

ANZACATT Parliamentary Law, Practice and Procedure Course

What lies beneath: Parliamentary scrutiny, skeleton legislation and delegated legislation

Introduction

The focus of my research paper examines the concerning tendency of skeleton legislation, Henry VIII clauses and quasi-legislation.

The role of Parliamentary scrutiny on the Executive's actions is essential for responsible and accountable government and the separation of powers. However, the prevalence of skeleton legislation, the volume of legislative instruments and delegation of legislative powers has led to concerns of whether the role of parliamentary scrutiny has been subverted. This is particularly concerning where skeleton legislation may potentially create subordinate or delegated legislation which will infringe upon an individual's rights and liberties without the same level of scrutiny or consideration as Bills.¹

This paper explores and tests the hypothesis that the prevalence of skeleton legislation and inappropriate delegation of legislative power has subverted Parliament's scrutiny of the Executive's actions. The paper also contends that skeleton legislation, Henry VIII clauses and quasi-legislation are symptoms of the same problem of subverting Parliamentary scrutiny and consequently, violating the key underpinnings of democracy, including the doctrine of the separation of powers and the rule of law. Such delegated legislation is inappropriate for a system that places value on Parliamentary scrutiny of the Executive Government as a measure of accountability.

The first section looks at the philosophical basis for the separation of powers and responsible government. The second section examines the growth of delegated legislation and the prevalence of skeleton legislation, Henry VIII clauses and quasi-legislation. The third section discusses the role of scrutiny committees and analyses the prevalence of skeleton legislation and inappropriate delegations of legislative power with examples from the State Parliaments of New South Wales and Western Australia, as well as the Australian Federal Parliament. The final section examines the safeguards and potential remedies to address the issue of skeletal legislation, Henry VIII clauses and quasi-legislation.

The paper concludes that the prevalence of skeleton legislation and inappropriate delegation of legislative powers is not restricted to a particular Parliamentary jurisdiction or political party alignment. Instead, a notable development is that specific clauses are skeletal in nature, leaving matters of detail to the regulations.

¹ The Hon. Farina, Adele MLC, A Bones without Flesh – the issues with skeletal legislation in Australia-New Zealand Scrutiny Legislation Conference, Brisbane, 2011, 6.

Section 1: Philosophical basis for separation of powers and responsible government

The doctrine of the separation of powers defines three organs of government, with each performing a separate and different function. The Parliament makes the laws, the Executive administers or enforces the laws, and the judiciary interprets and adjudicates disputes about the law.² However, these powers are not entirely separate and the distinctions may not be clear, as members of the Executive (the Cabinet and other government ministers) are also members of the legislature in the Westminster system.

The broad objectives of the separation of powers is to provide checks and balances for each respective arm on the exercise of governmental power, while at the same time ensuring that the different governmental functions are discharged.³ As Sir Gerard Brennan surmises, the Executive and Legislative arms of the separation of powers are subject to, and expressions of the people's will.⁴

This doctrine assumes that Parliament is subject to popular election, must adhere to the wishes of the people and the laws made by delegates of the people in Parliament in accordance with the people's will. The Executive Government, being responsible to the Parliament for the exercise of executive powers, is accountable, albeit indirectly, to the people. Thus, the political branches of government simply give expression to the popular will.⁵ It is arguable that the role of the Parliamentary arm is to scrutinise the Executive's action, thereby being the "people's will" for good and responsible government.

Seal-Pollard stressed the importance of Parliament to the whole rationale of responsible government by holding the Executive accountable for their actions, noting that "this chain of accountability allows for the governed to hold the governors to account".⁶

Emy and Hughes addressed the relationship between the Executive and the Parliament:

The whole issue of accountability is a crucial one for the liberal democratic state because loss of accountability strikes at the basic theoretical justification offered for this kind of polity. The legitimacy of such a state is closely related to its claim to be able to control the exercise of power effectively by legal and rational (or constitutional) means. Loss of accountability implies loss of democratic control over those in charge of the coercive powers of the state.⁷

Conversely, Creyke and McMillian considered the concept of responsible government as a fundamental breach of the separation of powers.⁸ While Seal-Pollard noted the importance of the

² Australian Law Reform Commission, Chapter 16: Delegating Legislative Power in *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws*, Report 129 (Canberra: Commonwealth of Australia, 2015) 441.

³ Creyke, Robin and McMillian, John, Constitutional Considerations in *Control of Government Action: Text, Cases and Commentary* (LexisNexis Butterworth: Australia, 2005) 237.

⁴ Gerard Carney, Sir Gerard Brennan: The Parliament, the Executive and the Courts: Role and Immunities, *The Brennan Lectures 1998-2001* (Bond University Press, 2003)

⁵ Ibid.

⁶ Seal-Pollard, John, Addressing the Balance: The Executive and the Parliament in *Australasian Study of Parliament Group conference*, Adelaide, 2016, 1.

⁷ Hugh Emy and Owen Hughes, *Australian Politics: Realities in Conflict* (Macmillan: Australia, 1988) 309.

⁸ Creyke, Robin and McMillian, John, Constitutional Considerations in *Control of Government Action: Text, Cases and Commentary* (LexisNexis Butterworth: Australia, 2005) 237.

theoretical basis for responsible government and accountability, he argued that the loose, uncodified set of constitutional rules, practices and conventions of the Westminster system provided a practical reality of strong party control and a rigid two-party system. Consequently, the primary conflict between the Parliament and the Executive is “supplanted by the real politics battle between the then Government and opposition parties”⁹ and that as long as the governing party holds majority, the Executive is more accountable to their own party than to the Parliament.¹⁰

Nevertheless, delegated legislation may be used to subvert Parliamentary scrutiny, as demonstrated in Emy and Hughes’ analysis and a loss of accountability of the government implies a loss of democratic control.

Section 2: Growth of delegated legislation and prevalence of skeleton legislation

Concept of Delegated Legislation

The development of delegated legislation or subordinate legislation is necessary due to the breadth of policy the Executive is expected to legislate over. Given the rapid increase in the use of delegated legislation in the last twenty-two years,¹¹ there remains the prevalent theme of skeleton legislation, Henry VIII clauses and quasi-legislation which may serve to subvert Parliamentary scrutiny.

Skeleton legislation are instances where the legislation covers major policy matters and principle in the barest terms and leaves the detail, substantive matters, to be set out in the regulations.¹²

A Henry VIII clause is defined as a clause of an Act inappropriately delegating legislative power to allow a legislative instrument (for instance, a regulation) to amend an Act. While quasi-legislation are documents which are referred to within the regulations, including but not limited to codes, guidelines, protocols, directives, policy, standards, notices, orders or frameworks.¹³ Quasi-legislation may allow Agencies to update administrative details however given the lack of accountability and inaccessibility of the legislation, it may be open to abuse.

While the Australian Constitution doesn’t expressly authorise the Commonwealth Parliament to delegate powers to make laws, nor does it strictly prohibit it¹⁴ as reflected in *Victorian Stevedoring and General Contracting Company Proprietary Limited v Dignan (Dignan’s case)*,¹⁵ Justice Dixon noted that *Roche v Kronheimer*¹⁶ determined:

⁹ Seal-Pollard, John, Addressing the Balance: The Executive and the Parliament in *Australasian Study of Parliament Group conference*, Adelaide, 2016, 3.

¹⁰ *Ibid.*

¹¹ Pearce, Dennis and Argument, Stephen (2012), *Delegated Legislation in Australia* (Australia; LexisNexis Buttersworth), Preface, ix.

¹² Parliament of Western Australia, Legislative Council, Standing Committee on Legislation, Report 22, *Workforce Reform Bill 2013*, March 2014, p1494.

¹³ Hickie, Scott (2012) *Diminishing the efficacy of disallowance motions: quasi-legislation in state jurisdictions*, *Australasian Parliamentary Review*, Vol. 27(1), pp. 94

¹⁴ Australian Law Reform Commission, Chapter 16: Delegating Legislative Power in *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws*, Report 129 (Canberra: Commonwealth of Australia, 2015) 448.

¹⁵ *The Victorian Stevedoring and General Contracting Company Proprietary Limited v Dignan* (1931) 46 CLR 73, 101.; Australian Law Reform Commission, Chapter 16: Delegating Legislative Power in *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws*, Report 129 (Canberra: Commonwealth of Australia, 2015) 448.

¹⁶ *Roche v Kronheimer* (1921) 29 CLR 329.

a statute conferring upon the Executive a power to legislate upon some matter contained within one of the subjects of the legislative power of the Parliament is a law with respect to that subject, and that the distribution of legislative, executive and judicial powers in the *Constitution* does not operate to restrain the power of the Parliament to make such a law.¹⁷

However, Justice Dixon noted two constitutional limits on the power to delegate legislative power. The first is in the instance where there is “such a width or such an uncertainty of the subject matter”¹⁸ that the respective enactment is not law with respect to any particular head of legislative power.¹⁹ The second is that the Parliament cannot entirely abdicate its legislative power by delegating an entire head of power.²⁰

The development of delegated legislation has an essential role for efficient and effective government. Pearce and Argument note the importance of the legislature to empower others to make laws as an “essential adjunct to the practice of government.”²¹

In his paper *Leaving it to the regs – the pros and cons of dealing with issues in subordinate legislation*, Stephen Argument cites Professor Pearce’s four basic justifications for the making of subordinate legislation:²² to save pressure on parliamentary time; to deal with material that is too technical or detailed to be suitable for parliamentary consideration; to deal with rapidly changing or uncertain situations and to deal with cases of emergency.²³ Delegated legislation is a practical necessity for the Executive when dealing with changes to the law requiring administrative reorganisation and detailed consultations with affected sectors of the community with the commencement of particular parts of the Act postponed and left to the Executive’s discretion.²⁴

Criticisms of delegated legislation

Given the administrative convenience delegated and subordinate legislation provide, academics and legal scholars are concerned with the tendency of inappropriate delegations of legislative power to subordinate legislation where the actions of the Executive are not readily scrutinised.

Professor Meyerson is weary of the potential dangers of delegated legislation:

if we allow the unlimited transfer of legislative power to the executive we run the risk of subverting the rule of law ideal, fundamental to the control of government, that those who carry out the law should be restrained by those who make it.²⁵

Pearce and Argument observed the sheer volume of legislative instruments outweighed the number of Acts enacted and raised concerns over delegated instruments (such as regulations, rules, by-laws,

¹⁷ The Victorian Stevedoring and General Contracting Company Proprietary Limited v Dignan (1931) 46 CLR 73, 101.; Australian Law Reform Commission, Chapter 16: Delegating Legislative Power in *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws*, Report 129 (Canberra: Commonwealth of Australia, 2015) 448.

¹⁸ The Victorian Stevedoring and General Contracting Company Proprietary Limited v Dignan (1931) 46 CLR 73, 101.

¹⁹ Australian Law Reform Commission, Chapter 16: Delegating Legislative Power in *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws*, Report 129 (Canberra: Commonwealth of Australia, 2015) 448.

²⁰ *Ibid.*

²¹ Australian Law Reform Commission, Chapter 16: Delegating Legislative Power in *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws*, Report 129 (Canberra: Commonwealth of Australia, 2015) 450.

²² Argument, Stephen, *Leaving it to the Regs – The pros and cons of dealing with issues in subordinate legislation* in Australia-New Zealand Scrutiny of Legislation Conference, Brisbane, 2011, 1.

²³ *Ibid.*

²⁴ *Ibid.*

²⁵ Meyerson, Denise ‘Rethinking the Constitutionality of Delegated Legislation’ 11 *Australian Journal of Administrative Law* 45, (2003): 52.

ordinances and other instruments) which are subject to scrutiny, noting that “such instruments have largely passed unexamined.”²⁶

The Commonwealth Office of Parliamentary Council (OPC) noted in their 2014-15 annual report that 172 Bills, totalling 6,395 pages introduced compared to 253 Executive Council (ExCo) Legislative Instruments totalling 8,091 pages introduced during the same period. According to the Federal Register of Legislative Instruments in 2015, 2,143 legislative instruments were registered in the calendar year.²⁷

The Senate Standing Committee on Regulations and Ordinances (R and O Committee) reported that in the 2015 calendar year, the Committee scrutinised 1,828 instruments that were disallowable by the Senate. To provide an indication of the significant growth in the last decade, there were 800 disallowable instruments in 1983-84 compared to 3,404 in 2008-09.²⁸ However Argument did note that the surge in disallowable instruments in 2008-09 might have been attributed to the ‘backcapturing process’²⁹ of existing legislative instruments in the *Legislative Instruments Act 2003*.³⁰ Given the volume of legislation passed in the House, the Parliament remains in a difficult position in how closely they are able to scrutinise a number of Bills within a short timeframe.

Lord Hewart described delegated legislation as:

disrupting the roles demarcated by the separation of powers and undermining the democratic legitimacy of parliament by allowing zealous executives to overextend their administrative mandate without sufficient parliamentary oversight.³¹

Aronson observed a shift in legislative drafting with an increased rate of substantive provisions found in subordinate or other legislative documents.³² While this may not be a surprise, this makes it much more difficult for Parliaments to keep across the content of subordinate legislation.

The Australian Law Reform Commission noted their concern with the increase of delegations of legislative power to statutory instruments which may have an impact on human rights and liberties. This includes creating offences with high penalties to be determined in the regulations which should be left to primary legislation; noting that the “wide and vague delegations of legislative power undermine the separation of powers doctrine by allowing those who enforce the law to also make the law.”³³

A key example is the frequency of Henry VIII clauses. The most famous instance of a Henry VIII clause came in the *Statute of Proclamation 1539* where “The King for the Time being, with the advice of his Council, or the more Part of them, may set forth Proclamations under such Penalties and Pains as to him and them shall seem necessary, which shall be observed as though they were made by an Act of

²⁶ Pearce, Dennis and Argument, Stephen (2012), *Delegated Legislation in Australia* (Australia; LexisNexis Buttersworth), Preface, ix.

²⁷ Argument, Stephen (2016) *Executive law-making in the 21st century: Delegation not subordination*, Australia-New Zealand Scrutiny of Legislation Conference – Perth, Western Australia, 11-14 July 2016, p5

²⁸ Ibid.

²⁹ Ibid. p6

³⁰ *Legislative Instruments Act 2003 (Cth)*

³¹ Lord Gordon Hewart, *The New Despotism* (Benn, London, UK, 1929); Scott Hickie, *Diminishing the efficacy of disallowance motions: quasi-legislation in state jurisdictions* (2012) 27(1) *Australasian Parliamentary Review*, 91-92

³² Aronson, Mark *Subordinate legislation: lively scrutiny or politics in seclusion* (2011) Vol 26(2) *Australasian Parliamentary Review*, 8.

³³ Australian Law Reform Commission, *Delegating Legislative Power in Traditional Rights and Freedoms – Encroachments by Commonwealth Laws*, Report 129 (Canberra: Commonwealth of Australia, 2015). 447

Parliament.”³⁴ The delegated legislation would in effect authorise the King to make or unmake any laws on any subject by proclamation without the consent of the Parliament.³⁵

While Henry VIII clauses can be disallowed as an inappropriate delegation of legislative power, the prevalence of skeletal legislation provisions highlights a concerning trend which may lead to the subversion of Parliamentary oversight and an infringement on the doctrine of the separation of powers.

However, the delegation of legislative power to the Executive may be reasonable in emergency situations, for example in the case of Brexit. The United Kingdom’s departure from the European Union has raised many contentious issues including the legal and constitutional ramifications of Brexit on the Parliament and the Rule of Law.

The enormity and complexity of Brexit may “give rise to an understandable temptation to delegate swathes of legislative power to the Executive”³⁶ and exacerbate the issue of drafting skeleton legislation and broad powers of delegation. Despite this delicate and complex legal minefield, Bingham Centre noted the importance of Parliament to act as a safeguard against the drafting of skeleton legislation and poorly defined Henry VIII clauses as “they will undermine the Parliamentary sovereignty and Rule of Law.”³⁷

Causes for skeleton legislation

The prevalence of skeleton legislation and Henry VIII clauses has led to questions about the causes of skeleton legislation. Academics noted a number of causes including the concept of nowism, executive dominance and time pressures to meet Council of Australian Government/ National Seamless Economy Intergovernmental Agreement (IGA) deadlines.

Argument observed that the concept of ‘nowism’, along with the constant media focus on ‘getting things done’, has contributed to the alarming frequency of skeleton legislation and quasi-legislation.

Argument concluded that the political culture prioritises executive decisiveness rather than executive reflection.

It sees success in term of the passage of legislation rather than its consequences and fosters departmental tourism (reshuffle) as a short-term quick fix to political problems with little regard for the results in terms of ministerial continuity and understanding of policy and legislation.³⁸

Furthermore, Argument noted the media’s perception of legislation as a sign of action and a lack of legislative activity could be perceived in the contrary,³⁹ thereby exacerbating the use of legislative

³⁴ Australian Law Reform Commission, *Delegating Legislative Power in Traditional Rights and Freedoms – Encroachments by Commonwealth Laws*, Report 129 (Canberra: Commonwealth of Australia, 2015) 454.

³⁵ *Ibid.*

³⁶ Bingham Centre for the rule of law – briefing paper: Parliament and the Rule of Law in the Context of Brexit – 29 September 2016, 7.

³⁷ *Ibid.* 1

³⁸ Stephen Argument, *Leaving it to the Regs – The pros and cons of dealing with issues in subordinate legislation* in Australia-New Zealand Scrutiny of Legislation Conference, Brisbane, 2011, 22.

³⁹ James Robertson, “Gladys Berejiklian so far: slimmest legislative record of any rookie premier in decades”, *The Sydney Morning Herald*, October 10, 2017, (<http://www.smh.com.au/nsw/gladys-berejiklian-so-far-slimmest-legislative-record-of-any-rookie-premier-in-decades-20171006-gyw57l.html>)

drafting as a powerful public relations and communication tool,⁴⁰ as the Parliament faces the challenge of scrutinising bills within tight timeframes.

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.⁴¹

The concept of executive dominance has been identified as another cause for the prevalence of skeleton legislation. John Seal-Pollard noted the rise of executive control has led to the concerning trend of increasing Henry VIII clauses and skeletal legislation.⁴² Seal-Pollard argued the practical reality of strong party control and a rigid two-party system has led to the primary conflict between the Parliament being “supplanted by the real politics battle between the then Government and opposition parties.”⁴³

In contrast, the Chairman of the Legislative Council Uniform Legislation and Statutes Review Committee in the Parliament of Western Australia, Hon. Adele Farina MLC noted that there may be other factors which contribute to the growth of skeleton legislation, including the pressure of the deadlines imposed to meet Council of Australian Governments (COAG) and the National Seamless Economy Intergovernmental Agreements (IGA).⁴⁴ This is in addition to: Commonwealth requirements being tied to State funding regardless of the readiness of the legislation; an inability to reach agreement on how to legislate on issues and the hope that it can be resolved later; bureaucratic frustrations in amending legislation on the government legislative agenda and a lack of respect for the institution of the Parliament by a belief that Parliamentary scrutiny takes too long.⁴⁵

However, the difficulty may lie in the identification and assessment of skeleton legislation. The Hon. Adele Farina MLC noted that the nature of skeleton legislation could be a matter of opinion over “what is a proper balance between primary and subordinate legislation”.⁴⁶ The Hon. Adele Farina MLC cites her concerns that with the prevalence of skeleton legislation, scrutiny committees will have very little idea about what is proposed in Bills if the bare bones of the legislation are determined; thereby weakening their ability to properly scrutinise Bills.⁴⁷

Quasi-Legislation

While regulations may be disallowed through a motion in Parliament, another concerning development is the Executive’s use of quasi-legislation. Quasi-legislation can include Ministerial Orders, codes of practice, notices and other administrative documents. However, many academics

⁴⁰Argument, Stephen, *Leaving it to the Regs – The pros and cons of dealing with issues in subordinate legislation* in Australia-New Zealand Scrutiny of Legislation Conference, Brisbane, 2011, 22.

⁴¹ Seal-Pollard, John, Addressing the Balance: The Executive and the Parliament in *Australasian Study of Parliament Group conference*, Adelaide, 2016, 5; the Hon. Michael Mischin from the Parliament of Western Australia *Hansard, Legislative Council*, 9 August 2011, 5278.

⁴² Seal-Pollard, John, Addressing the Balance: The Executive and the Parliament in *Australasian Study of Parliament Group conference*, Adelaide, 2016, 1.

⁴³ Ibid. 3.

⁴⁴ The Hon. Farina, Adele MLC, *A Bones without Flesh – the issues with skeletal legislation* in Australia-New Zealand Scrutiny Legislation Conference, Brisbane, 2011. 2.

⁴⁵ The Hon. Farina, Adele MLC, *A Bones without Flesh – the issues with skeletal legislation* in Australia-New Zealand Scrutiny Legislation Conference, Brisbane, 2011.

⁴⁶ Ibid. 3.

⁴⁷ Ibid.

noted the growing concern of the inaccessibility of quasi-legislation with the lack of Parliamentary oversight has led to a derogation of the scrutiny role of Parliament.⁴⁸

While quasi-legislation may have a legitimate role in “facilitating the practical dimensions of regulatory harmonisation”⁴⁹ for instance, the use of professional codes and standards can be used to shape due diligence requirements via Parliament rather than leaving it to the judiciary.

Pearce and Argument⁵⁰ noted there are four problems with quasi-legislation including proliferation, poor quality drafting and inaccessibility of quasi-legislative instruments. The principal concern being that quasi-legislation diminished the role of scrutiny committees and the power of Parliament to provide oversight as the “main watchdogs against inappropriate or unsupervised delegation of legislative power.”⁵¹

The *Native Vegetations Regulation 2005 (NSW)*⁵² is an example of quasi-legislation where the regulation referenced external documents. The regulation used two highly detailed and comprehensive quasi-legislation documents, an Assessment Methodology⁵³ and Code of Practice⁵⁴ to regulate operational and policy elements of native vegetation management. However, clauses 26(1) and 29D(1)(c) require regulatory amendment of definitions before amendments to these referenced documents take effect. Hickie noted the effect of these clauses would require non-statutory documents to be put in regulatory form.

if the minister sought to make a rewrite of the Private Native Forestry (PNF) Code of Practice the changes would not come into effect until an amendment regulation was enacted to update the definition of ‘PNF Code of Practice’. Through this process, the changes made to the non-statutory document are put into a regulatory form and can be subject to disallowance.

Hickie remained sceptical of the Executive’s use of quasi-legislation and the diminishing efficacy of disallowance motions for quasi-legislation.⁵⁵ Hickie describes quasi-legislation as a “wolf in sheep’s clothing”⁵⁶ where “skeleton Acts shift the theatre of Parliamentary policy battles and defer ‘tough policy’ questions to regulation, quasi-legislation becomes an important tool for the executive.”⁵⁷ The potential use and inaccessibility of quasi-legislation may present pose problems as it is outside the scope of the Parliament’s ambit and a means to subvert Parliamentary scrutiny of the Executive’s actions.

⁴⁸ The Hon. Farina, Adele MLC, A Bones without Flesh – the issues with skeletal legislation in Australia-New Zealand Scrutiny Legislation Conference, Brisbane, 2011, 7.

⁴⁹ Hickie, Scott, ‘Diminishing the efficacy of disallowance motions: quasi-legislation in state jurisdictions’ 27(1) *Australasian Parliamentary Review*, (2012): 93.

⁵⁰ Pearce, Dennis and Argument, Stephen (2012), Chapter 1: Overview in *Delegated Legislation in Australia* (Australia; LexisNexis Buttersworth).

⁵¹ *Ibid.* 12.

⁵² *Native Vegetations Regulation 2005 (NSW)*

⁵³ *Ibid.* Part 5 (Clause 24)

⁵⁴ *Ibid.* Part 5A (Clause 29A)

⁵⁵ Scott Hickie, ‘Diminishing the efficacy of disallowance motions: quasi-legislation in state jurisdictions’ 27(1) *Australasian Parliamentary Review* (2012): 93.

⁵⁶ *Ibid.* 92.

⁵⁷ *Ibid.*

Section Three: Scrutiny Committees and prevalence of skeleton legislation and inappropriate delegation of legislative powers across different jurisdictions

The importance of scrutiny committees

The legislative scrutiny process and Parliamentary committees are “key mechanisms for ensuring the Executive does the right thing” and preserves Parliamentary sovereignty.⁵⁸ In particular, the legislative scrutiny committees perform an important function in drawing attention to possible issues in delegated legislation which may otherwise remain unnoticed. However, there remain concerns that delegated legislation doesn’t receive the same visibility compared to Bills.⁵⁹

The section examines the prevalence of skeleton legislation and inappropriate delegations of legislative power to the Executive in different jurisdictions.

Western Australia

In Western Australia, the scrutiny of bills and delegated legislation is split over three Committees: the Joint Standing Committee on Delegated Legislation, the Standing Committee on Legislation and the Standing Committee on Uniform Legislation and Statute Review. The Parliament of Western Australia is unique in Australian Parliaments as it has a Committee that specifically scrutinises proposed legislation that is uniform in nature or has some element of uniformity.

The Chair of the Uniform Legislation and Statutes Review Committee, the Hon. Adele Farina MLC identified the *Occupational Licensing National Law (WA) Bill 2010* (OLNL Bill)⁶⁰ as one of the most extreme examples of skeleton legislation, as it contained numerous clauses lacking clarity or certainty. The Bill was so extreme that the Committee took the unusual step of making a recommendation that the OLNL Bill not to be passed in the form it was presented to the Committee.⁶¹

Occupational Licensing National Law (WA) Bill 2010

On 30 April 2009, the Council of Australian Governments (COAG) approved the Intergovernmental Agreement for a National Licensing System for Specified Occupations. The purpose of the national licensing system was “to remove overlapping and inconsistent regulation between jurisdictions for the licensing of occupational areas”.⁶² The national licensing scheme aimed to improve business efficiency and the competitiveness of the national economy, reduce red tape, improve labour mobility and improve productivity to enhance consumer confidence and protection without imposing unnecessary costs on consumers and business or substantially lessening competition.⁶³

⁵⁸ Australian Law Reform Commission, Delegating Legislative Power in *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws*, Report 129 (Canberra: Commonwealth of Australia, 2015) 456.

⁵⁹ Australia- NZ Scrutiny of Legislation Conference – 11 July 2016, Perth WA – Comparative approaches to legislative scrutiny – Chair of NSW Legislation Review Committee, Mr Michael Johnsen MP, 5

⁶⁰ *Occupational Licensing National Law (WA) Bill 2010*

⁶¹ The Hon. Farina, Adele MLC, *A Bones without Flesh – the issues with skeletal legislation in Australia-New Zealand Scrutiny Legislation Conference*, Brisbane, 2011, 8.

⁶² Explanatory Memorandum to the Occupational Licensing National Law (WA) Bill 2010, 1-2

⁶³ Explanatory Memorandum to the Occupational Licensing National Law (WA) Bill 2010, 1-2

The Committee commented that the Bill contained numerous examples of uncertainty, a lack of clarity and incoherence key definitions and terms used in the OLNL Bill.

In examining the Bill, the Committee reported:⁶⁴

- (a) not all occupations, sub-groups or work performed within a specified (or later prescribed) “licensed occupation” will be subject to a licence;
- (b) if an occupation, sub-group or work is subject to a licence, that licence may apply in some jurisdictions but not others. Thereby, the licence is not necessarily “national”; and
- (c) a decision not to require a particular occupation, sub-group or work within specified (or later prescribed) “licensed occupation” to obtain a licence through the national licensing system will not preclude a State or Territory from subjecting that activity to a jurisdictional licence.

The Committee in their examination noted the model “unnecessarily abrogates State Sovereignty, lacks detail and is bad law”.⁶⁵ The Committee was particularly critical in their assessment of the reasons given by the State Parliament for presenting the Bill in its current form, namely “to ask a State Parliament to pass legislation in the form of this Bill because the jurisdictions have not been able to sort out their differences and agree to the details of the uniform scheme is absurd.”⁶⁶

The Committee further advised if the Commonwealth and State jurisdictions wanted to implement uniform legislation, they would need to work out the details of the scheme before presenting the Bill to Parliament.⁶⁷

New South Wales

In New South Wales, the Legislation Review Committee examines Bills and delegated legislation. On the 23 November 2017, the Legislative Council established the Legislative Council Regulation Committee which examines any regulation, including the policy or substantive content of a regulation, and trends or issues that relate to regulations.

The *Fire and Emergency Services Levy Act 2017*⁶⁸ provided an example of a Henry VIII clause where the primary legislation which is the view of the Committee inappropriately delegated legislative power to the regulations.

⁶⁴ Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, Report 61, Occupational Licensing National Law (WA) Bill 2010, 14 April 2011, 3-4

⁶⁵ Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, Report 61, Occupational Licensing National Law (WA) Bill 2010, 14 April 2011, 20-21

⁶⁶ Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, Report 61, Occupational Licensing National Law (WA) Bill 2010, 14 April 2011, 20.

⁶⁷ *Ibid.* 21

⁶⁸ *Fire and Emergency Services Levy Act 2017 (NSW)*

Fire and Emergency Services Levy Act 2017

The purpose of the *Fire and Emergency Services Levy Act 2017*⁶⁹ was to provide for the charging and collection of a fire and emergency services levy (the levy). The levy is payable on all land (other than government land) that is situated in the area of a council or on Lord Howe Island.

Under the Act, land can be classified into the following property sectors: government land, public benefit land, farmland, residential land, industrial land and commercial land.

The Committee noted the Act contained several Henry VIII clauses which allowed the Executive to amend the Act by regulation. The following provisions authorised regulations to amend the Act:

- (a) Councils are required to classify land for the purpose of charging the fire and emergency services levy. Clause 43 specifies criteria for classifying land as ‘public benefit land’. Schedule 1 of the Bill assists with this classification by listing uses of land that may contribute to it being determined as ‘public benefit land’. The regulations may amend Schedule 1.
- (b) Clause 46 specifies criteria for classifying land as ‘industrial land’. If the dominant use of the land is for a purpose listed in Schedule 2 then the land will be industrial land. The regulations may amend Schedule 2.
- (c) Schedule 3 contains savings, transitional and other provisions. Clause 1 of that Schedule authorises regulations to contain provisions of a savings or transitional nature. Those provisions can be separate to Schedule 3 or may amend that Schedule to consolidate savings and transitional provisions.⁷⁰

In their examination, the Committee noted that the provisions of the Bill which may be amended by regulations are associated with key definitions relating to classifying land. While the Committee noted that regulations are scrutinised through a disallowance process, there is a ‘much greater level of scrutiny associated with the passage of a Bill through the Parliament’.⁷¹

Subsequently, the Committee referred the relevant clauses⁷² to Parliament for its further consideration as to whether authorising the regulations to amend various Schedules of the Act is appropriate.⁷³

Commonwealth

The Commonwealth Parliament of Australia examines bills and regulations across three different Committees: The Senate Standing Committee for the Scrutiny of Bills (Scrutiny of Bills Committee), the Senate Standing Committee on Regulations and Ordinances (Regulations and Ordinance Committee) and the Parliamentary Joint Committee on Human Rights.

⁶⁹ *Fire and Emergency Services Levy Act 2017 (NSW)*

⁷⁰ Legislation Review Digest – Fire and Emergency Services Levy Bill 2017, Digest No. 33/56 – 28 March 2017, 15

⁷¹ Legislation Review Digest – Fire and Emergency Services Levy Bill 2017, Digest No. 33/56 – 28 March 2017, 15

⁷² Clauses 43, 46 and Schedule 3, clause 1 of the *Fire and Emergency Services Levy Bill 2017 (NSW)*

⁷³ Legislation Review Digest – Fire and Emergency Services Levy Bill 2017, Digest No. 33/56 – 28 March 2017, 15

Carbon Credit (Carbon Farming Initiative) Bill 2011

The Government introduced a package of three Bills for the Carbon Farming Initiative. The package consisted of the *Australian National Registry of Emissions Units Bill 2011*,⁷⁴ *Carbon Credits (Consequential Amendments) Bill 2011*⁷⁵ and the *Carbon Credits (Carbon Farming Initiative) Bill 2011*.⁷⁶

The purpose of the scheme was to help Australia meet its international obligations on Climate Change under the Kyoto Protocol by reducing its emission of greenhouse gases and incentivising people to undertake land sector abatement projects.

The *Carbon Credit (Carbon Farming Initiative) Bill 2011*⁷⁷ exemplified the tendency where the primary legislation sets out the bare bones of the legislative scheme, leaving the detail to be set out in delegated legislation.⁷⁸

In the second reading debate, Senators expressed their concerns that the content of certain clauses would be left to the regulations, creating uncertainty as to what is being scrutinised:

[E]ven within the Carbon Farming Initiative legislation, we do not yet know how much the detail because, so far as the legislation goes, this is one upon which much hangs on the regulations.⁷⁹

The Leader of Government in the Senate argued the point:

I take your point about it being always preferable to have as much detail as possible, but the reality of the way legislation works is that we get the framework of the legislation and then we move to regulations or other things that implement that broad legislation.⁸⁰

One of the Bill's objectives was to create incentives for people to undertake land sector abatement projects. Clause 41 sets out an 'additionality test' to examine projects and ensure that credits are only issued for abatement that would not normally have occurred.

The clause states that a project passes the test, if the project is specified in the regulations and is not required to be undertaken by or under a Commonwealth, State or Territory laws.⁸¹ The regulations would list the activities or types of activities which are additional.

Prior to the making of the regulation, the Minister must consider expert advice (from a body established by the Bill – the Domestic Offsets Integrity Commission (DOIC) and also whether the practice under consideration is a 'common practice'.

The Committee noted the Bill includes some legislative guidance as to the requirements for the regulations, while expressing concerns that it may be difficult to establish what is considered to be

⁷⁴ *Australian National Registry of Emissions Units Bill 2011* (Cth)

⁷⁵ *Carbon Credits (Consequential Amendments) Bill 2011* (Cth)

⁷⁶ *Carbon Credits (Carbon Farming Initiative) Bill 2011* (Cth)

⁷⁷ *Carbon Credit (Carbon Farming Initiative) Bill 2011* (Cth)

⁷⁸ Pearce, Dennis and Argument, Stephen (2012) *Delegated Legislation in Australia* (Australia: LexisNexis Butterworths 2005), Overview, 1.

⁷⁹ Senate, Hansard, 5 July 2011, 1 (Senate Birmingham)

⁸⁰ Senate, Hansard, 5 July 2011, 80 (Senate Evans)

⁸¹ *Carbon Credits (Carbon Farming Initiative) Bill 2011* (Cth) s41

‘common practice’. In their examination, the Committee noted that clause 41 delegated matters of detail to the regulation which could constitute an inappropriate delegation of legislative power.

While Argument doesn’t suggest the package of Bills amounts to skeleton Acts as the Bills are very detailed and descriptive. However, specific clauses delegated matters of detail to the regulations. Clause 41 demonstrates the difficult position that scrutiny committees may encounter when examining Bills and the uncertainty which may be considered an inappropriate delegation of legislative power.

Overall observations

The *Occupational Licensing National Law (WA) Bill 2010*⁸² provides an extreme example of skeleton legislation. However, another noticeable theme emerging from the analysis is that specific clauses of the Bill are skeletal-in-nature and delegate some matters of detail to the regulations as evidenced in the *Fire and Emergencies Levy Bill 2017*⁸³ and the *Carbon Credits (Carbon Farming Initiative) Bill 2011*.⁸⁴

While providing a legislative framework for a scheme may be a practical reality, leaving some matters of detail to the regulations raises questions of uncertainty, a lack of clarity and whether the Parliament has been properly scrutinised the Executive. As demonstrated in the *Fire and Emergencies Levy Bill*⁸⁵ and *Carbon Credits (Carbon Farming Initiative) Bill*⁸⁶, a lack of clarity and uncertainty of delegating matters of detail to legislative instruments could constitute an inappropriate delegation of legislative power.

Safeguard mechanisms and potential avenues of redress

As delegated legislation receives less public and Parliamentary scrutiny than primary legislation and the sheer volume of legislative instruments enacted, the importance of safeguards cannot be understated. The tabling of Bills and regulations, disallowance periods and scrutiny committees are practical ways in which the Parliament controls Executive law-making.⁸⁷

The common law also provides limits on delegating legislative powers, where the delegation is of “such a width or such an uncertainty of the subject matter”⁸⁸ or the delegation of power cannot abdicate an entire head of legislative power.⁸⁹

In the Commonwealth Parliament, the *Legislative Instruments Act 2003*⁹⁰ requires legislative instruments to be published on a public register which has helped provide transparency and accountability in the delegated legislative process.⁹¹

⁸² *Occupational Licensing National Law (WA) Bill 2010*

⁸³ *Fire and Emergencies Levy Bill 2017 (NSW)*

⁸⁴ *Carbon Credits (Carbon Farming Initiative) Bill 2011 (Cth)*

⁸⁵ *Fire and Emergencies Levy Bill 2017 (NSW)*

⁸⁶ *Carbon Credits (Carbon Farming Initiative) Bill 2011 (Cth)*

⁸⁷ Australian Law Reform Commission, *Delegating Legislative Power in Traditional Rights and Freedoms – Encroachments by Commonwealth Laws*, Report 129 (Canberra: Commonwealth of Australia, 2015) 444.

⁸⁸ *The Victorian Stevedoring and General Contracting Company Proprietary Limited v Dignan* (1931) 46 CLR 73, 101.

⁸⁹ Australian Law Reform Commission, *Delegating Legislative Power in Traditional Rights and Freedoms – Encroachments by Commonwealth Laws*, Report 129 (Canberra: Commonwealth of Australia, 2015) 448.

⁹⁰ *Legislative Instruments Act 2003 (Cth)*

⁹¹ *Legislative Instruments Act 2003 (Cth)* Part 4; Australian Law Reform Commission, *Delegating Legislative Power in Traditional Rights and Freedoms – Encroachments by Commonwealth Laws*, Report 129 (Canberra: Commonwealth of Australia, 2015) 444.

The power to disallow regulations is an important tool as the Parliament delegates power to the Executive with a significant degree of supervision and the power of disallowance is crucial to that supervision.⁹² Despite this mechanism, the regulation may still infringe on an individual's rights and liberties as the regulation remains in force until the time taken for a disallowance motion to be passed.

The use of quasi-legislation could diminish the efficacy of disallowance motions. Hickie expressed his concerns that quasi-legislation has the potential of creating an additional platform to alter or vary the content without enacting an amending regulation.⁹³ This would render disallowance periods to be meaningless.⁹⁴

However, Hickie stressed that the importance of preserving the disallowance periods as quasi-legislation is playing a greater role in the regulatory toolbox.⁹⁵ He suggested amendments to target quasi-legislation, such as requiring date stamping to prevent variations without Parliamentary oversight. While Parliamentary oversight won't disallow the relevant quasi-legislation, the disallowance motion would apply to the regulation attached to the respective quasi-legislation.

In addition, Hickie proposed amending legislation to require all publications and other materials to be incorporated into the schedule of the legislative instrument which would greatly improve the quality of quasi-legislation drafting and open up all elements of quasi-legislation to disallowance, removing the 'all or nothing proposition' of completely removing the whole regulation.⁹⁶

As previously mentioned, scrutiny committees have an important role in scrutinising legislation. However, Aronson noted that the prevalence of skeleton legislation, Henry VIII clauses and quasi-legislation posed different challenges to scrutiny committees and whether the standard scrutiny criterion is appropriate:

The whole point of skeleton acts is that they do indeed leave for subordinate legislation many rules that fundamentally change the law, or which are lengthy and complex, or which are designed to effect radical attitudinal or relationship changes.⁹⁷

To provide comment on delegated legislation in matters of policy whilst maintaining strict political neutrality is a delicate balancing act. However, Pearce suggested that non-partisanship could co-exist alongside policy scrutiny.⁹⁸ The House of Lords Secondary Legislation Scrutiny Committee examines delegated legislation with a policy ambit but limits itself to reporting on major policy issues and matters which the Committee believes the House may wish take action.⁹⁹ Pearce noted the Secondary Legislation Scrutiny Committee model could apply to Australian and New Zealand Parliaments to provide oversight of delegated legislation.

The importance of explanatory memorandums and pre-making consultation with scrutiny committees will enhance transparency, accountability and accessibility of delegated legislation. While Pearce

⁹² Pearce, Dennis (2009) Legislative Scrutiny: Are the Anzacs still the leaders? In *Australia-New Zealand Scrutiny of Legislation Conference* – Canberra, Australian Capital Territory, available at: (https://www.aph.gov.au/About_Parliament/Senate/Whats_On/Conferences/sl_conference/papers/pearce).

⁹³ Hickie, Scott (2012) *Diminishing the efficacy of disallowance motions: quasi-legislation in state jurisdictions*, Australasian Parliamentary Review, Vol. 27(1), 96.

⁹⁴ Ibid. 94.

⁹⁵ Ibid. 96.

⁹⁶ Ibid.

⁹⁷ Aronson, Mark (2011) *Subordinate legislation: lively scrutiny or politics in seclusion*, Australasian Parliamentary Review, Vol 26(2), 11.

⁹⁸ Pearce, Dennis (2009) Legislative Scrutiny: Are the Anzacs still the leaders? In *Australia-New Zealand Scrutiny of Legislation Conference* – Canberra, Australian Capital Territory, available at: (https://www.aph.gov.au/About_Parliament/Senate/Whats_On/Conferences/sl_conference/papers/pearce),11.

⁹⁹ Ibid. 10.

noted that explanatory statements are an aid to assist the Parliament and the public's understanding of the legislation, however the quality and detail of the explanatory notes varies considerably.¹⁰⁰ Aronson stressed greater detail be provided in explanatory statements.¹⁰¹

While the Senate Regulations and Ordinance Committee provides guidelines as to what an explanatory memorandum should contain,¹⁰² Pearce notes that the Committee only requires the essential features of the legislation as opposed to asking for too much detail.¹⁰³

Given the Committees' ambit to scrutinise delegated legislation, the importance of pre-making consultations would be a valuable resource and governmental agencies. In a majority of Australian Parliaments, there is no obligation to engage in pre-making consultation with scrutiny committees at the regulation's drafting stage.¹⁰⁴

Pearce stressed the importance of providing an avenue for affected parties to voice their concerns. While Regulatory Impact Statements is a positive step, there is significant benefit in amending legislation to mandate pre-consultation processes with scrutiny committees in relation to more significant pieces of delegated legislation, similar to the Victorian Parliament.¹⁰⁵ This process would allow the Committee to keep the Executive accountable and provide a level of transparency for more significant pieces of delegated legislation. At the same time, the Executive will be able to address any potential issues before they arise – creating a mutually beneficial arrangement between the Executive and scrutiny committees.

Conclusion

The increasing amounts and the Executive's usage of delegated legislation have implications that legislative instruments may affect the public as much as an Act of Parliament. The prevalence of skeleton legislation and other inappropriate delegations of legislative power including Henry VIII clauses and quasi-legislation may diminish the role of Parliamentary scrutiny on the Executive's actions and but raises the question of whether the information may be more appropriate in primary legislation.

While traditional safeguards provide assurances to control Executive law-making, the tendency to delegate matters of detail to legislative instruments has raised question of the Parliament's capacity to appropriately scrutinised the Executive's actions.

¹⁰⁰ Pearce, Dennis (2009) Legislative Scrutiny: Are the Anzacs still the leaders? In *Australia-New Zealand Scrutiny of Legislation Conference* – Canberra, Australian Capital Territory, available at: (https://www.aph.gov.au/About_Parliament/Senate/Whats_On/Conferences/sl_conference/papers/pearce),2.

¹⁰¹ Aronson, Mark (2011) *Subordinate legislation: lively scrutiny or politics in seclusion*, Australasian Parliamentary Review, Vol 26(2),14.

¹⁰² Provide a plain English explanation, state the authority for making the instrument, summarise the likely impact and effect, discuss any unusual aspects or matters that call for special comment, give reasons for and the basis upon which charges or fees have been increased or decreased, advise where required, that consultation has taken place and the effect of that consultation, provide a detailed provision-by-provision description of the instrument and be precise and informative.

¹⁰³ Pearce, Dennis (2009) Legislative Scrutiny: Are the Anzacs still the leaders? In *Australia-New Zealand Scrutiny of Legislation Conference* – Canberra, Australian Capital Territory, available at: (https://www.aph.gov.au/About_Parliament/Senate/Whats_On/Conferences/sl_conference/papers/pearce), p3.

¹⁰⁴ Pearce, Dennis (2009) Legislative Scrutiny: Are the Anzacs still the leaders? In *Australia-New Zealand Scrutiny of Legislation Conference* – Canberra, Australian Capital Territory, available at: (https://www.aph.gov.au/About_Parliament/Senate/Whats_On/Conferences/sl_conference/papers/pearce).

¹⁰⁵ *Subordinate Legislation Act 1994* (Vic) Part 2

Legal and political academics have raised concerns that legislation may become so skeletal in nature that in order to give it substance, it would rely on subordinate legislation. Furthermore, the cross jurisdictional analysis has indicated that while Bills are detailed and descriptive, there is a frequency for specific clauses to be skeletal in nature.

An underlying area of importance, inappropriate delegation of legislative power to legislative instruments poses questions of uncertainty and a lack of clarity of primary legislation. The Parliament risks ceding a significant part of their capacity to scrutinise the Executive however, there are avenues of potential redress including a public registry for delegated legislation, date stamping of any amendments made to legislative instruments and a pre-making consultation process with scrutiny committees for major pieces of delegated legislation which would increase accountability and transparency.

While matters are just under the surface, the importance of the preserving Parliament's role to scrutinise the Executive's actions cannot be understated.

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