# LEGISLATION

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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;

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- 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.