

**The importance of legislative
drafters to legislative scrutiny by
parliamentary committees –
Challenges presented by recent
developments in the (Australian)
Commonwealth jurisdiction**

Stephen Argument

Potted history of legislative scrutiny in Australia

- Long history of legislative scrutiny in Australia
- As Peter Bernhardt's paper notes, Senate Standing Committee on Regulations and Ordinances established in 1932

Terms of reference of Regulations and Ordinances Committee

Regulations and Ordinances Committee examines each regulation, etc 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

Other Australian jurisdictions established similar committees

- South Australia – 1938
- Victoria – 1956
- New South Wales – 1960
- Tasmania – 1969
- Northern Territory – 1974
- Queensland – 1975
- Western Australia – 1976
- Australian Capital Territory – 1989

Scrutiny of Bills

- Senate Standing Committee for the Scrutiny of Bills established in 1981
- Similar role to Regulations and Ordinances Committee – using similar terms of reference – but in relation to Bills

Scrutiny of Bills committees established in other jurisdictions

- Australian Capital Territory – 1989
- Victoria – 1992
- Queensland – 1995
- New South Wales – 2002

Queensland situation changed in 2011, however

- Role of Scrutiny of Legislation Committee replaced in 2011, as part of reforms to the Queensland Parliament's committee system, by scrutiny by subject-matter committees (ie rather than a specialist legislative scrutiny committee)

(Commonwealth) Parliamentary Joint Committee on Human Rights

- Established by *Human Rights (Parliamentary Scrutiny) Act 2011*
- Committee examines Bills for Acts, and legislative instruments, that come before either House of the Parliament for compatibility with human rights and reports to both Houses of the Parliament

Parliamentary Joint Committee on Human Rights (cont'd)

- Committee also examines Bills for Acts, and legislative instruments, that come before either House of the Parliament for compatibility with human rights and reports to both Houses of the Parliament
- Committee also inquires into any matter relating to human rights that is referred to it by the Attorney-General and reports to both Houses of the Parliament

Unseen influence of legislative scrutiny committees in Australia

- Over a long history, legislative scrutiny committees have had a direct influence on the content of legislation in various Australian jurisdictions
- Also have unseen influence, including through their influence on legislative drafters

Statements from the 1990s

- (Then) First Parliamentary Counsel, Ian Turnbull QC (in 1991) and (then) Victorian Chief Parliamentary Counsel, Rowena Armstrong QC (in 1993) have said
- “We draft with the scrutiny committees in mind”
- But is this still the case?

Walter Munyard, Parliamentary Counsel for Western Australia (2011)

Clearly drafters wishing to dissuade instructors from requiring them to write law that offends against legal principle will often resort to the threat of unfavourable comment when the legislation comes before parliament.

Queensland Parliamentary Counsel, Theresa Johnson (2011)

The information and approach of the committee then informs our advice to drafting clients throughout the drafting process and our briefing notes to the Department of the Premier and Cabinet in relation to Cabinet Submissions. At all times, drafters strive to avoid or ameliorate potential breaches of fundamental legislative principles.

Commonwealth First Parliamentary Counsel, Peter Quiggin PSM (2011)

- A practical point ...
 - ... there are 19 references to the Senate Scrutiny of Bills Committee in our Drafting Directions and most of these are alerting drafters to issues that the Committee is likely to raise.*

Peter Quiggin

We also get copies of the Alert Digests and the Reports loaded on to our internal network so that drafters have access to them. When they arrive in the office, one of our staff sends an email that lists the Bills that have been commented upon.

Peter Quiggin also says

I think that it is hard to untangle the policy of the Government and the approach of the Scrutiny of Bills Committee on many issues. By this I mean that the policies of the Government on review of decisions, protections where powers are granted and other issues (mainly administered by [the Attorney-General's Department]) often mirror those of the Committee.

Peter Quiggin also says ...

Consequently, when we draft with “one eye to the relevant committee”, we also are drafting with one eye to the relevant Department responsible for the whole of Government policy.

This point is echoed by Victoria's Chief Parliamentary Counsel, Gemma Varley (among others)

This does not mean that provisions that impact adversely on rights and freedoms will never be drafted. It means that if a provision is to have an adverse impact it should be the result of informed policy-making, taking into account the Charter and the concerns that [the Victorian Committee] is likely to raise. (2011)

However, drafters ultimately do what they are told

- But they will, at least, warn you of the possible consequences
- In my view, the role of drafters as a kind-of filter for legislative “nasties” cannot (and should not) be underestimated
- Reference in the paper to an indication that the Federal Court also doesn’t underestimate the role of drafters

A new threat to the role of drafters, in the Commonwealth jurisdiction in Australia

- First, some background
- In 1904, a definition of “prescribed” was introduced into the *Acts Interpretation Act 1901*
- After that, Australian legislation operated on the basis that Acts allowed for certain things to be “prescribed” by regulations made under the Act

“Prescribed”

- Though the definition of “prescribed” is “prescribed by the Act or by regulations under the Act”, I’ve always read “prescribed” as meaning “prescribed by the regulations”
- That is, the use of “prescribed” means that there will be regulations made, to give effect to the relevant legislative provision

Regulations made by the Governor-General

- Governor-General Acts with the advice of the Executive Council (ExCo)
- ExCo supported by a Secretariat
- Regulations drafted by the Office of Parliamentary Counsel (OPC)
- Important to note that regulations drafted at no cost to relevant Government department

Australian Jobs (Australian Industry Participation) Rule 2014

- Early in 2014, the Minister for Industry made the Australian Jobs (Australian Industry Participation) Rule 2014
- Rule made under section 128 of the *Australian Jobs Act 2013* which provides ...

Section 128 of the Australian Jobs Act

128 Legislative rules

The Minister may, by legislative instrument, make rules (legislative rules) prescribing matters:

- (a) required or permitted by this Act to be prescribed by the legislative rules; or
- (b) necessary or convenient to be prescribed for carrying out or giving effect to this Act.

No regulation-making power in the Australian Jobs Act

- As a result, whatever was to be “prescribed” for the Act would be prescribed by the legislative rules, rather than by regulation
- Important to note that the explanatory memorandum for the relevant Bill contained no substantive discussion of the new provision, or the thinking behind it

Issue raised with Minister by the Senate Standing Committee on Regulations and Ordinances

- Senate Committee noted that this was a “novel” approach
- Noted that the making of regulations is subject to the drafting and approval requirements of OPC and ExCo
- Senate Committee suggested that this was “an additional layer of scrutiny”

Senate Committee's questions

- Would the OPC and ExCo requirements also apply to legislative rules?
- If not, what would be the ramifications for both the quality of, and level of scrutiny applied to, such instruments.?

An exchange of letters followed

- Minister for Industry provided various responses to the Senate Committee's concerns
- Responses attached letters from the First Parliamentary Counsel, addressing issues raised by the Senate Committee
- Responses prompted further questions from the Senate Committee

Exchange of letters discussed in my paper

- I won't go through all of them here
- But I note the following ...

Why are you asking these questions?

- Minister's second response contained the following ...

I am concerned that the Rule, which serves an essential function has become the vehicle by which the Committee is exploring OPC's drafting practice of including a rule-making power in primary legislation as opposed to the more traditional regulation-making power.

Minister went on ...

In particular, I note that the Committee has taken the step of having moved a notice of motion to disallow the Rule, notwithstanding the Committee's queries do not relate to the substance of the Rule itself, but rather to the underlying power authorising the making of the instrument.

Senate Committee's response to this

... the committee notes that the question of whether the Parliament regards the new general rule-making power as appropriate to the exercise of the Parliament's delegated legislative powers goes fundamentally to the committee's institutional role and the principles which inform its operation.

Senate Committee's response (cont'd)

The delegation of the Parliament's legislative power to executive government involves a 'considerable violation of the principle of separation of powers, the principle that laws should be made by the elected representatives of the people in Parliament and not by the executive government'.

Senate Committee's response (cont'd)

This principle is effectively preserved through the committee's work scrutinising delegated legislation, and the power of the Parliament to disallow delegated legislation.

In accordance with this critical role, the committee's scrutiny principles are 'interpreted broadly to include every possible deficiency in delegated legislation affecting parliamentary propriety and personal rights'.

What was behind the new approach?

- OPC (in its first response) advised ...

OPC does not have the resources to draft all Commonwealth subordinate legislation, nor is it appropriate to do so.

... OPC's view is that it should use its limited resources to best effect and focus its resources in drafting subordinate legislation that would most benefit from its drafting expertise.

What is the effect of this?

Over a series of responses, OPC advised that:

- certain provisions (offence provisions, search and seizure provisions, etc) would only appear in regulations;
- within its resource limitations, OPC would be available to draft other-than-regulations, for a fee; and
- OPC would be taking steps to improve non-OPC drafting

Section 16 of the *Legislative Instruments Act 2003*

- The taking of steps to improve the quality of drafting involves section 16 of the *Legislative Instruments Act 2003*

(1) To encourage high standards in the drafting of legislative instruments, the First Parliamentary Counsel must cause steps to be taken to promote the legal effectiveness, clarity, and intelligibility to anticipated users, of legislative instruments.

Section 16 (cont'd)

- (2) The steps referred to in subsection (1) may include, but are not limited to:*
- (a) undertaking or supervising the drafting of legislative instruments; and*
 - (b) scrutinising preliminary drafts of legislative instruments; and*
 - (c) providing advice concerning the drafting of legislative instruments; and*

Subsection 16(2) (cont'd)

(d) providing training in drafting and matters related to drafting to officers and employees of Departments or other agencies; and

(e) arranging the temporary secondment to Departments or other agencies of APS employees performing duties in the Office of Parliamentary Counsel; and

Subsection 16(2) (cont'd)

(f) providing drafting precedents to officers and employees of Departments or other agencies.

It would be good to see these things actually happen

- I worked in OPC (and its predecessor) for over 6 years and saw no evidence of anyone doing any of the things listed in subsection 16(2) of the Legislative Instruments Act
- But OPC says that they will start doing these things
- No detail yet, however

Letter from OPC published after my paper was submitted

- In letter to the Senate Committee dated 6 August 2014, OPC refers to a “broad range of measures [that OPC has taken] to promote high drafting standards for all legislative instruments”, “other strategies to promote high drafting standards that OPC is already pursuing” and “the other measures that OPC is already pursuing”

But no detail is provided in the letter as to the actual strategies

- See http://www.aph.gov.au/~media/Committees/Senate/committee/regord_ctte/mon2014/pdf/no10.pdf
- Senate committee met with OPC on 2 September 2014
- However, what came out of the meeting not yet published

Other issues

- The OPC letters contain all sorts of things that are curious to me
- There's the proposition that the introduction of the "legislative rules" mechanism will result in OPC drafting more instruments, rather than less
- I can't see how this will happen

Proportion of legislative instruments drafted by OPC

- I did some rough calculations for a paper I presented in November 2013
- Calculations were based on figures provided to me by OPC

2011

- In 2011, 1,471 legislative instruments were registered on the Federal Register of Legislative Instruments (FRLI)
- Of those legislative instruments, 286 were “Select Legislative Instruments” or SLIs
- Regulations are SLIs

2011 (cont'd)

- In simple terms, it can safely be assumed that most SLIs were drafted by OPC
- This being so, for 2011, just over 19% of legislative instruments registered on FRLI were drafted by OPC

2012

- For 2012, 2,591 legislative instruments were registered on FRLI
- 331 were SLIs
- That means that, for 2012, just under 13% of legislative instruments registered on FRLI were drafted by OPC

2013

- As of November 2013, 1,832 legislative instruments were registered on FRLI
- 235 were SLIs
- That means that, to that point, for 2013, just under 13% of legislative instruments registered on FRLI were drafted by OPC

2014

- I can be more confident about the 2014 figures, because I have been keeping a count
- I have scrutinised 1,161 instruments in 2014, in my role as Legal Adviser to the Senate Committee. Of that number, 186 have been drafted by OPC
- That's just over 16% of the total

16% is clearly better than 13%

- But I'm still a little shocked that the figure is so low

What's the problem with that?

- Non-OPC drafting is, at best, variable
- In the paper, I give one of the worst examples – an instrument that (in my view) simply does not work

(Designated Persons and Entities and Declared Persons – Zimbabwe) Amendment List 2014

- Made by the Minister for Foreign Affairs on 8 April 2014
- Amends the Autonomous Sanctions (Designated Persons and Entities and Declared Persons - Zimbabwe) List 2012

Section 3 of Amendment instrument

3 Amendment of the Autonomous Sanctions (Designated Persons and Entities and Declared Persons – Zimbabwe) List 2012

*Schedule 1 amends the Autonomous Sanctions
(Designated Persons and Entities and
Declared Persons – Zimbabwe) List 2012.*

Schedule 1 of the Amendment instrument

Schedule 1 Designated persons and entities and declared persons

(section 3)

Part 1 Designated and declared persons

| Item | Description |
|------|---|
| 1 | Name of Individual: Augustine CHIHURI Additional Information: Police Commissioner-General Date of Birth: 10/03/1953 Listing Information: Formerly listed on the RBA Consolidated as 2002ZIM0015 |
| 2 | Name of Individual: Constantine CHIWENGA Additional Information: Lt Gen, Commander Zimbabwe Defence Forces Date of Birth: 25/08/1956 Listing Information: Formerly listed on the RBA Consolidated as 2002ZIM0025 |

.....

Schedule 1 then goes on for another page or so

- Issue (for me) is that there are no “amendment instructions”
- Section 3 tells us that Schedule 1 amends the principal instrument but Schedule 1 does not tell us how
- It’s clearly intended to replace the existing Schedule 1 but it doesn’t say that

Senate Committee raised this issue with the Minister for Foreign Affairs

- Minister said ...

the Instrument ... was drafted in accordance with standard drafting practice for these types of instruments under the Autonomous Sanctions Regulations 2011.

Minister went on to say

On the basis of recent advice from the Office of Parliamentary Counsel and the comments of the Committee in the [Delegated Legislation] Monitor, DFAT has updated its drafting practices to ensure that future instruments include an express amendment instruction to indicate how the Principal Instrument will be amended.

However

- Senate Committee first raised this issue, in relation to a similar instrument, on 27 June 2013
- The (then) Minister for Foreign Affairs advised the Senate Committee that future amending instruments would address this issue
- Despite this, there have been at least 2 or 3 instances of this issue since the original comment

So, it's a slow, learning process

- And most Australian lawyers seem to think that they can draft
- Or, perhaps, just the ones that I come across
- Seems to be underpinned by a belief that all a drafter of legislation needs to do is take an existing OPC document and change a few of the words to suit the particular case

I see this all the time

- I see instruments that are clearly based on an OPC document but drafted without an understanding of the OPC template, or the OPC style, or the OPC format, or specific issues such as the correct OPC amending words
- Also presumably drafted without an understanding of changes to drafting style, reflected in updating of drafting directions

These are things that legislative drafters bring to their work

- Many instructors simply have no appreciation of this
- Likewise, legislative drafters bring to their work an appreciation of the work of legislative scrutiny committees
- Drafters know what committees don't like

And then there's the role of settlers and editors

- Non-OPC drafting unlikely to be subject to the same sorts of rigorous processes of settling and editing as OPC drafting
- I've worked with some very good settlers and some very good editors
- I'm a better drafter for this

So

- If less instruments are drafted by OPC then, surely, there can only be more problems with drafting and more issues that will attract the attention of legislative scrutiny committees
- I'm yet to see any evidence to the contrary
- And who knows what the judges will make of all this?

Section 16 of the Legislative Instruments Act becomes even more important

- It is important (in my view) that OPC does all that it can to fulfil its obligations under section 16 of the Legislative Instruments Act

Lessons from all this?

- The importance of legislative drafters to the legislative process (including the legislative scrutiny process)
- Discussion of “legislative rules” issue demonstrates (I hope) both a challenge to the important role of legislative drafters and the importance of the engagement of a legislative scrutiny committee in the issue



Thank you!!

