Enabling provisions: the gatekeeper of legislative power

LORNE NEUDORF
ASSOCIATE PROFESSOR
DEPUTY DEAN
ADELAIDE LAW SCHOOL
Delegation of legislative power

Legislative power vested in Parliament

Parliament delegates legislative power

Delegated legislation is made outside Parliament
The predominant form of lawmaking

Total Pages of Federal Legislative Text in 2019

- Primary Legislation: 2378, 26%
- Delegated Legislation: 6788, 74%

Total Number of Federal Instruments in 2019

- Primary Legislation: 30, 6%
- Delegated Legislation: 488, 94%
Challenges

• Delegated legislation is made directly by the Executive outside the ordinary parliamentary process
• It is less transparent and accountable than primary legislation
• Broad delegations compromise legal certainty and predictability, and allow the Executive to ‘hide’ public policy choices
• Potential constitutional issues with extensive or vague delegations, or the unsupervised exercise of delegated power
Enabling provisions

- Enabling provisions are the gatekeeper of legislative power
- They define and set terms/conditions on delegated powers: the primary source of the Executive’s legal powers
- Drafters should carefully delimit enabling provisions and clearly express parliamentary intent about their use
- The goal is to provide a calibrated and intelligible standard
Enabling provisions

• Judicial review provides a ‘safety valve’ (not a comprehensive review) for the unlawful exercise of delegated powers

• Courts must work with enabling provisions as drafted (which tend to be interpreted generously)

• Regulations benefit from a presumption of validity

• Parliamentary committee scrutiny: effectiveness is limited by broad language used in enabling provisions (e.g., 6 of 13 criteria for REGS Committee focus on the enabling legislation)
Drafting guidance

• Canadian uniform drafting conventions:
  ‘Regulation-making powers should be clearly expressed and should be no broader than is necessary’

• The Guide to Making Federal Acts and Regulations:
  ‘The power to make regulations must not be drafted in unnecessarily wide terms’
The practical realities

- Legislative drafters may be instructed by clients to provide ‘maximum flexibility’ to allow the Executive to respond to new circumstances as they arise.

- Enabling provisions are often drafted in broad or general terms:

  ‘The Governor in Council may make regulations generally for carrying out the purposes and provisions of this Act.’
COVID-19 delegations

• The *COVID-19 Emergency Response Act* delegates sweeping powers

• Delegated legislation can be made by the Executive in relation to matters when ‘appropriate’, ‘necessary’ or even ‘desirable’

• Henry VIII powers allow the Executive to directly change primary legislation such as the *Employment Insurance Act*

• Limited or absent controls: no declaration of emergency, little consultation, no proportionality, limited reporting
Comparative context

• UK’s Delegated Powers and Regulatory Reform Committee: 
  ‘To report whether the provisions of any bill inappropriately delegate legislative power, or whether they subject the exercise of legislative power to an inappropriate degree of parliamentary scrutiny’

• Bills are accompanied by a ‘delegated powers memorandum’: 
  Details all delegated powers, their context and purpose, their justification, and the justification for the parliamentary scrutiny procedure in relation to those powers

• The memoranda are scrutinised along with the enabling provision by the Committee, also referred to by courts

• Committee reports on every bill and often identifies defects/problems in the drafting of enabling provisions (which are usually corrected)
Comparative context

• Australia’s Senate Standing Committee for the Scrutiny of Bills: ‘Whether ... bills ... inappropriately delegate legislative powers’

• Where there is ‘the inclusion of broad discretionary powers’, these ‘should be thoroughly justified in the explanatory memorandum’

• The memoranda are scrutinised along with the enabling provision by the Committee, also referred to by courts

• Committee reports frequently through its ‘Scrutiny Digest’ and identifies its concerns, recent focus on Henry VIII powers
Conclusion

• Delegated legislation must be taken seriously given its contemporary importance

• Constitutional vesting of legislative power in Parliament: departures from this lawmaking process through delegations must be justified, limited and supervised

• Many problems are best addressed at the ‘front end’ through careful drafting of enabling provisions – enables other institutional actors to perform their roles

• Comparative context demonstrates there is considerable room for improvement in drafting enabling provisions and lessons to be learned

• New bills should include an explanatory memorandum for enabling provisions to provide accountability and allow more effective judicial and committee scrutiny