

Subordinate legislation: lively scrutiny or politics in seclusion¹

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Introduction

Until recently, all Australian parliaments have had committees charged with the scrutiny of subordinate legislation, most of which runs the risk of disallowance in either chamber of the legislature. Queensland's dedicated scrutiny committee has recently made way for a series of portfolio committees which include the scrutiny of subordinate legislation as just one of their tasks. All committees, old and new, have steered clear of scrutinising subordinate legislation for their policy or substantive content. Indeed, they remain committed to a scrutiny criterion that deems it 'inappropriate' for subordinate legislation to contain any policy or substance. That commitment has long passed its use-by date, because subordinate legislation typically contains the policy and substance of many legislative schemes, particularly those of a regulatory nature. The challenge for scrutiny committees is to find ways of reporting on matters of policy and substance whilst maintaining their bipartisan mode of operation.

The Queensland parliament recently hosted the latest in a long line of biennial conferences of parliamentary committees whose remit is the scrutiny of legislation — the *Australia-New Zealand Scrutiny of Legislation Conference 2011*. That Queensland played host may seem ironic to some, because its dedicated scrutiny committee had only just been abolished. Queensland had, however, a group of delegates determined to ensure that the new portfolio committees should continue to perform the scrutiny functions previously performed by a single committee.

Queensland was not the only jurisdiction experiencing a sense of transition. Several of the conference papers (as yet unpublished) protested at the increasing difficulty of conducting effective scrutiny. There were complaints about the inability to conduct effective scrutiny of national scheme legislation, and about the increasingly

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tight deadlines to which governments expected scrutiny committees to conform. A delegate from Western Australia summarised the conference thus:²

The conference was a wide-ranging one. The theme was that of ‘nowism’; in essence, the challenges faced by Parliaments in scrutinising legislation at a time when people expect instantaneous results — people expect things to be done urgently and when there are considerable pressures on Parliaments to consider the legislation put before them.

A persistent theme was the prevalence of ‘skeleton legislation’, by which was meant primary legislation (acts) which contained precious little, if any, matters of substance or policy, leaving all of that to be developed and exposed later in subordinate legislation. Skeleton acts raise a number of concerns, ranging from the transfer of substantively important legislative power from the parliament to the executive, and the diminution in the transparency of a legislative process increasingly conducted without parliamentary debate.

Scrutiny committees originally focused solely on subordinate legislation, although nowadays, the committees in four Australian jurisdictions also scrutinise bills for primary legislation. Until relatively recently, the content of subordinate legislation used mostly to be limited to matters of detail, technical and procedural issues, and other non-substantive matter. From their inception, scrutiny committees have been charged with checking subordinate legislation for its compliance with rule of law and civil liberties principles that were so uncontroversial as to enable the committees to function in a purely bipartisan manner — they had no need to consider matters of substantive policy. Those days have long gone, and the question which must now be addressed is whether (and if so, how) the scrutiny function can be continued in a bipartisan manner whilst expanding its scope to match the expanded scope of subordinate legislation itself.

Legislation: from old to new

The nature of parliamentary legislation has changed considerably over the centuries, but for present purposes, it is convenient to start by looking at a typical annual statute book around the time of European settlement of Australia. British legislation at that time was extraordinarily specific. For one of his constitutional history lectures, Maitland gave as an example the statute book for 1786. This contained 160 ‘public acts’ and 60 ‘private acts’. Roughly half of the public acts were entirely limited in their operation to specific localities, and the private acts related to individuals, effecting divorces, name changes, rectification of individual marriage settlements, and so forth. According to Maitland, parliament:³

...seems afraid to rise to the dignity of a general proposition; it will not say, ‘All commons may be enclosed according to these general rules’, ‘All aliens may become naturalized if they fulfil these or those conditions’, ‘All boroughs shall have these powers for widening their roads’, ‘All marriages may be dissolved if the wife’s adultery be proved’. No, it deals with this and that marriage. We may attribute this to jealousy of the crown: to have erected boards of commissioners

empowered to sanction the enclosure of commons or the widening of roads, to have enabled a Secretary of State to naturalize aliens, would have been to increase the influence and patronage of the crown, and considering the events of the seventeenth century, it was but natural that parliament should look with suspicion on anything that tended in that direction.

Maitland went on to note how things had changed from around the time of the *Great Reform Act of 1832*.⁴ Legislation became increasingly general, enacted for all localities, and responding to types of transactions rather than the parties to particular transactions. Many acts made sweeping changes to the law. In Maitland's terms,⁵ Parliament stopped *governing* the country, and concentrated on the business of *legislating*. It increasingly left the tasks of application of the law and judging to the executive and judicial branches respectively.

Maitland's observations were not intended for publication. They were notes for his lectures in 1887–1888, published posthumously in 1908. By then, the style of legislation had begun to turn once more. The NSW statute book for 1908 largely conformed to Maitland's description of what for him was a modern act, setting generalised requirements that the administration could apply directly without the need for subordinate legislation to fill in the specifics. There was a great deal of subordinate legislation, but most of it seems to have been concerned with the technical details about process and forms, leaving the policy and substance to the primary acts. As for the acts, some of them were necessarily specific, such as the appropriation acts, and acts relating to specific tramway and railway lines. There were also acts, however, whose style had no eighteenth century counterpart. In the area of industrial relations, for example, one act reformed and enlarged the entire labour law regime for the state.⁶ Another act⁷ set 48 hours as the standard working week, and 4 shillings per week as the minimum wage. Overtime was tightly defined, and the act itself laid down minimum additional rates for overtime of 3 pence per hour, plus 6 pence tea money.

Another act from the same year had signs of Maitland's idea of modernity, plus elements that we would more readily recognise. The *Pure Food Act 1908* (NSW) aimed to prohibit drugs and food that were dangerous, putrid, or adulterated, and the Board of Health was empowered to set standards for food and drug purity. The same act, however, also went into some detail of its own about labelling. For example, proper labelling had to tell consumers of the proportions and quality of products containing morphine, opium, cocaine, heroin, alpha or beta eucaine, chloroform, cannabis indica, chloral hydrate, or acetanilide.⁸

The *Pure Food Act* was not alone. Another act of the same year required that passenger lifts be driven by qualified attendants.⁹ It inserted that requirement into some larger legislation enacted only 6 years previously, which had gone into extraordinary detail about the minimum safety requirements for scaffolding, lifts and hydraulic machinery at building sites.¹⁰ Bricklayers' scaffolds, for example, had to be.¹¹

...secured by best Manilla-rope, not less than one and three-quarter inch circumference, and fifteen feet long, or bolts not less than five-eighths inch diameter. All lashings to be properly wedged, such wedging to be tightened after rain.

Maitland's acts were different, then, from those of the eighteenth century, because they contained statements of general principle; but they were also piecemeal, each act building upon the last and focusing only upon some particularly pressing and specific issue. Sidney Webb wrote this in the preface to a 1911 work on the factory legislation:¹²

This [past] century of experiment in factory legislation affords a typical example of English practical empiricism. We began with no abstract theory of social justice or the rights of man. We seem always to have been incapable of taking a general view of the subject we were legislating upon. Each successive statute was aimed at remedying a single ascertained evil. It was in vain that objectors urged that other evils, no more defensible existed in other trades, or amongst other classes, or with persons of ages other than those to which the particular Bill applied. Neither logic nor consistency, neither the over-nice consideration of even-handed justice nor the Quixotic appeal of a general humanitarianism, was permitted to stand in the way of a practical remedy for a proved wrong. That this purely empirical method of dealing with industrial evils made progress slow is scarcely an objection to it. With the nineteenth century House of Commons no other method would have secured any progress at all. More serious is the drawback of the unevenness of the progress.

Laws for occupational health and safety remained both highly prescriptive and extraordinarily piecemeal down to the third quarter of the twentieth century. Legislative programs from the mid-1970s to the early 1990s set about replacing many of the details with generalised statements of principle.¹³ By that stage, however, many¹⁴ of those details had already shifted from primary acts to subordinate legislation.¹⁵ The strict design rules for scaffolding, for example, had become even more elaborate,¹⁶ but they were all to be found in subordinate legislation. Also the labelling rules in the *Pure Food Act 1908* (NSW) for drug compounds had become very general, with all of the detail being left to subordinate legislation.¹⁷

These days, the shift away from primary acts goes even further in some areas. Australia's Therapeutic Goods Administration (TGA), for example, has wide powers over the sale of medical instruments. It works in a highly structured regulatory environment comprising what on any functional analysis can only be described as four levels of legislation. First, there is a primary act,¹⁸ and secondly, there is subordinate legislation that theoretically runs the risk of disallowance in either chamber of the parliament.¹⁹ Immediately beneath those two levels, however, are guidelines that the TGA itself has promulgated; these are not legislative instruments subject to disallowance in either house.²⁰ Fourthly, there are international standards that aim for an international harmonisation of standards, and for recognition of testing processes pursuant to mutual recognition agreements with Europe, Switzerland, North America and Singapore.²¹

Other examples are easily found. Commonwealth legislation requires that retail customers of licensed advisers in the financial services industry be accorded access to appropriate dispute resolution schemes, and no scheme is appropriate until it has first received the corporate regulator's approval.²² The schemes themselves, however, are not legislative instruments, and there is real uncertainty as to their precise legal status.²³

One more example must suffice, this time from the regulatory field involving statutory rights of competitive access to basic services such as electricity grids, rail lines, and telephone exchange systems. Access codes are binding once they are finalised, but the relevant act goes out of its way to insist that they are not legislative instruments. Only the Guidelines are legislative instruments that run the risk of parliamentary scrutiny, and they have no more weight than considerations to guide the decision-making processes.²⁴

Reversal or adjustment?

I have to this point been purely descriptive. For the best part of a century, substantive legislation has increasingly been found in subordinate or other legislative documents which go by a variety of names. Maitland, it will be recalled, had said that since roughly the time of the *Great Reform Act of 1832*, parliament had stopped governing and had restricted itself to legislating. Post-Maitland, one must now acknowledge that except in constitutional terms, parliament is no longer the primary legislator. That should come as no surprise; executive dominance of parliament has long been recognised. What is surprising, however, is the extent to which parliamentarians are kept in the dark as to the content of subordinate legislation. In particular, their scrutiny committees avoid comment on matters of substance.

Whilst acknowledging that the change in legislative style was a gradual affair, Maitland had singled out 1832 as particularly significant because the *Great Reform Act* of that year had started the democratisation of the electoral system. His argument was that parliamentarians started to trust an elected executive, where previously they had good reason not to trust the crown.²⁵ On the other hand, one could argue that regardless of whether it was elected, an executive branch of some sort would inevitably have had to assume the tasks of governing on a national scale, given the enormous co-ordination requirements of the newly industrialised society.

A couple of American articles prompted the suggestion that the shift to executive legislation was not just an inevitable consequence of the administrative state requiring masses of detailed rules. They suggested that the shift to skeleton acts at least correlated with (and perhaps was caused by) a loss of interest on the part of elected politicians themselves, and/or a reduction in the time available for members to work on the detail of bills. Edward Rubin summed up the trend to skeleton acts and substantive subordinate legislation (or other instruments) as a shift from the transitive to the intransitive.²⁶ In his terms, an act was transitive when its detail was

sufficient for the act to be immediately operative. Modern Acts, he wrote, are typically intransitive. Peter Strauss illustrated not just the shift away from transitive legislation, but also the loss of interest shown by Representatives and Senators in a bill's specific content.²⁷ Strauss compared federal railroad safety laws enacted in 1893 with federal vehicle safety laws enacted in 1966. Back in 1893, individual legislators worked on the bill's detail at length before agreeing on its final form. In 1966, any congressional consideration of a bill's detail was left to a huge congressional bureaucracy, supervised by politicians' staffers.

I am not sure that the accusation of loss of interest was entirely fair, and even less sure in the case of Australian MPs. Comparisons with another country can be dangerous, particularly if its executive branch does not sit in its legislature. However, the percentage of their working time that our politicians can reasonably be expected to devote to legislative detail has definitely diminished. In addition, it appears that Australian legislatures sit less often than their counterparts in London and Washington.²⁸ As important, the amount of legislative detail has grown exponentially. The net result is that, page for page, our politicians necessarily give far less *personal* scrutiny to legislation these days than did their predecessors when the scrutiny committees were first established. I emphasised 'personal' because, as their work loads have increased, parliamentarians must be ever more reliant on assistance, whether from within the parliamentary service or from external sources.²⁹

I should not be understood as seeking to argue against this trend. The administrative state requires ever more legislation which must, in its turn, be ever more flexible. There is simply insufficient parliamentary time for members to work on most of its detail. Some would add to the argument of administrative necessity a further argument for executive legislation and minimal involvement from parliamentarians. This is the argument for government convenience. That argument sometimes presents as something akin to an argument for emergency powers, because the government claims an overwhelming need for the speedy passage of primary legislation, with the detail being left until later because the government processes themselves have not yet had the time to get to those. In a paper given at the 2009 Scrutiny of Legislation Conference, Dennis Pearce wrote:³⁰

...matters are often left to be included in regulations because there has not been time to cover all issues in the Bill introduced into the Parliament. Time is thus gained to deal with matters that may be of significance.

One suspects the government's lack of time to formulate much more than a skeleton bill is sometimes a product of the current political addiction to the 24-hour news cycle, with its demands for almost daily announcements.

War powers have always constituted the most obvious case for executive legislation, but government claims for plenary legislative power have not stopped there. The UK's legislative responses to the global financial crisis were extraordinary. Primary acts invested in the executive branch a power to legislate on

the run, both generally and in relation to specific bank insolvency issues, and both prospectively and retrospectively. Executive legislation could even effect retrospective amendments of primary acts, bringing forth the usual protests against Henry VIII clauses,³¹ named after a tyrannical king who had forced parliament to invest him with the power to make subordinate legislation amending or suspending the terms of primary legislation.³² Some of the UK's new executive legislation to deal with distressed banks was theoretically subject to negative resolutions in either house, but resolutions would inevitably have come too late. Some of the executive legislation took the form of codes or guidelines that lacked even a pretend risk of disallowance.³³

The first round of stimulus spending and stabilisation funding for financial institutions in the US did not look much better. Known colloquially as TARP,³⁴ the *Emergency Economic Stabilization Act*³⁵ started out as a proposal from Treasury Secretary Paulson for a three-page bill, which would have given him unlimited authority to spend up to \$US700m on so-called troubled assets. The bill grew like Topsy, partly to enhance Treasury's options, but also because it was padded out with all sorts of pork barrel emollients.³⁶ In fact, both the UK and the US legislative schemes were operationalised largely in accordance with the rule of law,³⁷ as one would expect of two of the most stable democracies and capital centres in the world.³⁸

Closer to home, Prime Minister Kevin Rudd's failed *Carbon Pollution Reduction Scheme Bill 2010* (Cth) (CPRS) ran for 559 pages, and that is not including the 10 cognate bills which accompanied the principal measure. For present purposes, the bill's most striking feature was that it left so much to subordinate legislation, and *that* was where the real action would have lain. Liable entities were to buy and trade emission units, but subordinate legislation would have set their price in all but the first year, the number of units on issue after that, the rate at which that number would decline, the entities that would have been required to buy their permits and those that would have received at least their initial allocation *gratis*, the number and prices of international off-sets, the industries or sectors that would have been eligible for direct assistance or compensation, and the assistance and compensation formulas themselves.

Whatever one thought of the theoretical or practical merits of an emissions trading scheme, one can readily sympathise with the complaint from several industry groups that CPRS would have left too much to subordinate legislation.³⁹ CPRS was not an emergency measure, and one might reasonably criticise the amount of detail it would have left to subordinate legislation. Of course, it was necessarily a regulatory work in progress, and some degree of regulatory flexibility would still have been integral to a more detailed bill, but one might reasonably have wished for less haste and more detail.

One might debate whether government resort to primary acts that are skeletal can be reversed or only made more difficult. My own view is that the skeleton act is one of

the regrettable outcomes of a lethal combination of two forces. These are our drift towards a presidential-style of government, and a crippling rigidity of party discipline. Whatever its causes, however, it is pointless for scrutiny committees to restrict their scrutiny to the merely technical aspects of a measure.

Policy neutrality and subordinate legislation

In the old days, scrutiny committees looked only at subordinate legislation. In four Australian jurisdictions,⁴⁰ the committees that scrutinise subordinate legislation now have additional functions, such as bill scrutiny. One criterion that scrutiny committees have always had in their check-list when determining whether to bring subordinate legislation to the notice of the house is whether it contains matter that belongs more appropriately in primary legislation. For convenience, I call this the 'appropriateness' criterion. Except for NSW, the appropriateness criterion remains to this day.⁴¹ It is obviously circular, but its original intent was in part to confine matters of policy or substance to primary acts. If its original intent were strictly applied, it would provide considerable justification for the policy-neutral approach that all scrutiny committees adopt, even where they are dual function committees. It appears that so far as they scrutinise subordinate legislation, all scrutiny committees regard policy neutrality as a point of principle verging on pride. The justification for policy neutrality needs further examination.

The Senate Standing Committee on Regulations and Ordinances is Australia's oldest scrutiny committee, dating back to 1932, and its current explanation of this criterion takes the form of examples of non-complying instruments. Putting aside the case of uniform national laws, its examples are revealing. Matter is more 'appropriately' located in primary legislation if it 'fundamentally changes the law'; or if it 'is lengthy and complex'; or if it is 'intended to bring about radical changes in relationships or community attitudes'.⁴²

As substantive legislation is increasingly to be found not in primary acts but in subordinate legislation, one must question how much meaning will remain in the standard scrutiny criterion that certain matter is not appropriate for subordinate legislation. The whole point of skeleton acts is that they do indeed leave for subordinate legislation many rules that will fundamentally change the law, or which are lengthy and complex, or which are designed to effect radical attitudinal or relationship changes. CPRS would have ticked all of those boxes to an extraordinary extent.

The continuing validity of the appropriateness criterion is even more questionable in those jurisdictions⁴³ whose scrutiny committees must also consider any regulatory impact statement (RIS) that accompanies subordinate legislation. The very premise of the RIS process is that subordinate legislation in fact deals with contentious matters of policy and substance.

The RIS procedure is sometimes conceived as a crude cost-benefit analysis in which the regulatory proponent is made to bear a heavy burden of proof in justifying the introduction of a new piece of subordinate legislation. In fact, however, all RIS jurisdictions stipulate that social costs and benefits also count, alongside the more obviously tangible pecuniary measures.⁴⁴ All RIS jurisdictions also require some measure of public consultation, as does the Commonwealth,⁴⁵ even though it has not legislated for regulatory impact statements. In all four Australian RIS jurisdictions plus the Commonwealth, one of the exemptions from having either to consult or prepare cost-benefit analyses is that the proposed subordinate legislation is mere ‘machinery’. In other words, the RIS and consultation procedures are engaged *only* where policy issues are or might be in contention, and the whole point of the exercise is to encourage and assist appropriate policy scrutiny and debate. The exemption of ‘machinery’ provisions from the process serves only to emphasise how rapidly the appropriateness criterion is approaching its use-by date.

It would appear, however, that only NSW has dropped the appropriateness test, although it has legislation that expressly forbids its scrutiny committee from questioning ‘Government policy’.⁴⁶

Queensland recently conducted a radical review of its parliamentary committee system. A major report ensued,⁴⁷ and its major restructuring recommendations were adopted. Up to the start of July 2011, the former Scrutiny of Legislation Committee was a fairly typical dual-function committee, scrutinising bills and subordinate instruments against two separate but overlapping sets of criteria. So far as it scrutinised subordinate legislation, the committee would check that it ‘contains only matter appropriate to subordinate legislation’ — the standard ‘appropriateness’ criterion.⁴⁸ The old committee has now gone, and none of the new committees is charged *solely* with technical scrutiny functions.

Seven portfolio committees have come into existence in Queensland, each with wide-ranging responsibilities over a range of portfolio areas.⁴⁹ In essence, no issue is theoretically off the table for the portfolio committees. For the departments, entities and subject matter within their jurisdiction, each portfolio committee can now inquire into any number of issues, including an entity’s management, its performance by outcomes, and its finances. These new committees cannot avoid policy issues. Indeed, each committee is charged with:⁵⁰

...examining each Bill and item of subordinate legislation in its portfolio area to consider—

- (a) the policy to be given effect by the legislation ...

In addition, each portfolio committee must scrutinise bills and subordinate legislation according to exactly the same criteria that applied in the days of the former scrutiny committee. As a result, the new committees will continue to supervise the RIS processes, and continue to examine subordinate instruments against the older ‘policy neutral’ criteria, including the ‘appropriateness’ criterion.⁵¹

The big question will be whether they will continue to confine their scrutiny of subordinate legislation to policy-neutral criteria despite the significant legislative expansion of their duties.

Writing about Australian scrutiny committees, Stephen Argument described a practice so deeply embedded that he called it a 'tradition',⁵² and part of the 'folklore' of Australian scrutiny committees.⁵³ Scrutiny committees, he observed, have an unshakeable belief that their success depends on maintaining strict political neutrality. He was not sure whether bipartisanship came first, or only as a consequence of the committees' earlier insistence on the appropriateness criterion of keeping policy out of subordinate legislation. He did acknowledge, however, that the old appropriateness criterion might be breached these days more regularly than in times gone by, and at the level of the Commonwealth parliament, he was inclined to lay the blame for that upon the Scrutiny of Bills Committee of the Senate. His reasoning was that there would have been no problem if Bills scrutiny had worked properly, because one of the criteria for *that* committee is to maintain an appropriate demarcation line between primary and subordinate legislation.

With respect, it is submitted that it is far too late to restart the old substance/technicality dividing line between primary and subordinate legislation. It is obvious that bills are no longer being routinely scrutinised to ensure that subordinate legislation is a policy-free zone, and it is equally obvious that there will be no return to the old distinctions. It is unproductive to lay blame on those responsible for scrutinising Bills, particularly in the case of dual function scrutiny committees. It is equally unproductive to exhort governments to return to the old dividing line. They can always (and often with some justification) plead lack of parliamentary time, the necessary length and complexity of much legislative material, and the need for much of it to be capable of speedy amendment. Finally, there are the committees that *already* have 'policy' within their remit, even if they have until now chosen to look the other way. Scrutiny of RIS processes involves policy (as the NSW act implicitly acknowledges by its deletion of the old appropriateness criterion), and the Act itself in Queensland has now added 'policy' to the old 'policy-neutral' criteria.

Some choices must now be made. Dennis Pearce said that scrutiny committees must now confront a:⁵⁴

...significant issue of principle — are Members of Parliament politicians or parliamentarians? It is this question that the Review Committees have conjured with successfully throughout their existence. They have managed to keep the politics at bay by limiting their role to issues where the committee members feel that they are not driven to support their party. However, by so doing a large hole has been left in the oversight of delegated legislation. More significantly, it has created a culture which denies that the Parliament should be involved in the oversight of the policy underlying delegated legislation.

Drawing on the experience of the House of Lords Merits of Statutory Instruments Committee, Pearce suggested that bipartisanship could co-exist alongside policy

scrutiny. The Westminster committee avoids a clash of party loyalties by avoiding a committee resolution of policy issues. The committee considers policy, but limits itself to reporting major policy issues. As Pearce suggested, Australia could follow suit. Were that to occur, members of scrutiny committees could still avoid party-political partisanship, and function as parliamentarians. Bipartisanship could coexist with full scrutiny of subordinate legislation.

Merits scrutiny

Stephen Argument has advocated a different approach to that urged by Pearce. Argument looked at the possibility of creating more committees, and pointed to the House of Lords Merits of Statutory Instruments Committee.⁵⁵ However, the establishment of a new committee might not be the best response to a problem that no-one can pretend is new, especially if the main reason for creating the new committee is to maintain the old one in its pristine and bipartisan state. In smaller parliaments, there would also be a real problem in the potential for duplication of work.

Argument also looked at Westminster's affirmative resolution procedure, whereby certain subordinate legislation comes into effect only after an affirmative resolution in each House. Roughly 10% of disallowable instruments run this gamut, and most of these are laid in draft, and are made only after receiving the necessary affirmation. According to the parliamentary website, 1969 was the last time that draft statutory instruments failed to obtain House of Commons approval, the occasion being an attempt to redraw the electoral boundaries for England, Wales and Scotland.⁵⁶

It is at this point that I turn to the title of this paper. Edward Page described the UK system as 'politics in seclusion',⁵⁷ his point being that most subordinate legislation in fact received no scrutiny, and scrutiny of the remainder tended to occur behind closed doors, where deals were done and compromises reached to avoid the embarrassment of outright disallowance. The system was certainly efficient, but efficiency was bought at a price. His description has obvious resonance for Australia. Page was writing in 2001, around the time when the parliament at Westminster was looking at new ways of conducting its work, and particularly at new ways of connecting with their public. At the risk of being too general, the trend at Westminster since then has been towards greater resourcing of committees (from an admittedly fairly low base),⁵⁸ and towards greater involvement from the public and interest groups in committee work. From a distance, at least, it seemed to be accepted that scrutiny, particularly policy and accountability scrutiny, required not just greater resourcing from within parliamentary services, but also more information *and* more voice from outside the parliament.

In a sense, therefore, Westminster's reforms to enhance scrutiny⁵⁹ were not *just* about producing a more polished policy or service delivery. More public involvement obviously assisted in that, but the reforms also gave more transparency

to the processes of government. To adapt Page's terminology, the politics of seclusion started to make way for greater public debate. That is not to criticise the motivations of those involved in the older practices. With so much work and so little parliamentary time and resources, their options were limited. Nor is it to say that they have now attained perfection.⁶⁰ But the changes at Westminster do mean that committee work now enhances the opportunities for the provision of information (including expert advice), and encourages more vigorous debate.⁶¹

One might question how much of the Westminster experience is transferable to Australia. It seems, for example, that even the select committees at Westminster are very largely bipartisan and operate according to a 'consensual ethos'. It also remains the case that much of the effectiveness of committee work lies in its ability to broker compromises behind closed doors, or even to anticipate and outflank disagreement before issue can be joined.⁶² This is entirely understandable — the politics of consensus requires compromises that can sometimes be reached only behind closed doors.

One wonders if lessons can be learned from the Westminster reforms. The one constant that comes through clearly in all of the literature from Australia, the US and the UK, is the necessity for adequate resources. No matter how the committees might be restructured, the quality of their work is critically dependent upon the quality of the assistance with which they are provided. The review report that preceded Queensland's radical restructuring of its committee system made the point reasonably clearly that a more pro-active committee system would require more research capacity to service the new committees.⁶³ The *Budget Papers* accompanying the 2011–12 Budget duly noted that one of the upcoming initiatives of the parliamentary service would be to establish 'resourcing and administrative support arrangements' for the new committee system.⁶⁴ The Budget itself, however, gave no hint of any funding increase for servicing the new committees.

Modest proposals

Active committees necessarily require larger budgets. Whether they also require more of their own dedicated staff is too large a question to admit of a single answer applicable to all parliaments large and small, unicameral or bicameral. For some years, scrutiny committees have been emphasising the need for more information and greater clarity in explanatory memorandums and regulatory impact statements.⁶⁵ That is a difficult matter for outsiders to assess, but it does indicate that the committees are understandably concerned to seek alternatives to the material sent to them by the proponents of legislative measures. It is also apparent that compliance with legislated or administrative consultation requirements with so-called stakeholders (let alone with the public at large) has been rather patchy. Greater attention to these processes would certainly assist the work of scrutiny committees, as would a return to greater lead times for drafting legislative schemes. These are 'front end' measures that would enhance scrutiny by enhancing the quality of instruments and information going to the scrutiny committees.

Another measure that might be worth considering is something akin to the excellent service to all members provided by the Commonwealth's Parliamentary Library, by way of its *Bills Digest* publications. Those publications strive to be impartial as between the political parties, and their quality is not sufficiently acknowledged beyond the confines of the parliament itself. Frankly, it is difficult to imagine how a conscientious representative or senator could even attempt to understand some of the measures brought to their attention were it not for the extraordinarily high quality assistance provided by that particular service of the Parliamentary Library. The assistance currently provided to scrutiny committees focuses on checking for violations of civil liberties and rule of law principles. Important as that is, the committees will inevitably need more assistance if they are to contemplate reporting on substantive policy issues, and it is envisaged that these reports could usefully model themselves for neutrality and quality upon the *Bills Digest* series. Naturally, that would require that the committees be allowed more time to do their work. However, that is a necessary precondition for any attempt on the part of the committees to subject all subordinate legislation to due scrutiny, not just its technical aspects.

I am not suggesting that scrutiny committees descend into party-political brawls — on the assumption of rigid party discipline, there would be little point in that option. However, the committees could perform a very valuable role if they were to *report* policy concerns raised by any of their members. In effect, they would be adding an *alert* service to their existing role of technical scrutiny for violation of rule of law values. ▲

Notes

- ¹ I am grateful for the advice, references and assistance I have received from Stephen Argument, and from the APR's anonymous referees.
- ² Mischin, Michael. 2011. Parliament of Western Australia, *Hansard*. Legislative Council: 9 August 2011, p 5278. Available at [http://www.parliament.wa.gov.au/Hansard/hansard.nsf/0/BC91292D8D5CB41F482578ED00197978/\\$File/C38%20S1%2020110809%20All.pdf](http://www.parliament.wa.gov.au/Hansard/hansard.nsf/0/BC91292D8D5CB41F482578ED00197978/$File/C38%20S1%2020110809%20All.pdf). Accessed 23 September 2011.
- ³ Maitland, Frederick William. 1908. *The Constitutional History of England*. Cambridge: Cambridge University Press, 1908, p 383.
- ⁴ *Representation of the People Act 1832* (2 & 3 Wm IV, c 45).
- ⁵ Maitland, p 384.
- ⁶ *Industrial Disputes Act 1908* (NSW).
- ⁷ *Minimum Wage Act 1908* (NSW).
- ⁸ *Pure Food Act 1908* (NSW) s 5(k).
- ⁹ *Scaffolding and Lifts (Amending) Act 1908* (NSW) s 4.
- ¹⁰ *Scaffolding and Lifts Act 1902* (NSW).
- ¹¹ *ibid.*, Schedule 1.

- ¹² Hutchins, Barbara Leigh; and Harrison, Amy. 2nd edn, 1911. *A History of Factory Legislation*. London: King & Son. pp ix–x, quoted in Reid, Kiron 2011, ‘A Bonfire of the Criminal Laws? A Review of Law Commission Consultation Paper no 195: Criminal Liability in Regulatory Contexts?’ Commonwealth Association of Legislative Counsel, 2011(2) *The Loophole* pp 30–31. Available at http://www.opc.gov.au/calc/docs/Loophole_May11.pdf. Accessed 24 September 2011.
- ¹³ The key policy document was the *Report of the Committee on Safety and Health at Work, 1970–1972* (the *Robens Report*) Cmnd 5034 (HMSO, 1972). The Australian legislation is discussed in Brooks, Adrian 1994, ‘Judicial Interpretation of General Duties of Care: Some Hidden Problems in Occupational Health and Safety Legislation’ 17(2) *University of New South Wales Law Journal* 475.
- ¹⁴ But not all. For example, the classic old-style requirement to fence machinery was still in the *Factories, Shops and Industries Act 1912* (NSW), s 33.
- ¹⁵ In Britain, there were ‘nine separate groups of statutes, with 500 subordinate statutory instruments administered by five central government departments through seven inspectorates’: Baldwin, Robert 1990, ‘Why Rules Don’t Work’ 53(3) *Modern Law Review* p 321, at p 322. The *Occupational Health and Safety Act 1983* (NSW) was typical of the Robens-based Acts. One of its stated aims (s 5(1)(d)) was to initiate a staged repeal of many of the specific statutory standards in five Acts covering factories, shops, other industries, construction work, mines, dangerous goods, and rural workers accommodation. The 1983 Act’s ‘reasonable care’ standards prevailed in most situations in which they conflicted with the many specific standards that remained: s 33(2).
- ¹⁶ They were contained in Part VI of the *Scaffolding and Lifts Regulations 1950* (NSW), and ran for 23 pages. The primary Act (namely, the *Scaffolding and Lifts Act 1912* (NSW), replacing a 1902 Act of the same name) underwent a name change in 1978, to become the *Construction Safety Act 1912* (NSW).
- ¹⁷ *Pure Food Regulations 1937–1983* (NSW).
- ¹⁸ *Therapeutic Goods Act 1989* (Cth).
- ¹⁹ *Therapeutic Goods (Medical Devices) Regulations 2002* (Cth)
- ²⁰ *Australian Regulatory Guidelines for Medical Devices* (v 1.1, May 2011).
- ²¹ *ibid.*, s 9.
- ²² *Corporations Act 2001* (Cth) s 912A.
- ²³ *Mickovski v Financial Ombudsman Service Ltd* [2011] VSC 257.
- ²⁴ *Competition and Consumer Act 2010* (Cth), Part IIIA. Sections 44ZO and 44ZZCB(6) relate to the Guidelines. Sections 44FA, 44LG, 44LJ, 44PA, 44PB, 44V, 44ZNA, 44ZNB, 44ZZAAA, 44ZZCB(8), and 44ZZCBA all disapply the operation of the *Legislative Instruments Act 2003* (Cth).
- ²⁵ Maitland, pp 383–384.
- ²⁶ Rubin, Edward 1989, ‘Law and Legislation in the Administrative State’ 89(3) *Columbia Law Review* p 369.
- ²⁷ Strauss, Peter 1989, ‘Legislative Theory and the Rule of Law: Some Comments on Rubin’ 89(3) *Columbia Law Review* p 427, at pp 428–430.
- ²⁸ Pearce, Dennis. 1977. *Delegated Legislation in Australia and New Zealand*. Sydney: Butterworths, pp 5–6; and Argument, Stephen 2011, ‘Legislative Scrutiny in Australia: Wisdom to Export?’ 32 *Statute Law Review* p 116 at pp 134–5.
- ²⁹ Pearce, Dennis; and Argument, Stephen. 3rd edn, 2005. *Delegated Legislation in Australia*. Sydney: LexisNexis, p 85, which notes that Victoria’s scrutiny of Regulatory Impact Statements relies on the expert assistance provided by the Office of Regulation Reform.

- ³⁰ Pearce, Dennis 2009, 'Legislative Scrutiny: Are the ANZACS Still Leaders?', p 5, available at http://www.aph.gov.au/Senate/sl_conference/papers/pearce.pdf. Accessed 4 July 2011.
- ³¹ *Banking Act 2009* (UK) c 1, ss75, 135, 156 and 168.
- ³² *Statute of Proclamations 1539* (Eng), 31 Hen VIII c 8. Despite regular protests, Henry VIII clauses are now reasonably common in UK legislation. Section 2 of the *European Communities Act 1972* (UK) is perhaps the best known example. Its Henry VIII powers allow government to implement Community law by Order in Council, even where that involves changing or repealing existing laws or altering Acts passed after 1972. These clauses are not unknown in Australia. A Henry VIII clause received extensive consideration in Legal and Constitutional Affairs Legislation Committee. 2011. *Trade Marks Amendment (Tobacco Plain Packing) Bill 2011 [Provisions]*. Canberra: Parliament of Australia: Senate: pp 10–18. Available at http://www.aph.gov.au/Senate/committee/legcon_ctte/trade_marks_amendment/report/report.pdf. Accessed 23 September 2011.
- ³³ Aronson, Mark 2009, 'The Great Depression, this Depression, and Administrative Law' 37(2) *Federal Law Review* p 165 at pp 192–195.
- ³⁴ Troubled Asset Relief Program.
- ³⁵ Pub L No 110–343, 122 Stat 3765 (2008).
- ³⁶ Aronson, pp 200–201.
- ³⁷ If by that, one means that their powers were not used arbitrarily. The big exception was the UK government's shameful freeze of the UK funds of the Landsbanki bank of Iceland. The government misused anti-terrorism powers designed to deprive funding for Al Qaeda and like organisations: Aronson, pp 202–203.
- ³⁸ See: Perdue, William 2010, 'Administering Crisis: the Success of Alternative Accountability Mechanisms in the Capital Purchase Program' 29(1) *Yale Law & Policy Review* p 295; and Black, Julia 2010, 'Managing the Financial Crisis — the Constitutional Dimension' 12/2010 LSE Law, Society and Economy Working Papers, available at <http://ssrn.com/abstract=1619784>. Accessed 20 September 2011.
- ³⁹ Their views are summarised by the Parliamentary Library's *Bills Digest no 59 of 2009–10: Carbon Pollution Reduction Scheme Bill 2009 [No 2]* pp 29–30, available at <http://www.aph.gov.au/library/pubs/bd/2009-10/10bd059.pdf>. Accessed 20 September 2011.
- ⁴⁰ The Australian Capital Territory, Queensland, Victoria, and New South Wales.
- ⁴¹ Queensland and Tasmania have placed that criterion onto their statute books; see *Legislative Standards Act 1992* (Qld), s 4(5)(c); and *Subordinate Legislation Committee Act 1969* (Tas), s 8(1)(a)(v). For a detailed description and analysis of the law and practice around Australia, see Pearce and Argument, pp 26–27, 32–33, 39–42, 53–55, 57–66, 70–74, 79–81, 89–92, and 96–100.
- ⁴² See the Senate Committee's Guidelines at http://www.aph.gov.au/Senate/committee/regord_ctte/guidelines.htm. Accessed 28 June 2011.
- ⁴³ Namely, Victoria, Tasmania, New South Wales, and Queensland.
- ⁴⁴ See discussion in Morgan, Bronwen. 2003. *Social Citizenship in the Shadow of Competition: the Bureaucratic Politics of Regulatory Justification*. Aldershot: Ashgate.
- ⁴⁵ *Legislative Instruments Act 2003* (Cth), s 18.
- ⁴⁶ *Legislation Review Act 1987* (NSW), s 9(3).
- ⁴⁷ Committee System Review Committee of the Legislative Assembly of Queensland. 2010. *Review of the Queensland Parliamentary Committee System*.
- ⁴⁸ *Legislative Standards Act 1992* (Qld), s 4(5)(c).

- ⁴⁹ Legislative Assembly of Queensland. *Standing Rules and Orders of the Legislative Assembly*. Schedule 6.
- ⁵⁰ *Parliament of Queensland Act 2001* (Qld), s 93(1)(a).
- ⁵¹ *ibid.*, s 93(1)(b) and (c), and 93(2).
- ⁵² Argument, 'Legislative Scrutiny' p 117.
- ⁵³ *ibid.*, p 13.
- ⁵⁴ Pearce, 'Legislative Scrutiny', p 5.
- ⁵⁵ Argument, 'Legislative Scrutiny' pp 140–142.
- ⁵⁶ House of Commons Information Office. 2008. *Factsheet L7: Legislative Series*. London: UK Parliament, p 5. Available online at <http://www.parliament.uk/about/how/guides/factsheets/legislation/l7/>. Accessed 29 June 2011.
- ⁵⁷ Page, Edward. 2001. *Governing by Numbers: Delegated Legislation and Everyday Policy-Making*. Oxford: Hart Publications, pp 1–18.
- ⁵⁸ 'House of Commons committees were, for many years, notoriously under-resourced.': Maer, Lucinda and Sandford, Mark 2004, 'The Development of Scrutiny in the UK: a Review of Procedures and Practice', London: The Constitution Unit, University College London, p 47. Available online at <http://www.ucl.ac.uk/spp/publications/unit-publications/116.pdf>. Accessed on 30 June 2011.
- ⁵⁹ So far as it was forward-looking, rather than seeking accountability for past mistakes.
- ⁶⁰ See Levy, Jessica 2009, 'Strengthening Parliament's Powers of Scrutiny? An Assessment of the Introduction of Public Bill Committees', London: The Constitution Unit, University College London. Available at http://www.ucl.ac.uk/spp/publications/unit-publications/145_-_FINAL.pdf. Accessed on 1 July 2011.
- ⁶¹ See: Sandford, Mark 2005, 'Effective Scrutiny: Tools and Intended Outcomes', London: The Constitution Unit, University College London. Available online at <http://www.ucl.ac.uk/spp/publications/unit-publications/120.pdf> on 30 June 2011; accessed 30 June 2011; and Russell, Meg and Benton, Meghan 2011 'Selective Influence: the Policy Impact of House of Commons Select Committees'. London: The Constitution Unit, University College London. Available at <http://www.ucl.ac.uk/constitution-unit/publications/tabs/unit-publications/153.pdf>. Accessed 30 June 2011.
- ⁶² Russell and Benton, pp 66, 84–85, and 88–89.
- ⁶³ The reform report made no specific resources recommendation, although it noted the possibility of portfolio committees drawing upon the services of library staff on an ad hoc basis if the staff who formerly serviced the scrutiny committee were too stretched. Committee System Review Committee of the Legislative Assembly of Queensland, p 65.
- ⁶⁴ Queensland Government, 2011. *State Budget 2011–2012: Service Delivery Statements* p 4.3. Available at <http://www.budget.qld.gov.au/budget-papers/2011-12/bp5-2011-12.pdf>. Accessed 22 September 2011.
- ⁶⁵ Pearce, 'Legislative Scrutiny', pp 2–4.