Subcommittee to Study Issues Relating to the Power of the Legislative Council to Amend Subsidiary Legislation

Supplementary Information on the Principles and Policies for Delegating Power to Make Subsidiary Legislation to an Executive Authority or Other Body

The paper of the Administration entitled "Delegation by the Legislature of the Power to make Subsidiary Legislation to an Executive Authority or Other Body" (LC Paper No. CB(2)1558/10-11(01) ("Administration's paper") examines the principles and policies concerning the delegation of legislative power to an executive authority or other body. The Administration's paper was discussed in the meeting of the Subcommittee held on 20 April 2011. The Subcommittee requested the Administration to provide supplementary information on the principles or factors for deciding when a matter would be included in the primary legislation.

Primary or subsidiary legislation?

2. The crux of the issue is when law-making power should be exercised by the legislature and when it would be appropriate for the legislature to delegate such power to the executive arm of the government, or other bodies. It was in response to this basic question that the principle was first formulated in the United Kingdom ("UK") that Parliament's responsibility was to decide matters of principle, while matters of details could be left to government. In 1877 Lord Thring[1] wrote[2]:

> "The adoption of the system of confining the attention of Parliament to material provisions only and leaving details to be settled departmentally is probably the only mode in which parliamentary government can as respects its legislative functions, be carried on. The province of Parliament is to decide material questions affecting the public interest; and the

[1] Henry Thring was made Parliamentary Counsel to the Treasury in 1869.

[2] Henry Thring, *Practical Legislation or the Composition and Language of Acts of Parliament* (1877), p. 13, cited in Allen, C.K., *Law and Orders*, London: Steven & Sons, 3rd ed., 1965, pp.34-35.

> more procedure and subordinate matters can be withdrawn from their cognisance, the greater will be the time afforded for the consideration of the more serious question involved in legislation."

Lord Thring added that any tendency towards excessive executive powers or "any attempt to evade the vigilance of Parliament can always be checked by laying draft orders before the House."

3. Another chief Government draftsman, Sir Courtenay Ilbert, wrote in 1901 that[3]:

> "The extent to which a power should be delegated always requires careful consideration. The power should not extend to matters of principle on which a decision of Parliament ought to be taken."

4. Apart from leaving the Parliament free to concentrate on matters of principle by relieving it of the burden of detail, it was thought that rationalising the content of Acts of Parliament through exclusion of matters of details would lead to an improvement of their drafting. Dicey, for example, considered that "The cumbersomeness and prolixity of English Statute law is due in no small measure to futile endeavours of Parliament to work out the details of large legislative changes." The substance and form of the law, he concluded, "would probably be a good deal improved if the executive government of England could … work out the detailed application of general principles embodied in Acts of Parliament."[4]

5. The question on which matters should be included in primary legislation may be the other side of the coin of why law-making power is delegated to the executive to make subsidiary legislation. As discussed in para. 6 of the Administration's paper, one major reason for delegating subsidiary law-making power to the executive is to save the legislature's time. The chief Government draftsman, Sir William Graham-Harrison, in his testimony to the Donoughmore-Scott Committee on Ministers' Powers also

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[3] Cited in Sir Cecil Carr, Q.C., "Parliamentary Control of Delegated Legislation" (1956) *Public Law*, 200, at 203.

[4] Dicey, A.V., *An Introduction to the Study of the Law of the Constitution*, London: MacMillan and Co. , 8th ed., 1924, p. 50.

identified "time" as an important consideration in the law-making exercise[5]:

> "I have no hesitation in saying that it would be impossible to produce the amount and the kind of legislation which Parliament desires to pass and which the people of this country are supposed to want if it became necessary to insert in the Acts of Parliament themselves any considerable portion of what is now left to delegated legislation."

6. The Cabinet Office of the UK Government identifies the following as some of the factors to consider when deciding whether to make provision in primary or secondary legislation[6] –

- the matters in question may need adjusting more often than it would be sensible for Parliament to legislate for by primary legislation;

- there may be rules which will be better made after some experience of administering the new Act and which it is not essential to have as soon as it begins to operate;

- the use of delegated powers in a particular area may be well precedented and uncontroversial;

- there may be transitional and technical matters which it would be appropriate to deal with by delegated powers.

On the other hand –

- the matters, though detailed, may be so much of the essence of the Bill that Parliament ought to consider them along with the rest of the Bill;

- the matters may raise controversial issues running through the Bill which it would be better for Parliament to decide once in principle rather than arguing several times over (and taking up scarce Parliamentary time in so doing).

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[5] Committee on Ministers' Powers, Memoranda and Evidence (1932) Vol. 2, p. 35 Cited in Sir Cecil Carr, Q.C., "Parliamentary Control of Delegated Legislation" (1956) *Public Law*, 200, at 203.

[6] *Guide to Making Legislation*, Cabinet Office of the UK Government, 23/9/2010, para. 9.36.

7. Apart from the basic distinction between policies and detail, there is no hard and fast rule on when a matter should be included in primary legislation and when it should be included in delegated legislation. It is ultimately a decision of the legislature to decide whether a matter should be dealt with by primary legislation or by delegated legislation. Examples of provisions which may be dealt with by subsidiary legislation were discussed in the Administration's paper[7]. To recap, these include -

(a) where the primary legislation has created a statutory scheme, such as a licensing or permit regime, detailed provisions relating to the operation of that scheme may be laid down in subsidiary legislation;

(b) rules relating to the conduct of court or other proceedings; and

(c) bylaws made by professional bodies to regulate the professional practice.

8. It may be noted that in their consideration of the proper balance between primary and subordinate legislation, the writers of *Craies on Legislation* agree that the aim is to avoid leaving too much of significance to be determined by the executive while at the same time preventing the principal purpose of the primary legislation from being obscured by an excess of complicated detail. Distinguishing principle from detail however may not always be easy and the learned writers admit that like many balances between conflicting desiderata, this is both easy to state and impossible to achieve to everybody's satisfaction. As part of their discussion of the balance, the writers also recognise that the two principal advantages of the use of subordinate legislation are: it relieves pressure on Parliamentary time and it offers flexibility[8].

Other jurisdictions

9. A similar distinction between general principles and detail can be observed in Australia, Canada and New Zealand. As noted by the editor of *Odgers' Australian Senate Practice*, "while the Parliament deals directly with general principles, the executive, or other body empowered to make

[7] See para. 4 of the Administration's paper.
[8] *Craies on Legislation*, London: Sweet & Maxwell, 8th ed., 2004, pp. 10-11.

subordinate legislation, attends to matters of administration and detail" .[9]

10. In Canada, according to the *Guide to Make Federal Acts and Regulations*[10], matters of fundamental importance should be dealt with in the bill (primary legislation) so that parliamentarians have a chance to consider and debate them. The bill should establish a framework that limits the scope of regulation making powers to matters that are best left to subordinate law-making delegates and processes.

11. Similarly, the New Zealand Government also states in its *Cabinet Manual 2008* that[11]:

> "In general, the principles and policies of the law are set out in Acts of Parliament. … Regulations usually deal with matters of detail or implementation, matters of a technical nature, or matters likely to require frequent alteration or updating."

12. In summary, the literature reveals that, generally speaking, matters of principle should be included in the primary legislation whereas matters of detail should be included in subsidiary legislation. Other considerations may include the technical nature of the subject matter and the likelihood of frequent alteration.

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[9] *Odgers' Australian Senate Practice*, edited by Harry Evans, 12th ed., Department of the Senate: Canberra, 2008, p. 325.
[10] Issued by the Government of Canada in 2001, p. 8.
[11] At para. 7.77.