
Delegated Legislation: The Weak Link of Parliamentary Accountability?

by Elizabeth Weir, MLA

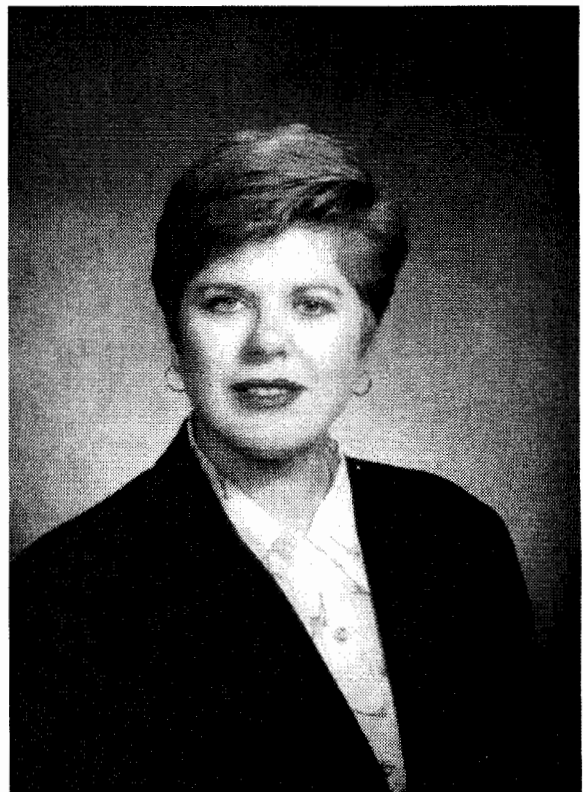
Delegated legislation has generally proved to be a useful tool in governing an increasingly complex society. But the shift of part of the legislative function from legislatures to the executive, has created a problem for democratic representative systems. This can generally be characterized as one of accountability. The central legislative body is no longer directly responsible for a vast body of law that perhaps has the greatest impact on the general public. The principle of parliamentary supremacy is also undermined when delegated legislation contains matters of policy. This article considers whether the existing framework for the process of delegation assures adequate accountability, indeed adequate scrutiny, in the exercise of the authority given.

The power of delegation has provided governments, in an increasingly technocratic world, with a range of administrative tools to carry out policies and programs. It remains the responsibility of the legislature to ensure that the executive is accountable for its use of "law-making" powers, as well as for its expenditures of public funds.

There appear to be at least two principal "problem areas" for accountability. First, is the vast body of "rules" that guide the decisions of government officials but are not drafted in the form of published regulations; the second is the absence of review of regulations published pursuant to statutes at the provincial level.

The "Directive"

Direct delegation of decision-making authority to a subordinate body, such as a tribunal is the most common example of delegated legislation. But increasingly, delegation is carried out, not through the drafting of



Elizabeth Weir represents Saint John Harbour in the New Brunswick Legislative Assembly. This is an edited version of a paper delivered to the 36th Canadian Regional Conference in Regina in July 1997.

regulations that require some form of publication, but rather through the development of policy manuals and departmental guidelines.

The term "directive" is generally employed to describe this form of delegation. The purpose of the "directive" is to provide guidance to officials in carrying out government policies. There is little, if any, review of the decisions that are taken, or the powers allocated to government officials, and consequently, little accountability.

The following examples, from New Brunswick illustrate the impact on citizens of the use of this form of delegation. Early in 1997, the Department of Human Resources Development made a change in its rules for income assistance eligibility. These rules are contained in a policy manual. In order to ensure "equity" in treatment of married and unmarried couples in terms of benefit levels, the "economic unit" rule was developed. It set the same level of benefits for unmarried people in relationships, as for those in marital relationships.

However, a new gloss was added by virtue of a policy change and the "economic unit" rule was extended to catch unrelated people, sharing accommodation, with no legal obligation of support. Using the concept of the "economic unit", income assistance benefits eligibility was now limited to "one cheque, one household" – either one income assistance cheque, or one earned income cheque.

Case 1. A high school student about to graduate had left an abusive home situation. She had been offered a place to stay by a woman, no relation, with three children, who was also receiving income assistance. The young woman was informed that her benefits would be terminated and that the single parent with three children would be responsible for her support. Needless to say, the mother could not afford to add another adult onto to her monthly budget. The young woman's social worker wanted her to remain in this home and felt she was provided with good support in her efforts to complete high school.

Case 2. A senior receiving a small widow's pension and income assistance had taken in a boarder during the week while he worked in the Saint John area. The widow had always reported the income to the Department. However, with this rule change, they were deemed to be an "economic unit". The boarder was informed that he would be responsible for the widow's support. When the Department backed off this demand, the boarder was asked to bring in statements from his employer. Quite rightly regarding this to be an invasion of his life and privacy, the boarder moved out.

At no time was a regulation drafted to effect this rule change, nor was any form of legislative change presented in the Legislative Assembly. This decision was effected by a unilateral policy change by officials within the Department of Human Resources Development, and it

was often executed without notice. A court challenge would probably be successful, however, the people affected by this rule change are clearly without the means to get it before the courts.

Regulations

The principles for the appropriate use of delegation were set out in a 1932 report of the Australian Senate's Standing Committee of Regulation and Ordinances and form the basis for that Committee's review of regulations.

Four principles were identified in that report to test the valid and appropriate use of the power of delegation.

- delegated legislation shall be in accordance with the statute;
- it must not unduly trespass upon the personal rights and liberties of citizens;
- it must not unduly make the rights and liberties of citizens dependent upon administrative decisions which are not subject to review of their merits by a judicial or other independent tribunal;
- it must not contain matters more appropriate for parliamentary enactment, for example, entail a fundamental change in law affecting rights, obligations, or liabilities.

Other committees have added further tests. For example, in Canada a Standing Joint Committee includes in its review whether the regulation conforms to the *Canadian Charter of Rights and Freedoms* or the *Canadian Bill of Rights*.

Getting a driver's license, a hunting or fishing license, applying for income assistance benefits, the issuing of a license for the operation of a radio or television station, or even a nuclear power plant – are just a few examples of the ways in which delegation can touch the day to day lives of citizens, in sometimes dramatic and profound ways.

Although the use of government directives points to challenges in developing effective means of scrutiny, perhaps, more troublesome is the gap in accountability that exists in most provinces in terms of any legislative review whatsoever of regulations created pursuant to statute.

The following is list of scrutiny measures that are used in other jurisdictions.

- **Review by a parliamentary committee.** In Australia, Canada, New Zealand and the United Kingdom, standing committees have been created to review executive legislation. These committees are generally chaired by members of the opposition. The work of the committees is often assisted by the advice of independent legal counsel. Committees in Canada and the United Kingdom are permitted to include legal and drafting issues in their review of regulations.
- **The requirement to lay delegated legislation before the House for approval.** Several jurisdictions require the tabling of regulations in the legislature. In some cases, resolutions of both houses are required to implement an instrument.
- **Resolutions of annulment or disallowance.** In some jurisdictions, resolutions may be brought to reject regulations.
- **A public register.** In the United States, administrative procedure legislation requires the publication of not just regulations, but other documents, such as policy manuals, in a public register. The Internet now offers citizens a method

of quick and inexpensive access to regulations and other documents.

- **Sunrise or sunset clauses.** Regulations are deemed to be repealed if a proclamation date is not set. In Victoria State, in Australia, all regulations are sunsetted every ten years.
- **Regulatory Impact Statements.** These are statements prepared by Departments with the requirement of public advertising. In Canada, departments are required to publish Regulatory Impact Analysis Statements in the *Canada Gazette*. Such statements must outline the policy objective of the regulation, the need for the regulation, the content of the regulation, any changes from the existing legal regime, and must include the identification of a contact person within the department.
- **Regulatory Plans.** In Canada, since 1986, federal departments and participating regulatory agencies are required to prepare and file regulatory plans that list the regulatory initiatives with which they intend to proceed in the coming calendar year. This serves to provide broader public notice for parties who may be affected by the creation of new regulations, or the amendment of existing regulations.