

Chapter 5

Parliamentary Scrutiny of Legislation

In order to understand fully the relevance of parliamentary scrutiny to the issues raised by quasi-legislation, it is useful to review and consider the scrutiny processes which are currently applied to the conventional varieties of legislation.

Parliamentary Scrutiny of Bills

An Act passed by the Commonwealth Parliament is, necessarily, subject to the most comprehensive parliamentary scrutiny. Pursuant to section 1 of the *Constitution*, the legislative power of the Commonwealth is vested in the 'Federal Parliament', consisting of the Queen, the House of Representatives and the Senate. Commonwealth Acts, which are the most obvious and potent exercise of this legislative power, must be passed by both Houses of the Parliament and then assented to by the Queen or, as happens in most cases, her representative in Australia, the Governor-General. Bills for such Acts are generally debated in both Houses of the Parliament prior to passage. The opportunity for such debate is the primary avenue through which parliamentary scrutiny is exercised.

The Senate Standing Committee for the Scrutiny of Bills

Bills introduced into the Parliament are subject to scrutiny in the Senate which goes beyond the requirements of the *Constitution*. First, there are the processes of the Senate Standing Committee for the Scrutiny of Bills. Initially formed in 1981, this Committee examines all bills introduced into the Parliament¹ against five principles which are set out in the Senate's Standing Orders and which operate as its terms of reference. The Committee is required to report on whether bills introduced into the Senate, by express words or otherwise,

- (i) trespass unduly on personal rights and liberties;

¹ It should be noted that the Committee is formally empowered to report only on bills introduced in the Senate. However, the Committee has relied on paragraph 24(1)(b) of the Senate Standing Orders (which allows it to consider any 'proposed' law, notwithstanding that the relevant bill has not been introduced in the Senate) as authority for its practice of examining bills as they are introduced in the House of Representatives. Given that 70-80% of bills originate in the House, the Committee therefore has the opportunity to examine and then provide its initial views on most bills prior to their introduction in the Senate. The Committee is also able to consider clauses in Acts. For further background on the history and operation of the Committee see, generally, Senate Standing Committee for the Scrutiny of Bills, *The Operation of the Senate Standing Committee for the Scrutiny of Bills, 1981-1985*, Parliamentary Paper No 317 of 1985.

- (ii) make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers;
- (iii) make such rights, liberties or obligations unduly dependent upon non-reviewable decisions;
- (iv) inappropriately delegate legislative powers; or
- (v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.²

These scrutiny criteria fall into two basic categories. Principles (i) to (iii) are essentially concerned with protecting personal rights and liberties. Principles (iv) and (v) are aimed at protecting and preserving the legislative power of the Parliament. Interestingly, it is under principle (v), which requires the Committee to draw attention to provisions in bills which inappropriately delegate legislative power, that many examples of quasi-legislation have been identified by the Committee.³

The scrutiny carried out by the Scrutiny of Bills Committee is very much a technical examination. In its consideration of bills, the Committee actively avoids the policy and political elements of those bills. Indeed, this is an integral part of the operation of the Committee and contributes in no small measure to the bipartisan and apolitical manner in which the Committee operates.⁴

² Senate Standing Order 24(1)(a).

³ See Senate Standing Committee for the Scrutiny of Bills, *Annual Report 1988-1989 (Journals of the Senate*, No 59, 21 December 1990, p 688), pp 41-2.

⁴ See Senate Standing Committee for the Scrutiny of Bills, *The Operation of the Senate Standing Committee for the Scrutiny of Bills, 1981-1985*, Parliamentary Paper No 317 of 1985, pp 1-2.

Reference of Bills to Senate Legislative and General Purpose Standing Committees

Though the Scrutiny of Bills Committee steadfastly avoids the political element of bills, a recent innovation in the Senate has introduced a further form of scrutiny which is not so constrained. When the 36th Parliament commenced, on 8 May 1990, the Senate adopted a series of procedures which were intended to facilitate the detailed examination of bills by the Senate's legislative and general purpose standing committees.⁵ The new procedures were adopted following recommendations contained in the Report of the Senate Select Committee on Legislation Procedures,⁶ which was tabled in the Senate on 1 December 1988.⁷

Such examination by the legislative and general purpose standing committees was (and, indeed, still is) always possible under the existing procedures. Indeed, committees such as the Senate Standing Committee on Legal and Constitutional Affairs (and its predecessor in title, the Senate Standing Committee on Constitutional and Legal Affairs) have conducted numerous, detailed inquiries into bills referred to them by the Senate for examination and report.⁸ Prior to the new procedures, however, a formal motion and a resolution of the Senate was required to refer a bill to a committee.⁹ Compared to the number of bills passing through the Senate, this happened relatively rarely. In its Report, the Senate Select Committee on Legislation Procedures listed 34 bills which had been referred to committees in the 18 years prior to that report.¹⁰

Under the new procedures, which were explicitly intended to increase the frequency of such referrals,¹¹ bills are referred on the recommendation of a Selection of Bills Committee, which reports to

⁵ See *Journals of the Senate*, No 212, 5 December 1989, pp 2303-5. For the full text of the procedures, see *The Senate, Standing and other Orders*, pp 133-43.

⁶ Parliamentary Paper No 398 of 1988.

⁷ *Journals of the Senate*, No 119, 1 December 1988, p 1225.

⁸ See, eg, Senate Standing Committee on Constitutional and Legal Affairs, *Freedom of Information: Report on the Freedom of Information Bill 1978 and aspects of the Archives Bill 1978* (Parliamentary Paper No 272 of 1979); Senate Standing Committee on Education and the Arts, *Report on the Archives Bill 1978* (Parliamentary Paper No 219 of 1979) and *Report on Broadcasting and Television Amendment Bill 1980* (Parliamentary Paper No 132 of 1980); Senate Standing Committee on Constitutional and Legal Affairs, *The National Crime Authority Bill 1983* (Parliamentary Paper No 30 of 1984); Senate Standing Committee on National Resources, *Plant Variety Rights* (Parliamentary Paper No 63 of 1984); Senate Select Committee on Television Equalisation, *Television Equalisation: Report of the Senate Select Committee* (Parliamentary Paper No 106 of 1987); Senate Standing Committee on Legal and Constitutional Affairs, *Administrative Decisions (Judicial Review) Amendment Bill 1987* (Parliamentary Paper No 212 of 1987), *The Operation and Administration of the Freedom of Information Legislation* (Parliamentary Paper No 441 of 1987), *Matters relating to the War Crimes Amendment Bill 1987* (Parliamentary Paper No 394 of 1988), *Cash Transaction Reports Bill 1987* (Parliamentary Paper No 395 of 1988), *Matters relating to the Defence Service Homes Amendment Bill 1988* (Parliamentary Paper No 479 of 1989).

⁹ While a motion and vote is still required under the new procedures (a motion to accept the recommendations of the Selection of Bills Committee), the recommendations of the Selection of Bills Committee have generally been adopted by the Senate as a matter of course.

¹⁰ See Senate Select Committee on Legislation Procedures, *Report*, Parliamentary Paper No. 398 of 1988, Appendix 1. See also McNaughton, B, 'The Senate's committee system and new procedures for reviewing legislation', *Australian Institute of Administrative Law Newsletter*, No 2 1990, 5, at p 6.

¹¹ *Ibid.*, at p 26 (Conclusion (a)).

the Senate weekly during the sittings of the Senate. In its report, that Committee recommends in respect of each bill introduced that it should or should not be referred to a relevant legislative and general purpose standing committee.

Between August¹² and December 1990, the Selection of Bills Committee considered a total of 94 bills. It recommended that 27 of those bills be referred to committees. Of those 27 bills, 22 were actually referred, in whole or in part, to committees.¹³ Clearly, the number of bills referred represents a significant proportion of those introduced into the Senate during the relevant period. The proportion of bills referred, in turn, represents a significant increase compared to previous experience. In that respect, it would appear that the new procedures are having the desired effect.

As to the nature and value of the scrutiny which has been brought to bear under the new procedures, it is probably too early to draw any firm conclusions. The examination conducted by the several committees which have had bills referred has been varied. Similarly, the committee inquiries have yielded a range of results and an assortment of quite different reports.¹⁴ However, it has been asserted that the legislative process has been generally enhanced by this innovation.¹⁵ In any event, it is my firm view (and, indeed, a central tenet of this paper) that legislation (in all of its various forms) can only benefit from being subject to additional scrutiny such as this.

As far as parliamentary scrutiny is concerned, it is clear that bills (which then become Acts) are subject to the most comprehensive and detailed scrutiny. Given the potential effect of such bills, which become laws of the land, it is only appropriate that this level of scrutiny be directed at them.

Parliamentary Scrutiny of Delegated Legislation

Delegated or 'subordinate' legislation is subject to a quite different form of parliamentary scrutiny which is, in some respects, more exacting than that directed at bills. The key to this scrutiny is Part XII of the *Acts Interpretation Act 1901*, which sets out fairly detailed conditions governing the validity of regulations. For example, paragraph 48(1)(a) requires that all regulations be notified in the

¹² When the Senate resumed on 8 May 1990, it was agreed that the commencement of the new procedures should be deferred until the first sitting day in August (see *Journals of the Senate*, No 1, 8 May 1990, p 29).

¹³ See *Business of the Senate* for the period of 1 January to 31 December 1990, pp 42-6.

¹⁴ See, eg, Senate Standing Committee on Finance and Public Administration, *Report on the Petroleum Resource Rent Legislation Amendment Bill 1991, Petroleum (Submerged Lands) Amendment Bill 1991, Petroleum (Submerged Lands) (Royalty) Amendment Bill 1991* (see *Journals of the Senate*, No 95, 5 June 1991, pp 1129-30); Senate Standing Committee on Legal and Constitutional Affairs, *The Proposed Tax File Number Provisions and Data-Matching Program* (see *Journals of the Senate*, No 52, 11 December 1990, p 542); Senate Standing Committee on Industry, Science and Technology, *Report on the consideration of the Patents Bill 1990* (see *Journals of the Senate*, No 24, 13 September 1990, p 265).

¹⁵ See, generally, Evans, H, 'Consideration of legislation by committees', *The Table*, Vol. LVII, 1990, p 16 and, by the same author, 'Reference of Bills to Senate Committees', *The House Magazine*, 12 December 1990, p 5.

Gazette. Paragraph 48(1)(b) provides that, unless otherwise specified in the document itself, a regulation takes effect from the date of its notification. Subsection 48(2) then sets out stringent criteria in relation to regulations expressed to take effect prior to notification.

However, while these clauses are important, from a scrutiny point of view the most significant provisions contained in Part XII are probably those requiring the tabling of regulations in both Houses of the Parliament and the ensuing provisions which set out the procedures governing disallowance of a regulation by either House. Those provisions are contained in section 48.

Briefly, paragraph 48(1)(c) requires that all regulations be tabled in each House of the Parliament within 15 sitting days of being made. Failure to observe this requirement results in the regulations ceasing to have effect (subsection 48(3)). Subsection 48(4) provides:

If either House of the Parliament, in pursuance of a motion of which notice has been given within 15 sitting days after any regulations have been laid before that House, passes a resolution disallowing any of those regulations, any regulation so disallowed ceases to have effect.

Subsection 48(5) provides that if a notice of motion given within the 15 days after a regulation has been tabled has not been dealt with within a further 15 sitting days of the notice having been given, then the regulation is deemed to have been disallowed. This is intended to ensure that a motion of disallowance cannot be adjourned indefinitely and facilitates the form of disallowance commonly referred to as 'disallowance by effluxion of time'.¹⁶ Further provisions deal with the effect of the dissolution etc of the House of Representatives on such a motion (subsection 48(5A)), the effect of disallowance (subsections 48(6) and (7) and section 50) and restrict the re-making of disallowed regulations (sections 48A, 48B, 49). In the context of parliamentary scrutiny, however, it is those provisions dealing with tabling and disallowance that are the most significant.

The Senate Standing Committee on Regulations and Ordinances

Since 1931, the Senate has been assisted in its scrutiny of delegated legislation by the Senate Standing Committee on Regulations and Ordinances. Like the Scrutiny of Bills Committee, the Regulations and Ordinances Committee operates pursuant to terms of reference set out in Senate Standing Orders. Standing Order 23(2) states:

All regulations, ordinances and other instruments made under the authority of Acts of the Parliament, which are subject to disallowance or disapproval by the Senate and which are legislative in character, stand referred to the [Regulations and

¹⁶ See, generally, Senate Standing Committee on Regulations and Ordinances, *Seventy-ninth Report*, Parliamentary Paper No 170 of 1986.

Ordinances] Committee for consideration and, if necessary, report.

Pursuant to Standing Order 23(3), the Committee is required to scrutinise each instrument so referred to ensure:

- (a) that it is in accordance with the statute;
- (b) that it does not trespass unduly on personal rights and liberties;
- (c) that it does not unduly make the rights and liberties of citizens dependent upon administrative decisions which are not subject to review of their merits by a judicial or other independent tribunal; and
- (d) that it does not contain matter more appropriate for parliamentary enactment.

As does the Scrutiny of Bills Committee, the Regulations and Ordinances Committee carries out a strictly technical scrutiny of the instruments referred and operates in a bipartisan and apolitical manner. If the Committee moves a motion of disallowance, as provided for by subsection 48(4) of the *Acts Interpretation Act*, that motion, unless withdrawn by the Committee, invariably results in the disallowance of the instrument in question. This is considered to be a reflection of both the expertise of the Committee in this area and also the esteem in which its recommendations are held by the Senate. It also acknowledges, at least informally, the gravity of the Committee moving such a motion, as the Committee goes through a series of consultative steps (principally involving correspondence between the Committee and the relevant Minister) before doing so and uses the motion for disallowance only as a last resort.¹⁷

Disallowable Instruments - Section 46A of the *Acts Interpretation Act 1901*

The final category of legislative instrument which needs to be discussed is the so-called 'disallowable instrument'. In 1987, the *Acts Interpretation Act 1901* was amended by the *Statute Law (Miscellaneous Provisions) Act 1987*.¹⁸ Those amendments inserted a new section 46A, which provides:

Disallowable instruments

46A. (1) Where a provision (in this subsection called the "enabling provision") of a law confers power to make an instrument (however described) and expressly provides that

¹⁷ For further background on the history and operation of the Senate Standing Committee on Regulations and Ordinances see, eg, its *Eightieth Report* (Parliamentary Paper No 241 of 1986) or any of the Committee's annual reports.

¹⁸ Act No 141 of 1987. See, in particular, Schedule 1.

the instrument is a disallowable instrument for the purposes of this section, then, except so far as the law otherwise provides:

- (a) sections 48, 48A, 48B, 49 and 50 [of the *Acts Interpretation Act 1901*] apply as if:
- (i) references to regulations were references to the instrument;
 - (ii) references to a regulation were references to a provision of the instrument;
 - (iii) references to repeal were references to revocation;
 - (iiia) references in subsection 48(7) to another regulation included references to a provision of another instrument made under the enabling provision; and
 - (iv) where the enabling provision is a provision of regulations - references to an Act were references to regulations;
- (b) section 49A applies to the instrument as if:
- (i) the instrument were regulations under an Act; and
 - (ii) the reference in paragraph (1)(a) to regulations included a reference to other instruments made under the enabling provision;
- (c) the instrument shall not to be taken to be a statutory rule within the meaning of the *Statutory Rules Publication Act 1903*, but subsections 5(3) to (3C) (inclusive) of that Act apply as they apply in relation to statutory rules;
- (d) for the purposes of the application of subsection 5(3B) of that Act under paragraph (c) of this subsection, the reference to the Minister specified in that subsection shall be read as a reference to a Minister administering the enabling provision;
- (e) if the instrument is not an order made under the authority of a Minister, section 5 of the *Evidence Act 1905* applies in relation to the instrument as it applies in relation to such an order; and
- (f) if the enabling provision is a provision of regulations, the instrument shall be deemed to be an enactment for the purposes of the *Administrative Appeals Tribunal Act 1975*.
- (2) A reference in subsection (1) to a law is a reference to an Act or to regulations.¹⁹

The principal effect of section 46A is that it subjects certain instruments to the same tabling requirements and parliamentary disallowance procedures as apply to regulations pursuant to section 48. Prior to the insertion of section 46A, if an instrument was to be subject to these requirements and procedures, it was necessary to set this out in the legislation which authorised the making of the instrument. As the Explanatory Memorandum to the Statute Law (Miscellaneous Provisions) Bill 1987 points out, '[t]he standard

¹⁹ Section 46A was subsequently amended by the *Statutory Instruments (Tabling and Disallowance) Legislation Amendment Act 1988* (Act No. 99 of 1988) which, *inter alia*, inserted subparagraph (iiia).

provision consists of four subsections that are always identical'.²⁰ As a result of the insertion of section 46A, it is only necessary to state that an instrument as a 'disallowable instrument' for the purposes of section 46A.²¹

As a result of the application of the tabling and disallowance provisions of the *Acts Interpretation Act*, in conjunction with Senate Standing Order 23(2), disallowable instruments come under the scrutiny of the Senate Standing Committee on Regulations and Ordinances. They are subject to the same level of scrutiny and, ultimately, the same sanctions as regulations.

It is worthwhile at this stage to note also the effect of paragraph 46(1)(c). This paragraph exempts any instrument which is designated as a 'disallowable instrument' from the publication requirements of the *Statutory Rules Publication Act 1903*. The relevance of this provision is considered in greater detail in Chapter 6 below.

Summary

The Commonwealth Parliament has mechanisms in place to deal with three basic levels of conventional legislative instrument. At one end of the spectrum, bills receive the greatest scrutiny. At the other, disallowable instruments receive somewhat less. It is suggested that, in each case, the legislative instruments involved are generally subject to the level of scrutiny which is *appropriate*.

²⁰ Explanatory Memorandum, p 7. A good example of a pre-s46A disallowance mechanism is contained in the *Environment Protection (Impact of Proposals) Act 1974*, ss 7-7C.

²¹ For a good example of a post-s46A disallowance provision, see s45 of the *Superannuation Act 1990*.

Chapter 6

Parliamentary Scrutiny of Quasi-legislation

It would be wrong to assume that existing forms of quasi-legislation completely escape scrutiny by the Commonwealth Parliament. Equally, it would be wrong to assume that parliamentary scrutiny is the complete answer to all of the problems which quasi-legislation poses. This chapter identifies and discusses the ways in which the Commonwealth Parliament currently deals with quasi-legislation and then, in the light of this discussion, highlights the advantages that parliamentary scrutiny has to offer.

The Role of the Senate Standing Committee for the Scrutiny of Bills

In considering the role of the Commonwealth Parliament in relation to quasi-legislation, it should be remembered that the provisions under which all of the examples of quasi-legislation identified in Chapter 3 were promulgated were, themselves, passed by the Parliament. Equally, it should be remembered that it is quite conceivable that Parliament explicitly desires that these sorts of provisions be enacted. Emeritus Professor Douglas Whalan (in his capacity as legal adviser to the Senate Standing Committee on Regulations and Ordinances) has observed that

[t]he first opportunity to consider and, if needs be, curb delegation is during the passage of primary legislation through the Parliament. The Parliament can, in theory, authorise virtually any degree of delegation that it wishes in an Act.²²

Similarly, the Parliament can enact provisions which authorise the making of whatever instruments it wants. However, whether the Parliament intends that such provisions should be enacted or not, it is the role of the Senate Standing Committee for the Scrutiny of Bills to draw attention to such provisions if the Committee considers that they infringe its terms of reference. As noted in Chapter 5 above, Senate Standing Order 24(1)(a)(iv) requires the Committee to draw attention to provisions which 'inappropriately delegate legislative power'. Indeed, as noted in Chapters 2 and 3 above, the Committee does regularly draw attention pursuant to this principle to provisions which, if enacted, would authorise the making of instruments such as those with which this paper is concerned.²³ In that sense, the

²² Senate Standing Committee on Regulations and Ordinances, *Eighty-seventh Report (Journals of the Senate*, No 47, 29 November 1990, p 494).

²³ See Senate Standing Committee for the Scrutiny of Bills, *Annual Report 1988-89 (Journals of the Senate*, No 59, 21 December 1990, p 688).

Committee has a very important role. It acts as what Professor Whalan has called 'the first bulwark' against such instruments.²⁴

However, unlike its sister committee, the Senate Standing Committee on Regulations and Ordinances, the Scrutiny of Bills Committee has limited power to exercise in relation to such provisions. The Scrutiny of Bills Committee can do no more than draw attention to provisions which, in its view, inappropriately delegate legislative power. It is then up to the Senate and to individual Senators to act upon the Committee's concerns.

To illustrate the limits on the Committee's ability to influence the enactment or not of provisions which cause it concern, it is useful to refer to some of the examples set out in Chapter 3. As noted in that chapter, in 1988 the Committee drew the Senate's attention to provisions in the Social Security Legislation Amendment Bill 1988 which proposed to insert certain new provisions into the *Social Security Act 1947*. The Committee drew attention to a provision which, if enacted, would allow the relevant Minister to issue directions which would govern the exercise of the Secretary's discretion to waive or write-off debts. In particular, the Committee was concerned that not only would the Secretary be bound by those directions but so would the Social Security Appeals Tribunal and the Administrative Appeals Tribunal in reviewing the Secretary's decisions.²⁵

Having drawn attention to the provisions, it was up to the Senate to decide whether or not it wished to enact them in that form. In the Committee stage of the Bill, Senator Janet Powell of the Australian Democrats (and a member of the Scrutiny of Bills Committee) moved an amendment that took in the Scrutiny of Bills Committee's concerns. That amendment was defeated.²⁶ As a result, the Bill passed into law with the provisions intact.²⁷

Conversely, in 1990 the Scrutiny of Bills Committee raised some concerns in relation to the Occupational Health and Safety (Commonwealth Employment) Bill 1990. As noted in Chapter 3

²⁴ Senate Standing Committee on Regulations and Ordinances, *Eighty-seventh Report (Journals of the Senate*, No 47, 29 November 1990, p 494).

²⁵ See, generally, Senate Standing Committee for the Scrutiny of Bills, *Seventeenth Report of 1988*, Parliamentary Paper No 402 of 1988, pp 264-6, 289-91.

²⁶ See Senate, *Hansard*, 13 December 1988, p 4070.

²⁷ However, in June 1991, the Senate considered the Social Security Legislation Amendment Bill 1991, which proposed certain amendments to the *Social Security Act 1947*. On 5 June 1991, Senator Lees, on behalf of the Australian Democrats, moved an amendment to the bill which had the effect of amending 251 of the 1947 Act, to make determinations made pursuant to 251(1B) disallowable instruments for the purposes of 46A of the *Acts Interpretation Act 1901*. The amendment was passed (see *Journals of the Senate*, No 95, 5 June 1991, at p 1137). The House of Representatives accepted the Senate's amendment.

It should also be noted that, earlier in 1991, the Parliament passed the *Social Security Act 1991*. That Act, which commenced on 1 July 1991, replaces the *Social Security Act 1947*. Section 1237 of the 1991 Act is in identical terms to section 251 of the 1947 Act (without the amendment of 5 June). However, on 19 June 1991, the Senate passed an amendment to the Social Security Legislation Amendment Bill (No 2) 1991, which had the effect of amending s1237 of the 1991 Act to make determinations pursuant to that section disallowable instruments (see *Journals of the Senate*, No 99, 19 June 1991, at p 1233). The House of Representatives accepted the Senate's amendment.

above, the Committee indicated that it was concerned about the use to which certain codes of practice which were to be authorised by the Bill could be put in court proceedings.²⁸

In accordance with its usual procedures, the Committee drew its concerns to the attention of the Minister responsible for the Bill, Senator Cook. Senator Cook responded to the Committee in writing. He indicated that, while he did not share the Committee's concerns about the provisions identified, he was prepared to amend the Bill to make the codes of practice subject to disallowance if the Committee adhered to its original view.²⁹

In its *Eleventh Report of 1990*, the Scrutiny of Bills Committee indicated that, having considered the Minister's response, it remained of the view that the codes of practice should be disallowable, given the use that the codes could be put in court proceedings.³⁰ In the Committee stage of the Bill, the Minister duly moved an amendment to the Bill to make the codes of practice disallowable instruments for the purposes of section 46A of the *Acts Interpretation Act 1901*.³¹ In moving the amendment, the Minister acknowledged the role of the Scrutiny of Bills Committee in its conception. He went on to say:

The fact that the Government has accepted this amendment indicates yet again the value and utility of the Scrutiny of Bills Committee and the role of that Committee in the Senate.³²

While this vote of confidence from the Minister may have made the Committee's success in this matter a little sweeter, it should not be allowed to cloud the realities of the Committee's role in these matters. The Committee has its victories but it also has more than its share of defeats. Success or failure often depends on whether or not Opposition, Australian Democrat or Independent senators pick up the Committee's concerns. As a scrutineer of quasi-legislation the Committee can do little more than identify new provisions which would serve to that form of legislation and to draw such provisions to the attention of the Senate.

The Role of the Senate Standing Committee on Regulations and Ordinances

As was noted above, the Commonwealth Parliament essentially can (subject to certain constitutional limitations) delegate whatever it wishes. Professor Whalan has observed that

²⁸ See, generally, Senate Standing Committee for the Scrutiny of Bills, *Alert Digest No 9 of 1990 (Journals of the Senate, No 38, 7 November 1990, p 390)*, pp 16-8.

²⁹ See, generally, letter from Minister for Industrial Relations to Chairman of the Committee, dated 5 December 1990 (reproduced in Senate Standing Committee for the Scrutiny of Bills, *Eleventh Report of 1990 (12 December 1990)*, pp 230-2), especially at p 3.

³⁰ Senate Standing Committee for the Scrutiny of Bills, *Eleventh Report of 1990 (Journals of the Senate, No 53, 12 December 1990, p 555)*, p 218.

³¹ Senate, *Hansard*, 18 February 1991, p 723.

³² *Ibid.*

[o]nce that has happened the Regulations and Ordinances Committee is not in a very strong position to do a great deal, if the delegation or subdelegation is technically valid.³³

If the Scrutiny of Bills Committee has failed to prevent the passage of what it regards to be an inappropriate delegation of legislative power, there is little that the Regulations and Ordinances Committee can do beyond ensuring that any instrument promulgated pursuant to such a provision accords with any formalities contained in the enabling provision, such as, in the case of disallowable instruments, tabling requirements.

Despite this apparent impotence, in 1990 the Committee took what, on reflection, appears to be an innovative and courageous step. The Committee's attention had been drawn to a determination issued pursuant to paragraph 98C(1)(b) of the *National Health Act 1953*, which related to computerised accounting systems to be installed in pharmacies in accordance with requirements of the Act and in connection with the supply of pharmaceutical benefits. After observing that the determination did not 'appear' to be subject to tabling and disallowance (in fact, it clearly *is not*), the Committee said:

However, it is clearly a legislative instrument, affecting as it does the rights and obligations of classes of persons. The Committee decided that it would scrutinise the instrument in the same way it does other delegated legislation, although it may not be possible to give a protective motion of disallowance.³⁴

The Committee went on to say that it had decided on this course of action

because it [had] often expressed the view that such instruments should be subject to tabling and disallowance. Also, the Committee receives such a high level of cooperation from Ministers that it is appropriate to raise possible defects in such instruments.³⁵

In other words, relying on its record and its high standing with Ministers, the Committee was chancing its arm.

Having invited itself to scrutinise the instrument in question, the Committee noted that the copy which it had received was neither signed nor dated. The instrument referred to Schedules 2, 3, 4 and 5,

³³ Senate Standing Committee on Regulations and Ordinances, *Eighty-seventh Report (Journals of the Senate*, No 47, 29 November 1990, p 494).

³⁴ Senate, *Hansard*, 4 December 1990, p 4884.

³⁵ *Ibid.*

none of which were attached to the copy which had been provided to the Committee. With these matters in mind, the Committee suggested that

[i]f the original instrument is purported to be made in this fashion it may be invalid. If the original was validly made then defective copies should not be circulated to the public.³⁶

The Committee went on to point out several other defects and possible defects in the instrument.³⁷ For present purposes, it is not necessary to identify them all. The importance of this example is that not only does it provide a further illustration of the kinds of problems which these instruments can involve but also indicates that the Parliament and its committees are not necessarily prevented from directing their attention at such instruments merely because they are under no formal duty to do so.³⁸

Delegated Legislation Monitor

In October 1989, the Procedure Office of the Senate published a document which it called the 'Delegated Legislation Monitor'. The first issue indicated that it would be the pilot of a regular series of Monitors which would 'bring together details of all disallowable instruments of delegated legislation tabled in the Senate'.³⁹ It stated that its object was

to record the numbers, variety and purpose of instruments of delegated legislation which are made under the authority of Acts of the Parliament.⁴⁰

The Monitor acknowledged that these instruments are, of course, listed in the Journals of the Senate. However, they are not necessarily easy to find and, in any event, in order to keep track of such instruments access and attention to the Journals is required. The Monitor set out to provide

quick access in one series to such instruments and supply other information including a brief summary of the effect of each instrument. It is understood that the executive does not keep a similar monitor listing all the legislation it, and its agents make with the permission and authority of the Parliament.⁴¹

³⁶ Senate, *Hansard*, 4 December 1990, p 4884.

³⁷ *Ibid.*

³⁸ At the time of submission, the Regulations and Ordinances Committee had written a letter to the relevant Minister, drawing his attention to the matters which they had raised, and had received (but not made public) a reply.

³⁹ Department of the Senate, *Delegated Legislation Monitor No 1 of 1989*, 3-6 October 1989, p 1.

⁴⁰ *Ibid.*

⁴¹ Department of the Senate, *Delegated Legislation Monitor No 1 of 1989*, 3-6 October 1989, p 1.

The introduction to the first Monitor concludes with this statement:

Delegated legislation made by the executive in accordance with provisions of Acts of the Parliament is not much less significant in the rights and obligations it creates than rights and obligations imposed under the parent Acts which authorise such delegated legislation in the first place. The Houses of the Parliament have a duty to supervise executive law making as part of their general broader supervision and control of the executive. This Monitor will help them to perform that role.⁴²

The Delegated Legislation Monitor has, as foreshadowed in the first issue, continued to list, on a weekly basis, disallowable instruments tabled in the Senate. As such, it is a useful tool in keeping track of such instruments and a worthwhile innovation.

The Significance of Tabling in the Parliament

It is useful at this point to make a brief comment about the consequences of quasi-legislative or other instruments being tabled in the Parliament. Tabling does not, of itself, give an instrument a characteristic or effect which the instrument would not otherwise have. However, tabling is relevant as a means of ensuring that documents are made public, in the first instance, and are then available for examination by the Parliament.

Limitations on Parliamentary Scrutiny of Quasi-legislation

The two legislative scrutiny committees of the Senate (ie the Standing Committee for the Scrutiny of Bills and the Standing Committee on Regulations and Ordinances) are, because of their expertise in such matters and their access to legal advice, probably best equipped to fulfil the role of parliamentary scrutineer of quasi-legislation. However, as noted above, their powers in this area are limited. The Scrutiny of Bills Committee requires the support of the Senate if it is to prevent the enactment of provisions which cause it concern. The Regulations and Ordinances Committee relies, to a large extent, on the Scrutiny of Bills Committee, as there is little that the Regulations and Ordinances Committee can do once a provision which enables the promulgation of an instrument has been enacted.

Both Committees are also limited in what they can do by their terms of reference. Since the terms of reference of both Committees are quite deliberately limited to matters of technical scrutiny, so too is the scrutiny which those Committees are able to apply to such instruments. Policy aspects of such instruments are expressly out of bounds. Even if the Scrutiny of Bills Committee has been successful in ensuring that an instrument is disallowable and, therefore, accessible

⁴² *Ibid.*

to the scrutiny of its sister committee, that Committee cannot examine the policy elements of such instruments. This is, clearly, a significant limitation on such scrutiny.

Another limitation is the capacity of Parliament to make a constructive contribution to such instruments. In its *Report on Parliamentary Scrutiny of Rules of Court*,⁴³ which is discussed in Chapter 3 above, the Senate Standing Committee on Constitutional and Legal Affairs (as it then was) was cautious about the role that the Parliament could take in relation to such rules. The Committee said that it was

concerned to ensure that Parliament's role in respect of rules of court is a constructive one. In the past, Parliament has exercised its power of disallowance [in relation to rules of court] only rarely because it, and its committees, have lacked the expertise to embark on the task of effectively examining the rules of court.⁴⁴

In other words, it is all very well for the Parliament or its committees to have the power to look at instruments and even for them to be in a position to recommend disallowance, but they must also be in a position to exercise those powers constructively.

The issue of the volume of these instruments has already been raised in Chapters 2, 3 and 4. In assessing the capacity of the Parliament to scrutinise such instruments their number is, clearly, a limiting factor.

Two British academics, Robert Baldwin and John Houghton, have painted a similarly pessimistic picture of the capacity of the United Kingdom Parliament to deal with these sorts of instruments, giving two reasons:

First, there is a lack of parliamentary time so acute that even the present system of scrutiny of statutory instruments is overloaded and unsatisfactory. Massively to increase such a workload would be to indulge in little more than a presentational exercise. Second, one may point to the other deficiencies of the existing system: the *de facto* executive control of the legislature, the lack of information about the substance of a rule in advance of parliamentary scrutiny, the restrictions on debate, and the low priority that Members of Parliament give to technical or substantive scrutiny.⁴⁵

All of these observations are equally applicable to the Australian Parliament. Indeed, two of the principal arguments referred to by Professor Pearce as operating to justify the use of delegated (as

⁴³ Parliamentary Paper No 288 of 1979.

⁴⁴ Senate Standing Committee on Constitutional and Legal Affairs, *Report on Parliamentary Scrutiny of Rules of Court*, Parliamentary Paper No 288 of 1979, p 13.

⁴⁵ Baldwin, R and Houghton, J, 'Circular arguments: The status and legitimacy of administrative rules', (1986) *Public Law* 239, at p 270.

opposed to primary) legislation are that a) it decreases the pressure on parliamentary time and b) it can be used to accommodate material which is too technical or detailed to be suitable for parliamentary consideration.⁴⁶

By way of a colourful illustration of their point about the low priority which Members of Parliament give to the technical or substantive scrutiny of instruments, Messrs Baldwin and Houghton gave the following example:

Norman Tebbit commented that his task of laying a code of practice before Parliament was like being 'a head waiter asked to serve a bottle of Coca-Cola.'⁴⁷

The authors are left to conclude that the addition of informal rules to the parliamentary scrutiny workload would only magnify the problems that already exist in relation to Parliament's ability to deal with the more conventional forms of legislation.⁴⁸ Once again, this is a factor which would similarly limit the effectiveness of such scrutiny by the Australian Parliament.

One final limitation, which may or may not be a reflection of the sheer volume of instruments with which it has to deal, is the possibility that the Parliament will make mistakes. It is foolish to assume that scrutiny by the Parliament or by its specialist committees is foolproof or that it can prevent all possible abuses.

A good example of the parliamentary scrutiny processes failing to cope with what, on its face, represents a lamentable denial of the authority of the Parliament occurred in 1990, in the context of the election rules promulgated pursuant to the *Aboriginal and Torres Strait Islander Commission Act 1989* (the *ATSIC Act*). Section 113 of that Act empowers the relevant Minister to make election rules to govern elections to be held for Regional Councils established under the Act. Pursuant to subsection 113(8), those rules are disallowable instruments for the purposes of section 46A of the *Acts Interpretation Act 1901*. As has already been discussed in Chapter 5 above, the effect of this is to subject such rules to essentially the same regime of tabling and disallowance as applies to regulations.

The rules applying to the first Regional Council elections were tabled in the House of Representatives within the relevant time but (apparently as a result of a bureaucratic oversight) not in the Senate. On the basis of subsection 46A(3) of the *Acts Interpretation Act*, the rules thereby ceased to have effect. However, as a result of the peculiar combination of subsection 104(3) (which required that the

⁴⁶ Pearce, DC, *Delegated Legislation* (1977, Butterworths Pty Ltd, Sydney), pp 5-6.

⁴⁷ Baldwin, R and Houghton, J, 'Circular arguments: The status and legitimacy of administrative rules', (1986) *Public Law* 239, at p 270 - Norman Tebbit is a prominent British politician and was, at the time, a Minister.

⁴⁸ Baldwin, R and Houghton, J, 'Circular arguments: The status and legitimacy of administrative rules', (1986) *Public Law* 239, at p 270.

first elections take place by a certain date) and paragraph 100 (a) (which stated that the rules to apply to a first election were those in force at the beginning of the election period) of the *ATSIC Act*, the rules were found to be valid, despite this defect.

Subsection 104(3) was relevant because it imposed an irresistible urgency on both the holding of the elections and a finding (by the Court) that the rules were valid. Paragraph 100(a) was relevant because at the start of the election period (as defined in the *ATSIC Act*) the relevant provisions of the *Acts Interpretation Act* had not operated to make the rules cease to have effect.

In the Federal Court, Justice Pincus held that, for the reasons outlined above, the rules were valid and could operate in relation to the elections which were, by that stage, pressing.⁴⁹ The matter went on appeal to the Full Court. In the course of his judgment, Justice Northrop said:

There is no material before the Court explaining why the Regional Council election rules were not laid before the Senate in conformity with the requirements of s 48 of the *Acts Interpretation Act*. Nevertheless, this failure illustrates an arrogance by the Executive which borders on contempt for the Parliament. The failure is very serious. It is to be condemned. It cannot be condoned.⁵⁰

In spite of these strong words, Justice Northrop, like his two brother judges, found that the election rules were valid insofar as they applied to the first elections.

Apart from indicating the kinds of serious problems which quasi-legislative instruments can involve, this example also provides a salutary illustration of another limit on parliamentary scrutiny. In this case, the election rules were quite properly designated as a disallowable instrument, thereby avoiding adverse comment from the Senate Standing Committee for the Scrutiny of Bills. They had not come to the attention of the Regulations and Ordinances Committee as they had not been tabled. Indeed, in the absence of the Regulations and Ordinances Committee taking some sort of pre-emptive action to ensure that they *were* tabled in accordance with the relevant provisions, there was no scope for that Committee to become involved. As a result of this, a serious defect slipped through the Senate's (and, in effect, the Parliament's) scrutiny net. Clearly, the system is not infallible.

The Importance of Parliamentary Scrutiny

⁴⁹ *Glenda Rose Thorpe v The Honourable Robert Tickner, Minister for Aboriginal Affairs and Ors*, VG 311 of 1990, decision handed down on 30 October 1990 (unreported).

⁵⁰ *Glenda Rose Thorpe v Minister for Aboriginal Affairs and Others*, VG319 of 1990, decision handed down on 11 December 1990 (unreported), p 12.

Whatever its drawbacks, it is imperative that the authority of Parliament in relation to quasi-legislation (and, indeed, in relation to *all* legislation) be recognised and protected. The Parliament is, after all, the supreme law-making body. As Mr Ian Thynne and Professor Jack Goldring have observed,

[i]n Westminster systems, parliaments traditionally have been viewed as the ultimate instrument of the people's will for ensuring the accountability and control of all aspects of governmental activity.⁵¹

In a similar vein, Senator Bob McMullan has suggested that

[a]ccountability of the executive and administrative arms of government to Parliament, and through it to the people, is vital in a democracy. But as the structure of modern government evolves the existing structures and processes might not provide the guarantees for which they were originally intended.⁵²

In its issues paper on rulemaking, the Administrative Review Council observed that

[w]hile the Parliament might not wish to make all the laws, it nonetheless does desire to have a chance to review and express its opinion of laws made by the executive.⁵³

It is arguable that the very opportunity for parliamentary review may offer at least a partial solution to the problems of quasi-legislation. As suggested above, a requirement that a document be tabled in the Parliament ensures that it is at least published to the Parliament. It may also cause a bureaucrat drafting such an instrument to take additional care with that drafting.⁵⁴ Making an instrument subject to disallowance may cause the bureaucrat to take particular care. The problem with this approach, however, is in deciding which instruments should be tabled and which should be subject to disallowance. It is a matter of deciding what is the appropriate form of scrutiny.

⁵¹ Thynne, I and Goldring, J, *Accountability and Control: Government Officials and the Exercise of Power* (1987, The Law Book Company Limited, Sydney), p 236. It should be noted, however, that the authors go on to say that the actual workings of most parliaments suggest that this view 'has long been unrealistic'.

⁵² McMullan, B, 'Constitution review: guarantee reforms', *The Canberra Times*, 31 March 1991, p 9.

⁵³ Administrative Review Council, *Rule making by Commonwealth agencies: Issues paper* (30 June 1990, Canberra), at p 8.

⁵⁴ Though the experience of the Regulations and Ordinances Committee with such instruments (discussed in Chapter 4 above) cannot be ignored.

'Appropriate' Parliamentary Scrutiny

Quasi-legislative instruments cause problems because of the difficulty involved in developing a form (or forms) of scrutiny that, on the one hand, preserves the supremacy of Parliament and, on the other, does not require the Parliament to divert an excessive amount of its time and resources to that scrutiny. At the heart of this difficulty is the need to account for the wide variety of instruments involved and the desirability of developing a scrutiny mechanism which ensures that each instrument receives the appropriate scrutiny.

In its issues paper on rule-making, the Administrative Review Council suggested that

[s]ome part of the responsibility for ensuring that appropriate instruments are laid before the Parliament was seen to lie with the Senate Scrutiny of Bills Committee.⁵⁵

In its response to the issues paper, the Scrutiny of Bills Committee went one step further, stating that it was its responsibility

to ensure that such instruments receive the *appropriate* scrutiny.⁵⁶

In making this statement, the Committee indicated that it had not formulated any specific guidelines as to the basis on which it could be decided whether an instrument should be subject to, say, tabling and disallowance as opposed to tabling only.⁵⁷ However, the Committee said that, in its view,

a key element in determining the appropriate form of scrutiny in each case is the effect of the instrument in question. The degree to which the instrument is binding on a decisionmaker and the extent to which the instrument is subsequently binding on review bodies are two important factors to be considered in assessing the effect of an instrument.⁵⁸

The Committee concluded by saying:

The more binding an instrument is, the closer it comes to having a legislative effect and the greater is the need for parliamentary scrutiny.⁵⁹

⁵⁵ Administrative Review Council, *Rule making by Commonwealth agencies: Issues paper* (30 June 1990, Canberra), p 8.

⁵⁶ Letter from Chairman of the Senate Standing Committee for the Scrutiny of Bills to President of the Administrative Review Council, dated 14 September 1990 (unpublished), p 3.

⁵⁷ *Ibid.*

⁵⁸ Letter from Chairman of Senate Standing Committee for the Scrutiny of Bills to President of Administrative Review Council, dated 14 September 1990 (unpublished), p 4.

⁵⁹ Letter from Chairman of Senate Standing Committee for the Scrutiny of Bills to President of Administrative Review Council, dated 14 September 1990 (unpublished), p 4.

Summary

Parliamentary scrutiny is by no means a cure-all for the problems caused by quasi-legislative instruments. In some respects, increased parliamentary scrutiny is a two-edged sword. While many types of instruments clearly *should* receive greater scrutiny by the Parliament, the proliferation of such instruments lessens the Parliament's capacity to deal with them properly. In addition, Parliament has, to date, demonstrated an inability to come to grips with such instruments. The Senate Standing Committee for the Scrutiny of Bills continues to draw attention to provisions which, in its view, derogate from the primacy of the Commonwealth Parliament as the supreme law-maker. Those concerns have not always been taken up by the Senate.

The Committee will no doubt continue to draw the Senate's attention to these types of provisions. If the growth and use of quasi-legislative instruments is to be controlled it is incumbent on the Parliament to pay attention to the Committee's comments, to share its concerns and to act on its recommendations. However, from a practical standpoint, the capacity of the Parliament to adequately deal with an increased volume of legislative and quasi-legislative instruments must also be addressed.

Chapter 7

Some Possibilities and Some Promising Developments

Clearly, parliamentary scrutiny, even if it were possible to apply it to all relevant legislative and quasi-legislative instruments, is by no means a panacea. Nor is it the only possible answer. Several other suggestions have been put forward as likely improvements on the situation that currently exists. In addition, two recent developments offer some hope.

Administrative Review Council Project on Rule Making

The Administrative Review Council is currently engaged in an important project on rule making by Commonwealth agencies. Many of the kinds of instruments which the project is dealing with can be described as quasi-legislative. Several of the problems which the project addresses are problems which have been identified in this paper.

The project is significant for two reasons. First it serves to focus some much-needed attention on this area, which can only serve to heighten awareness of what is going on. Second, the Administrative Review Council has asked all Commonwealth departments and agencies to identify their current practices in relation to instruments. Departments and agencies have been asked to supply details of the types, numbers and nomenclature of the instruments which they make as well as details of if and where they are published and how the general public can obtain copies.⁶⁰

If the various departments co-operate with the inquiry, it should, at the very least, result in a comprehensive stock-take of quasi-legislative law-making in the Commonwealth. The results are likely to shock those people who are not aware of what has been going on in this area. Perhaps they will also stir into action those people who have the power to do something about it.

⁶⁰ See, generally, Administrative Review Council, *Rule making by Commonwealth agencies* (30 June 1990, Canberra) 'Report on submissions and preliminary proposals', paper presented at the Australian Institute of Administrative Law/Royal Australian Institute of Public Administration '1991 administrative law forum', held in Canberra on 29-30 April 1991, proposal 17, p 15. The Administrative Review Council's final report was tabled in the Parliament on 7 May 1992.

Office of Legislative Drafting

Another promising development is the establishment within the Commonwealth Attorney-General's Department of the Office of Legislative Drafting. The establishment of that Office, which represents a significant advance in status and resources compared to what was previously available for drafting, is apparently part of an attempt to centralise legislative drafting in the Commonwealth sphere. According to its brochure, in addition to drafting regulations, ordinances, proclamations, etc, the Office offers advice and assistance on a wide variety of other instruments, including ministerial orders, all other ministerial instruments and 'documents generally'.⁶¹ This can only be an improvement on the current situation, which allows departments to draft a great deal of their own instruments and which is, in turn, at least part of the problem posed by the proliferation of quasi-legislative instruments.

Consultation

In its issues paper on rule making, the Administrative Review Council said that one of the issues which arose at its conference on rule making was the absence of mechanisms for consultation with parties affected by legislative instruments.⁶² The Administrative Review Council said:

It was pointed out that Acts receive a great deal of publicity and of course are debated in the Parliament. It was also noted that administrative decisions are now subject to the rules of natural justice whereby a person affected has a right to put his or her side of the case before the decision is taken. Fitting as it were, between these two, is delegated legislation where consultation, if any, is left to the discretion of the making agency.⁶³

It is implied that the introduction of consultative procedures may offer some benefit. Similarly, with reference to quasi-legislative instruments, Professor Roman Tomasic has argued that

there seems to be no reason why draft guidelines should not be formulated in consultation with interested parties.⁶⁴

Indeed, Professor Tomasic suggests that the implementation of 'notice and comment' procedures as a 'formal component' of the rule making process is worthy of serious consideration.⁶⁵

⁶¹ Office of Legislative Drafting, Attorney-General's Department, brochure entitled 'Drafting Services' (undated).

⁶² Administrative Review Council, *Rule making by Commonwealth Agencies: Issues paper* (30 June 1990, Canberra), p 12.

⁶³ Administrative Review Council, *Rule making by Commonwealth Agencies: Issues paper* (30 June 1990, Canberra), p 12.

⁶⁴ Tomasic, R, 'Formalised Consultation, Delegated Legislation and Guidelines : "New" directions in Australian administrative law', *Canberra Journal of Public Administration*, No 58, April 1989, 158, at p 164.

In support of his arguments, Professor Tomasic points to procedures which currently exist in the United States, under the *Administrative Procedure Act*, to require publication of all proposed regulations at least 30 days before they are intended to come into force. He notes that

[t]he notice must state time, place and nature of any public rule-making proceeding, refer to the legal authority under which the rule is proposed and, finally, set down the substance of the proposed rules or else describe the issues or subjects that it involves. Following this, interested persons must be allowed the opportunity to participate in the rule-making process by submitting written evidence or views so that all relevant concerns are able to be considered by the agency proposing to make administrative rules.⁶⁶

A paper which appears as an appendix to the Administrative Review Council's issues paper points to broadly similar procedures which have been established in Victoria, pursuant to the *Subordinate Legislation Act 1962*. Those procedures provide that where a statutory rule is likely to impose any appreciable burden, cost or disadvantage to any sector of industry, commerce, consumers, members of public or the State, consultation commensurate with the impact of the rule shall take place with appropriate representatives of the sector concerned.⁶⁷

Broadly similar requirements were introduced in New South Wales by the *Subordinate Legislation Act 1989*, which introduced requirements for Regulatory Impact Statements to be prepared in relation to delegated legislation.⁶⁸ In her book on quasi-legislation, Professor Ganz refers to equivalent requirements that exist under United Kingdom legislation, though in relation to specific Acts and instruments.⁶⁹

At the risk of being dismissive, to suggest that consultation or regulatory impact statements hold the key to the quasi-legislative puzzle is to miss the point (or, at least, a fundamental point of this paper). Though consultation might offer many benefits to the people affected by a proposed rule or guideline and while several of the provisions referred to involve a collateral benefit in ensuring wider publication, they do nothing toward redressing the problem of proper

⁶⁵ *Ibid.*

⁶⁶ Tomasic, R, 'Formalised Consultation, Delegated Legislation and Guidelines : "New" directions in Australian administrative law', *Canberra Journal of Public Administration*, No 58, April 1989, 158, at p 162.

⁶⁷ Craven, G, 'The making of delegated legislation under the Victorian Subordinate Legislation Act', in Administrative Review Council, *Rule making by Commonwealth agencies*, (30 June 1990), Appendix 3, at p 23. The relevant provisions are s11(5) and Schedule 2 of the *Subordinate Legislation Act 1962*.

⁶⁸ See, Administrative Review Council, *Rule making by Commonwealth agencies: Issues paper* (30 June 1990, Canberra), p 14. The relevant provisions are ss4 and 5 and Schedules 1 and 2 of the *Subordinate Legislation Act 1989*.

⁶⁹ Ganz, G, *Quasi-Legislation : Recent Developments in Secondary Legislation* (Second edition) (1987, Sweet and Maxwell Limited, London), pp 37-8.

accountability to the Parliament and the further problems which that lack of accountability involves. The executive arm of government still ends up making the laws (or the quasi-laws) instead of the Parliament. In any event, consultation matters little unless those doing the consulting actually listen to and act on the responses that they receive.

Publication

As has been discussed in Chapter 4 above, the inaccessibility of quasi-legislative instruments is a fundamental problem, both in practical and conceptual terms. Instruments that are tabled in the Parliament are published to the Parliament and become public documents as a result. Instruments which are subject to disallowance by the Parliament are, in addition, scrutinised by the Senate Standing Committee on Regulations and Ordinances, which may be considered as a form of enhanced publication. Instruments that are subject to neither requirement need be published to no-one. Anything that can be done to ensure the publication of such instruments can only assist.

It has been suggested that one way of achieving this would be to make *all* such instruments Statutory Rules. In a paper delivered to the Third Commonwealth Conference on Delegated Legislation, Senator Patricia Giles, then a member and now Chair of the Senate Standing Committee on Regulations and Ordinances, said:

There are no compelling reasons why all delegated legislative instruments should not be treated similarly to Statutory Rules.⁷⁰

Mr Peter Bayne has also plaintively argued that, as a matter of law, many such instruments should, because they are legislative in character, be published as Statutory Rules.⁷¹ His arguments rely on the intersection of certain provisions of the *Statutory Rules Publication Act 1903* and the Rules Publication Regulations 1913. Mr Bayne also put these arguments to the Senate Standing Committee on Legal and Constitutional Affairs in the context of its inquiry into debt recovery under the *Social Security Act 1847* and the *Veterans' Entitlements Act 1986*.⁷² The Committee showed an interest in Mr Bayne's arguments, though it did not take them up.⁷³

The first thing to note about Mr Bayne's suggestion is that 'disallowable instruments' for the purposes of the *Acts Interpretation Act 1901* are specifically exempted from the relevant provisions of the

⁷⁰ Giles, P, 'Scrutiny of Federal quasi-legislation in Australia', in Third Commonwealth Conference on Delegated Legislation, *Record of Proceedings* (1990, HMSO, London), Appendix 5, at p 124.

⁷¹ Bayne, P, 'The publication of delegated legislation', (1989) *Australian Law Journal* Volume 63, p 355, at pp 357-8.

⁷² Senate Standing Committee on Legal and Constitutional Affairs, *Debt recovery under the Social Security and the Veterans' Entitlements Act* (*Journals of the Senate*, No 20, 22 August 1990, p 228), pp 67-8. See also *Evidence* at pp 337-8.

⁷³ Senate Standing Committee on Legal and Constitutional Affairs, *Debt recovery under the Social Security and the Veterans' Entitlements Act* (*Journals of the Senate*, No 20, 22 August 1990, p 228), pp 67-8.

Statutory Rules Publication Act.⁷⁴ Second, though the publication of all such instruments as Statutory Rules would no doubt be an improvement, it would no doubt cause what the bureaucracy would regard as 'unacceptable' delays and cost a great deal of money. As such, it is likely to be vigorously opposed by the bureaucracy. Nevertheless, though the suggestion does not address *all* the problems caused by quasi-legislation, it is worthy of further consideration.

Similarly, the establishment of an Australian equivalent of the *Federal Register* might offer some hope. The United States *Administration Procedure Act* also provides for the creation of a central register of the rules in relation to which it imposes publication requirements. Those rules are actually published in the Federal Register. Though the Senate Procedure Office's *Delegated Legislation Monitor* fulfils a similar purpose, the formal establishment of a register similar to that which exists in the United States has some merit. Indeed, one of the preliminary proposals arising out of the Administrative Review Council's rule making project is that such a register be established in Australia.⁷⁵

Summary

All of the possible innovations touched on above all involve at least some degree of improvement on the current situation. They all address aspects or symptoms of the problem, which is that legislative and quasi-legislative instruments should receive appropriate scrutiny. While none of the options or developments discussed can be regarded as a complete solution, incremental improvements may, in the final analysis, offer the only practical possibility of progress.

⁷⁴ *Acts Interpretation Act 1901*, s46A(1)(c).

⁷⁵ Administrative Review Council Secretariat, 'Report on submissions and preliminary proposals', paper presented at Australian Institute of Administrative Law/Royal Australian Institute of Public Administration '1991 administrative law forum', held in Canberra on 29-30 April 1991.

Chapter 8

Conclusions

Despite having been a matter causing concern for over 40 years, quasi-legislative instruments continue to flourish. What is more, they flourish largely unchecked.

By far the majority of quasi-legislative instruments are issued with the express authority of Acts passed by the Parliament. Committees such as the Senate Standing Committee for the Scrutiny of Bills will continue to draw Parliament's attention to provisions which encroach on the power of the Parliament and which interfere with the rights of individual citizens. On this basis, the Scrutiny of Bills Committee has often drawn attention to provisions which allow for promulgation of quasi-legislative instruments.

However, as things stand, the Scrutiny of Bills Committee can do little more than draw attention to such provisions. If the use of quasi-legislative instruments continues to increase, it does so because the Parliament allows it to happen. Unless there is a fairly dramatic change in the attitude that the Parliament, in particular, has adopted in relation to these instruments, parliamentary scrutiny has little to offer as a means of controlling the use of quasi-legislation.

In addition, doubts have been expressed about the capacity of the Parliament to cope with ever-increasing volumes of legislative and quasi-legislative instruments. Ultimately, the burden is placed on committees such as the Senate Scrutiny of Bills Committee and the Senate Standing Committee on Regulations and Ordinances. Therefore, if the Parliament adopts a more rigorous approach to quasi-legislation it must also re-evaluate its own processes for dealing with quasi-legislation.

The bottom line must be that *all* instruments, whether they be legislative or quasi-legislative, must receive the *appropriate* scrutiny by Parliament. Anything less involves a derogation of the power of the Commonwealth Parliament as the supreme law making body in Australia.

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