Deliberative processes for administrative regulations: Unenforceable public consultation provisions and the courts

Andrew Edgar*

Delegated legislation is subject to parliamentary scrutiny processes and judicial review in order to mitigate concerns that it lacks constitutional legitimacy. This article examines how unenforceable public consultation provisions relate to these checks and safeguards. It argues that public consultation should be regarded as a necessary addition to these supervisory mechanisms and that it should also be judicially enforceable. There are, however, institutional and historical reasons for thinking that enforceable public consultation provisions are not likely to be introduced at the Commonwealth level. Accordingly, the article argues that the courts could develop the principle of legality and unreasonableness review in ways that would encourage transparency and public participation in rule-making processes. These issues are examined with reference to the discretionary public consultation provisions in the Legislative Instruments Act 2003 (Cth).

PART 1: INTRODUCTION

While the importance of public consultation for proposed regulations is commonly recognised, it is often regulated in Commonwealth countries by policy documents that are not enforceable.[1] In such systems, the scope and nature of discussion between government agencies and members of the public is controlled by officials without supervision by the courts. In Australia, the public consultation provisions of the Commonwealth rule-making legislation, the *Legislative Instruments Act 2003* (Cth) (LI Act), make consultation discretionary. That is, whether or not public consultation is carried out at all is a matter for the rule-maker to decide and so is the nature and extent of any consultation the rule-maker actually carries out. While amendments to this Act have been enacted, but have not commenced at the time of writing,[2] the changes made to the consultation provisions do not affect the discretionary nature of the provisions.[3]

The primary consequence of the discretionary nature of the consultation provisions in the LI Act is that lack of consultation or poor consultation practices cannot be reviewed by the courts. In Australian law, legal requirements for public consultation are exclusively a matter of statutory law rather than judge-made law such as procedural fairness. Procedural fairness does not extend to the making of delegated legislation or administrative decisions that affect the public generally.[4] Since the LI Act commenced in 2005, there have been no cases challenging the consultation processes used for

* Associate Professor, Sydney Law School. Many thanks to the anonymous reviewer for helpful comments and to Giovanni Frischman for research assistance.

[1] For the United Kingdom, see Cabinet Office, *Consultation Principles: Guidance* (17 July 2012) Gov UK <https://www.gov.uk/government/publications/consultation-principles-guidance#history>; Paul Craig, *Administrative Law* (Sweet and Maxwell, 7th ed, 2012) 454. For Canada, see Treasury Board of Canada, *Cabinet Directive on Regulatory Management* (2012) <http://www.tbs-sct.gc.ca/rtrap-parfa/cdrm-dcgr/cdrm-dcgrpr-eng.asp>; John Mark Keyes, *Executive Legislation* (Lexis Nexis, 2nd ed, 2010) 198-199. For New Zealand, see Department of the Prime Minister and Cabinet, *Cabinet Manual* (2008) <http://cabinetmanual.cabinetoffice.govt.nz> summary [7.40], [7.85]; Ross Carter et al, *Subordinate Legislation in New Zealand* (Lexis Nexis, 2013) 98.

[2] It should be noted that the amendments to the *Legislative Instruments Act 2003* (Cth) include changing the Act's title to the *Legislation Act 2003* (Cth): *Acts and Instruments (Framework Reform) Act 2015* (Cth) Sch 1 cl 3.

[3] *Acts and Instruments (Framework Reform) Act 2015* (Cth) Sch 1 cll 33-35.

[4] *Re Gosling* (1943) 43 SR (NSW) 312, 318; *Kioa v West* (1985) 159 CLR 550, 582, 584 (Mason J), 620 (Brennan J), 632 (Deane J).

particular regulations. The methods that have been employed in the drafting of the Act to limit supervision of public consultation practices have therefore achieved the apparent aim of making the consultation provisions unenforceable.

The provisions of the LI Act make it clear that all aspects of the consultation process, even the decision to hold a consultation process, are for the discretion of the rule-maker. The relevant part of s 17(1) states that, "the rule-maker must be satisfied that any consultation that is considered by the rule-maker to be appropriate and that is reasonably practicable to undertake, has been undertaken". Rather than setting out minimum requirements for consultation processes, as is the case for mandatory consultation provisions, s 17 presents options for the rule-maker. This is made clear by s 17(3):

> Without limiting, by implication, the form that consultation referred to in subsection (1) might take, such consultation could involve notification, either directly or by advertisement, of bodies that, or of organisations representative of persons who, are likely to be affected by the proposed instrument. Such notification could invite submissions to be made by a specified date or might invite participation in public hearings to be held concerning the proposed instrument.

Section 19 confirms that no consultation is a permissible option. It provides that the "fact that consultation does not occur does not affect the validity or enforceability of a legislative instrument".[5] The overall purpose is confirmed in the objects of the LI Act, which includes "encouraging rule-makers to undertake appropriate consultation before making legislative instruments".[6] Accordingly, public consultation is facilitated and encouraged but is not enforceable.

What are the reasons for making public consultation provisions discretionary and unenforceable? Two reasons have been given in relevant reports but neither is particularly persuasive. The first is that public consultation causes undue costs and delays.[7] This concern, however, seems more suited to concerns about public consultation generally rather than the threat of litigation. Making consultation provisions unenforceable is likely to have little effect on litigation to challenge a legislative instrument. Judicial review will be available, subject to standing requirements, on the grounds of the regulation's consistency with the enabling Act and on substantive grounds, such as unreasonableness and proportionality. Moreover, a concern about the cost and delay of public consultation would suggest it is appropriate not to include such provisions in the Act rather than include discretionary, unenforceable provisions.

The second reason that has been said to support the discretionary consultation provisions in the LI Act is that they enable an agency to adapt the form of consultation to the nature of the particular regulation. This view was stated by a Committee commissioned to review the LI Act in 2008.[8] The Committee stated that:

> [t]he LIA does not establish a minimum standard for consultation, but instead makes rule-makers responsible for determining the form and scope of consultation. The Committee considers that this is appropriate because the nature and extent of consultation should vary according to the nature of the legislative instrument. Accordingly, the Committee is not in favour of making consultation mandatory or providing that a failure to consult will affect the validity of an instrument.[9]

The Committee suggested instead that more guidance should be provided by non-enforceable policy documents.[10]

The difficulty with the Committee's view is that it equates flexibility, the ability to match consultation processes with the nature of the particular regulation, with the statutory provisions being unenforceable. Mandatory consultation provisions do not necessarily disable such flexibility. They can

[5] See also *Legislative Instruments Act 2003* (Cth) s 26(1A)(e).

[6] *Legislative Instruments Act 2003* (Cth) s 3(b).

[7] Administrative Review Council, *Rule Making by Commonwealth Agencies*, Report No 35 (1992) 31, 33; David Borthwick and Robert Milliner, *Independent Review of Australia Government's Regulatory Impact Analysis Process* (2012) 52.

[8] Anthony Blunn et al, *2008 Review of the Legislative Instruments Act 2003* (2009).

[9] Blunn et al, n 8, 39.

[10] Blunn et al, n 8, 40.

be designed to enable flexibility within limits – such as by setting general, relatively undemanding, consultation requirements (for example, public notices and written submissions) which do not exclude officials employing more intensive processes for engaging members of the public (such as meetings and workshops) if they are regarded as necessary. It may be that the Committee's actual, but unexpressed, concern was to preserve a very broad range of possible consultation options, including no consultation at all. However, mandatory public consultation provisions do not necessarily rule out this option. It is possible, as occurs in the United States,[11] for legislation to exempt from public consultation requirements regulations dealing with particular identified matters. The LI Act uses a similar approach for exempting some legislative instruments from disallowance by Parliament.[12] Accordingly, the flexibility required to match consultation with the nature of the particular regulation is therefore not necessarily inconsistent with mandatory consultation provisions.

The reasons that have been given for making the public consultation provisions discretionary are therefore unpersuasive. The article raises a series of questions that relate primarily to the consequences of the discretionary public consultation provisions in the LI Act. The first question (addressed in Part 2) is why would discretionary public consultation provisions raise concerns for public lawyers? My answer is that effective public consultation should be regarded as an important means of supporting the legitimacy of administrative rule-making. The second question (raised in Part 3) is; do other parliamentary and executive checks and safeguards facilitate public discussion so that mandatory and enforceable public consultation provisions are unnecessary? My examination of these controls highlights weaknesses that make them ineffective facilitators of public discussion. The third question (Part 4) is; are there realistic possibilities of moving to enforceable consultation requirements? I argue here that there are good reasons to doubt that such reform will occur. The fourth question (Part 5) is; could judicial developments encourage officials to apply the discretionary public consultation provisions in a manner that supports public engagement in rule-making processes? I explore two ways in which courts could do so.

PART 2: RULE-MAKING CHECKS AND SAFEGUARDS AND PUBLIC DISCUSSION

Why should public lawyers be concerned about public consultation provisions in general rule-making legislation? The primary reasons relate to legitimacy but there is also a more pragmatic reason that I discuss briefly here.

The legitimacy-based reasons relate to constitutional issues. The constitutional concern regarding delegated legislation is that law-making is the role of Parliaments rather than the Executive. The current editors of the primary text on the Australian Senate, *Odger's Australian Senate Practice*, refer to delegated legislation as having:

> the appearance of a considerable violation of the principle of the separation of powers, the principle that laws should be made by the elected representatives of the people in Parliament and not by the executive government.[13]

Australian judges have expressed similar unease about delegated legislation. For example, in *Victorian Stevedoring & General Contracting Co Pty Ltd v Dignan*, Dixon J accepted parliamentary authority to delegate regulation-making powers for reasons of precedent and history, while also acknowledging the tension that it raises with separation of powers principles.[14]

Such separation of powers concerns are addressed for delegated legislation by processes enabling parliamentary and judicial scrutiny: parliamentary disallowance, scrutiny committees and judicial review for the consistency of regulations with the enabling Act and substantive review such as on the ground of unreasonableness. These processes and accountability mechanisms, often referred to as

[11] *Administrative Procedure Act*, 5 USC § 553(a), (b)(3) (1946).

[12] *Legislative Instruments Act 2003* (Cth) s 44.

[13] Harry Evans and Rosemary Laing (eds), *Odgers' Australian Senate Practice* (Department of the Senate, 13th ed, 2012) 413.

[14] *Victorian Stevedoring & General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73, 101-102. See also *South Australia v Tanner* (1989) 166 CLR 161, 173-174 (Brennan J).

"checks and safeguards", are designed to mitigate concerns that delegated legislation lacks legitimacy because it involves rules not made by Parliament.[15] They enable supervision of delegated legislation by Parliament and the courts.

There are, however, deeper reasons for being concerned about the delegation of rule-making authority to administrative officials. Parliaments are the primary rule-making institution not merely because its members are elected, but also due to its processes for making rules. Parliamentary processes facilitate debate in a public forum that enables wider debate among citizens.[16] This aspect of parliamentary process suggests that the checks and safeguards used to mitigate the separation of powers concerns for delegated legislation should include analogous measures; measures that ensure transparency and opportunities for objection and debate about proposed regulations.

Public consultation requirements provide such processes for rule-making by administrative officials. They have been recognised as one of the possible mechanisms for controlling delegated legislation, at least since the 19th century when the *Rules Publication Act 1893* (UK) was enacted with a public consultation provision, and implemented in Australia by the *Rules Publication Act 1903* (Cth) s 3. Although the public consultation provisions in both Acts were later repealed and not replaced,[17] public consultation can be understood to contribute to the legitimacy of delegated legislation by requiring officials to engage directly with members of the public regarding the potential benefits and harms of the proposed rule. Such processes expose proposed rules to interested individuals and groups whose submissions can inform the rule-maker's consideration of the factors that they are required to take into account.[18] They enable proposed regulations to be tested by objections directed to the evidential foundations for, and the values inherent in, the proposed rule and its provisions.

The checks and safeguards for administrative rule-making take on additional significance when the importance of regulations in the modern era is considered. Much scholarship on delegated legislation highlights this by pointing out that there are many more regulations made each year than statutes in many countries,[19] and statistics indicate that this is also the case for Australia at the federal level.[20] The amount of regulations made is not the only reason for their significance. Delegated legislation is also important because it often concerns policy issues that are debateable amongst different parts of the community. This is the consequence of modern legislation in Australia and related countries being commonly made in a framework, or "skeleton", manner, leaving the substance to be filled in by regulations according to broad delegations of legislative power.[21] If matters of

[15] Craig, n 1, 433; Dennis Pearce and Stephen Argument, *Delegated Legislation in Australia* (LexisNexis Butterworths, 4th ed, 2012) 24-25; Hermann Punder, "Democratic Legitimation of Delegated Legislation – A Comparative View on the American, British and German Law" (2009) 58 ICLQ 353, 356; Bernard Schwartz and HWR Wade, *Legal Control of Government: Administrative Law in Britain and the United States* (Clarendon Press, 1972) 85; George Winterton, *Parliament, The Executive and the Governor General: A Constitutional Analysis* (Melbourne University Press, 1983) 92.

[16] Dennis Baranger, "Parliamentary Law and Parliamentary Government in Britain" in Katja S Ziegler, Denis Baranger and Anthony W Bradley, *Constitutionalism and the Role of Parliaments* (Hart Publishing, 2007) 23-24; Robert Blackburn and Andrew Kennon, *Griffith and Ryle on Parliament: Functions, Practice and Procedures* (Sweet and Maxwell, 2nd ed, 2003) 6-7, 11; John Uhr, *Deliberative Democracy in Australia: The Changing Place of Parliament* (Cambridge University Press, 1998) 96-98.

[17] Administrative Review Council, n 7, 27; Schwartz and Wade, n 15, 97-98.

[18] See David Dyzenhaus, "Dicey's Shadow" (1993) 43 UTLJ 127, 142; *Tickner v Chapman* (1995) 57 FCR 451, 456, 462 (Black CJ).

[19] See, for example, Punder, n 15, 355; Caroline Morris and Ryan Malone, "Regulations Review in the New Zealand Parliament" (2004) 4 Macquarie LJ 7, 8; Schwartz and Wade, n 15, 84. See also Pearce and Argument, n 15, 60 and fn 2.

[20] The most recent statistics show that from 1992-2013 there have been between 1,600 and 3,000 legislative instruments made per year compared to between 84-264 Acts: Evans and Laing, n 13, 415-416; Senate Standing Committee on Regulations and Ordinances, Parliament of Australia, *Report on the Work of the Committee in 2012-13* (2013) 13; House of Representatives Chamber Research Office, Parliament of Australia, *Legislation Statistics Since 1901* (17 September 2015) <http://www.aph.gov.au/Parliamentary_Business/Statistics/~/media/889A1A19021743AB84B9F39180031A72.ashx>.

[21] See, for example, Mark Aronson, "Subordinate Legislation: Lively Scrutiny or Politics in Seclusion" (2011) 26 *Australasian Parliamentary Review* 4, 5-11; Craig, n 1, 435-436.

substance are determined in administrative processes for regulations rather than by Parliament, basic democratic norms indicate that those administrative processes should enable space in which debate about proposed regulations can occur.

As regulations are a major form of law in modern societies and they deal with significant, debateable matters, it is worthwhile investigating whether there are adequate spaces for public discussion and transparent deliberation. I highlight in Part 3 that the current parliamentary and executive checks and safeguards are either not effective or not designed for this purpose. If this is right, we should be concerned about the mechanisms intended to support the legitimacy of delegated legislation. Enforceable public consultation provisions would, I argue in Part 4, help to strengthen the legitimacy of delegated legislation.

There is also a more pragmatic reason for concerns to be raised about the unenforceable nature of the consultation provisions in the LI Act. It is that there are doubts over whether the discretionary consultation provisions encourage effective consultation practices. The Senate Regulations and Ordinances Committee has expressed concerns about non-compliance with the reporting of consultation by such agencies.[22] Concerns have also been raised by business and public interest groups about the lack of public consultation for regulations and the tokenistic manner in which they are administered when they have been carried out.[23] Accordingly, there are indications of dissatisfaction regarding the public consultation that is carried out by Commonwealth agencies. Making these provisions enforceable would enable members of the public with standing to challenge poor consultation practices by way of judicial review. It would also help to deter such practices.

PART 3: PARLIAMENTARY AND EXECUTIVE CONTROLS

The question raised by the LI Act is whether its inclusion of public consultation in a discretionary, unenforceable manner is a significant limitation on the checks and safeguards provided for delegated legislation. Is discussion and debate about regulations sufficiently facilitated by the other control mechanisms? If so, it may not matter that officials cannot be held accountable by the courts for their public consultation practices. I note in this Part, however, that there are limitations on the other controls on rule-making that suggest that public consultation is a necessary additional control. I also note how the discretionary nature of the LI Act consultation provisions limits supervision, not only by the courts for the public consultation practices of Commonwealth agencies, but also by the relevant parliamentary scrutiny committee.

Parliamentary review

We can start with the processes for parliamentary review. Section 42 of the LI Act enables tabling of delegated legislation in Parliament and disallowance. This is a basic element of rule-making legislation in related Commonwealth countries.[24] There are, however, weaknesses with disallowance processes that limit their effectiveness as a control mechanism.

The initial point to note is that disallowance is not available for all delegated legislation caught by the threshold provisions of the LI Act. Section 44 of the Act includes a long list of legislative instruments that are not subject to disallowance. For the legislative instruments that may potentially be subject to disallowance, there are concerns that parliamentary discussion of regulations is relatively rare and if there is debate there is little ability to fine-tune them. First, very few legislative instruments are actually debated in Parliament. The most recent annual report of the Senate Standing Committee on Regulations and Ordinances, the 2012-2013 report, notes that there were 2,084 legislative

[22] See, for example, Senate Regulations and Ordinances Committee, Parliament of Australia, *Delegated Legislation Monitor No 12 of 2015* (2015) 19-23; Senate Regulations and Ordinances Committee, Parliament of Australia, *Consultation under the Legislative Instruments Act 2003 – Interim Report* (2007) 6-7.

[23] Productivity Commission, *Regulatory Impact Analysis: Benchmarking* (2012) 222, 235; Borthwick and Milliner, n 7, 52.

[24] See *Statutory Instruments Act 1946* (UK) 9 & 10 Geo 6, c 36, ss 4, 5; Craig, n 1, 441-442; *Statutory Instruments Act*, RSC 1985, c S-22, s 19.1; Keyes, n 1, 507, 509; *Legislation Act 2012* (NZ) ss 37-47; Carter et al, n 1, 210-219.

instruments made in that period and 31 notices of disallowance which trigger debates.[25] Whether or not a particular regulation is debated in Parliament is, of course, a matter for parliamentarians and the vagaries of politics,[26] rather than the direct actions of interested members of the public. Secondly, even if a regulation is debated, disallowance according to the LI Act is not a mechanism for fine-tuning delegated legislation. The options are to either allow or disallow a legislative instrument or a particular provision.[27] That means there is no ability to adjust the wording of provisions. This is a limit on the outcome of debates about legislative instruments.

The significant point is that the disallowance provisions of the LI Act potentially enable parliamentary debate about regulations, however, this form of supervision includes weaknesses. Jack Beatson concluded, in relation to such review in the United Kingdom, that parliamentary control is necessarily weak as otherwise it would defeat the purpose of delegating legislative powers.[28] That is, more thorough parliamentary review would require substantial time and resources – precisely the reason for Parliament delegating legislative powers in the first place. Such concerns are likely to apply equally in Australia.

The Senate Standing Committee on Regulations and Ordinances provides additional parliamentary supervision of rule-making. It was established in 1932 to provide "a proper and sufficient check" on delegated legislation which was regarded as necessary due to the just-referred limitations on parliamentarians reviewing delegated legislation.[29] According to Senate Standing Order 23(2), all regulations and other instruments subject to disallowance or disapproval by the Senate are referred to the Regulations and Ordinances Committee for it to consider and, if necessary, report on.

The Committee is not designed for enabling public debate about regulations. The criteria that it applies are that the legislative instrument is in accordance with the enabling Act, does not trespass unduly on rights and interests, that any administrative decision-making it enables that affects rights and interests is subject to merits review, and that delegated legislation does not contain matter more appropriate for parliamentary enactment.[30] The scrutiny carried out by the Committee has been regarded, since its early period, as limited to technical matters and not policy.[31] This distinction enables the Committee to operate in a non-partisan manner, thus supporting the efficacy of the concerns that it puts to Ministers and the Senate.[32] However, the restrictiveness of the distinction on the Committee's scrutiny has been highlighted by Professor Aronson[33] and Professor Pearce:[34] it disables the Committee from raising for Parliament's attention broader policy issues. That suggests that matters of general public interest that might trigger public debate are not raised by the Committee.

The Regulations and Ordinances Committee has two roles within its technical scrutiny function that can be understood as relating to discussion of regulations. The first is that it raises questions and

[25] Senate Standing Committee on Regulations and Ordinances, n 20, 13-14.

[26] See Dennis Pearce, "Legislative Scrutiny: Are the Anzacs Still the Leaders?" (Paper presented at Australia-New Zealand Scrutiny of Legislation Conference, Scrutiny and Accountability in the 21st Century, Canberra, Australia, 6-8 July 2009) 3.

[27] *Legislative Instruments Act 2003* (Cth) s 42.

[28] Jack Beatson, "Legislative Control of Administrative Rulemaking: Lessons from the British Experience?" (1979) 12 Corn ILJ 199, 212.

[29] Commonwealth, *The Advisability or Otherwise of Establishing Standing Committees of the Senate on Rules and Ordinances, International Relations, Finance, and Private Members' Bills*, Parl Paper No S1 (1929-1931) Vol 1 Senate, ix-x. For the political context in which the Regulations and Ordinances Committee was established, see GS Reid, "Parliament and Delegated Legislation" in JR Nethercote (ed), *Parliament and Bureaucracy* (Hale and Iremonger, 1982) 149, 153-155.

[30] Commonwealth, *Standing Orders of the Senate*, O 23(3).

[31] Evans and Laing, n 13, 438-439; Pearce and Argument, n 15, 64. For the history of this distinction, see Stephen Argument, "Legislative Scrutiny in Australia: Wisdom to Export?" (2011) 32 Stat LR 116, 128-131.

[32] Pearce and Argument, n 15, 162. See also Argument, n 31, 130-132.

[33] Aronson, n 21.

[34] Pearce, n 26, 3-4, 6.

concerns with Ministers responsible for particular pieces of delegated legislation and agencies about matters within the Committee's authority.[35] An account of the Committee's work by Stephen Argument indicates that the Committee operates primarily by negotiated outcomes with Ministers rather than by recommendations for disallowance.[36] Argument also states that much of the Regulations and Ordinances Committee's work is unseen;[37] however, the Committee publishes a *Delegated Legislation Monitor*, which in recent years has set out some of the issues raised by the Committee with Ministers and correspondence.[38] These negotiations between the Committee and Ministers are one way in which the Committee questions legislative instruments; but, of course, this cannot be regarded as *public* discussion.

The Regulations and Ordinances Committee's second role relates more closely to public consultation rather than discussion within governmental institutions. The Committee reviews legislative instruments for their consistency with s 26 of the LI Act, which requires a rule-maker to provide an explanatory statement, including a description of any consultation that has been held or if no consultation has been carried out, the rule-maker is required to explain why no such consultation was undertaken.[39] The most recent annual report of the Committee states that problems relating to these explanatory statements are the second most common concern raised by the Committee with Ministers.[40] The common response of the Committee is that departments and agencies have not included in their explanatory statements the consultation that has been conducted or that they make vague, uninformative statements of their consultation processes.[41]

The Regulations and Ordinances Committee may express such concerns, however, it is necessarily constrained by the system established by s 26 of the LI Act that requires self-reporting by the proponents of the legislative instrument. The Committee can comment that the explanatory statement is inadequate but not comment on whether the explanatory statement is wrong or on any difficulties in relation to public consultation. This limited nature of the Committee's review of public consultation is due to the drafting techniques employed for the consultation provisions in the LI Act and the Committee's scrutiny principles. Making the consultation provisions in the LI Act discretionary not only restricts the courts from reviewing consultation processes but also restricts such review by the scrutiny committee.

The above analysis of parliamentary accountability mechanisms highlights a number of points. The first is that parliamentary disallowance processes provide for very limited review of delegated legislation. The second is that restricting the Regulations and Ordinances Committee's role to technical assessment disables it from reviewing delegated legislation regarding policy issues, the matters that are most relevant to public discussion of delegated legislation that raises the concerns for this article. These first two points suggest that parliamentary review mechanisms are ineffective facilitators of public discussion for delegated legislation. And thirdly, the discretionary nature of the public consultation provisions of the LI Act restricts the Regulations and Ordinances Committee's role as a reviewer of public consultation processes carried out by Commonwealth agencies.

[35] Evans and Laing, n 13, 439; Pearce and Argument, n 15, 66-67.

[36] Argument, n 31, 138.

[37] Argument, n 31, 138.

[38] Pearce and Argument, n 15, 67.

[39] *Legislative Instruments Act 2003* (Cth) s 26(1A)(d), (e).

[40] Senate Standing Committee on Regulations and Ordinances, n 20, 14.

[41] See, for example, Senate Standing Committee on Regulations and Ordinances, n 20; Schwartz and Wade, n 15, 14-15; Senate Standing Committee on Regulations and Ordinances, n 22, 6-7.

Executive controls

The Commonwealth Government also has a non-statutory regulatory impact assessment system that includes public consultation requirements. These consultation requirements are recognised to complement the public consultation provisions of the LI Act.[42] The relevant question is whether the Commonwealth regulatory impact assessment system is an effective source of public consultation requirements. If it is, enforceable consultation provisions in the LI Act may not be necessary. There are, however, reasons to think that the Commonwealth regulatory impact assessment system is not an effective source of public consultation requirements.

Regulatory impact assessment has been a requirement of Commonwealth policy-making since the mid-1980s.[43] The current requirements are set out in *The Australian Government Guide to Regulation*, prepared by the Department of Prime Minister and Cabinet.[44] The Guide sets out principles that apply to "regulations", defined broadly as rules "endorsed by government where there is an expectation of compliance" and includes legislation, delegated legislation and policy guidelines.[45] The Guide includes public consultation as a principle of regulatory impact assessment and an explanation of how it should be carried out.[46] The Commonwealth regulatory impact assessment system also includes a supervisory institution, the Office of Best Practice Regulation, a Division of the Department of Prime Minister and Cabinet. This Office assesses regulation impact statements for compliance with the Guide.[47]

However, there are reasons to doubt the regulatory impact assessment system's effectiveness in regard to public consultation. The first is that regulatory impact statements, and thus public consultation, are required for a very small amount of regulations. The Productivity Commission found that in 2010 and 2011, less than two per cent of Bills, proposed regulations and policy documents were determined by the Office of Best Practice Regulation to require a regulation impact statement.[48] The most recent annual report of the Office of Best Practice Regulation indicates that in 2013-2014, 48 regulation impact statements were prepared.[49] This is a small amount given that between 1,800 and 3,000 regulations and other disallowable instruments are made each year.[50] Moreover, the regulatory impact assessment system does not just apply to delegated legislation; it applies to legislation and policies as well. Accordingly, the regulatory impact assessment system applies to such a small number of regulations that it must be recognised as having very little effectiveness as a source of public consultation requirements. There are therefore reasons to doubt whether the regulatory impact assessment system contributes much to enabling public discussion of regulations.

The second reason for doubting the effectiveness of the Commonwealth regulatory impact assessment system relates to findings made in a review of it in 2012. The Borthwick-Milliner review found that business and interest groups were satisfied with the public consultation principles included in the regulatory impact assessment guidelines that applied at the time but not with how those

[42] Senate Committee on Regulations and Ordinances, Parliament of Australia, *Legislative Instruments Bill 2003* (2003) 30; Senate Standing Committee on Regulations and Ordinances, Parliament of Australia, *Delegated Legislation Monitor No 13 of 2015* (2015) 20.

[43] Borthwick and Milliner, n 7, 14; Peter Carroll, "The Regulatory Impact System: Promise and Performance" in Peter Carroll et al (eds), *Minding the Gap: Appraising the Promise and Performance of Regulatory Reform in Australia* (ANU E-Press, 2008) 17.

[44] Department of Prime Minister and Cabinet, *The Australian Government Guide to Regulation* (March 2014).

[45] Department of Prime Minister and Cabinet, 44, 3.

[46] Department of Prime Minister and Cabinet, 44, 2, 39-45.

[47] Department of Prime Minister and Cabinet, 44, 53-54.

[48] Productivity Commission, n 23, 109-110. See also Carroll, n 43, 24.

[49] Office of Best Practice Regulation, *Best Practice Regulation Report 2013-14* (2015) 11.

[50] Evans and Laing, n 13, 415-416.

principles were administered.[51] The review was based on 40 interviews with Ministers, government agencies, businesses and interest groups and 17 written submissions.[52] The authors explained the dissatisfaction of businesses and interest groups with the consultation processes by Commonwealth agencies. Insufficient information was said to be provided for them to come to a proper judgment of the impacts of proposed regulations and there was little sense of discussion being held prior to a regulation being made.[53] Most interestingly, these concerns were confirmed by government agencies. The authors described some representatives of government agencies as being "hostile" to the regulation impact assessment system; referring to it as "red-tape on government".[54]

The Borthwick-Milliner review recommended that in order to improve agencies' consultation practices the Office of Best Practice Regulation should review not only the regulation impact statement prepared by agency officials but also the "veracity of the consultation process".[55] This recommendation was not accepted by the government.[56] Nevertheless, the government has reformed the public consultation process subsequent to the Borthwick-Milliner review. Public consultation processes are now assessed by the Office of Best Practice Regulation at two stages – an early stage to assess the relevant agency's consultation plan and at a later stage to assess whether its regulation impact statement reflects stakeholder feedback of the agency's policy analysis.[57] This two-staged approach may enable improved oversight by the Office of Best Practice Regulation and better consultation practices, even though it does not enable review of all aspects of the consultation process carried out by agencies.

However, even if this two-staged approach in the current regulatory impact assessment system does improve the consultation practices of Commonwealth agencies, the system applies only to a very small proportion of regulations that are made. The result is that there are reasons to doubt whether the regulatory impact assessment system contributes much to enabling public discussion of legislative instruments.

It is worthwhile summarising the primary conclusions made in this Part. While parliamentary and executive accountability mechanisms have potential for enabling public discussion of legislative instruments, they also have serious weaknesses. This conclusion suggests that if we recognise public discussion as a fundamental part of law-making, public consultation can be regarded as a necessary supplement to the other checks and safeguards. However, as I discussed, strong criticisms have been made of the consultation practices of Commonwealth agencies, and the discretionary nature of the consultation provisions of the LI Act effectively disable parliamentary institutions as well as courts from correcting them.

PART 4: MANDATORY CONSULTATION PROVISIONS?

The question that then arises is whether there are realistic possibilities of moving to enforceable consultation requirements. I argue here that due to institutional incentives in parliamentary systems and the history of the LI Act, the likelihood of that occurring is low. However, before developing that argument, it is worthwhile looking briefly at the reasons why mandatory public consultation would be beneficial.

The most general reason for thinking that public consultation should be mandatory is that once it is regarded as an important supplement to the other checks and safeguards for rule-making, there are

[51] Borthwick and Milliner, n 7, 37-38, 45, 51-53. This is consistent with a report of the Productivity Commission inquiring into regulatory impact analysis in all Australian jurisdictions carried out 2012: Productivity Commission, n 23, 2.

[52] Borthwick and Milliner, n 7, 13, Appendix G.

[53] Borthwick and Milliner, n 7, 37.

[54] Borthwick and Milliner, n 7, 37.

[55] Borthwick and Milliner, n 7, 53, 74.

[56] Australian Government, *Final Response to the Recommendations of the Independent Review of the Australian Government's Regulatory Impact Analysis Process* (7 December 2012) 6.

[57] Department of Prime Minister and Cabinet, n 44, 53-54.

good reasons for an effective enforcement mechanism. This is because it is well-known that government officials can be unwilling to carry out consultation processes and when they do carry them out they can be administered in what is often referred to as a "tokenistic" manner.[58] Mandatory consultation provisions would enable judicial review of the elements of consultation processes and also scrutiny by the Senate Regulations and Ordinances Committee.

The benefit of enabling judicial review for compliance with public consultation requirements is that it is a complaint mechanism that can be engaged by affected members of the public. Other checks and safeguards are controlled by parliamentarians and government officials. Parliamentary debates for regulations are dependent on a member of Parliament moving a motion for disallowance. Triggering the regulatory impact assessment process is dependent on the Office of Better Regulation determining that a regulation impact statement is required for a particular piece of delegated legislation. Judicial review, on the other hand, enables an affected member of the public to initiate proceedings to challenge the regulation on consultation grounds.

The advantages of enforcing public consultation provisions through judicial review are not limited to situations in which members of the public bring proceedings. The mere potential of judicial review proceedings to enforce consultation provisions should encourage officials to administer such requirements in a more effective manner. Professor Mulgan's influential work on accountability reveals that the potential for administrators to be held accountable creates in administrators' minds an expectation of it occurring, even if such mechanisms are not engaged for particular actions.[59] In other words, officials tend to change their behaviour when there is the potential for being held accountable. This has been recognised to be one of the benefits of judicial review of rule-making under the United States' *Administrative Procedure Act*, 5 USC § 553 (1946).[60] The concerns expressed in the Borthwick-Milliner report regarding the poor consultation practices of Commonwealth agencies that were discussed in Part 3 indicate that without a mechanism to challenge public consultation processes, there is a substantial risk of ineffective engagement with interested members of the public.

There are, however, reasons for thinking that it is unlikely that the provisions of the LI Act would be amended to make public consultation mandatory. At a very general level, the concerns relate to inter-institutional dynamics; most particularly, differences between the constitutional framework in presidential systems where enforceable public participation legislation has been enacted (represented by the United States) and in parliamentary systems where public participation tends to occur according to informal, non-statutory schemes (represented by the United Kingdom). The differences between the controls on rule-making in these constitutional systems have recently been examined in two separate studies by scholars with extensive comparative public law experience – Professor Susan Rose-Ackerman[61] and Professor Peter Cane.[62] Both explain how these different constitutional systems influence the incentives to establish judicially enforceable legislative controls for the making of delegated legislation. The studies help us to understand why public consultation for rule-making by Commonwealth government agencies is controlled in a manner more like the informal guidelines in related Commonwealth countries, notwithstanding the inclusion of consultation provisions in general rule-making legislation as is the case in the United States.

[58] Stephen Bell and Andrew Hindmoor, *Rethinking Governance: The Centrality of the State in Modern Society* (Cambridge University Press, 2009) 139; Lyn Carson and Ron Lubensky, "Raising Expectations of Democratic Participation: An Analysis of the National Human Rights Consultation" (2010) 33 UNSWLJ 34, 41; John Kane and Patrick Bishop, "Consultation and Contest: The Danger of Mixing Modes" (2002) 61 AJPA 87, 88.

[59] Richard Mulgan, *Holding Power to Account: Accountability in Modern Democracies* (Palgrave McMillan, 2003) 10-11.

[60] Thomas O McGarrity, "Some Thoughts on 'Deossifying' the Rulemaking Process" (1992) 41 Duke LJ 1385, 1451-1452; Peter L Strauss, "Overseers or 'The Deciders' – The Courts in Administrative Law" (2008) 75 U Chi L Rev 815, 829. See also Elizabeth Fisher, Pasky Pascual and Wendy Wagner, "Rethinking Judicial Review of Expert Agencies" (2015) 93 Tex LR 1681, 1715-1721.

[61] Susan Rose-Ackerman, "Policy-Making Accountability: Parliamentary Versus Presidential Systems" in David Levi-Faur (ed), *Handbook on the Politics of Regulation* (Edward Elgar, 2011) 171.

[62] Peter Cane, "Control of Administrative Rule-Making in England and the US" (Paper presented at Process and Substance in Public Law, Cambridge University, 15-17 September 2014).

The studies make clear that the enforceable consultation provisions in the United States are consistent with incentives that operate for Congress as an institution that delegates rule-making powers to agencies. The separation of the Executive from the legislature in the United States provides an incentive for the legislature to impose controls on the exercise of delegated powers by agencies that are separate to the controls on agencies established by the President. Enforceable public consultation provisions are an important form of Congressional control. According to Rose-Ackerman, while there are other possible forms of Congressional supervision of agency action, such ongoing oversight would defeat the purpose of delegation being to reduce congressional time and resources.[63] Enforceable public consultation provisions enable Congress to "outsource" oversight of administrative agencies to the public and the courts.[64] The legislature may even support intensive judicial review in order to limit agencies' ability to establish policy that is against Congress's interests.[65]

These studies also make clear that the relevant features of parliamentary systems create incentives that go the other way – that is, to *not* control administrative rule-making by enforceable public consultation provisions. In such systems, the Executive controls the making of primary and delegated legislation to a relatively large extent. Rose-Ackerman points out that there is no incentive in a parliamentary system for governments to introduce or support legislation establishing mandatory consultation provisions. In her words, a government will have "little reason to require direct accountability to the public in ways that would constrain its own discretion".[66] Furthermore, politicians are likely to "resist judicial involvement in political issues".[67] Cane makes a similar point. He concludes his analysis of legislative controls on administrative rule-making stating:

> it is not surprising that there is no equivalent to the rule-making provisions of the APA [*Administrative Procedure Act*] in England: because the executive (in theory, anyway) has full hierarchical, bureaucratic control over rule-making it does not need to use legislation to ensure that administrative rules are consistent with its policy preferences.[68]

The primary point therefore is that the incentives in parliamentary systems are against legislatures enacting generally applicable, mandatory public consultation provisions.

The comparative studies carried out by Professor Rose-Ackerman and Professor Cane utilise positive political theory, a form of public choice theory, to highlight institutional incentives. This theory focuses on how political, legal and administrative arrangements emerge from the actions of politicians and administrators acting on the basis of rational self-interest.[69] Public law scholars in the United States, where this kind of analysis has been highly developed, commonly emphasise that this theory can help understanding of the consequences of particular constitutional arrangements but does not necessarily reflect current practices and is not always a good predictor of future institutional behaviour.[70]

With this caveat in mind, the Rose-Ackerman and Cane studies can help to explain the reluctance of governments to make the public consultation provisions of the LI Act 2003 enforceable. The reluctance can be seen in reports and parliamentary debates leading to its enactment in 2003. The starting point of the reform process was a 1992 report of the Administrative Review Council that

[63] Rose-Ackerman, n 61, 178.

[64] Rose-Ackerman, n 61, 179.

[65] Rose-Ackerman, n 61, 179. See also Cane, n 62, 22.

[66] Rose-Ackerman, n 61, 176-177.

[67] Rose-Ackerman, n 61, 177. See also Brendan Lim, "The Normativity of the Principle of Legality" (2013) 37 MULR 372, 405-406.

[68] Cane, n 62, 34.

[69] Jerry Mashaw, "Public Law and Public Choice: Critique and Rapprochement" in Daniel A Farber and Anne Joseph O'Connell (eds), *Research Handbook on Public Choice and Public Law* (Edward Elgar, 2010) 19-20. See also M Elizabeth Magill and Daniel R Ortiz, "Comparative Positive Political Theory" in Susan Rose-Ackerman and Peter L Lindseth (eds), *Comparative Administrative Law* (Edward Elgar, 2010) 134.

[70] Magill and Ortiz, n 69, 145; Mashaw, n 69, 41.

recommended that consultation should be a mandatory requirement.[71] It stated that mandatory public consultation, at least for significant pieces of delegated legislation, was necessary due to the weaknesses of parliamentary processes for enabling "contrary views to be put publicly" regarding proposed regulations.[72] Its concern about informal, non-statutory, consultation processes was that agencies tend to consult just "known groups", risking "captured consultation" and the exclusion of others with legitimate points of view.[73] The process leading to the enactment of the LI Act therefore started from a position that public consultation should be included in the LI Act as a mandatory requirement.

Governments of both major parties in the 1990s were, however, ambivalent about the Administrative Review Council's recommendation. They introduced Bills for regulating rule-making processes to the Commonwealth Parliament that included apparently mandatory consultation provisions, referring to public consultation in the mandatory language of "must",[74] but also included no invalidity clauses, provisions that state that failure to comply with the consultation provisions does not affect the validity or enforceability of a legislative instrument.[75] Such clauses seek to deny the effectiveness of judicial review. When the LI Act was enacted in 2003, the mandatory terminology of the prior Bills was dropped in favour of discretionary language and the no invalidity clause was retained.

The parliamentary debates reveal that by 2003 both major parties supported the policy of encouraging consultation without it being mandatory.[76] The Attorney-General made clear in Parliament that the risk of litigation regarding consultation was unacceptable to the government.[77] There was, however, no direct explanation of the government's views as to why it was unacceptable but some indications of the concerns that underpin the discretionary consultation provisions were identified. The push for such provisions apparently came from the government agencies that would be required to administer the consultation requirements. This was made clear by the opposition spokesperson Senator Ludwig, who stated in the Senate that,

> consultation is a contentious subject. Here the main concerns were not so much those of Parliament but those of government agencies, who have obviously very effectively lobbied the former Attorney-General, Mr Williams, to replace the mandatory consultation provisions in the earlier bills with the mechanism in the current bills.[78]

It therefore seems that the discretionary consultation provisions in the LI Act were included due to resistance to mandatory provisions by government departments and agencies. There is a precedent for such opposition to controls on delegated legislation by government departments. It was said to have occurred in the making of the *Rules Publication Act 1893* (UK).[79]

There has been no interest since the commencement of the LI Act to make the public consultation provisions mandatory and enforceable. A committee that reviewed the operation of the Act in 2008

[71] Administrative Review Council, n 7, 35.

[72] Administrative Review Council, n 7, 27.

[73] Administrative Review Council, n 7, 33.

[74] *Legislative Instruments Bill 1994* (Cth) cl 16(1); *Legislative Instruments Bill 1996* (Cth) cl 18.

[75] *Legislative Instruments Bill 1994* (Cth) cl 20; *Legislative Instruments Bill 1996* (Cth) cl 33. The 1996 Bill also included a broad discretion to exempt a legislative instrument from consultation requirements which would also have operated to restrict judicial review for failure to carry out a consultation process: *Legislative Instruments Bill 1996* (Cth) cl 30.

[76] See Commonwealth, *Parliamentary Debates*, Senate, 2 December 2003, 18625, 18628 (Senator Ludwig) indicating the support of the opposition Labor party.

[77] Commonwealth, *Parliamentary Debates*, House of Representatives, 3 December 2003, 23648-23649 (Mr Ruddock, Attorney-General).

[78] Commonwealth, *Parliamentary Debates*, Senate, 2 December 2003, 18625-18626.

[79] CK Allen, *Law and Orders: An Inquiry into the Nature and Scope of Delegated Legislation and Executive Powers in English Law* (Steven & Sons, 3rd ed, 1965) 98.

accepted that the discretionary consultation provisions were appropriate[80] and the provisions remain that way in the amendments to the LI Act that have recently been made but not yet commenced.

The result is that while there are good reasons to think that it would be preferable for Parliaments to make public consultation provisions enforceable, there are also institutional reasons for their unwillingness to take such a step that have apparently played out in practice at the Commonwealth level. The incentive for governments in parliamentary constitutional systems is to resist constraints on delegated rule-making powers, such as by enforceable public consultation provisions. This does not mean, however, that public discussion and debate of proposed delegated legislation are unimportant. For legitimacy reasons, delegated legislation requires checks and safeguards and, as I discussed, without enforceable consultation provisions, there should be real doubts as to whether these checks and safeguards enable public debate for delegated legislation.

PART 5: ALTERNATIVE FORMS OF JUDICIAL REVIEW

I now turn to the last of the four questions raised in the introduction in Part 1: whether there are possible judicial developments that would encourage administrators to apply the discretionary public consultation provisions in a manner that facilitates public discussion and deliberation.

Before I examine such possibilities, it should be pointed out that where public consultation provisions are discretionary and unenforceable, there will be no direct means for challenging the rule-maker's engagement with members of the public in judicial review proceedings. The other source of legal procedures for administrators, procedural fairness, does not extend to delegated legislation. In order for procedural fairness to extend to the making of delegated legislation, some significant changes would need to be made to the case law principles. In Australia, procedural fairness does not apply to the making of delegated legislation and to decisions that affect the public generally.[81] This is also the case in the United Kingdom, Canada and New Zealand with regards to delegated legislation,[82] and scholars from such countries have recognised the courts' lack of interest in extending it.[83] Moreover, Australian courts have regarded statutory public consultation provisions as overriding any possible application of procedural fairness.[84] According to this reasoning, the discretionary consultation provisions of the LI Act would supplant the principles of procedural fairness, even if procedural fairness principles were extended to recognise a form of public consultation for delegated legislation.

Nevertheless, judicial review can facilitate transparency, objection and engagement by officials with members of the public in the process of making regulations. First, judicial review itself can be regarded as providing a forum for objections to regulations to be expressed publicly.[85] Secondly, and

[80] Blunn et al, n 8, 39.

[81] *Re Gosling* (1943) 43 SR (NSW) 312, 318; *Kioa v West* (1985) 159 CLR 550, 582, 584 (Mason J), 620 (Brennan J), 632 (Deane J). See also Andrew Edgar, "Procedural Fairness for Decisions Affecting the Public Generally: A Radical Step Towards Public Consultation?" (2014) 33 U Tas L Rev 56, 60-64.

[82] For the United Kingdom, see *R (Moseley) v Haringey London Borough Council* [2014] 1 WLR 3947, 3961-3962 [35]-[38] (Lord Reed); *Bates v Lord Hailsham of St Marylebone* [1972] 1 WLR 1373, 1378; Harry Woolf et al, *De Smith's Judicial Review* (Sweet and Maxwell, 7th ed, 2013) 399-400. For Canada, see *Inuit Tapirisat of Canada v Canada (Attorney General)* [1980] 2 SCR 735; Keyes, n 1, 209-212; Andrew Green, "Regulations and Rule Making: The Dilemma of Delegation" in Colleen M Flood and Lorne Sossin (eds), *Administrative Law in Context* (Emond Montgomery Publications, 2nd ed, 2013) 125, 141-142. For New Zealand, see Philip A Joseph, *Constitutional and Administrative Law in New Zealand* (Brookers Ltd, 4th ed, 2014) 1108.

[83] Genevieve Cartier, "Procedural Fairness in Legislative Functions: The End of Judicial Abstinence?" (2003) 53 UTLJ 217, 218-219; PP Craig, *Public Law and Democracy in the United Kingdom and the United States of America* (Clarendon Press, 1990) 174; Catherine Donnelly, "Participation and Expertise: Judicial Attitudes in Comparative Perspective" in Susan Rose-Ackerman and Peter L Lindseth (eds), *Comparative Administrative Law* (Edward Elgar, 2010) 357, 370; DJ Galligan, *Due Process and Fair Procedures: A Study of Administrative Procedures* (Clarendon Press, 1996) 493.

[84] *Vanmeld Pty Ltd v Fairfield City Council* (1999) 46 NSWLR 78, 113 [179]-[182] (Meagher JA), 115 [190] (Powell JA). See also *Wilderness Society Inc v Turnbull* (2007) 166 FCR 154, 175-176 [80]-[83.

[85] Jeff King, "The Instrumental Value of Legal Accountability" in Nicholas Bamforth and Peter Leyland (eds), *Accountability in the Contemporary Constitution* (Oxford University Press, 2013) 124, 147-148.

this will be the focus of this Part, some of the grounds of review that can be utilised in the review of regulations have potential indirectly to encourage effective consultative practices in the making of delegated legislation. This is particularly the case for challenges to regulations for being inconsistent with the provisions of the relevant Act and some forms of unreasonableness review.

Statutory interpretation and the principle of legality

The most basic form of challenge to regulations is to claim that they are inconsistent with the enabling Act. In such cases, a court is required to interpret the statutory provision that empowers the administrator to make regulations, interpret the challenged provisions of the regulation, and then determine whether the regulation is within the scope of the power to make regulations established by the Act. The first two of the three steps both clearly involve statutory interpretation and the results of these interpretive exercises inform the third step. The principle of legality (that general or ambiguous words in a statute should not be construed as curtailing fundamental rights, freedoms and immunities)[86] could potentially enable consideration of the processes used for making the regulations if it continues to evolve in a manner that emphasises improving political processes.

It is worthwhile starting with a brief description of how the principle of legality can be applied in challenges to regulations. The Full Court of the Federal Court's decision in *Evans v New South Wales*[87] provides a good example. The case involved a challenge to regulations that had been made to control conduct at a religious festival, the World Youth Day, held in Sydney. One of the challenged clauses of the regulation related to conduct of members of the public that "causes annoyance or inconvenience to participants in a World Youth Day event".[88] The applicants were student activists who were planning to conduct protests at the event raising matters such as sexual tolerance, contraception and reproductive freedom. The Full Court granted a declaration that the clause was invalid in so far as it related to conduct causing annoyance to World Youth Day participants. The principle of legality was at the heart of the Court's reasoning.[89] The Court held that the word "annoyance" in the regulation could affect freedom of speech and was not supported by the statutory provision that empowered making regulations to regulate "conduct of the public".[90] In this way, the principle of legality was applied to interpretation of the challenged provision of the regulation and the empowering provision in the Act.[91] *Evans v New South Wales* also highlights that unlike the use of the principle of legality in the context of statutory interpretation more generally, its application to the consistency of regulations with the empowering Act can result in the regulation, or some of its provisions, being invalid.

The focus of the principle of legality in challenges to regulations is primarily substantive. Its potential to encourage participatory, deliberative processes is that it could support a response by the government respondent that the challenged provisions of the delegated legislation were carefully considered following discussion and debate in rule-making processes. Such a response could be enabled by the principle of legality's modern democratic rationale[92] that Parliaments are presumed to not curtail fundamental rights and freedoms without directly engaging with the issues relevant to those rights and freedoms. This can be seen in two passages of the judgment of Mason CJ, Brennan, Gaudron and McHugh JJ in *Coco v The Queen*. Their Honours stated that:

> [t]he insistence on express authorization of an abrogation or curtailment of a fundamental right, freedom or immunity must be understood as a requirement for some manifestation or indication that the

[86] *Coco v The Queen* (1994) 179 CLR 427, 437. For a list of recognised rights, freedoms and immunities, see Dennis C Pearce and Robert S Geddes, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 8th ed, 2014) 255-259.

[87] *Evans v New South Wales* (2008) 168 FCR 576.

[88] *World Youth Day Regulation 2008* (NSW) cl 7(1)(b).

[89] *Evans v New South Wales* (2008) 168 FCR 576, 593-597 [68]-[83].

[90] *Evans v New South Wales* (2008) 168 FCR 576, 597 [83], 599 [88].

[91] *Evans v New South Wales* (2008) 168 FCR 576, 592-593 [67]-[68], 597 [82]-[83]. See also *Attorney-General (SA) v Adelaide City Corp* (2013) 249 CLR 1, 30-33 [42]-[46] (French CJ), 66-67 [150] (Heydon J).

[92] See, for example, Lim, n 67, 389-394.

> legislature has not only directed its attention to the question of the abrogation or curtailment of such basic rights, freedoms or immunities but has also determined upon abrogation or curtailment of them.[93]

Their Honours then emphasised this point by stating that the effect of the principle of legality is to "enhance the parliamentary process by securing a greater measure of attention to the impact of legislative proposals on fundamental rights".[94] In other words, the principle of legality is directed to whether the legislature has deliberated with regard to any restriction on rights, freedoms or immunities.

The modern democratic focus of the principle of legality could potentially enable judicial consideration of the process for making a particular regulation. The second step in the court's analysis of whether the regulation is consistent with the Act requires the court to interpret the regulation and make a judgment regarding the impact of the regulation on fundamental rights and freedoms. As is recognised by the courts, the principle of legality is often engaged when interpretive choices are presented to the court.[95] Common questions are raised, such as, is the regulation clear or overly general and ambiguous? And, to what extent does the regulation interfere with a particular fundamental rights or freedom? If it is a minor impact the court may conclude that the empowering provision in the Act does support it.[96]

My suggestion is that it is relevant at this point for the court to consider the processes used to make the regulation. Consideration of the process would help to answer the question raised by the principle of legality's modern rationale of whether administrators have focused attention on the impact of the regulation on the fundamental right or freedom. If the challenged provision was a considered solution to issues raised and debated by stakeholders in a public consultation process, the courts would have a reason to give weight to the judgments made by the administrator when making the regulation.[97] Moreover, consideration of the process would help courts to mitigate the risk that application of the principle of legality involves courts revisiting policy decisions;[98] it would enable them to step back from making judgments about substantive matters.

Information about rule-making processes can be admitted in challenges to Commonwealth regulations.[99] The parties, most relevantly the government respondent, could provide evidence of engagement with the relevant issue in public documents prepared during the regulation-making process. This would include evidence of public participation and responsiveness to submissions in the rule-maker's explanatory statement under s 26(1A)(d) of the LI Act. It could also include evidence of engagement with issues concerning rights, freedoms or immunities by the Regulations and Ordinances Committee or the Parliamentary Joint Committee on Human Rights.[100] Dennis Pearce and Robert Geddes note that courts are reluctant to accept extrinsic materials as a statement of intention to curtail fundamental rights.[101] However, such reluctance seems to relate to ministerial assertions of the meaning of the relevant legislation rather than evidence of genuine deliberation regarding the resolution of issues raised by stakeholders.

The point is that if evidence of deliberative processes were to be regarded as a relevant factor in applying the principle of legality, the principle would go some way to encouraging use of the discretionary public consultation processes in the LI Act to engage members of the public in discussion and debate. To be clear, I do not intend to suggest that such a development of the principle

[93] *Coco v The Queen* (1994) 179 CLR 427, 437.

[94] *Coco v The Queen* (1994) 179 CLR 427, 437-438.

[95] *Evans v New South Wales* (2008) 168 FCR 576, 592-593 [68]; *Al-Kateb v Godwin* (2004) 219 CLR 562, 578 [22].

[96] *Attorney-General (SA) v Adelaide City Corp* (2013) 249 CLR 1, 33 [46] (French CJ).

[97] Regarding deference as a form of giving weight to administrators' judgments, see Stephen Gageler, "Deference" (2015) 22 AJ Admin L 151, 153-154.

[98] Dan Meagher, "The Principle of Legality as Clear Statement Rule" (2014) 36 Syd LR 413, 436-437.

[99] *Acts Interpretation Act 1901* (Cth) s 15AB(2)(c), (e); *Legislative Instruments Act 2003* (Cth) s 13(1)(a).

[100] *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) s 7.

[101] Pearce and Geddes, n 86, 215-216.

of legality would be as effective as making the consultation provisions of the LI Act mandatory. If that were to happen, courts could directly review the elements of a public consultation process, such as the adequacy of a public notice or whether submissions were considered. Nevertheless, such a development of the principle of legality would establish an incentive on government officials to conduct public consultation processes.

Unreasonableness review

There is also potential for considering processes in challenges to regulations on the grounds of their being unreasonable. This is especially relevant as unreasonableness review in Australia is in a period of transformation due to the High Court's decision in *Minister for Immigration and Citizenship v Li*.[102] There are four different ways to test regulations for whether they are unreasonable.

1. *Wednesbury unreasonableness*: This form of unreasonableness review has minimal content and famously requires a high degree of deference due to its focus on the decision being "absurd" or involving "something overwhelming".[103]
2. *Li unreasonableness*: The High Court in *Minister for Immigration and Citizenship v Li* shifted the focus of unreasonableness review from *Wednesbury* unreasonableness to whether the decision is arbitrary and to the intelligibility of the administrator's justification.[104] There were also suggestions that the high degree of deference required by *Wednesbury* unreasonableness should be lowered and that a proportionality assessment is a permissible means for determining whether a decision is unreasonable.[105]
3. *Kruse v Johnson unreasonableness*: Unreasonableness in *Kruse v Johnson* is particularly associated with review of delegated legislation. In *Kruse v Johnson*, unreasonableness was understood to include lack of justification, as in *Li*, and also extend to delegated legislation that is "partial and unequal in [its] operation as between different classes", "manifestly unjust", made in "bad faith", or an "oppressive or gratuitous interference with the rights of those subject to them".[106] The contribution to unreasonableness review that is significant to us is that it expressly enables the court to exercise restraint (in the words of Lord Russell, "interpret benevolently" and "slow to condemn") if they are made according to procedures prescribed by statute.[107]
4. *Proportionality*: This form of review is also primarily associated with review of delegated legislation and is potentially the most intensive. It is best represented by Dixon J's judgment in *Williams v Melbourne Corp*, where he stated that a court will review a regulation for whether "it could not reasonably have been adopted as a means of attaining the ends of the power".[108] Judges have recognised it to enable more intense judicial scrutiny than review according to the form of unreasonableness in *Kruse v Johnson*.[109]

There is potential in *Kruse v Johnson* unreasonableness and *Li* unreasonableness to promote consultative, deliberative processes. Both forms of unreasonableness review enable consideration of processes to support assessments required by substantive review. The recent re-conceptualising of unreasonableness review by the High Court in *Minister for Immigration and Citizenship v Li* may have potential for supervising the processes for making delegated legislation. This form of unreasonableness review focuses attention on reasons (often regarded as a procedural requirement) for

[102] *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332.

[103] *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223, 229-230.

[104] *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332, 352 [31] (French CJ), 367 [76] (Hayne, Kiefel and Bell JJ), 375 [105] (Gageler J).

[105] *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332, 352 [30] (French CJ), 364 [68], 366 [73]-[74] (Hayne, Kiefel and Bell JJ]).

[106] *Kruse v Johnson* [1898] 2 QB 91, 99-100.

[107] *Kruse v Johnson* [1898] 2 QB 91, 98-99.

[108] *Williams v Melbourne Corp* (1933) 49 CLR 142, 155.

[109] *Attorney-General (SA) v Adelaide City Corp* (2013) 249 CLR 1, 38 [56] (French CJ); *South Australia v Tanner* (1989) 166 CLR 161, 175 (Brennan J).

consideration of the substance of the decision.[110] The significance of this shift in relation to delegated legislation made by Commonwealth government agencies is that it enables courts to carry out unreasonableness review not only for absurd decisions but also to focus on the intelligibility of the explanation. That could enable courts to review the explanatory statements required by s 26 of the LI Act to ensure there has been "intelligible justification". Moreover, an explanation of the administrator's responsiveness to stakeholders' participation in an explanatory statement and its influence on the terminology of the challenged regulation would help to show that the regulation is not arbitrary.

The other possible option would enable consideration of processes in substantive review through some updating of the approach in *Kruse v Johnson*.[111] In that case, the court stated that it should take into account the characteristics of the rule-making institution and the checks and safeguards that apply to it: such as, whether it is made up of elected representatives, whether the delegated legislation must be tabled in Parliament and whether the rule-maker is required to carry out a form of public consultation.[112] This approach recognises these checks and safeguards as providing a reason for courts to apply the unreasonableness ground in a restrained manner.

The approach in *Kruse v Johnson* would need to be updated for it to provide an incentive on rule-makers to use consultation processes when they are established in a discretionary manner such as under the LI Act. The update would be based on the recognition that parliamentary and executive checks and safeguards have gaps and weaknesses that limit their ability to enable public debate about legislative instruments. The recognition of these gaps and weaknesses emerged subsequent to *Kruse v Johnson*, which was decided in the 19th century, when governments were relying more heavily on delegated legislation.[113] When the concerns discussed in Pt III are recognised, regarding parliamentary and executive controls on delegated legislation not being designed to facilitate public discussion, the need for public consultation as a supplement becomes clearer. Thus, an updated version of the *Kruse v Johnson* approach to unreasonableness review would enable courts to exercise restraint in their assessment when the challenged legislative instrument was subject to such consultation processes. As explanatory statements under the LI Act are required to set out whether public consultation processes have occurred or not,[114] it would be a simple matter to determine whether they have been utilised.

These forms of substantive review would enable courts to consider procedural aspects of regulatory decision-making as a reason to exercise restraint in a court's assessment of whether regulations breach the unreasonableness ground of review. It is significant that the court in *Kruse v Johnson* used the language of deference when the relevant checks and safeguards are applicable rather than terminology indicating heightened scrutiny when such checks and safeguards are not. Deference enables courts to encourage good administrative practices when the particular relevant factors are operative but when the factors are not present they can refrain from comment.[115] This focus on deference rather than heightened scrutiny has an important consequence in the present context. If courts were to undertake heightened scrutiny of administrative regulations where there has been a failure to conduct public consultation processes, there would be a substantial extension of unreasonableness review principles. It could also establish in effect a duty to consult that would be inconsistent with the provisions of the LI Act that clearly make public consultation discretionary. My suggestion is not to establish a *duty* to consult under the guise of unreasonableness review but an *incentive* for administrators to use the public consultation provisions of the LI Act. That is, government agencies could fend off claims of unreasonableness with evidence of effective public

[110] Janina Boughey, "The Reasonableness of Proportionality in the Australian Administrative Law Context" (2015) 43 FL Rev 59, 84; Leighton McDonald, "Rethinking Unreasonableness Review" (2014) 25 PLR 117, 120-121.

[111] *Kruse v Johnson* [1898] 2 QB 91.

[112] *Kruse v Johnson* [1898] 2 QB 91, 97-99.

[113] See, for example, Beatson, n 28, 212, 225-226; Pearce, n 26, 3-4, 6; Aronson, n 21, 5-11.

[114] *Legislative Instruments Act 2003* (Cth) s 26(1A)(c), (d).

[115] See also Aileen Kavanagh, "Proportionality and Parliamentary Debates: Exploring Some Forbidden Territory" (2014) 34 OJLS 443.

consultation processes,[116] but applicants would not be able to claim unreasonableness due to lack of consultation. This approach would be consistent with the LI Act, as one of its objects is to encourage administrators to undertake consultation before making administrative regulations.[117]

Establishing incentives and process-based review

The approaches to the principle of legality and unreasonableness review outlined above can be connected with the legitimacy issues discussed in Part 2 and to theories of judicial review of administrative action. I explained in Part 2 that the checks and safeguards that have been developed for the making of regulations are necessary due to concerns regarding legitimacy. Within the division of functions in the Australian constitutional system, Parliament is the primary institution for making laws, not only because its members are elected, but also because it enables public discussion and debate about proposed rules. The checks and safeguards that have been developed for making regulations are regarded as a means for supervising administrative rule-making. The suggested adjustments to the principle of legality and unreasonableness review would enable courts to consider rule-making processes to support the challenged regulation if there is evidence of public consultation and genuine deliberation. In this way, the particular forms of judicial review enable consideration of rule-making processes in ways that encourage public consultation processes.

The suggested approaches to the principle of legality and to unreasonableness review would also help refocus judicial review in a way that better aligns with accepted understandings of judicial legitimacy. Many accounts of judicial review emphasise that procedural forms of judicial review are a more legitimate form of engagement by the courts with administrative decision-making than substantive forms of judicial review.[118] The developments with regard to the principle of legality and unreasonableness review would enable courts when confronted with substantive questions that are at the boundary of their institutional competence to factor into their reasoning consideration of the rule-making process.

The consideration of process in the principle of legality and unreasonableness review has a connection with a theory of judicial review that is gaining support in Australia. For example, Brendan Lim has recently associated the modern rationale for the principle of legality with John Hart Ely's theory that judicial review should be extended when political processes are weak.[119] Current and former Australian judges have made the same point but with regard to judicial review more generally. In particular, Justice Gageler, in a published speech prior to his appointment to the High Court, argued for the primacy of political processes in the Australian constitutional system and that judicial review should be adapted accordingly. He stated that this raised a series of questions, including:

> Why should there not openly be judicial deference where, by virtue of those institutional structures, political accountability is inherently strong? And why should there not openly be judicial vigilance where, by virtue of those institutional structures, political accountability is inherently weak or endangered? In short, why is it not appropriate to see the Constitution as creating a political system whose ordinary constitutional working will be through the political process and to see the role of the judicial power within that political system as akin to that of a referee whose extraordinary constitutional responsibility is for the game itself rather than a linesman whose only responsibility is to call in or out? These are not rhetorical questions. My answer to each of them is "yes".[120]

[116] See also Clive Sheldon, "Consultation: Revisiting the Basic Principles" [2012] JR 152, 159.

[117] *Legislative Instruments Act 2003* (Cth) s 3(b).

[118] See, for example, Jeffrey Jowell, "Of Vires and Vacuums: The Constitutional Context of Judicial Review" [1999] PL 448, 450-452; Adam Tomkins, "The Role of the Courts in the Political Constitution" (2010) 60 UTLJ 1, 6; Mark Aronson and Matthew Groves, *Judicial Review of Administrative Action* (Thomson Reuters, 5th ed, 2013) 19; Eduardo Jordão and Susan Rose-Ackerman, "Judicial Review of Executive Policymaking in Advanced Democracies: Beyond Rights Review" (2014) 66 Ad L Rev 1, 6-7.

[119] Lim, n 67, 403; John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press, 1980) 102-103.

[120] Stephen Gageler, "Beyond the Text: A Vision of the Structure and Function of the Constitution" (2009) 32 Aust Bar Rev 138, 152.

This passage in Justice Gageler's article was expressly supported by Chief Justice Spigelman in a published speech, where he stated that he would extend it to administrative law.[121]

Chief Justice Spigelman's suggested extension of this process-based theory to judicial review of administrative action is particularly relevant for review of delegated legislation. I explained in Part 2, that delegated legislation raises separation of powers concerns because it involves rules that are not made by Parliament and its processes do not enable transparency and public debate. In Part 3, I highlighted that parliamentary and executive methods for checking delegated legislation are not effective for enabling public discussion about the policy substance of proposed rules. And in Part 4, I noted that parliamentary reform to make the public consultation provisions in the LI Act mandatory is unlikely. The result is that the political processes for making Commonwealth regulations are potentially, but not necessarily, weak.

If this is the case, Justice Gageler's refocusing of judicial review would seem to support my suggested adjustments to substantive review of regulations. There does not seem to be any great difficulty for courts to consider these procedural matters. The rule-maker's explanatory statement, committee reports, and official records of parliamentary debates can be considered to determine the meaning of provisions of regulations,[122] a necessary step for both the principle of legality and unreasonableness review.

It must be noted, however, that Justice Gageler goes further than my suggestion by arguing not only for deference when the institutional structures operate well but also for judicial vigilance when the institutional structures are inherently weak. For the reasons given in Part 5, I would not suggest such judicial vigilance in the context of Commonwealth rule-making, as it would involve an extension of unreasonableness review and establish an effective duty to consult when the LI Act is clear that is not the case. For my purposes, making the use of public consultation processes a reason for exercising restraint for forms of substantive judicial review is sufficient to enable the desired incentive.

PART 6: CONCLUSION

In conclusion, it is apparent that the public consultation provisions of the LI Act were drafted to ensure that whether or not consultation is held and the extent of any consultation that is carried out is within the discretion of the rule-maker. These provisions suggest a series of questions that have been addressed in this article. I argued that public consultation for regulations should generally be understood as a necessary legitimation process for administrative rule-making to counteract the lack of parliamentary debate. I also noted that there are institutional disincentives for establishing mandatory publication consultation processes that help to explain the reluctance of Commonwealth governments to include such provisions in the LI Act. In Part 5, I turned to the potential of substantive forms of judicial review to encourage discussion, debate and deliberative practices by rule-makers. I argued that such substantive forms of review could be developed to create such incentives by enabling courts to consider the use of such processes by the administrator as a reason for exercising judicial restraint in determining the legal issues.

[121] JJ Spigelman, "Public Law and the Executive" (2010) 34 Aust Bar Rev 10, 13-14.

[122] *Acts Interpretation Act 1901* (Cth) s 15AB; *Legislative Instruments Act 2003* (Cth) s 13(1)(a).