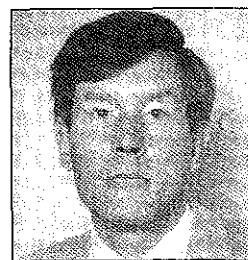


Canberra Rules: Talking About Legislative Instruments

Richard Griffiths
Capital Monitor



The article "Canberra Rules - With a Register of Legislative Instruments" (*ALL*, August 1994), finished with a promise to try to keep you informed of the further adventures of the *Legislative Instruments Bill 1994*. Well, there have been a lot of developments and very little has happened (which is the way of things in your National Capital), so here is an update

Progress on the Bill

Readers will recall that the *Legislative Instruments Bill 1994* was introduced into the Senate on 30 June 1994. It sought to establish a system for the electronic publication of all subordinate legislation, legislative instruments, etc, by 1 January 1995 (Read the August article for a full description.)

The article closed with the warning that there was considerable parliamentary "interest" in the Bill. Parliamentary "interest" in anything usually means that it is in for a rough ride, and the warning was well directed.

The Senate Standing Committee on Regulations and Ordinances inquired into the Bill and reported on 17 October. It made a number of significant recommendations, most of them dealing, in essence, with any perceived diminution of the powers of the Parliament. The Committee showed little interest in the practical (for librarians) aspects of the Bill.

The Senate Committee's report expressed concern about the following major provisions of the Bill:

- the conclusive and unreviewable power of the Attorney-General to determine whether an instrument is a legislative instrument;
- rules of court may be removed from parliamentary scrutiny by regulations;
- the inability of Parliament to disallow individual provisions of an instrument; and
- disallowable non-legislative instruments.

The Government responded on 8 November, accepting the Senate Committee's major points, but not accepting the following minor points:

- the removal of university legislation from parliamentary scrutiny; (This was not actually a recommendation of the Senate Committee; the Committee merely mentioned that it "accepted" that university legislation which affects the content of academic courses should be excluded. The Government took the hint, saw the error it had made in drafting the Bill, and intends to correct that.)

- the removal of the AGPS's proposed monopoly on the provision of authoritative (evidentiary) prints of instruments, but with some compensation (for librarians) in that the Government is seeking to make it possible to subscribe to paper forms of all the additional material which will appear on the register

In addition, the Government advised that it would make two more amendments:

- to exempt Proclamations which commence an Act or provisions of an Act from the disallowance provisions; (They nearly walked right into a terrible political trap, there!) and
- to permit House of Representatives committee scrutiny, the commencement date of the *Legislative Instruments Act 1995* (when enacted) will be deferred from 1 January to 1 July 1995.

This latter move, for a House committee inquiry, is very interesting. The House seldom gets involved with legislative instruments. The Government's interest in a further, House inquiry could, therefore, indicate:

- dissatisfaction with the Senate Committee's results; (Possibly a number of Government departments and agencies did not understand the implications of the Bill until after submissions had closed. They presumably now want a chance to attack it) or
- that someone in the House wants to develop the House's role in the scrutiny of legislation, possibly following on from the development of the "Main Committee" process

It seems most unlikely that the Government would encourage the latter development, which would be of no help, and of considerable potential hindrance, to executive Governments in the future. I therefore suspect that the former is the reason, which may mean that the Bill is about to come under sustained attack, in the House inquiry, by an apoplectic Public Service which has only now recognised a power grab by the Attorney-General's Department.

Public Access to the Register of Legislative Instruments

The Bill was drafted on the basis that public access to the register would be almost exclusively electronic, via the Attorney-General's SCALE system. Even more restrictively, those who did not have access to SCALE, either directly or through a database provider, would have to use terminals to be provided at AGPS bookshops. Now, a re-think seems to be occurring.

The Index

Emphasis seems to be being placed (i.e. the right noises are being made) on the development of a good, comprehensive index, available in both electronic and paper form. Furthermore, it appears that the Index will be published weekly in (Guess what?) the *Gazette*!

Readers will recall that one of the original selling points of this legislation was that it would almost do away with the requirement for a Government Gazette. So, all you law librarians, leave some money in your budget for subscriptions to the Gazette.

Additional Access Points

Negotiations have been held with public libraries, to provide the public (presumably "public" includes law librarians?) with access to terminals which can access SCALE. One can imagine what the public libraries would be asking the Attorney-General's Department to pay for!

It now seems to be appreciated that this measure will still not overcome the widespread inability of untrained members of the public to conduct a computer search, no matter how good the software, hence the new emphasis on the publication of the paper Index.

A point to be considered by law librarians, as well as by database providers, is whether the wider public access so achieved via public libraries should reduce the cost of direct SCALE access and licences for paying users. It seems that the Attorney-General's Department now has some interesting ethical, user-pays v community service obligation, dilemmas to resolve.

Improved SCALE

The Attorney-General's Department announced, on 6 January 1995, that it had selected three tenderers for a shortlist for a contract to improve SCALE. In particular, the software is to be made "user-friendly" - a term used by computer software developers to admit, implicitly, that what was in use before was a shocker (Its use does not always mean, however, that the new software will be much better).

The relevance of the improved SCALE project is its possible effect on the timing of the development of the Register of Legislative Instruments. If a shortlist of potential tenderers has only now been decided on, then the project is quite a way from successful completion. It would be a very "courageous" project manager who would be planning to launch the new SCALE system on a paying, complaining public by 1 July 1995, i.e. in time for the commencement of the *Legislative Instruments Act 1995*.

On the other hand, the mere existence of the SCALE improvement project implies official recognition that the public, sitting at terminals at public libraries, cannot be expected to search the Register of Legislative Instruments effectively using the present SCALE software. Unless public use of the register is to be severely curtailed, even if only temporarily until the SCALE improvement project comes online, the electronic Register of Legislative Instruments should, logically, be deferred until the SCALE improvement project has been completed.

Funding

The *Legislative Instruments Bill 1994* did not appear to allow enough funding to permit improved public access via all 1,500 or so public library outlets. In normal circumstances, the necessary additional four or five million dollars might have been found for the 1995-96 Budget.

These are not normal circumstances. Most readers will appreciate that the Government is under pressure to adjust "fiscal policy", i.e. cut the Budget deficit, in lieu of adjusting "monetary policy", i.e. increasing your housing mortgage. Finding a few extra millions to spend, in those circumstances, is likely to be quite painful.

Note that the Department of Finance is well represented on the Cabinet Expenditure Review Committee, which examines departments' expenditure proposals before they can be included in the Budget. Note also that the aforesaid Department of Finance is unlikely to look favourably on this particular piece of legislation, which diminishes some of its legislative powers. It is hard to avoid the conclusion that the Attorney-General's Department has a very hard fight on its hands to get extra funding.

Looking at the standard of its consultation and lobbying on this Bill so far, one cannot have total confidence in the Attorney-General's Department's ability to win the funding fight this year.

The Bottom Line

Fact: The *Legislative Instruments Bill 1994* will now:

- involve an augmented Index;
- require the continuation of the Government Gazette series, if only to publish the Index; and
- not come into force before 1 July 1995.

Supposition: The *Legislative Instruments Bill 1994* may:

- be accessible via public libraries, as well as the already planned AGPS and database providers' facilities; and
- not come into force until 1996 (or later).

Wild Surmise: There is now a finite possibility that the *Legislative Instruments Bill 1994*, and the associated project, will be delayed indefinitely. In that case, and accepting that something like the Register of Legislative Instruments is a good idea and inevitable if we are to have good government, when it does eventually re-appear it may be quite different from what is now envisaged.