

AUSTRALIA - NEW ZEALAND SCRUTINY OF LEGISLATION CONFERENCE

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Bones without flesh - the issues with skeletal legislation



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INTRODUCTION

Legislation that provides a skeletal framework only, leaving the detail to be spelt out in regulations and other subordinate legislation, is not a recent phenomenon.¹

Factors which appear to have contributed to this growth include:

- a) pressure to meet COAG/National Seamless Economy IGA deadlines as well as Commonwealth requirements tied to funding of states, regardless of the state of readiness of the legislation;
- b) an inability to reach agreement on how to legislate on issues and the hope that it will be resolved at a later time;
- c) bureaucratic frustration in getting amendment legislation on the government legislative agenda; and
- d) a lack of respect for the institution of Parliament by a belief that Parliamentary scrutiny takes too long.

It is significant that the modern tendency of governments in Australia to identify themselves with the Parliaments has been noted recently by the High Court.²

There has also been an accompanying increase in subordinate legislation, which has been argued as necessary to fill in the details the primary legislation has failed to provide.

Some prime examples of skeletal legislation include recent legislation which seeks to introduce a uniform scheme or laws in Western Australia, which the Standing Committee on Uniform Legislation and Statutes (Committee) is tasked with reviewing.³ The Committee is unique amongst Australian parliaments in being specifically dedicated to scrutinising proposed legislation that is uniform in nature or has some element of uniformity. Standing Order 230A of the Legislative Council of Western Australia is similarly unique in providing for the automatic referral of bills that are uniform in nature to the Committee.⁴

In my presentation I will:

- (a) give an overview of exactly what skeletal legislation is;
- (b) discuss the issues with uniform legislation and how skeletal legislation exacerbates these issues;
- (c) discuss recent examples of such legislation in Western Australia;
- (d) refer to examples of its use in other countries; and

¹ *Institute of Patent Agents v Lockwood* [1894] A.C. 347 at 356 per Lord Herschell, L.C.

² *Thomas v Mowbray* (2007) HCA 33 per Kirby J.

³ The Committee's Terms of Reference are attached as Appendix 1.

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- (e) conclude by speculating on its possible implications for the future of the role of Parliament in scrutinising legislation and making some suggestions as to how skeletal legislation could be avoided or minimised in the future.

WHAT IS SKELETAL LEGISLATION?

There have been a number of definitions given, some of which are as follows.

*Nothing more than vehicles for extensive delegated powers*⁵

*Little more than a licence to legislate*⁶

*'Skeletal legislation' denotes a statute which delegates legislative power without laying down sufficient policy for the guidance of the delegate. While such legislation should be invalid as it violates the principles of delegation, in modern practice there are a number of statutes which lay down only the barest possible policy guidance and leave enormous discretion to the delegate.*⁷

*A measure introduced with little or no substance. It will be amended at a later date to include substantive text.*⁸

The content and tone of these definitions are instructive in conveying some of the concerns that have been expressed about this method of law making.

Skeletal legislation has also been classified as a method of subordinate legislation under the heading of 'power to fill in details'.⁹

What constitutes skeletal legislation can be very much a matter of opinion as it depends upon one's view as to what is a proper balance between primary and subordinate legislation. That being said, there are instances where there can be no doubt that legislation fits within the above definitions, where so little of what you would normally see in an empowering Act is present and is left to be set out in subordinate legislation. This gives Parliament and the committees tasked with scrutiny very little idea, if any, about what will be contained in the subordinate legislation and without the ability to undertake proper scrutiny before it comes into force.

Nevertheless, arguments have been made justifying skeletal legislation on the grounds of:

- (a) there being a total flexibility to cater for changing circumstances;

⁴ A copy of Standing Order 230A is attached as Appendix 2.

⁵ Submissions to the UK House of Commons Select Committee on Procedure in 1996.

⁶ Tudor, P (2000), Secondary Legislation: Second Class or Crucial?, *Statute Law Review*, Vol.21, No.3, pp 152.

⁷ *Bhatnagars & Co. v. Union of India* AIR 1957 SC 478.

⁸ California State Assembly Office of the Chief Clerk, Glossary of Legislative Terms. See www.assembly.ca.gov/clerk/billslegislature/glossary (viewed on 18 April 2011).

⁹ N.K. Jayakumar, *Administrative Law*, Prentice-Hall of India Private Limited, New Delhi, 2005, p16.

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- (b) avoiding parliamentary overload, given the sheer volume of legislation parliaments are asked to pass¹⁰; and
 - (c) dealing with complex or novel subject matters which are perceived to be beyond the capacity of parliaments to deal with.

Also, the reality is that the Executive, depending on the extent of its numbers in the Houses of Parliament, has often controlled both primary and secondary legislation making as a consequence of party discipline.¹¹

ISSUES WITH UNIFORM LEGISLATION

State sovereignty

One of the main concerns that have been raised with respect to uniform legislation is its ramifications for the sovereignty of state parliaments.

Uniform schemes and resulting legislation by their very nature have the capacity to erode or undermine the sovereignty of the Western Australian State Parliament. As elected representatives of the people of Western Australia to the State Parliament we have an obligation to protect this sovereignty. Legislation that impinges on the State's sovereignty should be passed by the Parliament only when, on balance, it is in the best interests of Western Australians to do so.¹²

The creation of the Committee arose out of the realization that procedures were required to safeguard the powers of the State Parliament, given the limits uniform legislation placed on this.

Compliance with Fundamental Legislative Scrutiny Principles (FLPs)

Another concern, as with any Parliamentary committee, has to do with compliance with FLPs - attached as Appendix 3. When the Committee examines uniform legislation, consideration is always given to whether it is in accordance with the FLPs. Although they have not been formally adopted by the Legislative Council as part of the Committee's terms of reference, the Committee applies the principles as a convenient framework for the scrutiny process.¹³

Decisions already made by national body

The Committee has sometimes felt that a bill has been presented to it to be rubber stamped on the basis that all decisions regarding the implementation of the relevant national scheme

¹⁰ Craies on Legislation, Sweet & Maxwell, London, 9th edition, paragraph 3.1.1.1.

¹¹ Mr Joe Francis, MLA, 'Some Accountability Issues in Scrutinising Subsidiary Legislation made under Skeletal Acts', paper delivered at the Scrutiny of Legislation Conference, Canberra, 8 July 2009, p1-2.

¹² Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, Report 59, *Personal Property Securities (Commonwealth Laws) Bill 2011 and Personal Property Securities (Consequential Repeals and Amendments) Bill 2011*, 22 March 2011, p5.

¹³ Western Australia, Legislative Council, Uniform Legislation and Statutes Review Committee, Report 4, *Defamation Bill 2005*, October 2005, p1-2.

have already been made by the national body (such as a Ministerial Council) and that any changes would put the participation by Western Australia in the scheme (or, indeed, the whole of the national scheme) in jeopardy and may result in it having to withdraw.

1992 Select Committee report

On 4 June 1992, a select committee (Select Committee) was set up to inquire into and report on the issues that had been encountered with uniform legislation governing non-bank financial institutions.¹⁴ Application of laws legislation had been passed in the Western Australian Parliament without the Parliament having had an opportunity to view, let alone comment on, the substantive legislation passed in the Queensland Parliament, which was incorporated into the law of Western Australia (due to the legislation not being attached to the legislation). This prevented them making any informed decision when the legislation was passed.

One of the functions of the Select Committee was to inquire into and report on structures or processes which could be established to ensure proper parliamentary scrutiny of the implementation of proposed amendments to and regulations pursuant to uniform schemes.

Some 13 recommendations were made, including:

- (a) the setting up of the Committee to scrutinize, monitor and review uniform legislative schemes;
- (b) that the primary consideration in decisions on participation in intergovernmental agreements and uniform legislative schemes should be whether Western Australia will be better served by the enactment of uniform law than by Western Australian legislation specifically drafted to address Western Australian needs and requirements; and
- (c) the tabling of exposure drafts of material explaining proposed uniform schemes in each participating Parliament.

It is significant that the Solicitor-General of Western Australia, in his advice to the Select Committee, stated that, while there can be valid reasons why national uniformity of law can be desirable or necessary, the need for or the advantages of national uniformity are usually exaggerated, describing such a need as having developed into a 'catch-cry' for Federal committees and bodies.¹⁵

It is the view of the Committee that the Select Committee was very much ahead of its time, anticipating many of the challenges currently being faced by the Committee. Indeed, a significant number of its recommendations have still not been implemented, including the one covering exposure drafts.

¹⁴ Western Australia, Legislative Assembly, Select Committee on Parliamentary Procedures for Uniform Legislation Agreements, Report, 27 August 1992.

¹⁵ Op. cit. n 14 at p 25.

Subsequent reports have highlighted the very same issues, including reports handed down after the Committee had inquired into how federations overseas deal with issues of state sovereignty and uniform legislation and how their Parliaments determine the appropriate balance.¹⁶

How skeletal legislation exacerbates these issues

Essentially, this is done by it by-passing altogether the scrutiny process with respect to what would otherwise be contained in the bill. Accordingly, the Committee will not even have an opportunity to become aware of the extent to which state sovereignty is to be affected because substantive provisions are set out in subordinate legislation, which is out of the scope of the Committee's inquiry. Also, it's often the case the negotiations on a state level have not been concluded on even the form of the scheme itself. This deprives the Committee of an opportunity to properly apply FLPs.

The consequences are obvious - the subversion of the parliamentary process by the Executive and inherent uncertainty of what is being asked of Parliament to be approved. This has serious implications for the future of legislative scrutiny and state sovereignty.

Additionally, it is not just the lack of parliamentary scrutiny which presents an issue. It is more difficult for skeletal legislation to afford an adequate basis for judicial review of the powers as their description can be so broad so as to cover almost all executive action.

Finally, let us also not forget that there are significant cost implications from not comprehensively working out the detail of legislative framework at the start and leaving so much of this to be worked out at a later time (arising, for example, from duplication of processes).

INCREASED AMOUNT OF SUBORDINATE LEGISLATION

Some proposed legislation is so skeletal in nature that in order to give it any substance and effect, it relies entirely on the making of subordinate legislation. Hence, there is a clear link between the increases of both.

Placing provisions that could be inserted into the primary legislation into subordinate legislation when the primary legislation is very skeletal in nature has the following important consequences.

- (a) It being often the case that subordinate legislation is only scrutinized once it has come into force, it has the capacity to affect the rights of citizens before being reviewed by Parliament.
- (b) It is more difficult to defend a recommendation that subordinate legislation be disallowed by Parliament on the basis that the empowering Act does not authorize

¹⁶ For example, see the following reports: Western Australia, Legislative Assembly, Standing Committee on Uniform Legislation and Intergovernmental Agreements, Report 4, *Parliament and the Executive*, 16th June 1994 and Western Australia, Legislative Assembly, Standing Committee on Uniform Legislation and Intergovernmental Agreements, Report 21, *Uniform Legislation*, 9 April 1998.

this when there is so little detail in the empowering Act to rely upon. In other words, the rule that where there is conflict between subordinate legislation and the empowering Act, the Act prevails cannot be as effectively applied.

- (c) The potential for greater numbers of Henry VIII clauses where the Act is amended by the subordinate legislation.

The experiences of my colleagues on the Western Australian Joint Standing Committee on Delegated Legislation arising out of the increasing incidence of skeletal legislation has been covered in a paper delivered to the 2009 conference by the chair of that committee, Mr Joe Francis MLA and I do not intend to repeat everything which has been stated.¹⁷

What I will do is point out a further issue highlighted in that paper, namely, where the subordinate legislation is not something which Parliament is able to disallow. This has been referred to in some literature as 'quasi-legislation', examples of which can include Ministerial Orders, codes of practice, notices and other administrative documents. Our Committee has come across a large number of such instruments. The 1992 Select Committee report referred to above identified prudential standards which the financial institutions legislation was empowered to make as not subject to disallowance by Parliament, despite them stating to have the force of law in that penalties may be imposed for failing to comply with them.¹⁸

The inaccessibility of such legislation, in that it is not often subject to publication requirements, combined with the lack of Parliamentary scrutiny, with the resulting derogation of the role of Parliament, is of increasing concern.

Indeed, so concerned was the Select Committee that one of its recommendations was:

That quasi-legislative instruments which form part of the co-operative or uniform schemes be submitted to the (Select Committee) for scrutiny¹⁹.

EXAMPLES OF SKELETAL LEGISLATION IN WESTERN AUSTRALIA

The application of laws legislation which made the financial legislation referred to under the heading '1992 Select Committee Report' above, namely, the Financial Institutions (Queensland) Act 1992 and the Australian Financial Institutions Commission Act 1992, laws of Western Australia, represents an earlier example of skeletal legislation passing through Parliament.

Additionally:

- the Queensland Parliament, as the 'host' state under the uniform scheme, was empowered to enact any amendments to the legislation;

¹⁷ Op. cit. n. 11.

¹⁸ Op. cit. n. 14 at p 38.

¹⁹ Ibid, at p 50.

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- any regulations under the scheme were to be made by the Governor in Council in Queensland; and
 - the Supreme Court of Queensland was to have jurisdiction in an appeal from a question of law on a matter arising in Western Australia.

There is no clearer example than this of the enactment of skeletal legislation having an adverse impact on the sovereignty of the Western Australian Parliament.

Recent examples before the Committee

- **Occupational Licensing National Law (WA) Bill 2010 (OLNL Bill)**

The OLNL Bill was one of the most extreme examples of skeletal legislation encountered by the Committee in more recent times. So extreme, the Committee took the unusual step of recommending that the OLNL Bill not be passed in the form it was presented to the Committee. It is notable that this recommendation does not appear to have been made in any other jurisdictions passing the National Law.

The OLNL Bill arose out of COAG, in 2009, signing an Intergovernmental Agreement for a National Licensing System for Specified Occupations, with Victoria being nominated as the host for the legislation. The Occupational Licensing National Law was passed by the Victorian Parliament on 17 September 2010, with the remaining States and Territories being left to pass the National Law in their jurisdiction.

The purpose of the national licensing system was to remove overlapping and inconsistent regulation between jurisdictions for the licensing of occupational areas. By so doing, it aimed to improve business efficiency and the competitiveness of the national economy, reduce red tape, improve labour mobility and enhance productivity, thereby enhancing consumer confidence and protection without imposing unnecessary costs on consumers and business or substantially lessening competition.²⁰

Having conducted extensive research and analysis of the OLNL Bill and detailed hearings, the Committee's report could not have been more emphatic about the skeletal nature of the OLNL Bill, even going so far as to say it does not introduce national occupational licensing at all, but rather proposes a process for developing one. The Committee also cast doubt upon whether a national licensing system will ever be developed.²¹

An example of the uncertainty, lack of clarity and incoherence included no clarity about key definitions and terms used in the OLNL Bill.

To further illustrate the lack of detail and certainty, the Committee reported that:

²⁰ Explanatory Memorandum to the Occupational Licensing National Law Bill 2010 (Vic), p 1.

²¹ Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, Report 61, *Occupational Licensing National Law (WA) Bill 2010*, 14 April 2011, p1.

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- (a) not all occupations, sub-groups or work performed within a specified (or later prescribed) “licensed occupation” will be subject to a licence;
 - (b) if an occupation, sub-group or work is subject to a licence, that licence may apply in some jurisdictions but not others. That is, the licence is not necessarily “national”; and
 - (c) a decision not to require a particular occupation, sub-group or work within specified (or later prescribed) “licensed occupation” to obtain a licence through the national licensing system will not preclude a State or Territory from subjecting that activity to a jurisdictional licence.²²

There were a myriad of other examples of this, to such an extent that the regulations, when they are made, will constitute the legislative framework, rather than, as should be the case, implement this framework as provided by Parliament.

In evidence the Department of Commerce submitted that skeletal type legislation, where more detail would be set out in regulations than normal, is proposed as the new national model for uniform legislation.

The general argument is that with national schemes, if you are requiring legislation, it is very difficult to get legislation through eight Parliaments in any form of timely manner and very complicated, so that to be efficient and effective and obtain the advantages of a national scheme, it is appropriate to put more detail into regulations than would be normal²³

The Committee responded as follows.

*The Committee does not support the view that State Parliaments, and in particular this State Parliament, need to accept the model used in this Bill as the new model for uniform legislation. The model unnecessarily abrogates State Sovereignty, lacks detail and is bad law. **To ask a State Parliament to pass legislation in the form of this Bill because the jurisdictions have not been able to sort out their differences and agree to the details of the uniform scheme is absurd.** If the Commonwealth and State jurisdictions want to implement uniform legislation they need to work out the detail of the scheme and include this in the Bill before presenting a Uniform Bill to Parliament for adoption.*

Concerns were also raised in other state jurisdictions at the time corresponding legislation was introduced. For instance, during the debate over the Occupational Licensing National Law (Queensland) Bill, Jann Stuckey remarked:

Also of concern is the limited parliamentary oversight involved with this national scheme. National regulations, on which the majority of this

²² Ibid, at p3-4.

²³ Ibid, at p20.

scheme will be reliant, are to be made by the ministerial council, at this stage being the Ministerial Council for Federal Financial Relations. The process by which regulations are proposed to be made appears to bypass significant parliamentary scrutiny. To ensure legislative consistency, any disallowance of a regulation by a jurisdiction can only be approved if the majority of participating jurisdictions have disallowed the regulation. Further concerns about abrogating the rights of parliaments will undoubtedly arise once the system begins. I note at this point that Western Australia is the only state that has indicated that it will not enact the national legislation. However, WA has indicated that it will draft legislation that mirrors the law.

- **Health Practitioner Regulation National Law (WA) Bill 2010 (HPRN Bill)**

The HPRN Bill was a less extreme, albeit still demonstrable example of a skeletal legislative framework. While the Committee did not feel it was necessary to recommend it not be passed, its recommended amendments were successful in eliciting an undertaking from the Government that an amendment would be moved to require that the Minister for Health table in Parliament regulations made by the Ministerial Council.²⁴ This amendment, that sections 41 and 42 of the Interpretation Act 1984 (WA) apply to regulations made under what is now the Health Practitioner Regulation National Law (WA) Act 2010, was passed and now appears in section 7(2) of the Act.²⁵

The purpose of the Bill was to create a single national registration and accreditation scheme for 14 health professions. It was intended as a major overhaul on how health professions are regulated and to replace the State based systems.²⁶

The Committee observed as follows.

The Bill does not contain the same level of detail as that contained in the State Acts which it replaces. The Bill provides a skeletal legislative framework only, with much of the detail to be determined administratively through the wide discretionary powers provided to the Ministerial Council and National Boards. How that discretion is to be exercised is largely not detailed in the Bill. Also, there is no requirement in the Bill for this detail to be prescribed in regulations. This has the effect of excluding the State

²⁴ Letter from Dr Kim Hames, MLA, 4 August 2010, attaching document entitled 'Responses to Standing Committee on Uniform Legislation and Statutes Review Health Practitioner Regulation National Law (WA) Bill 2010 from Minister for Health p 1.

²⁵ Sections 41 and 42 of the Interpretation Act 1984 (WA) provides for the publication of subsidiary legislation in the Government Gazette and for it to be laid before Parliament, making it subject to disallowance. Various determinations, proclamations and regulations have since been published in the Government Gazette.

²⁶ Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, Report 52, *Report on the Health Practitioner Regulation National Law (WA) Bill 2010*, 22 June 2010, p 1.

*Parliament entirely from any oversight of, and involvement in, the National Scheme.*²⁷

The Committee gave a number of examples to illustrate the lack of detail in the HPRN Bill by comparing it to the detail contained in provisions of State Acts it was designed to replace. For instance, Section 30(1)(b) of the *Medical Practitioners Act 2008* provides that registration fees shall be prescribed in regulations, whereas clause 26 of the National Law provides that the Australian Health Practitioner Regulation Agency must enter into an agreement with a National Board that makes provision for fees and that each National Board must publish these fees on its website. There is no requirement to prescribe fees in the National Law regulations.²⁸

The consequence is that the State Parliament was entirely excluded from the oversight of and involvement in the National Scheme being introduced by the HPRN Bill - so many matters were not open to being specified in regulations and hence not disallowable by the Parliament.

SKELETAL LEGISLATION IN OTHER COUNTRIES

It appears that wherever Westminster systems of parliamentary democracy are in operation, skeletal legislation has been passed. The following brief examples, both recent and more historical, demonstrate that Australian Parliaments are not alone in grappling with this phenomenon. I think the quotes speak for themselves about the views being expressed about the type of legislation being considered.

(a) United Kingdom

The current financial austerity measures being taken in the UK have resulted in the introduction of skeleton legislation.

For instance, the Public Bodies Bill, which is currently progressing through the House of Lords, confers extensive powers on the government to use secondary legislation to make any necessary amendments of primary legislation to support measures required for the abolition of a list of scheduled bodies and the redistribution of their functions and property. Its purpose has been described as carrying out a major cull of non-departmental bodies, with a view to both saving money and simplifying public administration - a policy commitment of the coalition government.²⁹

Daniel Greenberg described the Public Bodies Bill as:

...entirely "skeleton" legislation, achieving nothing on its face other than conferring legislative powers on the Executive.

²⁷ Ibid, at p 21.

²⁸ Ibid, at p 22.

²⁹ Daniel Greenberg, 'Public Bodies Bill sparks constitutional debate', www.publicsector.practicallaw.com/blog/publicsector/plc/?p=428, 8 November 2010.

Lord Knight of Weymouth went even further, stating:

This skeleton bill is an insult to parliamentary scrutiny - and I am afraid that the insult is doubled by ministers claiming to act in the name of increasing accountability.

(b) New Zealand

A number of laws have been passed in New Zealand which have been described as a blank cheque, written by Parliament for ratifying in advance whatever the Government should choose to do by regulation.³⁰

One example is the Economic Stabilization Act 1948, Section 11(1) of which enacted the broad regulation-making power, that:

*The Governor-General may from time to time, by Order in Council, make such regulations...as appear to him to be necessary or expedient for the general purpose of this Act....*³¹

Section 3 defined the general purpose of the Act:

...to promote the economic stability of New Zealand.

Given that there was no definition of 'economic stability', there was no fetter on what regulations the Government could make for the promotion of economic stability.

Under this Act, successive governments took advantage of this, including the government of Sir Robert Muldoon, who stated:

*You can do anything provided you can hang your hat on economic stabilization.*³²

(c) Republic of Ireland

In supporting the establishment of the Select Committee on Statutory Instruments, the then Senator Mary Robinson, who was later to become President of Ireland, stated:

*We tend more and more to bring in what might be called skeleton legislation and then let it be fleshed out by statutory instruments being brought in by the appropriate Minister.*³³

During debate after the Second Reading Speech for the Sea-Fisheries and Maritime Jurisdiction Bill 2005, John Perry stated:

³⁰ Philip A. Joseph, 'Delegated Legislation in New Zealand', *Statute Law Review*, Volume 18, Number 2, 1997. p85, citing *Read v Smith* [1959] NZLR 996 at 1003 per Turner J.

³¹ Ibid at p 93.

³² Ibid at p 93.

³³ Senator Mary Robinson, *Seanad Eireann*, Volume 88, 26 April 1978.

In many ways this Bill amounts to an outline of the law. Despite the fact that it is lengthy, it represents a skeletal outline of the law. In too many instances, the Bill delegates regulation making powers to the Minister.³⁴

(d) United States

Available literature is littered with references to skeletal legislation having been enacted in the United States over the years, both at state and federal level. Excerpts from texts covering debates in the House of Representatives of numerous states, including Michigan³⁵ and California³⁶, testify to the concerns over the by-passing of the legislative process and the unlimited scope of authority left to purely administrative discretion.

(e) India

The Supreme Court of India upheld a delegation of power contained in Section 3(1)(a) of the Imports & Exports Control Act 1947, which authorized the Central Government to prohibit or restrict import and export of goods of any specified description. It did so on the grounds that the predecessor Act contained a policy statement, despite the Act in question being skeletal in nature and not containing sufficient policy guidance for the exercise of the delegated powers.³⁷

CONCLUSION - IMPLICATIONS FOR THE FUTURE OF PARLIAMENTARY SCRUTINY

Of all the tactics a government may employ to control the legislative process, the use of skeletal legislation is one of the most worrying, not least because, despite being discussed in relevant texts and raised in parliamentary debates, it appears to have received relatively little mainstream coverage. It is no doubt a very tempting tactic for governments, given how effective it is in subverting the parliamentary process.

As a way of avoiding skeletal legislation or minimizing its occurrence, the following could be done.

- (a) Parliaments can refuse to pass skeletal legislation.
- (b) More time could be devoted by Parliament to debating proposed legislation.
- (c) More time could be devoted by governments in putting together the legislative framework before it is introduced into Parliament.

³⁴ Mr John Perry, Dail Eireann, Volume 610, 17 November 2005

³⁵ Journal of the House of Representatives, Michigan, Volume 2, p1,856.

³⁶ California State Government, Dewey Anderson, p105.

³⁷ Op. cit. n. 7.

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- (d) Parliament could pass as secondary legislation, not subordinate legislation, the detail of what is being proposed once it has been worked out.
 - (e) Regulations and other subordinate legislation to be made by bodies outside of Parliament, such as Ministerial Councils, could be tabled in Parliament and subjected to scrutiny, as was promised by the Government in relation to the HPRN Bill.

Also, there could be tighter controls exercised over what legislation can be introduced into Parliament. For example, rules such as Standing Orders could lay down formal informational requirements for legislation, specifying the level of detail required to be laid out in primary legislation. This may go some way to ensuring there is enough detail in the legislation to give Parliament, as well as committees tasked with scrutinizing it, a good enough idea about its intent and how it will be implemented, so as to place some control over subsequent executive power exercised pursuant to it. As members of Parliament, we have an obligation to make good laws, not laws that are insufficiently thought out and ill conceived.

Increased use of skeletal legislation may, arguably, move us closer to what could be termed an 'elected dictatorship', whereby the substance of laws are left to be decided by a purely administrative process by the Executive, there being little oversight by Parliament between elections. The path we appear to be going down may well leave no real role for state parliaments, making them irrelevant.

While its use may be well intentioned, there is simply no substitute for proper parliamentary scrutiny and the deliberate avoidance of this by successive governments could lead to an increasing loss of confidence in the machinery of responsible government and the parliamentary process, which is one of the foundations of parliamentary democracy.

Accordingly, further investigation is warranted into methods by which the integrity of the parliamentary process can be effectively maintained and respected to ensure that this confidence is regained and the sovereignty of the Parliament is assured. The role skeletal legislation has and is playing in subverting the parliamentary process would be an important part of this investigation. This investigation could be undertaken by any one of a number of different types of bodies, such as a select parliamentary committee or other expert body set up for this purpose.

To conclude with a biological analogy, a skeleton is not a living body and Parliament needs to appreciate how proposed legislation is going to live by seeing not only the bones of it, but the flesh as well, in order for it to properly carry out its legislative function.

APPENDIX 1

Terms of Reference of the Committee

Schedule 1

8. Uniform Legislation and Statutes Review Committee

8.1 A Uniform *Legislation Statutes Review Committee* is established.

8.2 The Committee consists of 4 Members.

8.3 The functions of the Committee are -

(a) to consider and report on Bills referred under SO 230A;

(b) of its own motion or on a reference from a Minister, to consider or review the development and formulation of any proposal or agreement whose implementation would require the enactment of legislation made subject to SO 230A;

(c) to examine the provisions of any instrument that the Commonwealth has acceded to, or proposes to accede to, that imposes an obligation on the Commonwealth to give effect to the provisions of the instrument as part of the municipal law of Australia;

(d) to review the form and content of the statute book;

(e) to inquire into and report on any proposal to reform existing law that may be referred by the House or a Minister; and

(f) to consider and report on any matter referred by the House or under SO 230A.

8.4 For a purpose relating to the performance of its functions, the Committee may consult with a like committee of a House of the Parliament of the Commonwealth, a state or a territory, and New Zealand and similarly, may participate in any conference or other meeting.

APPENDIX 2

Standing Order 230A

Uniform legislation

- 230A. (1) This order applies to a Bill that —
- (a) ratifies or gives effect to a bilateral or multilateral intergovernmental agreement to which the Government of the State is a party; or
 - (b) by reason of its subject matter, introduces a uniform scheme or uniform laws throughout the Commonwealth.
- (2) The second reading stage of a Bill is not to be resumed where SO 230(a) applies, within 30 days of the date of the adjournment (exclusive of that day) or before it has been reported from a committee, whichever is the later.
- (3) Unless otherwise ordered, a Bill stands referred to the *Uniform Legislation and Statutes Review Committee* at the conclusion of the second reading speech of the Minister or Member in charge.
- (4) The *Uniform Legislation and Statutes Review Committee*, or other committee, receiving a Bill under subclause (3) is to present its final report not later than 30 days of the day of the reference (exclusive of the referral day) or such other period as may be ordered by the House.

APPENDIX 3

Fundamental Legislative Scrutiny Principles

Does the legislation have sufficient regard to the rights and liberties of individuals?
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1. Are rights, freedoms or obligations, dependent on administrative power only if sufficiently defined and subject to appropriate review?
2. Is the Bill consistent with principles of natural justice?
3. Does the Bill allow the delegation of administrative power only in appropriate cases and to appropriate persons? Sections 44(8)(c) and (d) of the *Interpretation Act 1984*. The matters to be dealt with by regulation should not contain matters that should be in the Act not subsidiary legislation.
4. Does the Bill reverse the onus of proof in criminal proceedings without adequate justification?
5. Does the Bill confer power to enter premises, and search for or seize documents or other property, only with a warrant issued by a judge or other judicial officer?
6. Does the Bill provide appropriate protection against self-incrimination?
7. Does the Bill adversely affect rights and liberties, or impose obligations, retrospectively?
8. Does the Bill confer immunity from proceeding or prosecution without adequate justification?
9. Does the Bill provide for the compulsory acquisition of property only with fair compensation?
10. Does the Bill have sufficient regard to Aboriginal tradition and Island custom?
11. Is the Bill unambiguous and drafted in a sufficiently clear and precise way?

Does the Bill have sufficient regard to the institution of Parliament?

12. Does the Bill allow the delegation of legislative power only in appropriate cases and to appropriate persons?
13. Does the Bill sufficiently subject the exercise of a proposed delegated legislative power (instrument) to the scrutiny of the Legislative Council?
14. Does the Bill allow or authorise the amendment of an Act only by another Act?
15. Does the Bill affect parliamentary privilege in any manner?

16. In relation to uniform legislation where the interaction between state and federal powers is concerned: Does the scheme provide for the conduct of Commonwealth and State reviews and, if so, are they tabled in State Parliament?