when sensible opposition amendments, proposed with goodwill and without the sole purpose of scoring political points, can be and should be accepted by the government. And it would have the added advantage of reducing the concentration on the Senate as being the more relevant part of the legislature.

Recently, more Bills have been referred to House of Representatives standing committees, and that is a welcome development. I am hoping that the introduction of the Main Committee procedure in the House of Representatives will also help to redress the balance. I regret the Senate's reputation as the better legislative chamber, a reputation which is sometimes overstated. It's not a competition (or it shouldn't be), but there is an opportunity for the House of Representatives to do some careful analysis of Bills and reduce the need for the Senate to do the same quite so much. I further hope that that new process won't make it less likely that improvements are made in the way we deal with Bills within the government before their introduction.

There is also hope for things being done a better way now that we have

this system of three periods a year of parliamentary sittings, instead of two. The idea is that most Bills will be introduced, without urgency, in one period and not debated until the next period. This should improve things for the consideration of Bills by non-government members and senators and by interested groups in the community. It should also allow for more systematic, technical review of Bills when required. The only trouble is that there may still be a tendency to rush a Bill through caucus and into the Parliament to ensure it is introduced in the period of sittings before that in which the government wants it passed. And of course May budget Bills with 1 July start dates have to be drafted and proceed through all stages in a pretty tight time frame.

Of course much of the problem is because of the environment in which we operate - it's the very existence of the Senate. I know there are those who have convinced themselves that it is the only thing standing between good and evil, but it is in the interests of such people to keep pushing such a line. But I believe that it is only because it is there, that more improvements aren't made elsewhere, such as in the House of Representatives. I claim to speak with a more balanced outlook than most, because of having been a member of both Houses in my time, but then I was also a victim of the misuse of an accidental majority in the Senate in 1975, so maybe I have a prejudice to declare.

If there were to be only one House, it wouldn't happen simply by abolishing the Senate and leaving everything else unchanged. There would have to be a wide variety of inbuilt checks and balances to guard against abuse of power. It would have to be unconstitutional for a Bill to proceed through all stages in less than, say, a month, so that those very important aspects of democracy - public opinion - or informal democracy as I like to call it - can get into action and ensure that the message gets through to the Government that some outrageous proposal that may have been introduced is unacceptable. The Senate's present value is mostly in ensuring that there is that sufficient time.

There would also be prescribed minimum requirements for referral to committees, and there would be an atmosphere of cooperation and goodwill. Maybe some of you are now beginning to think I am being ridiculously idealistic, but I would like to think it was possible. With the Senate there, in the form in which it is, such an atmosphere is unattainable. It's all very well to say there should be a second opinion but, if so, why not a third opinion, and a fourth? I think it would be so much better for the variety of opinions to be thrashed out around the one table.

I acknowledge that there would be persuasive arguments for part of a single House to be elected by proportional representation to bring in a degree of minority leavening. A dual method of election to a single House is one of the proposals being considered in Tasmania for reform of the Parliament there. No one method gives a perfect democratic outcome, but we ought to be able to get closer to perfection than we have now. We will eventually change from our present monarchical arrangements, we will have constitutional change of substance, but I am not seriously suggesting that more radical change is likely, or even possible. I know as well as anyone how hard it is to achieve even simple and seemingly innocuous amendments to the Constitution, let alone substantial change. But sometimes I indulge in the odd dream.

Of course there are many useful things that the Senate and its committees do. The Regulations and Ordinances Committee is a case in point. It acts as a watchdog, in a mostly low-profile non-partisan way, on that huge volume of subordinate legislation that never stops. There is no point in the House of Representatives duplicating that function. But if there were to be a unicameral system, there would have to be such a committee, and it would do the same useful job that the present one does.

There have been some significant universally welcomed reports from Senate committees, just as there have been from House of Representatives committees. But there is wastefulness in having a virtually parallel system of committees, unable to sit jointly. And insufficient liaison. Overlap can happen, but more often issues can be overlooked because of lack of coordination, and there are ridiculous jealousies - not so much between the members of committees but between the parliamentary bureaucracies which sometimes believe they personally own the institutions for which they work.

The system of Senate committees reviewing Bills, which was begun three or four years ago, has worked differently from how it was initially envisaged. The intent was that Bills would be selected for referral by an all-party group making genuine judgements about which ones were appropriate for committee consideration. However, the Selection of Bills Committee does not do that. It is merely a mechanism for recording which Bills either the opposition or the Democrats want referred, because those two groups have an arrangement that, if either one wants a Bill referred, the other will support it in the chamber. There is a certain inevitability about those sorts of numbers, and the government accepts that reality. But we're not really part of a genuine process.

It was also intended that mostly, Bills would be referred after the second reading had been passed and the policy issues settled, and that the standing committee process could lead to recommended amendments. It was intended that the committee stage in the whole Senate could be avoided and much time would be saved. It soon became clear that generally there was not opposition acceptance of bypassing the committee-of-the-whole if a Bill had gone to a standing committee. So I don't think it can be claimed that time has been saved. Also, Bills have mostly been referred before the second reading and witnesses invited to comment on the Bill and its policy at standing committee hearings, so the debate in the Senate is often just a rehash of what was said at the standing committee. Sometimes the process has meant useful interest-group involvement, and many organisations have felt good about having had their day before a committee, but I remain to be convinced that the process is anywhere near as worthwhile as had been promised.

It was thought that the quality of the drafting could be addressed in a bipartisan spirit, but drafting issues are rarely raised. The objective of producing technically better legislation has been lost and the process has - not always, but sometimes - degenerated into yet another forum for political point scoring.

There have been occasional minor benefits from committee reviews of Bills. A hearing of the Finance and Public Administration Committee last year, for example, led to a fairer system of taxing credit unions than that proposed in the 1993 Budget.

The government was prepared to make a sensible change in that case when the need for it became apparent in the committee process. But, despite a few such successes, most of the Senate committee hearings on legislation have not proved to be as successful as they could have been.

I have had my moan about Senate Estimates Committees many times in the past, and have suggested ways in which they could be improved, with a reduction in the waste and stress for all concerned. Some already do it some of the time, but I think there is scope for making the estimates process work better, with genuine, non-agressive review of past and future portfolio program spending. But it does require a change of attitude that does not coincide with making every political post a winner - a notion that eventually, after all your fishing expeditions and trick questions, and unfortunately sometimes straight-out abuse, you as an opposition senator will ask the very question that brings the government down. I live in hope of the change of attitude required.

The Senate estimates committees can serve the useful purpose of forcing the government and the Public Service periodically to consider what justifications they can advance for their policy and administrative decisions. But too often the estimates hearings degenerate into fishing expeditions or headline grabbing stunts. It is rare for any issue of significance to be effectively explored in estimates committee hearings. It is far more common for large numbers of highly paid public servants and politicians to be detained for hours while individual senators pursue minor points of detailed information which they could have obtained by other means and which, as far as can be judged by their later activities, they neither need or use. Regrettably, there has also been a tendency for some senators to chase cheap headlines by hectoring and bullying public servants.

That practice has proven very hard to control. As an estimates committee chair, I have faced the problem of having to decide how far I should try to protect a witness, knowing that an attempt to prevent cowardly bullying can be portrayed as a cover up. Such a perception can be more productive of headlines for the bully, and more damaging to the witness in some cases, than it would be to allow the offensive questioning to continue.

There may be an unintended side-benefit from the current review of the Senate committee structure resulting from the opposition's wanting more of the committee chair positions. It just might happen that portfolio performance review by one stream of Senate committees will be undertaken in a more calm, more considered way over a period of time instead of the heavy stress that is involved in binding that function up with consideration of the Appropriation Bills, and doing it all in blockbuster fashion by estimates committees over only a few days and nights twice a year. In fact, I am going straight from here into a Procedure Committee meeting which might, just might, lead to that preferable process I mentioned. Maybe over the next year or two, he said with his optimistic head on, reason will prevail.

The Senate Finance and Public Administration Committee has always interested itself in accountability and its processes. We have published report after report on these matters and, over the years, the accountability system has continued to improve. Australia has a Public Service of which it can be proud and, while acknowledging the criticisms I have voiced, the way in which it interacts

with the Parliament is generally good. Some people may complain about some aspects of it, but the accountability processes we have are excellent. There is a high degree of accountability of the executive to Parliament. There will always be tensions arising as each side, or parts of each side, test each other out about the limits on accountability - or answerability, which is the term I think is sometimes more appropriate.

Our various types of committee processes do open up some important areas of government activity to public scrutiny. A lot can be said in their favour. They clearly have a most important function to perform. However, there are times when the use of the various accountability processes becomes excessive; when they are used solely for headline-grabbing; when demands for information are made (rather than just requests); when senators on estimates committees forget to behave in a civil manner towards Public Service witnesses who are genuinely trying to balance their duty to their minister and their duty to the Parliament. There is often a thoughtless demand for more information than is really needed, yet a huge amount of valuable time and effort can be expended on delving for and presenting that information. The guilty ones are usually the same people who are most critical of public sector waste and inefficiency and who repeatedly demand that fewer and fewer staff be employed!

So, despite all the review mechanisms which exist for both Bills and administration, there is often failure to use those mechanisms sensibly, effectively and fairly. It is depressing that their full potential is not being realised in keeping the executive on its toes and in improving legislation.

But we have to remember that too often Parliament is seen as some sort of cohesive institution separate from and opposed to the executive. In fact, Parliament is a forum in which political forces contend. This means, however, that if we want parliamentary processes to contribute to good legislation, good policy and good administration, we need to design them in the knowledge that Parliament will not behave as a single, rational institution but rather will serve primarily as a forum for political argument. Sometimes it will be good for the system if parliamentary scrutiny is politicised in the party sense. In other cases, we want relatively non-partisan parliamentary discussion of ways of improving administration or policy processes. An ideal set of parliamentary reforms would separate the two sorts of processes as far as that can be done. There has been enormous progress over the years. Much more could be achieved, and some of us will continue to work for improved outcomes.