The Poms can't teach us nuthin'

Commentary on paper by Professor Dennis Pearce

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Introduction

The theme of this paper is that, in my view, the "ANZAC Committees" (to use Professor Pearce's term), and the systems within which they operate, continue to lead the way in legislative scrutiny. While I believe that the ANZAC Committees should **always** be on the lookout for new ideas and alternative approaches, it is my view that the House of Lords Committee that Professor Pearce discusses in his paper does little that is not done (in one way or another) within the Australian system.[1]

Of greater significance, however, is Professor Pearce's suggestion that the ANZAC Parliaments follow the House of Lords' lead and establish committees to examine "policy" issues in subordinate legislation.[2] This is an issue on which Professor Pearce and I have long disagreed. I set out the basis of my disagreement below, together with my analysis of some of the work of the House of Lords Select Committee on the Merits of Statutory Instruments, which Professor Pearce also discusses in his paper.

Explanatory statements

In his paper, Professor Pearce (rightly) points out that, in Australia, the quality of explanatory statements leaves much to be desired. By way of comparison, he gives an example of a UK explanatory statement, chosen at random. Professor Pearce states:

> A most cursory examination reveals that it is a much more useful document than those commonly produced in Australia. It describes the effect of the instrument succinctly, provides a guide to why it was made and its likely impact, states what consultation has occurred and indicates how the instrument's impact into the future is to be monitored. The assistance that a memorandum in this form will provide the Parliament and the public is manifest.

I agree that an explanatory statement in this form is of greater assistance than the majority of (Australian) explanatory statements that I have seen. The issue, however, is the preparedness of Australian Parliaments to put up with

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1 I do not pretend to speak definitively, in this paper, of the work of the NZ committees.

2 In this paper, I have opted to refer to "subordinate", rather than "delegated" legislation. For the purposes of this paper, the terms are interchangeable.

this sort of service from the makers of subordinate legislation. The fact is that there are requirements (certainly in the Commonwealth Parliament) that go to the sorts of issues that Professor Pearce identifies (ie reasons for making, consultation, likely impact, monitoring of impact, etc). The problem is that these requirements are not met.

As Professor Pearce points out, in 2005 (in its most recent sessional report), the Senate Standing Committee on Regulations and Ordinances stated:

> In general terms, an Explanatory Statement should:
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> - provide a plain English explanation;
> - state the authority for making the instrument;
> - state the reasons for making the instrument;
> - summarise the likely impact and effect;
> - discuss any unusual aspects or matters that call for special comment;
> - give reasons for and the basis upon which charges or fees have been increased or decreased;
> - advise, where required, that consultation has taken place and the effect of that consultation;
> - provide a detailed provision-by-provision description of the instrument; and
> - be precise and informative. [3]

The statement set out above was, in fact, a re-statement of what the Regulations and Ordinances Committee had stated in 2000, in its 1999-2000 annual report.[4] In fact, the statement is a reflection of something that the Regulations and Ordinances Committee has been saying since (at least) the early 1980s.[5] Indeed, it seems uncontroversial that the very *existence* of explanatory statements is attributable to the Regulations and Ordinances Committee's requirement that they be prepared.[6]

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3 The Senate, Regulations and Ordinances Committee, *40th Parliament Report, 112th Report* (June 2005), at para 3.72.

4 Senate Standing Committee on Regulations and Ordinances, *109th Report, Annual Report 1999-2000* (October 2000), para 3.12.

5 See, eg, Senate, Standing Committee on Regulations and Ordinances, *Seventy-first Report* (11 March 1982), pp 16-7.

6 See O'Neill, P, "'Was there an EM?': Explanatory Memoranda and Explanatory Statements in the Commonwealth Parliament" (available at http://www.aph.gov.au/library/Pubs/explanmem/was_there_an_EM.htm#explanatorystatements)

I note that the Regulations and Ordinances Committee's requirements are reinforced by their inclusion in the *Federal Executive Council Handbook*, issued by the Department of the Prime Minister and Cabinet.[7]

In addition to the requirements in relation to explanatory statements, the (Commonwealth) Office of Best Practice Regulation (a unit of the Productivity Commission) sets out further requirements that are relevant to the sorts of things that Professor Pearce would like to see in explanatory statements. While the OBPR requirements are concerned with the preparation of "regulatory impact statements", the general practice is for RISs to be included in or with explanatory statements (or, in the case of Bills, explanatory memoranda).

The OBPR's "generic outline" for an RIS (set out in its *Best Practice Regulation Handbook*[8]) has the following headings, which it suggests all RISs should contain:

1 Assessing the problem

- What is the problem being addressed? How significant is it?
  - Steps for identifying the problem.
- Why is (new) government action needed to correct the problem?
- Is there relevant regulation already in place? Why is additional action needed?

2 Objectives of government action

- What are the objectives, outcomes, goals or targets of government action?

3 Options that may achieve the objectives

- Identify a range of viable options, including non-regulatory options.
  - Checklist for the assessment of self-regulation.
  - Checklist for the assessment of quasi-regulation.
  - Checklist for the assessment of black letter law.

4 Impact analysis — costs, benefits and risks

- Who is affected by the problem and who is likely to be affected by proposed solutions?

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7 See June 2005 version (available at http://www.pmc.gov.au/parliamentary/index.cfm) at para 4.5.3.

8 Available at http://www.finance.gov.au/obpr/docs/handbook.pdf#page=71.

- Identify and categorise the expected economic, social and environmental
- impacts of the proposed options as likely costs and benefits.
- Assess the costs and benefits that will be experienced by different stakeholder groups, including small business, and by the community as a whole.
    - Competition assessment.
- Quantify these impacts where significant.
- Quantify the compliance costs on business.
- Examine the effect of each option on individuals, and on the cumulative burden on business.
- Identify the data sources and assumptions used in making these assessments, and any gaps in data.
- Summarise outcomes for each option examined.
    - Template summary table of impacts by option.

5 Consultation

- Who are the main affected parties? Who has been consulted?
- What are their views?
- How have stakeholders' views been taken into account?
- What was the consultation process?
- Where consultation was limited or not undertaken, why was full consultation inappropriate?

6 Conclusion and recommended option

- What is the preferred option? Why is this option preferred and others rejected?

7 Implementation and review

- How will the preferred option be implemented?
- Is the preferred option clear, consistent, comprehensible and accessible to users?
- Is the preferred option sufficiently flexible to adapt to various situations and circumstances?

- How will the preferred option interact with existing regulation of the sector?

- What is the impact on business, including small business, and how will compliance and paper burden costs be minimised?

- How will the effectiveness of the preferred option be assessed? How frequently? Is there a built-in provision to review or revoke the regulation after it has been in place for a certain length of time?[9]

If these requirements were routinely met, it is difficult to see how Professor Pearce could be disappointed with the explanatory material provided to the Parliament. The issue, of course, is that the requirements are not routinely met.

While the effectiveness of the OBPR requirements is a matter for another time, the point is that – as with the Regulations and Ordinances Committee requirements – the issue is not about a lack of requirements or guidance as to what is required. The issue is that the requirements are not routinely met.

This is not to say, however, that the Regulations and Ordinances Committee is not *trying* to improve the standards of explanatory statements. As I have indicated, the Regulations and Ordinances Committee has been making comment on this issue for over 25 years. Most recently, the Regulations and Ordinances Committee has dedicated a whole (interim) report to the issue of the consultation requirements of the *Legislative Instruments Act 2003* and the extent to which they are being met (the short answer being "not very well").[10]

In my view, the irresistible conclusion (assuming that Professor Pearce's criticisms of explanatory material are well-made) is that the makers of subordinate legislation ought to try harder. They ought to take heed of the various requirements for explanatory statements, etc and make a greater effort to meet them.

In making this observation, I acknowledge Professor Pearce's point that

> ... [t]he preparation of an explanatory statement is regarded as an onerous task by those charged with the preparation of delegated legislation. It is usually done as a last minute exercise before the legislation is made. This is a large part of the reason why it is not an informative document.

Having worked for and with Commonwealth agencies on legislation, I acknowledge that this is the case. It is generally the case that explanatory material cannot be written until the relevant legislation is finalised and that this means that it is often written, in a hurry, at the end of what may have been a long and stressful process. That said, this cannot continue to be used as a

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9 Ibid, at pp 52-3.

10 See, generally, Senate, Regulations and Ordinances Committee, *Consultation under the Legislative Instruments Act 2003, Interim Report, 113th Report* (June 2007) (available at http://www.aph.gov.au/Senate/committee/regord_ctte/reports/report113/report.pdf.

justification for inadequate explanatory material. Nor should it be accepted as such.

Scrutiny of explanatory statements as a formal scrutiny principle

In this context, I should note that, in the ACT, the Scrutiny of Bills and Subordinate Legislation Committee has a formal term of reference that requires it to scrutinise explanatory material. Principle (b) of the Committee's terms of reference requires it to

> ... consider whether any explanatory statement or explanatory memorandum associated with legislation and any regulatory impact statement meets the technical or stylistic standards expected by the Committee.

I stand to be corrected but I believe that the only similar, *formal* term of reference of an "ANZAC Committee" is held by the Queensland Scrutiny of Legislation Committee, as a result of that Committee's role, under paragraph 103 (2) (a) of the *Parliament of Queensland Act 2001*, in monitoring the operation of Part 4 of the *Legislative Standards Act 1992* (which sets out requirements in relation to "explanatory notes").

While I do not believe that the existence of a formal term of reference is necessarily required for committees to undertake the scrutiny of explanatory material, it is useful if I say something about my experience in advising the ACT Committee in relation to that term of reference. While I do not have any actual statistics, it is my estimation that, over the 4 or so years that I have advised the ACT Committee in relation to subordinate legislation, more than half of the advice that I have given to the ACT Committee has related to the inadequacy of explanatory statements.

The advice that I refer to above does not simply relate to principle (b) of the ACT Committee's terms of reference. It also goes to whether other principles are potentially offended against. For example, if the empowering legislation for subordinate legislation that I examine sets out requirements that are to be met before subordinate legislation can be made, my view is that either the subordinate legislation or the explanatory statement for the subordinate legislation should state (or otherwise demonstrate) that the requirements have been met.

As I told the last conference, instruments of appointment (and the legislative requirement that only non-public servant appointments are to be made by disallowable instrument) are a good example. In order for it to be satisfied that an instrument of appointment is in fact disallowable (and, therefore, subject to the ACT Committee's scrutiny jurisdiction), the ACT Committee generally requires that there be a statement, either in the instrument or in the explanatory statement for the instrument, to the effect that "this is not a public servant appointment". Similarly, if the empowering legislation provides that appointees must hold certain qualifications, or be members of a particular profession or represent a nominated sector of the community, the ACT Committee generally requires that either the instrument or the explanatory

statement state that the relevant person(s) hold the relevant qualifications or belong to the relevant profession, etc.

Explanatory statements are also important in providing justification for what would otherwise appear to involve breaches of the ACT Committee's terms of reference. Strict liability offences are a good example. Over many years, the ACT Committee has, while maintaining the view that strict liability offences are a bad thing, stated that it will (grudgingly) accept the inclusion of strict liability provisions in subordinate legislation if:

- an explanation is provided as to why, in the particular circumstances, a strict liability offence is required; and
- information is provided as to what (if any) defences are nevertheless available; and
- the offence carries a penalty not greater than 60 penalty units.

Having set out these requirements over many years, it is incumbent (one would have thought) on those responsible for subordinate legislation put before the ACT Committee to demonstrate that these requirements are met. The third requirement can generally be discerned from the face of the subordinate legislation. The first 2 requirements, however, are (more often than not) matters that need to be dealt with in explanatory material.

If an explanatory statement for a piece of subordinate legislation that contains a strict liability offence does not contain information related to the first 2 requirements above, the ACT Committee will invariably draw attention to the provision under principle (a) (ii) of the Committee's terms of reference, on the basis that it might be considered to unduly trespass on rights previously established by law. This means that a response to the ACT Committee, from the relevant Minister, is required. When it is provided, the response invariably contains information that addresses the first 2 requirements, with the effect that the ACT Committee's concerns are assuaged. Had that information been set out in the explanatory statement, however, a not-inconsiderable amount of time (including mine!!) could have been saved.

Another good example occurs in the context of explanatory statements for fees determinations. Under Part 6.3 of the (ACT) *Legislation Act 2001*, primary legislation can allow for fees to be set by disallowable instrument. In the ACT, the majority of fees are, in fact, set by disallowable instrument. This means that a huge number of fees instruments come before the ACT Committee for scrutiny. When considering fees instruments, the ACT Committee has taken the view that (given the importance of fees to the governance of the ACT) it would like to see an indication of (a) whether any new fees are imposed (b) if fees are increased, what was the level of the previous fee and (c) for increased fees, what is the reason for (or basis of) the increase.

The ACT Committee has taken the view that the explanatory statement is the best place to provide the information that it seeks in relation to fees. I am

pleased to report that, over a period of years (and after no small amount of comment from the ACT Committee), ACT agencies appear to have come to accept (and endeavour to meet) the ACT Committee's requirements, with the effect that (on current indications) the most recent round of fees determinations gives every indication of being (relatively) free of issues requiring comment from the ACT Committee.

A less clear-cut issue is when explanatory statements fail to provide information that might dissuade the ACT Committee from "smelling a rat". A good example of this is a situation where subordinate legislation is made and then, within a period of months (or, sometimes, weeks), revoked and re-made. As the ACT Committee's legal adviser, when this happens, I smell a rat. I suspect that a mistake has been made or that something untoward has occurred. (On the ACT Committee's behalf) I start looking for explanations.

Often, the answer is that there was a defect in the original piece of subordinate legislation, which is corrected in the re-made version. In these situations, my advice to agencies is to own up to the mistake. The best approach (in my view) is to tell the legislature that there has been a mistake and that the later piece of subordinate legislation is intended to correct the mistake. This is preferable to leaving the legislature (and its scrutiny committee, and the scrutiny committee's advisers) to work this out for itself. Apart from anything else, it saves the time of those who seek to investigate what has gone on, it saves the time of the ACT Committee in drawing attention to the matter and it saves the time of the relevant Minister in having to respond to the ACT Committee's concerns.

As a result of the approach that is suggested above, the ACT Committee has tended to commend agencies that, in explanatory statements, expressly acknowledge that later subordinate legislation is designed to correct mistakes in earlier subordinate legislation.

But back to the point .....

I could not (for a moment) disagree with Professor Pearce's point that, more often than not, explanatory material for legislation (in the Commonwealth jurisdiction, at least) is "almost useless". The issue, however, is how to address this issue. In relation to subordinate legislation, my view is that we do not require any further statements as to the requirements for explanatory statements. What we require is for those requirements to be met. What that probably then requires are mechanisms for the requirements to be enforced.

Speaking from my ACT experience, the message that (through the ACT Committee) I have been trying to get across is that it is in the interests of the makers of subordinate legislation that they use their explanatory statements to their best effect (which includes using them to meet any stated requirements for explanatory statements). In particular, I have been trying to convince ACT agencies that an extra sentence or an extra paragraph in an explanatory statement can avoid pages and pages of explanations down the track, in Ministerial letters, briefs to Ministers, etc. As I said to the last conference, it's not rocket surgery.

Pre-making consultation

The next part of Professor Pearce's paper deals with consultation prior to the making of legislation. As Professor Pearce notes, in the Commonwealth jurisdiction, pre-making consultation mechanisms, for subordinate legislation, at least, are "exhortatory only". As Professor Pearce also notes (and as I have already referred to above), even that limited requirement for consultation tends not to have been adequately met.

Again, I would not disagree with Professor Pearce on this issue. What I would note, however, is that it should be remembered that there is an existing, over-arching (albeit non-statutory) requirement, for all legislation, that the "main affected parties" be consulted, that their views be set out and that, if limited or no consultation was undertaken, the reasons be given. Those requirements are set out in the OBPR's *Best Practice Regulation Handbook*. So, again, we do not need further requirements. We need the existing requirements to be met.

Parliament and policy

I turn now to the most problematic (for me) issue in Professor Pearce's paper: Parliament and policy. It has long been Professor Pearce's view that the Commonwealth Parliament should take a greater role in scrutinising the policy behind subordinate legislation and not just rely on the "technical" scrutiny issues dealt with by the Senate Standing Committee on Regulations and Ordinances. It has long been my view that we should leave things as they are.

Recently, I drew Professor Pearce's attention to the establishment, in the United Kingdom, of the House of Lords Select Committee on the Merits of Statutory Instruments (**Merits Committee**). As indicated by his paper, Professor Pearce has embraced the establishment of the Merits Committee in support of his point. He has also pointed to the work of the Merits Committee as demonstrating the value of such a committee.

In the remainder of this paper, I intend to demonstrate (respectfully) that Professor Pearce is wrong, on all counts.

My starting point is the leading text on delegated legislation, *Delegated Legislation in Australia and New Zealand*,[11] by Professor Dennis Pearce. In that text, Professor Pearce set out the 4 basic justifications for allowing for the making of delegated legislation, which are:

1 to save pressure on parliamentary time;

2 to deal with material that is too technical or detailed to be suitable for parliamentary consideration;

3 to deal with rapidly changing or uncertain situations; and

[11] 1977, Butterworths, Chatswood.

4 to deal with cases of emergency.

In relation to justification 1, Professor Pearce stated:

> Parliaments in Australia and New Zealand meet for shorter and shorter periods than many of their counterparts in other countries. Governments have, therefore, fairly limited time within which to pass essential legislation; oppositions have few opportunities to demonstrate the deficiencies of governments. The upshot of this is that parliaments become places where only broad policy issues can be considered. Debate on such issues is, in any case, that which parliament is best equipped to carry on. It is also that which most readily and profitably attracts public attention. The details of administration fit ill in this scheme of things and hence are better left to delegated legislation. The decision whether there should be legislation on a topic is something of concern to the community at large. The arguments in favour and against must be publicly stated. But once the decision to legislate is taken, the details can be worked out by the executive – but within the limits specified in the empowering Act.[12]

In relation to justification 2, Professor Pearce stated (in part):

> The considerations referred to under the last heading apply even more obviously where it is necessary in legislation to set out technical details or deal with matters of a scientific nature. Parliaments have neither the time nor the expertise to consider such matters. The parliament needs to resolve whether legislation on the question is wanted, but, having so determined, the detail is best included in delegated legislation.[13]

In relation to justification 3, Professor Pearce stated (in part):

> One of the consequences of limited parliamentary sittings is that Acts cannot be readily amended. And even where a parliament is sitting, the process for amending Acts is laborious and slow. Accordingly, if an Act attempts to deal with a fact situation that is fluid, it is likely to impose controls that are too rigid. Similarly, where controls are needed over certain activities or benefits are to be attached to certain actions, the variables of human behaviour may be such that the conduct cannot be described on a once and for all basis. The inflexibility of an Act makes it an unsatisfactory legislative instrument in such cases.[14]

It should be borne in mind that Professor Pearce wrote this in **1977**.

One of the things that I have always taken out of what I have set out above is that one of the fundamental justifications for putting something into subordinate legislation is that it is something that the parliament need not be too concerned about but, rather, is something that the parliament can be relatively comfortable merely keeping a watching eye over. Putting it another

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12 Ibid, at p 5.
13 Ibid.
14 Ibid, at p 6.

way, I take Professor Pearce to be saying that the “important” things – including the intrinsically “political” things – are to be kept to the primary legislation. The subordinate legislation is for the detail, for the machinery.

This view (misguided though it may be) is supported by the Department of Prime Minister and Cabinet’s *Legislation Handbook*, which contains the following explanation of the delineation between what is suitable for primary legislation and what is suitable for subordinate legislation:

> **Primary or subordinate legislation**
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> 1.12 While it is not possible or desirable to provide a prescriptive list of matters that should be included in primary legislation and matters that should be included in subordinate legislation, it is possible to provide some guidance. Matters of the following kinds should be implemented only through Acts of Parliament:
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> (a) appropriations of money;
>
> **(b) significant questions of policy including significant new policy or fundamental changes to existing policy;**
>
> (c) rules which have a significant impact on individual rights and liberties;
>
> (d) provisions imposing obligations on citizens or organisations to undertake certain activities (for example, to provide information or submit documentation, noting that the detail of the information or documents required should be included in subordinate legislation) or desist from activities (for example, to prohibit an activity and impose penalties or sanctions for engaging in an activity);
>
> (e) provisions conferring enforceable rights on citizens or organisations;
>
> (f) provisions creating offences which impose significant criminal penalties (imprisonment or fines equal to more than 50 penalty units for individuals or more than 250 penalty units for corporations);
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> (g) provisions imposing administrative penalties for regulatory offences (administrative penalties enable the executive to receive payment of a monetary sum without determination of the issues by a court);
>
> (h) provisions imposing taxes or levies;
>
> (i) provisions imposing significant fees and charges (equal to more than 50 penalty units consistent with (f) above);
>
> (j) provisions authorising the borrowing of funds;

(k) procedural matters that go to the essence of the legislative scheme;

(l) provisions creating statutory authorities (noting that some details of the operations of a statutory authority would be appropriately dealt with in subordinate legislation); and

(m) amendments to Acts of Parliament (noting that the continued inclusion of a measure in an Act should be examined against these criteria when an amendment is required).

1.13 However it should be recognised that the decision as to whether a particular matter should be included in primary or subordinate legislation may well be influenced by the nature of the subject matter and a variety of other factors. Departments should consult OPC about the appropriateness of including particular matters in primary or subordinate legislation. (See also paragraphs 6.45 to 6.47.) The Office of Legislative Drafting in the Attorney-General's Department is available to provide advice about subordinate legislation (see paragraph 6.48). [emphasis added][15]

It has always been my (presumably naive) view that if the guidance given by the *Legislation Handbook* is followed, all the *important* stuff goes into primary legislation. If that view is correct, there should be nothing in subordinate legislation that is *worthy* of policy scrutiny. It should all be just "nuts and bolts".

This (naive) view is supported by the role of the Senate Standing Committee for the Scrutiny of Bills. As you are all aware, since 1981, the Scrutiny of Bills Committee has advised the Senate on, among other things, whether Bills introduced into the Commonwealth Parliament

(iv) inappropriately delegate legislative powers; or

(v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.

In my view, these 2 terms of reference allow the Scrutiny of Bills Committee to assist the Senate in ensuring that the correct "mix" is maintained between primary and subordinate legislation. It allows the Senate to ensure that the "important" issues are kept to the primary legislation and only the "machinery" issues are left to subordinate legislation.

Please note that I have stressed that these views may be naive.

If what I have set out above is correct, if the Scrutiny of Bills Committee is doing its job and if the Senate is heeding the Committee's advice, I do not see how (generally) there can be a need for a committee such as the Merits Committee.

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[15] Department of the Prime Minister and Cabinet, *Legislation Handbook* (as at May 2000) (available at http://www.pmc.gov.au/parliamentary/index.cfm), pp 3-4.

To the extent that there may be non-"technical" issues in subordinate legislation, such as to warrant the close attention of the Senate, it should be remembered that the Senate can always (debate and) disallow subordinate legislation, even without a recommendation of the Senate Standing Committee on Regulations and Ordinances. Indeed, I note that a piece of subordinate legislation was disallowed, on a non-"technical" basis, only recently.[16]

Another reason that I disagree with Professor Pearce in this regard is that I have a concern that requiring that "policy" scrutiny of subordinate legislation be undertaken, particularly if it were to be undertaken by the Senate Standing Committee on Regulations and Ordinances, might operate to undermine the fine work that the Regulations and Ordinances Committee already does. It is notorious that (like other legislative scrutiny committees) the Regulations and Ordinances Committee has, for over 75 years, operated in a bipartisan, non-political fashion. This has, surely in no small part, been attributable to the fact that the Regulations and Ordinances Committee confines its scrutiny to "technical" issues relating to subordinate legislation. While I do not underestimate the extent to which party-political issues may intrude, even into "technical" scrutiny, I fear (and I stress that this is purely a personal view) that assigning the scrutiny of expressly "policy" issues to the Regulations and Ordinances Committee might operate to undermine the bipartisan, apolitical manner in which the Committee has so successfully operated over such a long period of time.

Again, that may just be my naivety.

The work of the Merits Committee

I turn now to the work of the House of Lords Select Committee on the Merits of Statutory Instruments. As Professor Pearce points out in his paper, the UK Parliament now has 2 committees that deal with subordinate legislation. The Joint Committee on Statutory Instruments performs functions similar to the "ANZAC Committees" that consider subordinate legislation. The other committee is the House of Lords Select Committee on the Merits of Statutory Instruments Committee. As Professor Pearce points out, it was established in 2003. Its Terms of Reference state:

> **(1)** The Committee shall, subject to the exceptions in paragraph (2), consider-
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> (a) every instrument (whether or not a statutory instrument), or draft of an instrument, which is laid before each House of Parliament and upon which proceedings may be, or might have been, taken in either House of Parliament under an Act of Parliament;

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[16] See Senate, *Hansard*, 25 June 2009, at pp 32-6, re directions in relation to coercive powers under the *Building and Construction Industry Improvement Act 2005*.

(b) every proposal which is in the form of a draft of such an instrument and is laid before each House of Parliament under an Act of Parliament, with a view to determining whether or not the special attention of the House should be drawn to it on any of the grounds specified in paragraph (3).

(2) The exceptions are-

(a) remedial orders, and draft remedial orders, under section 10 of the *Human Rights Act 1998*;

(b) draft orders under sections 14 and 18 of the *Legislative and Regulatory Reform Act 2006*, and subordinate provisions orders made or proposed to be made under the *Regulatory Reform Act 2001*;

(c) Measures under the *Church of England Assembly (Powers) Act 1919* and instruments made, and drafts of instruments to be made, under them.

(3) The grounds on which an instrument, draft or proposal may be drawn to the special attention of the House are-

(a) that it is politically or legally important or gives rise to issues of public policy likely to be of interest to the House;

(b) that it may be inappropriate in view of changed circumstances since the enactment of the parent Act;

(c) that it may inappropriately implement European Union legislation;

(d) that it may imperfectly achieve its policy objectives.

(4) The Committee shall also consider such other general matters relating to the effective scrutiny of the merits of statutory instruments and arising from the performance of its functions under paragraphs (1) to (3) as the Committee considers appropriate, except matters within the orders of reference of the Joint Committee on Statutory Instruments.

The first thing to note is that, in relation to Term of Reference (3) (a), based on what I have already set out above, my view is that this is a function that, in the Commonwealth Parliament, is dealt with by a combination of the diligent application of the principles for delineation between primary and subordinate legislation (set out in the *Legislation Handbook*) and the Scrutiny of Bills Committee carrying out its functions in relation to principles (iv) and (v) of its terms of reference. The UK Parliament does not have a Scrutiny of Bills Committee, so perhaps they need Term of Reference (3) (a) (and a committee to enforce it).

The second thing to note is that, in the context of the Commonwealth Parliament, Terms of Reference (3) (b) and (d), if not taken account in any

relevant policy development, should at least be taken into account in the context of the requirements promulgated by the OBPR. Indeed, it is difficult to imagine how a legislative proposal that has been through the OBPR's "generic outline" for an RIS could result in legislation that failed to take into account changed circumstances between the enactment of the parent Act and the making of the legislation or imperfectly achieved its policy objectives (ie especially given that cost/benefit analysis, consideration of alternative options, etc is required). So, again, in the Commonwealth Parliament, these issues are already covered (at least in theory).

Next, I have considered the Merits Committee's publication entitled *Guidance for Departments*.[17] Of the document's 10 pages, 7 set out requirements for explanatory memoranda. Leaving aside the fact that these requirements do not appear to relate directly to any of the Merits Committee's Terms of Reference (though, obviously, they are issues that could come within Term of Reference (4)), the simple fact is that, again, similar requirements already exist in relation to subordinate legislation tabled in the Commonwealth Parliament. So the Merits Committee does nothing that we do not already do in the Commonwealth Parliament.

Having said this, I do not disagree with Professor Pearce that some of the requirements (and mechanisms) in relation to explanatory material that are set out in the *Guidance for Departments* document are worth considering in the Australian context. Any potential strategy to improve explanatory material should be considered.

Moving on from the *Guidance for Departments* document, I have briefly examined some of the Merits Committee's recent reports, to attempt to get an idea as to the value of the Merits Committee's work.

In its most recent report, the *Twenty-First Report of Session 2008-09*,[18] the Merits Committee drew "the special attention of the House" to the *Merchant Shipping (Light Dues) (Amendment) Regulations 2009*, "on the ground that they give rise to issues of public policy likely to be of interest to the House". The particular issue seems to be that the regulations in question give effect to a significant rise in certain fees payable by shipping. The cumulative increase, over 2 years, is stated as 35%. The relevant fees are evidently collected to fund lighthouses. The concern reflected in the Report is that the increase in fees may drive ships away from UK ports.

Though I admittedly speak from a position of relative ignorance (and though I do not doubt how important the effect of such a fee increase would be on shipping affected by the fee increase), it is difficult to see how this exercise involves a matter of high policy, such as to warrant there being a committee set up to monitor such issues. In Australia, this sort of issue would presumably have been identified as part of the OBPR processes (if they were followed). That aside, it is hard to believe that a fee increase of this magnitude (if, in fact, it was a concern to those involved in shipping) would not

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17 Available at http://www.parliament.uk/documents/upload/Meritsguidancefordepts0409.pdf.

18 Available at http://www.publications.parliament.uk/pa/ld200809/ldselect/ldmerit/118/118.pdf.

have been drawn to the attention of the Senate, probably by an affected party. In my view, the Senate would not have required a committee to point this sort of thing out. Indeed, I suggest that recent activity, in the Senate, in relation to the *Export Control (Fees) Amendment Orders 2009 (No. 1)* is a good example of this occurring.[19]

The *Twenty-First Report of Session 2008-09* also discusses 5 "instruments of interest". One involves a draft Treasury instrument that is (at least in part) a response to issues raised by the "Banking Liaison Panel". The Report notes that the instrument implements 4 of the 5 recommendations of the Panel but expressly fails to implement the fifth. The Report states that "[t]he House may wish to satisfy itself that there is now sufficient legal certainty concerning [the relevant issue] despite the Government's decision not to implement the [Panel's] fifth recommendation at present".

While the value of this entry is a little more difficult to understand, it is nevertheless hard to see how it involves a matter of high policy (and note, in any event, that the instrument is not drawn to "special attention").

The second "instrument of interest" is a draft regulation allowing the Legal Aid Commission to grant a "provisional representation order" for publicly funded representation (legal aid) at the investigative stage of a potential serious or complex fraud case. The entry appears to be merely descriptive of what the draft regulations would do. It is difficult to see how any high policy is involved.

The third "instrument of interest" is a draft regulation under the *Human Fertilisation and Embryology Act 2008*. The entry draws attention to "serious .. flaws" in drafts of the regulation which, according to the entry, might have been picked up at an earlier stage, if the relevant Department had put the instrument had been put out for public consultation. While it is commendable that drafting errors have been identified (and while it may be the case that these errors would have been identified in public consultation), it is difficult to see how any high policy is involved.

The fourth "instrument of interest" is a draft amendment of the *National Minimum Wage Regulations 1999*, relating to the effect of service charges, tips, gratuities and cover charges on the calculation of the national minimum wage. The entry draws attention to the fact that the explanatory memorandum for the draft regulation gave information about only some aspect of the public consultation on the issue and omitted other aspects (to which the entry draws attention). Again, while this is probably commendable, it is difficult to see how any high policy is involved.

The fifth "instrument of interest" is an order lifting an asset freeze imposed in the UK in relation to assets of an Icelandic bank. The entry appears to be largely descriptive, including providing an explanation as to why "the 21 day rule" has not been complied with in relation to the order. Again, while this is probably commendable, it is difficult to see how any high policy is involved.

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[19] See, eg, Senate*, Hansard*, 23 June 2009, p 27 and 25 June 2009, pp31-2.

Possibly of greater significance are instruments drawn to the "special attention" of the House in the Merits Committee's *Nineteenth Report of Session 2008-09*.[20] In that Report, the Merits Committee considered 4 instruments relating to procedures to introduce identity cards. The report states:

> These four affirmative instruments have a broad range of provisions, including: prescribing government departments which may be provided with information in connection with specified functions; the fees to be charged for applications; and designation, for the purpose of the 2006 Act, of a "criminal conviction certificate" when this is applied for by an airside worker. The Government intend [sic] that these instruments, together with the instruments to be laid later this month, will permit the issuing of ID cards to airside workers: initially at Manchester and London City airports, and volunteers in Manchester, from Autumn 2009. The statutory purposes for the establishment of the National Identity Register are set out in the 2006 Act. However, the House may wish to use the debates on these instruments to examine whether the net benefits of the scheme as set out in 'Identity Cards Act Secondary Legislation: An Impact Assessment' (available at www.ips.gov.uk) are a reasonable assessment. The House may also wish to seek reassurance from Ministers that the concerns about the scheme currently being raised from within the aviation industry are being given appropriate consideration.

The issues identified above appear to involve more substantive concerns and are clearly worth raising in a legislative scrutiny context. Equally clearly, however, is the fact that, in the Australian Parliament, they could be expected to have been raised by the Senate Standing Committee on Regulations and Ordinances, on the basis that the relevant instruments might be considered to involve an undue trespass on personal rights and liberties, contrary to principle (b) of the Regulations and Ordinances Committee's terms of reference. That being so, it is difficult to contemplate what the sort of scrutiny referred to above would add in the context of the Australian Parliament (ie to what we already have).

The Merits Committee's *Fifteenth Report of Session 2008-09*[21] deals with issues that may arouse particular interest in the Australian context, in that it deals with instruments that "form an implementation package for the provisions of the *Climate Change Act 2008* aimed at achieving the UK's carbon reduction targets." The Report states:

> During the passage of the Act, there was significant debate in the House on the issue of carbon budgets and accounting, and in particular around the provisions allowing for the purchase of carbon credits from overseas [e.g. HL Deb 27 November 2007, Cols 1134 - 1214]. Collectively, these [statutory instruments] set the first three carbon budgets; introduce a carbon accounting system which will be used to

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20 Available at http://www.publications.parliament.uk/pa/ld200809/ldselect/ldmerit/109/10903.htm.

21 Available at http://www.publications.parliament.uk/pa/ld200809/ldselect/ldmerit/85/8503.htm.

> monitor compliance with the targets for reducing greenhouse gas emissions; amend the level of the 2020 Target in the Act from a 26% reduction in carbon dioxide to a 34% reduction in all greenhouse gases (on the advice of the Committee on Climate Change); define "international aviation" and "international shipping" for the purposes of the Act; and set the limit of the net amount of carbon units that may be credited to the net UK carbon account for the first budgetary period as zero carbon units (excluding under the EU Emissions Trading Scheme).

After setting out background information, the Report states:

> 3. Given the significance and complexity of the package contained in these three instruments, the House may wish to use the debate on the instruments to satisfy itself that all of the components fit together logically, and that the Government can fully justify the developments to the package since the passing of the *Climate Change Act 2008*.

The Report does not, however, set out any basis on which the Merits Committee has made this suggestion to the House.

On the one hand, it is difficult to argue that subordinate legislation dealing with an issue as politically important (and sensitive) as carbon reduction could other than benefit from consideration, on its policy merits, by a legislative scrutiny committee. On the other hand, however, it is difficult to imagine this not happening in the Australian Parliament, regardless of the existence or not of a committee with similar functions to the Merits Committee. It is also difficult to discern (from the material available to me) precisely what value the Merits Committee added to the relevant debate on these particular instruments.

I do not propose (in the context of this paper) to consider all of the Merits Committee's reports in detail. Nor do I profess to have provided anything other than a rough, snapshot analysis, based on my brief examination of the material available on-line. There is, however, one other report of the Merits Committee that caught my attention.

The Merits Committee's *Ninth Report of Session 2008-09* is entitled *The Cumulative Impact of Statutory Instruments on Schools*.[22] It appears that the effect of subordinate legislation on schools has been an issue for the Merits Committee, as several of the Merits Committee's reports deal with that issue.

The *Ninth Report of Session 2008-09* contains the following summary of the Merits Committee's recommendations:

> 1. The Department for Children, Schools and Families should actively manage the planning and production of secondary legislation. The Department should also strengthen its gate-keeping activity, particularly to minimise the burdens imposed upon schools by Regulations from all Government Departments. (paragraph 15)

[22] Available at http://www.publications.parliament.uk/pa/ld200809/ldselect/ldmerit/45/4503.htm.

2. DCSF should adopt 1 September as the commencement date for all schools-related [statutory instruments] (except in very exceptional circumstances). (paragraph 22)

3. Schools should be given at least one full term's lead-in time between the notification of a new requirement in a statutory instrument and the commencement of that requirement. (paragraph 24)

4. DCSF should intensify their work to improve communication to schools, which needs to be fully informed by advice provided by practitioners. (paragraph 28)

5. We recommend that the DCSF should ensure that all significant statutory instruments are subjected to post-implementation review, and that the review findings are made known to Parliament. (paragraph 34)

6. DCSF should seriously consider a less heavy-handed approach to maintained schools. Furthermore, if DCSF consider that the light-touch regulatory framework for academies is appropriate and successful, that lighter touch should be extended to all maintained schools. (paragraph 43)

7. DCSF should now look to shift its primary focus away from the regulation of processes through statutory instruments, towards establishing accountability for the delivery of key outcomes. (paragraph 46)

What struck me about <u>all</u> of the recommendations set out above (with the possible exception of recommendation 4) is that these are <u>all</u> issues that, in Australia, for Commonwealth legislation, should have been addressed as part of the requirements promulgated by the OBPR. Indeed, my initial reaction to these recommendations was one of surprise, in that it is hard to believe that, in the UK, such recommendations *need* to be made and, further, that there are no processes similar to those promulgated by the OBPR.

Just to make it clear that I'm not just bagging the Poms ....

I should say 2 things before concluding my discussion of the work of the Merits Committee. The first is that (as I have said) I do not pretend to be an expert on the work of the Merits Committee. The analysis set out above is based on my (very quick) reading of various Merits Committee reports that are available on-line. Further, my analysis is premised on a desire to demonstrate (for the purposes of backing up my disagreement with Professor Pearce about the potential benefit of "policy" scrutiny of subordinate legislation) that I have struggled to identify anything significant in the operation or the work of the Merits Committee that we do not already do in Australia. That said, I do not deny that we can almost certainly do better than we do.

The second point that I should make is that I **applaud** the introduction of any process or mechanism that brings additional scrutiny to any form of

legislation. In my view, one of the great dangers of legislating at speed is that errors are made and possible consequences are not necessarily foreseen. In my view, the more eyes (and the more independent eyes) that are cast over draft legislation, the better. I have no doubt that the quality of the UK's subordinate legislation is improved by the work of the Merits Committee.

Concluding comments

While the purpose of this paper is to take issue with Professor Pearce's paper, it is evident that, in fact, we agree on many of the matters that we have discussed. There can be little doubt that (certainly in the Commonwealth jurisdiction) much can be done to improve the quality (and the usefulness) of explanatory material. The obvious thing that needs to be done (in my view) is that existing requirements need to be enforced more rigorously. We do not need any new requirements.

As to the work of the House of Lords Select Committee on the Merits of Statutory Instruments (as I have said), the introduction of any process or mechanism that brings additional scrutiny to any form of legislation is to be applauded. This is particularly the case in relation to the UK Parliament, which, in legislative scrutiny, has long been the poor cousin of the "ANZAC Parliaments". That said, I remain unconvinced (albeit though my analysis of the work of the Merits Committee may be shallow and misguided) that the operation or the work of the Merits Committee offers anything of which the ANZAC Committees should be envious. As I have set out above, most of what the Merits Committee does we already do or *can* do (certainly in the Commonwealth jurisdictions). That is not to say, however, that we cannot do it better.