LEGISLATIVE PROCESS - PUBLIC PARTICIPATION AND GOVERNMENT ACCOUNTABILITY

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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

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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.