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The following is an edited version of the closing address by Professor Dennis Pearce, Commonwealth Ombudsman, to the Conference on Rule-making which was hosted by the Council at Parliament House on 31 August 1989. In his address Professor Pearce summarised the views of other speakers and provided suggestions for further action.

THE RULE OF LAW AND THE LORE OF RULES

My role this afternoon is to gather together the threads of the discussion at this Conference, allude to remarks made during the course of the seminar and provide suggestions for future action.

The purpose of legislation or rules as revealed in most speeches and comments today could be seen to fall into two broad categories:

(a) specification of the obligations and rights of members of the public; and
(b) the controlling of government decisions, which is another way of saying that the rule of law must be maintained.

I. PUBLIC IMPACT REQUIREMENTS

The discussions centred more on the first of these matters than the second and, in relation to the requirement that legislation specify obligations and rights, five matters seem to be identified:

(i) the need for publicity so that persons affected can know the law;
(ii) tying in with (i), legislation needs to be available or accessible to the public;
(iii) issues relating to the validity of legislation;
(iv) means of ensuring the veracity of legislation; and
(v) mechanisms for determining the acceptability of legislation by the community.

Publicity: knowledge of the law

It has been said that the law should not be made by administrators, for administrators, and be known only to administrators. Further, the possibility arises that a court might hold that there is an obligation to publish legislation if the presumption that a person is presumed to know the law is to be realistically maintained.

In this regard, the distinction between primary and secondary legislation assumes significance. Bills are debated and

therefore subjected to extensive publicity both at the Parliamentary level and in the community generally. Their content can be taken to be known. Regulations are subjected to Parliamentary scrutiny - the extent of publicity is not as great as with Bills but there is some revelation of the legislation in a public forum. The other forms of legislation - orders, by-laws, notices, determinations, etc - may be revealed pursuant to section 9 of the Freedom of Information Act but this does not extend to all documents and it has been pointed out that FOI notices are sometimes too general to be of value in the identification of legislation. The question arises whether the present mechanisms for notification of a regulation in the Gazette, which simply refers to the fact that the legislation has been made and provides an address from which it may be possible to purchase the regulation, is sufficient. Would a requirement for production of all legislation in the equivalent of the US Federal Register be a more satisfactory method of bringing material with which the public must comply to the attention of members of the public?

Another matter worthy of consideration is that of prepublication of delegated legislation. It should be remembered that the Acts Interpretation Act provides that Commonwealth Acts are not to come into force for 28 days after Royal Assent unless specific provision is made to that effect in the legislation itself. The reason for the inclusion of this provision is quite simply to enable members of the public to become aware of the legislation before the obligation to comply with it comes into effect. Is there any reason why such an approach cannot also be adopted in relation to delegated legislation albeit with the ability to provide for immediate commencement where time factors make this necessary?

The insidious practice of the government in recent times, in indicating by the means of a press release that legislation will be altered with effect from the date of the press release, is worth noting. This form of legislating with effective retrospective operation should be regarded as improper, but none the less it is occurring.

Availability of legislation

Criticisms of the availability of legislation arose under a number of headings. Most, however, stemmed from the lack of any effective system of delegated legislation at the Commonwealth level. There is a great diversity of forms of instruments without any clear reason why one form is preferred over another. There is a lack of departmental indexes enabling the identification and retrieval of the various instruments produced by the agency concerned. The FOI notices in many cases are too general and do not list all the documents produced by the agency.

Even where it is possible to identify the instruments concerned, acquisition is hampered by their availability or lack of it, and their cost. Social Security manuals, for example, may be acquired but at the cost of $500 per annum.

One of the aspects of availability turns on the question of the complexity of the instruments. This may arise in two ways. First, all the law relating to a particular matter is not necessarily contained in one document. It can be irritating to have to look at more than one legislative document to be able to find the law on a particular topic. Further, some essential information may not be in legislation at all. In the superannuation field, for example, a person's entitlement might ultimately turn on an actuarial calculation which has no legislative base against which to check it. The second aspect of complexity may arise through obscure drafting, of which the superannuation legislation and Austudy regulations are notable examples.

The final issue under this heading relates to the method of publication of delegated legislation. The publication of Commonwealth legislation has been called 'fragmented'. It is interesting in this context to note that there are three volumes each year now of Commonwealth Acts and only one of Statutory Rules. The question must be asked where are all the other forms of delegated legislation reproduced? The question also arises whether the obligation to publish legislation is moving from the Government to the private sector. It is simply not possible to find one's way through taxation legislation without the CCH or an equivalent taxation reporter. It is only these sorts of services that gather together all the law on the topic extending through Act, regulations, rulings, determinations, etc. It is also only this type of service that produces the legislation quickly.

Associated with this matter is the question of crown copyright. In a number of overseas countries, legislation is regarded as in the public domain and any publisher is entitled to reproduce it. This is not the Australian position although the issue is under consideration here. It does not appear that there is any intention of the crown giving up its copyright. The assurance was given, however, that the Commonwealth would not vest an exclusive right to reproduce legislation in any one publisher.

Validity

The need for mechanisms for ensuring that the legislation that is made is valid, and therefore enforceable, was generally accepted. Adequate in-house expertise is necessary for this purpose. External control may also be useful through, for example, the issue of a certificate of validity by the Office of Parliamentary Counsel.

The importance of Parliamentary committees checking the validity of legislation is a major part of the committees' role.

With regard to methods of challenging the validity of delegated legislation, the view was expressed that much delegated legislation would be challengeable under the AD(JR) Act. It was noted in relation to the recent ARC report Review of the Administrative Decisions (Judicial Review) Act: the ambit of

the Act that an initial proposal to extend the Act to enable review of delegated legislation was abandoned as too radical a step at this time and in the context of what the ARC was endeavouring to do. The concerns that had been dealt with in that context, however, in fact led on to the broad consideration of rule making generally.

In the United States pre-enforcement review is available. This gives rise to the question whether the courts in Australia would be prepared to allow review where a person could not point to the fact that they were directly affected by the legislation concerned. Some means for obtaining a declaration as to validity would seem to be desirable.

Running through this issue and impinging upon its effectiveness is the question of costs. Only a limited number of persons can afford the cost of a challenge to legislation and this heightens the need for the original vetting and Parliamentary review to be sufficient to deal with validity issues in most circumstances.

The suggestion has been made with regard to social security matters that the Social Security Appeals Tribunal (SSAT) and the Administrative Appeals Tribunal (AAT) act as de facto reviewers of the validity of the matters included in the manuals and guidelines. The AAT fulfils a similar role in relation to taxation rulings. The position is not as clear in relation to other agencies. Even so, there is a problem where an agency says that it will not adhere to an AAT or Federal Court pronouncement on the effect of its guidelines or rulings although it will not appeal in the particular case.

Veracity

By veracity I refer to the question whether the legislation does what it is intended to do. Primarily this turns on the question who drafts the legislation and what form it takes. Only a limited number of instruments of a subordinate nature are sent by agencies for drafting by the Attorney-General's Department drafting section. Reasons given for this are the need for rapid production of material on many occasions, the quantity of such material and the relatively small number of drafters and the fact that subordinate instruments are often concerned with scientific and technical issues in contrast with legislation that raises legal issues.

While conceding all the matters raised above, it should be noted that the absence of a professional drafter removes the opportunity for both clarity and validity checks which are achieved by the Attorney-General's Department. It is necessary to ensure that the departmental officers who draft the instruments are able to deal with both these matters.

Discussion tended to concentrate on the distinction between regulations and other instruments without differentiating between those other instruments. Emphasis was given to departmental convenience. The interests of the public were not

a factor given any great emphasis in comments by agency representatives on the form of delegated instruments.

Further, while there has been an increasing tendency to depart from the traditional modes of delegated legislation, it was generally agreed that there has been no systematic attempt to classify the various forms of instruments.

Acceptability

Delegated legislation has to be acceptable to members of the public if compliance with its content is to be readily obtained. There are two ways in which this can be achieved - through Parliamentary scrutiny, about which more will be said later, or by means of public hearings. The United States has a formal mechanism for notification and consultation, and has developed a process of negotiated rule making whereby the interested parties are brought together with a view to agreeing on the content of the rules.

It is clear that in Australia consultation by departments with representative groups is common when subordinate legislation is to be prepared. In the primary industry area such consultation is often provided for in the Act under which the legislation is made. Tax rulings are the subject of extensive consultation with representative bodies.

Apart from the primary industry area, however, there is no obligation to consult. The due process obligations which are now accepted in relation to administrative decisions have not found like acceptance in the legislative process. There is a further problem that where such consultation occurs, it is on a selective basis and the agency could well be captured by the head bodies with whom it consulted while being unaware of concerns of others with interests that were not necessarily represented by the organisations consulted.

The need to prepare regulation impact statements, as is required under the Victorian Subordinate Legislation Act, can have value to the public service. In Victoria these statements have resulted in the formulation and statement of the objectives of the legislation, the costs to which it is likely to give rise and the possibility of alternative solutions to the problems in question.

Overall the absence of any form of notification and consultation process in relation to Commonwealth legislation shows a marked difference from the position in the United States and in Victoria, and as recommended in New South Wales. The objection to such procedures based on the delays which would be incurred could be met by appropriate exception provisions from the general rule. Such provisions exist in the Victorian legislation.

II. CONTROL OF GOVERNMENT: UPHOLDING RULE OF LAW

The second major theme running through discussion of these issues concerns the purpose of subordinate legislation as a means not of affecting members of the public but of exercising control over government action which is an essential element of the rule of law. In this context two issues can be seen as arising - first, the role of the Parliament in scrutinising delegated legislation and, secondly, the degree of particularity that should be included in such legislation insofar as the rules adopted control the actions of the executive.

Role of Parliament

Here two issues emerge. The first is the form of Acts. The question is what degree of detail should be included in an Act - should it merely contain broad principles leaving the detail to be included in subordinate legislation? Another way of putting this question is by way of referring to Acts as 'shell Acts'. The notion of a shell Act can take very different forms. The Social Security Act for example sets out the basis on which pensions and benefits are to be granted while leaving much of the detailed working out to departmental rulings. By way of contrast, the Air Navigation Act does little more than provide authority for the making of delegated legislation of a wide and diverse kind. This latter form of shell Act constitutes an abdication by the Parliament of its responsibility.

It seems unlikely that the Commonwealth Parliament will change its current approach to insisting that in most cases an Act contain a considerable amount of detail. The reason for this is that it would lose control over the content of legislation. Unless the Parliament is prepared to move to a new structure whereby it establishes a series of committees that look at the merits of delegated legislation, it seems unlikely that the present detailed drafting of Acts will be altered.

The second issue relating to the role of the Parliament is what form of scrutiny it should exercise over delegated legislation? At present scrutiny committees are concerned with issues of civil liberties, validity and form but do not become involved in the merits or policy underlying delegated legislation. The bipartisan approach achieved by committees is said to turn on this self-denial. Involved in this same issue is the question of what Parliament can effectively cope with. If it were to examine the merits of the many thousands of instruments that are made each year it would need a vast array of committees and a vast array of helpers.

The Victorian Subordinate Legislation Committee was said to be revitalised as a result of the Subordinate Legislation Act giving it a mandate to examine both the approaches to the making of delegated legislation and its content against an extended set of criteria. This has had a marked effect on Parliamentary interest in the delegated legislative process.

The question was also raised whether there ought to be a policy review committee of the Parliament concerned with at least some subordinate instruments. This could be achieved by including in particular Acts a requirement that the subordinate legislation made under the Act be considered by a Parliamentary committee.

The alternative to increased Parliamentary scrutiny is the development of other public consultative mechanisms previously discussed.

Particularity of subordinate instruments

K.C. Davis, the eminent US administrative law scholar distinguished between confining discretion which should be included in legislation and structuring discretion which should be in guidelines. The control of the exercise of power through discretions by the executive is dependent upon the effectiveness of accountability mechanisms. The vogue concept of risk management or managerialism is frankly 'anti-rule'. Rules confine managers and are said to lead to inefficiencies and ineffectiveness. It is said that risk management is not anti-accountable, but it is not clear to whom the managers are accountable and more particularly against what standard they are to be accountable. The inclusion of controls over discretion in subordinate legislation provides such a standard. The agency representatives primarily concerned with the production of subordinate legislation did not enunciate procedural safeguards in relation to those instruments which were not subjected to Parliamentary scrutiny despite this being one of the matters listed on our agenda for discussion. The attitude tends to be 'trust us'.

III. SUGGESTIONS FOR FUTURE ACTION

Public administration is often defined as the art of muddling through, but there is no question that Commonwealth subordinate legislation is in a thorough muddle. The time has come to tackle the issues and try to restore some order to the chaos of Commonwealth subordinate legislation. The following are suggested as actions that should be put in hand:

(1) attention should be paid to the distinction between primary and secondary legislation and what should form the prima facie division of content between them;
(2) there should be a thorough review of the forms of secondary instruments to produce uniformity of terminology and common content in the various forms of instruments. It should be possible to discard some as being unnecessary, eg proclamations;
(3) the Acts Interpretation Act and the Statutory Rules Publication Act should be reviewed to designate the different forms of subordinate legislation and the making and review processes appropriate to each;
(4) procedures for making subordinate legislation should be reviewed with regard being paid to notice and consultation procedures and the impact that the Victorian Subordinate Legislation Act procedures have had; and

(5) the method of publication of subordinate legislation should be reviewed with attention being paid to the need for consolidation of instruments and their publication in accessible form. In this context, the possibility of the establishment of a Federal Register should be considered.

The proposals set out above could well be undertaken as a collaborative project by the Administrative Review Council and the Senate Regulations and Ordinances Committee.

The possibility of establishing a Committee to review the merits of selected, more sensitive, subordinate legislative instruments should also be examined by the Parliament.

REGULAR REPORTS

Administrative Review Council

REPORTS

The Council's Thirteenth Annual Report, 1988-89, was adopted by the Council on 1 September 1989.

LETTERS OF ADVICE

Since the July 1989 issue of Admin Review the Council has provided the Attorney-General with letters of advice on the following issues:

- requirement for documents under section 37 of the Administrative Appeals Tribunal Act and location of AAT premises;
- costs associated with the use of the Administrative Appeals Tribunal.

OTHER PAPERS

- submission to the National Legal Aid Advisory Committee;
- report to the 14th Australasian Law Reform Agencies Conference.

CURRENT WORK PROGRAM - DEVELOPMENTS

Access to administrative review. The Council's submission to the National Legal Aid Advisory Committee on issues relating to legal aid in administrative review was forwarded to the Committee in October. Council's work on access is currently