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Parliamentary Scrutiny of Delegated Legislation in New Zealand - The Statutes Revision Committee and the Regulations Review Committee.

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Contents

Introduction

One of the principal innovations of the new structure of Parliamentary Committees introduced in 1985 was the establishment of a specialist Regulations Review Committee. This paper has three objectives. The first is to place the Committee in context by reviewing the history of concern over the use and scrutiny of delegated legislation in New Zealand. The second is to review the limited jurisdiction over regulations previously exercised by the Statutes Revision Committee. The third is to make a preliminary assessment of the impact of the Committee. To this end it reviews the work of the Committee from its inception until the end of the 1990 Parliamentary session. This review does not attempt to be comprehensive but rather to give an overview and to focus on particular aspects of interest.

The fact that the assessment is preliminary is stressed. A week may be a long time in politics, but in the development of a substantially new area of Parliamentary Committee jurisdiction four and a half years is not very long at all. The establishment of the new Committee introduced a new actor into the complex web of relationships in and around the New Zealand Parliament. There will inevitably be a learning process for the committee. Secondly ministers and officials must learn how to live with such a committee and make the necessary adjustments to their behaviour and expectations. So long as the business of the Executive is in the hands of Ministers and senior departmental officials whose careers pre-date the the existence of the committee the position remains, in a sense, transitional The full impact of the committee is likely to become apparent only within a longer time frame. Clearly, however, there is a great deal that can usefully be said about the committee and its work without awaiting the completion of these processes.

A considerable amount has been written over the years about the use and scrutiny of delegated legislation in New Zealand. The subject has given rise to sporadic debate in the pages of the New Zealand Law Journal since the mid 1920s. New Zealand practice has twice been surveyed as part of major comparative studies. Kersell in 1960 compared New Zealand practice to three other Commonwealth countries.[1] Pearce made a narrower comparative study of New Zealand and Australian practice in 1977.[2] In 1973 Cain made a detailed study of regulation making powers and procedures for the Public and Administrative Law Reform Committee.[3] Palmer devoted chapters to the question in both the 1979 and 1987 editions of "Unbridled Power".[4] In addition Shelton's 1980 study of the Economic Stabilisation Act 1949.deals to a significant degree with the question.[5] Smith's 1978 study of the Statutes Revision Committee is also relevant.[6] All except Palmer (1987), however, predate the establishment of the present Regulations Review Committee.

The active scrutiny of regulations and regulation making by a Parliamentary Committee in New Zealand is a development too recent to have attracted great

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1 Kersell J E Parliamentary Scrutiny of Delegated Legislation London 1960.

2 Pearce D C Delegated legislation in Australian and New Zealand Sydney 1977.

3 Cain G Regulation Making Powers and Procedures of the Executive of New Zealand Auckland 1973.

4 Palmer G Unbridled Power? An Interpretation of New Zealand's Constitution and Government Oxford University Press 1st Edition 1979 2nd Edition 1987.

5 Shelton D Government, the Economy and the Constitution unpublished LLM Thesis Wellington 1980.

6 Smith J M *Statutes Revision- The Lawyers Committee* in Levine S Politics in New Zealand A Reader George Unwin and Allen 1978.

attention Frame and McLuskie's 1978 article reviews the first three investigations of regulations by the Statutes Revision Committee.[7] Palmer (1987) includes reference to the first two Reports of the Regulations Review Committee. A body of more recent writing about the work of similar committees internationally has begun to build up over the past ten years in the papers presented at the Commonwealth Conferences on Delegated Legislation, held in 1980, 1983 and 1989, and the Conferences of Australian Subordinate Legislation Committees, held in 1986 and 1989. Of particular relevance is the comparative study of commonwealth practice by Abols and Carson, prepared for the 1989 Commonwealth Conference.[8] Two papers on particular topics were also presented by the New Zealand delegation at this conference.[9] There has, however, been no previous attempt to review the work of the Committee and to revisit the previous New Zealand experience in the light of its establishment.

Part 1 of the paper is concerned with events prior to 1964 when the Statutes Revision Committee was given its limited jurisdiction over regulations. This involves a brief discussion of the "the problem" of delegated legislation which such a regulation committee is designed to address. Earlier developments in relation to the control and scrutiny of delegated legislation are then briefly reviewed against their historical background.

Part 2 focuses on the jurisdiction exercised by the Statutes Revision Committee from 1977 onwards. The investigations carried out by the committee and the events leading to the establishment of a specialist regulations committee are reviewed.

Part 3 is concerned with the work of the Regulations Review Committee since 1985. This attempts to give some indication of the extent to which the Committee has lived up to the expectations of its proponents, and to paint a realistic picture of the behaviour of such a Committee in the political context in which it operates.

The story is in large measure part of a debate about ends and means in government. It can be seen as a thread in the general development of an awareness of constitutional issues in New Zealand. In this context the central issue is the extent to which, and the means by which, the use of regulations as a means of of achieving the ends of government should be constrained, controlled and supervised. The matter is not so clear cut as might be suggested by the characterisation of the issue as one of the imposition of principle on pragmatism, or the questioning or whether ends justify their means This is certainly part of the story. The nexus between ends and means, between policy and administration, and between political and constitutional considerations is not, however, a tidy one.

As Mulgan has pointed out " procedural limits also impose substantive limits".[10] At the margin the imposition of limits, grounded in constitutional principle, on the means by which government can act involves a trade off against the ability of the government to pursue the ends seen as desirable by the electorate. The view that government should be able to do so is not simply a matter of pragmatism but is grounded in principles of democratic responsiveness. The central issue is where society sees the appropriate balance being struck between the conflicting impulses driven by these two principles. This rests on a perception of the relative advantages

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[7] Frame A and McLuskie R *Review of Regulations Under Standing Orders* NZLJ 1978, 423.

[8] Abols I J and Carson B *Drafting and Scrutiny of delegated legislation in the Commonwealth- A Comparative Study* Third Commonwealth Conference on Delegated Legislation Westminster 1989.

[9] These were about *Parliamentary Disallowance of Delegated Legislation* and *Review of Existing Regulations.*

[10] Mulgan R *Palmer, Parliament and the Constitution* Political Science 32, 176

and dangers respectively of government being more or less constrained in the means available to pursue its policy objectives. The story of the gradual development of a greater degree of scrutiny and constraint on the use of delegated legislation, leading to the establishment of the Regulations Review Committee, can be seen as part of a general process of evolution towards greater constraint.

For most of its history New Zealand has been a nation of "big government". The dangers of an activist state relatively unconstrained by constitutional checks have been regarded as deserving less weight than the advantages of allowing the government to get on with job. Over the years the advocates of greater scrutiny of the use of regulations faced a generally hostile environment and made only slow progress. Proponents of the need for safeguards tended to be faced with the burden of proving that the lack of safeguards was in fact causing harm. New Zealand remained tardy in instituting procedures for the scrutiny of regulations. This began changing in the mid 1970s with the gradual breakdown of the broad social and political consensus which had prevailed since the end of WWII. In such an environment arguments about the desirability of safeguards were more readily accepted.

In reviewing the experience of the two parliamentary committees which have successively had responsibilities in relation to regulations, essentially the same forces can be seen at work. The objective of a parliamentary committee scrutinising regulations is technical scrutiny. It is to assess from a constitutional and not a political perspective the appropriateness of regulations, as a means of pursuing policy, as distinct from the policy itself. The borders between ends and means, policy and administration, constitutional and political concerns, however, are not always clear. The ability of such a committee successfully to carry out its functions is seen as centrally concerned with its ability to deal with this lack of clarity. The erection of a convention of bipartisanship in the operation of such committees is seen as vitally important in this regard. The collapse of the jurisdiction of the Statutes Revision Committee can be seen as largely reflecting its inability to sustain such a convention.

The debate about the appropriate use of regulations is not ended by the establishment of such a committee. To some degree it becomes a forum for continuing it. At the same time it can be seen as a mechanism to alter the balance of the debate. It is an advocate for procedural scruple in the use of regulations. The committee expresses to Parliament its view on the propriety of a regulation and Parliament then determines the ultimate outcome. The accountability of the Executive is ultimately achieved in the political forum.

In this light any expectation that a committee can visibly transform the behaviour of government within a short space of time is clearly naive. It is in a sense involved in a war of attrition. Its impact on the practice of government is likely to be gradual, even glacial, rather than spectacular and instantly visible. Nor will the occasional spectacular or controversial contributions of such a committee necessarily be the most significant. Perhaps the most important impact of a such a committee is simply that it exists and goes about its business in a diligent fashion. As the first Chairperson of the Committee has said -

> The mere existence of the committee - the carrying on of its work so that those concerned with proposals and thinking through of ideas for regulations are involved - acts as a safeguard. [11]

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[11] NZPD 4 Feb 87 ,6806

In doing so it performs a continual educative and preventative function which will influence the course of events almost invisibly by causing other players in the process of government to alter their behaviour.

The Regulations Review Committee's terms of reference have been designed to give it a broad brief and a position of considerable influence within the parliamentary process. It has already made a significant impact in several respects. It has played a key role in the introduction of a procedure for disallowance of regulations. It has on a number of occasions proven its mettle in challenging the propriety of particular regulations and, in relation to the question of the imposition of fees under regulations, shown itself willing to raise difficult issues. Perhaps most importantly, however, it has maintained diligent surveillance of the regulations being made and the empowering provisions being enacted. It has thus begun the long and almost invisible process of changing regulatory practice generally.

Part I

Delegated Legislation in New Zealand

1.1 The Problem of Delegated Legislation.

The Regulations Review Committee shares a common heritage, with the other Committees established as part of the 1985 reform but it also has its own genealogy in a debate over the use and scrutiny of delegated legislative powers which is older than representative government in New Zealand.

Chen (1933) suggests that the modern trend towards the greater delegation of powers by the British Parliament dates from the 1830s, and accelerated with the wave of social reforms from 1906, and again during World War I.[12] The issue of delegated legislation and its scrutiny is probably best viewed as an endemic feature of representative democracy. The extension of the franchise, from the 1830s onwards in the UK, obliged Government to respond to a broader electorate. This lead to an expansion of the state's role and functions beyond the relatively limited range of its traditional concerns. Increasingly the state became interested in matters which required the exercise of legal authority in contexts where it was not practicable to the enact legislation dealing explicitly with every eventuality. The increased resort to the practice of delegating the power to make law, through regulations and other instruments, overcame this practical difficulty.

The practice can be seen as having advantages in allowing governments to keep up with rapid economic, technological and social change. It enables matters of great complexity to be dealt with without the production of excessively prolix statutes. It avoids the need for constant recourse to the legislature to make minor adjustments to relatively unimportant areas of the law. It may allow greater scope for consultation with particularly affected groups in the community. The report of the Committee on Ministers' Powers identified six reasons it saw as justifying Parliaments delegating legislative powers.[13] These were -

(a) pressure of Parliamentary time.
(b) the technicality of the subject matter.

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[12] Chen Chih-Mai Parliamentary Opinion of Delegated Legislation Columbia University Press New York 1933,

[13] Committee on Ministers' Powers 1932. Cmd 4060 , 51-2.

(c) unforeseen contingencies that may arise during the introduction of large and complex measures of reform.
(d) the need for flexibility to respond to changing circumstances.
(e) the opportunity for experiment and learning from experience.
(f) emergency conditions which may arise requiring speedy or instant action.

Inevitably, however, every solution gives rise to new problems and indeed to some extent the potential problems arising from the use of delegated legislation are the mirror image of its advantages. A range of particular concerns arise. There is a need to ensure that the legislative powers delegated are not excessive. If such delegations were limitless then Parliament would have lost control of the process of law making. There is a need for the limits of appropriate delegation to be defined and then observed. Whatever the scope of the powers delegated it is necessary for the terms of the delegation to be clearly specified. The concern arises of regulations being made which go beyond the scope of the delegation contained in the empowering provision. Parliament as delegator has a responsibility to supervise its delegate and enforce the terms of its delegation. It needs to put in place the necessary mechanisms to achieve this. There is the potential for legislative powers to be subdelegated, thus further removing their exercise from parliament, or to be delegated to inappropriate delegates. While the delegation of legislative powers by Parliament to the Executive is itself an expression of parliamentary sovereignty it also holds within it the potential for the position of parliament to be significantly eroded.

The growth in the use of of regulations was not preceded by any systematic consideration of these sorts of implications. It evolved in uncontrolled fashion as a response to the demands placed on government by the electorate. Only with the passage of time did concern about the possible implications of the practice arise. These sorts of concerns became widespread in the years following the first World War. It was feared that the practice was developing of enacting statutes that were merely skeletal in form leaving the substance of the law making to be carried out by the executive. Parliamentary sovereignty was thus imperiled. The failure of Parliament as delegator to exercise the expected scrutiny of the use of regulations was identified. There were concerns that powers were being delegated which were so broad as to preclude recourse to the Courts by affected individuals. In other areas the scope of delegated powers were simply unclear. There was an absence of requirements for consultation with those likely to be affected. In some cases there was inadequate public notification of the rules that had been made.

The report of the Committee on Ministers' Powers in 1932 is a good starting point for the consideration of subsequent developments. It was a significant watershed in that it sought to comprehensively address these concerns and to recommend what should be done about them. It banished from the mainstream of the debate the line of criticism that held that the delegation of legislative powers was a "bad" in itself. In assessment of these sorts of criticisms it stated -

> We do not agree with those critics who think that the practice is wholly bad. We see definite advantages, provided that the statutory powers are exercised and the statutory functions performed in the right way. But risks of abuse are incidental to it, and we believe that safeguards are required, if the country is to enjoy the advantages of the practice without suffering from its inherent dangers.[14]

In doing so it focused debate on the question of the appropriate constraints on the granting and use of such powers. Secondly, it several specific unsatisfactory current practices. These were -

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[14] Committee on Ministers' Powers n13, 4-5

(i) instances of powers to legislate on matters of principle and impose taxation;
(ii) instances of powers to amend Acts (the "Henry VIII" clause);
(iii) instances of powers giving such a wide discretion that it is almost impossible to know the limit intended by parliament;
(iv) instances where parliament for effectively forbidden control by the courts.[15]

It identified these practices as examples of "exceptional" types of delegated legislation which it regarded as rarely justifiable and only subject to additional procedural checks. It thus defined the core of what would subsequently be regarded as suspect practice. Finally it made specific recommendations for the reform of British practice,among these the proposal for a Standing Committee to be established to report on Bills containing regulation making powers, and on regulations.

1.2 The Use of Regulations in New Zealand.

There has been some suggestion that the New Zealand Parliament may have been peculiarly susceptible to the use of regulations. Robson (1967) suggests that after the establishment of the legislature in New Zealand under the Constitution Act 1852, the fact that Parliamentary sessions were relatively short and infrequent provided initial impetus for the extensive use of regulations.[16] The inherent pragmatism of a pioneering society doubtless was also significant. New Zealand practice, thus developed against the backdrop of British precedent for the widespread delegation of legislative powers, and was reinforced by local circumstances. Robson identifies the enactment, during World War I, of emergency powers of unprecedented breadth as important here also. From Vogel's "go ahead policy" of the 1870s onwards New Zealand governments have actively lead, directed and regulated the economy. From the Liberals in the 1890s down to the present governments have promoted active social welfare programmes.

Extensive research would be required to verify the extent of use of regulations prior to 1939. It has only been since the enactment of the Regulations Act that regulations have been published in a numbered annual series. The table below lists the number of regulations made in New Zealand by year since 1936. [17]

Numbers of Regulations made by Years 1936-89

1936	93	1956	224	1976	332
1937	208	1957	281	1977	337
1938	184	1958	202	1978	240
1939	283	1959	215	1979	285
1940	329	1960	199	1980	273
1941	262	1961	178	1981	378
1942	358	1962	216	1982	279
1943	208	1963	227	1983	316
1944	188	1964	221	1984	352
1945	201	1965	230	1985	343
1946	218	1966	222	1986	383
1947	210	1967	289	1987	418
1948	221	1968	247	1988	338

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[15] Committee on Ministers' Powers n13, 31,36,38,40.

[16] Robson J L (ed.) New Zealand - The Development of its Laws and Constitution 2nd Edition Stevens & Sons London 1967,129.

[17] This updates the table in Palmer (1987) n 6, 163.

1949	194	1969	283	1989	413
1950	232	1970	282		
1951	302	1971	287		
1952	250	1972	277		
1953	193	1973	327		
1954	252	1974	327		
1955	232	1975	301		

As an indicator of either the relative effective extent of regulatory activity from one year to another, or the scope of regulatory powers delegated at any time such a head count is at best crude and at worst potentially misleading. Firstly it makes no distinction between regulations of an essentially trivial nature and those of far reaching effect. The numbers of regulations made since 1984 have been the highest in New Zealand history. At the same time, however, a number of the statutes which previously granted the most far reaching powers, such as the Public Safety Conservation Act 1932, and licensed the most sweeping intrusions into the lives of individuals, such as the Economic Stabilisation Act 1949, have been repealed.

Secondly it takes no account of the numbers of regulations repealed. In recent years these have been substantial. For instance in 1973, 1974 and 1975 the numbers of repeals in each year respectively were 272, 299, and 209. Although the number made over those years was 938 the actual increase over the period was only 158. Between 1978 and 1983 a total of 2250 regulations were repealed as against 1873 made, a decrease over the period of 377.[18] This was in large part a result of the repeal of 768 regulations in 1979, 507 of these as a result of a major exercise to revoke spent regulations.[19] It is estimated that at least 421 regulations were repealed in 1983.[20]

In November 1988 there was a total of 3,945 regulations in force. Of these over 400 were identified as no longer needed and thus capable of immediate repeal. [21] It would appear that over the past two decades the numbers of regulations in force at any time has probably not risen greatly despite the greater numbers made each year. The greater totals made possibly being more a reflection of the increased velocity of government activity than an increase in the scope of regulation. In the context of a consideration of Parliamentary scrutiny of regulations of course the total number of regulations is somewhat beside the point. The arguments for the proper control of regulations do not flow from their number, although the sense of urgency attached to them might .

1.3 Control of Delegated Legislation Before 1962

Delegated legislation attracted considerable attention throughout the Commonwealth in the 1920s and early 1930s. A number of influential books were published bringing such concerns to a wider public. [22] At this time that the Australian Senate established a committee with responsibility for the scrutiny of regulations. In Britain

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18 NZPD 1983, 3420,3425.

19 Revocations Order 1979 (SR 1979/177)

20 Palmer (1987) n 6,162.

21 Report of the Regulations Review Committee Inquiry into all Regulations in Force as at 14 November 1988 A.J.H.R. I. 16B

22 Lord Hewart, Lord Chief Justice of England, published his book "The New Despotism" in 1929. Professor C K Allen's "Bureaucracy Triumphant", a collection of earlier articles, was published in 1931 C.T. Carr's "Delegated Legislation" had laid the groundwork in 1921.

the issue culminated in a controversy over the Local Government Act 1929. This resulted in the establishment in 1929 of the Committee on Ministers' Powers. -

In New Zealand the New Zealand Law Society at its first annual conference in 1928 passed a motion stating -

> That this Conference expresses its strong disapproval of the growing practice of legislating by regulation in important matters.[23]

The expressions of concern on the issue came to a head in the celebrated exchange in the pages of the New Zealand Law Journal between Prime Minister Forbes, and R M Algie then Professor of Law at Auckland University. In a public address in Auckland in March 1933 Forbes had challenged the critics to produce examples of the unacceptable use of regulations to back up their previously general criticisms. An extract from the speech was reprinted in the New Zealand Law Journal along with a response by Algie which cited two examples . These were a regulation making power of virtually limitless scope in the Education Amendment Act 1915 a power to make regulations overiding the principal Act in the Education Amendment Act 1919.[24]

The response was the enactment in 1936 of the Regulations Act . It was supported by all parties and enacted with minimal debate. In the words of the Minister in charge of the Bill -

> There is nothing contentious in the Bill. Its provisions are a convenience to all concerned with the law.[25]

This imposed the requirement for regulations, as defined, to be printed and published in a regular series. Prior to then they were usually published in the New Zealand Gazette. This was clearly an advance, if only by imposing a degree of order on the situation. Chen's comment that "The chief characteristic of the English practice of delegating legislative powers is its lack of system" seems an apt description of the New Zealand experience also. [26]

Over the following years further stimuli to the extensive use of regulations arose. During the 1930s the development of the welfare state opened up whole new areas of Government activity and concern. From 1939 the need to mobilise the nations economic resources to support the war effort led to an explosion in regulatory activity substantially involving the use of unprecedented emergency regulations.

Parliament again turned its attention to the subject of regulations in the aftermath of World War II. During the war years emergency regulations imposed economic stabilisation measures in order to mobilise the economy as part of the war effort. At the conclusion of the war an Emergency Regulations Committee was established to consider the desirability or otherwise of the retention of the wartime emergency regulations.[27] Many were allowed to lapse. Others however were re-enacted in substantive legislation in the Economic Stabilisation Act 1948 or incorporated in modified form in existing Acts Of those which were continued many were made subject to annual parliamentary review. This not only had the effect of moving a large body of provisions from the realm of regulations into the Act, but also

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[23] *Proceedings of First Annual Legal Conference* New Zealand Law Journal Vol 4, 51.
[24] NZLJ vol 9, 92-3
[25] NZPD 1936, 36
[26] Chen n1, 13
[27] NZPD 1947, 1114

substituted rather narrower regulation making powers.[28] The arguments for greater safeguards in the use of delegated legislation generally continued. In 1944 an article by Hewitt argued for further safeguards.[29] Hewitt also published a book in 1954 in which he suggested a number of reforms. In 1947 A C Stephens addressed to the Sixth Dominion Legal Conference on the theme of the abuse of delegated legislation. Others raised similar concerns.

Following the return of peace the pressures giving rise to the use of regulation continued. From this time a broad social and political consensus emerged which would not be seriously challenged within the political mainstream until the late 1970s. This was based on the one hand on the maintenance, and gradual extension, of the welfare state, on the other of adherence to a Keynesian approach to economic management and the belief that economic stability could be assured by Government actively intervening in the economy.

In 1960 its General Election campaign the National Party advanced a number of proposals for Parliamentary and constitutional reform. Among these was a pledge to take measures to safeguard the rights of individuals from the abuse of delegated legislation. Other aspects of this concern led to the establishment of the Public Expenditure Committee in 1962 and the introduction, but not passage, of a Bill of Rights in 1963. In part this concern with constitutional and Parliamentary reform may have reflected the awareness that the abolition of the Legislative Council in 1950 had left New Zealand with an all-powerful unicameral legislature with few effective safeguards against the abuse of power. Doubtless it also reflected the influence of concerned individuals such as Algie and Marshall who had both been members of the 1947 Emergency Powers Committee.

The recent publication of Kersell's comparative study of the procedures and practices surrounding delegated legislation in Australia, Britain, Canada, and New Zealand may also have helped raise awareness of the matter.[30] It concluded that:

> While not the most tardy in entering this field of legislation, the Parliament of New Zealand has been the most lax in not providing protection of persons who find themselves subject to subordinate legislation".[31]

Kersell identified four principal shortcomings. The first was the lack of a requirement for the publication of regulations before they came into effect. [32] The second was the lack of a defence against a breach of a regulation based on the fact that the regulation had not been published. The third was the lack of a general requirement for the laying of regulations before the House, Finally he argued for the establishment of a Parliamentary Committee to scrutinise regulations.

Further impetus to consider more active supervision of regulations may also have come from the 1959 decision of the supreme Court in Reade v Smith.[32] The Court held the Education (School Age) Regulation 1943 to not be reasonably capable of being made for the purposes specified in the Act. In doing so it held that a power for the Governor-General to make regulations "in his opinion" necessary for the administration of the Act did not prevent the Courts acting. This was one of the earliest cases in which the Courts began to create a more assertive administrative jurisdiction than previously. Shortly before this time the practice of having all draft

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[28] NZPD 1948, 693 and 2269

[29] Hewitt D J *Rule by Regulation.* NZLJ 1944, 200)

[30] J. E. Kersell. Parliamentary Supervision of Delegated Legislation

[31] Kersell, 162

[32] Reade v Smith NZLR 1959, 996

regulations vetted in the Attorney-General's office was commenced. Later this task would be taken over by a solicitor in the Justice Department.

In June 1961 the Delegated Legislation Committee was established to -

> ... consider the desirability of introducing an effective form of Parliamentary control of delegated legislation, the Committee to review the schemes at present operating elsewhere in the Commonwealth and to make such recommendations as may be thought necessary for the provision of a suitable form of scrutiny of delegated legislation and law-making powers in New Zealand.[33]

The establishment of the committee was not greeted with uncritical approval. Hon G R Mason stated -

> I do not want to hold out the expectation to the people who discuss these things so much that they are going to find a tremendous lot of material calling for reform. I think they will find that the enormity of the evil is not in proportion to the immense amount of discussion which it calls for.[34]

The Committee reported early in 1962. In the course of its enquiry it considered the findings of the 1959 House of Commons Select Committee on Delegated Legislation, and the report of the Donoughmore Committee. It also investigated practice in a number of other Commonwealth countries which by that time had delegated legislation committees. In general it agreed with the Donoughmore Committee's conclusion that the use of regulations was necessary to the conduct of government, but "...that some safeguards are required if the country is to enjoy the benefits of the practice without the possibility of abuse." [35]

It made a number of specific recommendations. Firstly it recommended the implementation of confirmation procedures for regulations which varied taxes, or which were of an emergency nature. Such regulations would have a limited life unless confirmed. Secondly it recommended that the use of the new form of regulation making provision which had been adopted in the previous year should become standard. This was designed to make clear the precise limits of the power delegated by Parliament, and to be in a form which would not seek to prevent challenge in Court.

The Committee, however, rejected the notion of a specialist Regulations Committee. It considered that the administrative scrutiny of delegated legislation by the Law Drafting Office was being performed satisfactorily, and it saw no evidence of abuses that would justify the adoption of such a system. What was recommended was that the Statutes Revision Committee be given jurisdiction to consider regulations referred to it. This was a cautious response to the concerns which had been raised. It placed heavy reliance on administrative scrutiny within the Executive to ensure that regulations and empowering provisions were appropriately drafted. The jurisdiction proposed for the Statutes Revision Committee was not designed to provide for comprehensive scrutiny of regulations on behalf of Parliament. It was more in the nature of a regulations complaints procedure.

Part 2

The Jurisdiction of the Statutes Revision Committee.

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[33] Report of the Delegated Legislation Committee 1962 AJHR 1962 I 18, 4

[34] NZPD 1961,102

[35] Report of the Delegated Legislation Committee 1962 AJHR 1962 I. 18 p 12

2.1 The Quiet Years 1964-76

The package of recommendations made by the Delegated Legislation Committee was implemented later in 1962. Standing Orders were amended to give the Statutes Revision Committee the jurisdiction proposed, and the Regulations Act 1936 was amended to require the tabling of regulations in the House. As a consequence, the Statutes Revision Committee was empowered to-

> consider any regulation within the meaning of and published pursuant to the Regulations Act 1936 which may be referred to it with a view to determining whether the special attention of the House should be drawn to the regulation on any of the following grounds:
>
> (a) that it trespasses unduly on personal rights and liberties,
> (b) that it appears to make some unusual or unexpected use of the powers conferred by the statute under which it is made
> (c)that for any special reason its form or purport calls for elucidation.[36]

In 1964 the Committee got an opportunity to test its new jurisdiction. The Food Hygiene Regulations 1952 were referred to the Committee by the House on the motion of the Minister of Justice. This was in response to a question in the House from an Opposition member. This sought the Ministers response to a statement by a Wellington Magistrate that the regulations were "...a hotch-potch of inconsistencies arising from bad draftsmanship and should be rewritten..."[37]. The Committee recommended urgent review of the regulations.[38] The regulations were not replaced until 1975.[39]

The Committee's mandate to consider regulations then lay dormant, for another 13 years. Smith(1978) suggests two possible explanations for this. The first was that the -

> ...absence of parliamentary scrutiny apparently relates to the belief of politicians that the present scrutiny is adequate. As the responsibility for referral to Statutes Revision lies with MPs, this attitude leads to regulations being paid very little time or attention....[40]

In view of the confidence expressed by the 1962 Committee in the 1961 form of empowering provision and in the quality of drafting, this belief does not seem unreasonable. In the absence of any significant level of public concern politicians are unlikely to turn their minds to such an issue. As Kersell noted in 1977 -

> This lack of activity has not been because the Government has used its numbers to prevent regulations being referred to the Committee. Motions for referral have simply not been moved. [41]

The second suggestion was that the Statutes Revision Committee was "overworked and understaffed" in terms of its task of considering Bills. The committee

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36 SO 377

37 Smith J M *Statutes Revision: The Lawyers' Committee* in Levine S Politics in New Zealand A Reader George Allen and Unwin 1978,138.

38 Report of Statutes Revision Committee 1964 AJHR I. 5 p 6

39 Smith (1978),138

40 Smith (1978),139

41 Quoted by Minogue NZPD 1980, 1521

considered Bills of a technical legal and law reform character and had a heavy legislative workload.[42]

The provisions of Standing Orders relating to the referral of regulations to the Committee also require attention. Regulations could be referred by a motion of the House under SO 377. The Committee, however, was also able, under SO 378 to sit while the House was adjourned or not in session. At these times the Chairman could refer regulations to the Committee, and where there was a request from five Members of the House he was obliged to do so. The referral of a regulation to the Committee while the House was in session required, in effect, the agreement of the Government. At other times, the Chairman, or five members could make a referral irrespective of the Government's wishes. Clearly the logistics of referral to the Committee were more cumbersome than those for the possible alternative means of raising concerns about regulations. These might include the use of Parliamentary Questions and Petitions, or the making of representations to Ministers either directly or through Members of Parliament. It is perhaps not surprising the procedure was, initially at least, little used. The Standing Orders Committee in 1979 recommended the broadening of the referral provisions to allow the Committee to commence investigations on its own initiative.

Cain's 1973 study makes it clear that the committee's inactivity in relation to regulations was not because the concerns underlying the 1962 report were being adequately addressed in practice.[43] Cain identified, on the basis of a partial survey, -

(a) 21 subjective empowering provisions (that is provisions not in the form made standard from 1961) which remained in Acts which had been reprinted since 1961;
(b) 55 current regulations made under such provisions;
(c) 22 Acts in which such empowering provisions had been extended since 1961;
(d) 22 regulations which were still in force which predated the Regulations Act 1936 and were not printed in the Statutory regulations series.

2.2 Rediscovery 1977-82

In 1977 the committee's jurisdiction over regulations was reactivated. A complaint concerning an amendment to the the Rock Lobster Regulations 1969 was addressed to the Chairman, J. K. McLay, who used his power to accept the complaint while the House was not sitting.[44] The amendment had the effect of totally prohibiting the taking of rock lobster by diving or hand picking in the Chatham Islands. The Committee found that the regulations unduly trespassed on individual liberties by depriving persons of their customary means of earning a living.[45]

The debate on the tabling of the Report gave rise to some interesting comment on the issue. McLay having been instrumental in having the regulations considered by the Committee seemed to be having second thoughts. He expressed the view that the Committee's powers,"...have been used sparingly in the past, and ...,should

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[42] Even before the 1979 amendments to Standing Orders made the referral of Bills to Committee's a routine event, the Statutes Revision Committee's brief to "consider all Bills of a technical legal character referred to it" ensured a heavy legislative workload.

[43] Cain n3, 66-71

[44] Rock Lobster Regulations 1969 Amendment No. 8 1976.

[45] Report of Statutes Revision Committee 1977 AJHR I. 5 p 5

continue to be used sparingly if they are to be regarded as effective." [46] Opposition speakers, however, argued that greater scrutiny of regulations was needed.

Having been reminded of the existence of the procedure, however, others also saw opportunities for referral. A second set of regulations was also considered in 1977. The Wanganui Computer Centre Commencement Order 1977 was referred by 5 members of the Opposition while the House was not sitting. The referral arose out of disclosures of the unauthorised release of information from the Wanganui Computer Centre. This had already been the subject of a report by the Wanganui Computer Centre Privacy Commissioner who had drawn attention to the fact that the unauthorised disclosures had occurred prior to the making the of the Order in Council bringing into effect the safeguards under the Wanganui Computer Centre Act 1976.[47] The Opposition had seen the political opportunities afforded by the procedure to initiate such scrutiny in politically sensitive areas. In the event the Committee found no reason, in terms of the criteria in Standing Orders, to draw the arguably belated Order to the attention of the House. [48] The Committee's report to the House nonetheless provided the Opposition with an opportunity to force a substantial debate with the Government on the defensive.

The issue also featured, if in a small way, in the 1978 election campaign. Labour promised to create a Select Committee to review regulations. National more cautiously promised to consult widely before making regulations [49] There were other calls for such a Committee. Palmer(1979) described the protections from arbitrary use of regulations as "little short of derisory", and argued for a Parliamentary Committee on the model of the Australian Senate Committee.

Over the following years a number of further regulations would be considered by the Committee. These can be seen as falling into two more or less distinct categories. A number of referrals were initiated by private individuals, or in one case by the Committee itself, and concerned matters of no great political moment. Others were initiated by the Opposition and were part of their broad based attack on the Government's approach to the management of the economy

In the first category was the 1979 investigation of regulations which added a surcharge for postal items to the Chatham Islands.[50] The amendment was revoked before the Committee had considered the matter. Confronted with the prospect of close scrutiny the Post Office, or its Minister, thought better of the proposal.[51].

Three further investigations of this type occurred in 1980. The first of these concerned an amendment to the Civil Aviation Regulations 1953.[52] The complaint centred on the removal of stipulations related to the skill knowledge and experience requirements for the issue of pilots licences from the regulations into tertiary legislation documents. These were known as Civil Aviation Safety Orders (CASOs) and were made by the Director of Civil Aviation. The complaint suggested that this amounted to an unusual or unexpected use of the regulation making power and

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46 NZPD Vol 410, 391.

47 Inquiry into Unauthorised Retrieval and Disclosure of Information from Wanganui Computer Centre. Report of Wanganui Computer Centre Privacy Commissioner. January 1877 AJHR A4A.

48 NZPD 1977, 1625-1640

49 Palmer, 108.

50 Post Office (Inland Post) Regulations 1977 Amendment No. 1 (SR 1977/253)

51 Report of Statutes Revision Committee 1979 AJHR I. 5. See also NZPD 1979, 78.

52 Civil Aviation Regulations 1953 Amendment No 22 (SR.1979/18).

arguably involved undue trespass on individual liberties. Attention was also drawn to the absence of appeal provisions in relation to the licensing of pilots.

The Committee concluded that the regulations involved both an unusual and unexpected use of the delegated power and undue trespass on rights and liberties on two grounds. Firstly they gave to the Director of Civil Aviation wide powers without providing adequate safeguards against abuse. Secondly they failed to provide appeal rights against decisions which could adversely affect an individuals rights to earn a livelihood. It was suggested either that the personnel licensing aspect of the CASOs be returned to the regulations themselves, or that specific requirement relating to consultation, public availability of the Orders, and rights of appeal be imposed. In arriving at these conclusions the Committee also addressed the general issue of tertiary legislation. It suggested a rebuttable presumption against the practice. Circumstances where it might be seen as justified were identified as relating to extremely technical subject matter, and and the need for great speed and flexibility.

The second such investigation in 1980 related to the Economic Stabilisation (Conservation of Petroleum) Regulations 1979. It concerned the question of whether it was acceptable for exemptions from the principal regulations to be publicly notified through newspapers. The committee found no cause to object to the practice and indeed suggested the possible amendment of the regulations to allow other media to be used as well. It was also proposed, however, that they should also be notified in the Gazette. [53] The third such investigation concerned the Rock Lobster Regulations 1969. The complaint, relating to the means of measuring lobster tails, was rejected, although some drafting amendments to the regulations were suggested.[54]

In 1982 a similar referral was made involving the Transport Licensing Regulations 1963.[55] It concerned the exemption of grape carriers from the transport licensing regime, and resulted in the Committee expressing support for the amendment.

In these investigations the Committee can be seen as beginning to identify the sorts of provisions which should be regarded as trespassing unduly on rights, or making unusual or unexpected uses of powers. It would initially also attempt this approach in relation to the more political investigations. In the final analysis, however, this would not prove sustainable.

During the later 1970s and early 1980s the then Government increasingly resorted to an approach to the management of the economy based on frequent and extensive regulatory intervention. At its extreme this involved the imposition of a price and wage freeze involving the use of regulations under the Economic Stabilisation Act 1949, and a variety of other Acts. Far reaching regulation making powers were also taken under the National Development Act 1979. Between 1979 and 1983 the extremely broad power under the Economic Stabilisation Act, to make regulations to promote the economic stability of New Zealand was exercised on 96 occasions.[56] Inevitably the political controversy surrounding the government's approach to economic management came to embrace the instruments by which the policy was pursued. Against this background a number of politically contentious regulations

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[53] Regulation 13B of the Economic Stabilisation (Conservation of Petroleum) Regulations 1979 (SR 1980/137).

[54] Report of Statutes Revision Committee 1980 AJHR I. 5.

[55] Transport Licensing Regulations 1963 Amendment No.27 (SR 1982/36)

[56] Submission by K Keith to the Statutes Revision Committee's inquiry into delegated legislation.

were referred to the Committee by the Opposition. In this situation it became increasingly difficult for the Committee to conduct its scrutiny of the regulations concerned without becoming embroiled in the party political contest.

The first of these involved the regulations which imposed the "carless days" regime during the second oil price shock.[57] The Committee concluded that there were several areas where the regulations could unduly trespass on personal rights and liberties and recommended 8 changes to them.[58] The suggestion that they involved an unusual or unexpected use of the regulation making power was not accepted. Given the breadth of the empowering provision in the Economic Stabilisation Act this is hardly surprising. In conducting its investigation the committee attempted to avoid criticism of the policy behind the regulations and focus on the regulations themselves. As the Chairman commented in reporting to the House

> ..the committee determined that, as a general rule, it was not proper or competent for it to review the merits or otherwise of Government policy on which the regulations are based.[59]

The political nature of the referral was nonetheless clear. Geoff Thompson (Government -Horowhenua) was moved to describe the Opposition's referral of the regulations to the Committee as "...another effort to blatantly politic on a matter of important Government Policy."[60] Richard Prebble (Opposition - Auckland Central) moved an amendment to the report seeking to have it sent back to the Committee with a direction to the Committee to amend its recommendation to one that the regulations be revoked and their provisions brought back to the House as a Bill.. At the same time he warned of the possible future danger of the Government using its majority to stop the committee inquiring into regulations by ruling that they were a matter of policy.[61] Also of interest was the statement from Paul East, (Government - Rotorua), that -

> ..in todays' atmosphere and with the need to scrutinise regulations thoroughly and to hold an executive to account to Parliament, we will need to see the Standing Order being used more often in the future. If we do, I can only hope that the Statutes Revision Committee will, as it endeavoured to do on this occasion, proceed with its task on a bipartisan basis.[62]

The Opposition referred another politically contentious issue to the Committee the following year. This concerned regulations that had been passed amid great controversy to overide the agreement of an unexpectedly high wage increase for workers at New Zealand Forest Products' Kinleith pulp and paper mill.[63] The complaint was that the regulations trespassed on personal rights and liberties and made unusual or unexpected use of the regulation making power in the Remuneration Act 1979. The regulations were revoked shortly after the Committee's investigation commenced: the Government succeeded in having the agreement revised. The Committee nonetheless decided to proceed with the investigation of two particular issues. The first was the question of the notice to be given when remuneration regulations are contemplated. The second the nature of the

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[57] Economic Stabilisation (Conservation of Petroleum Regulations (No. 2) 1979.

[58] Report of Statutes Revision Committee 1979 AJHR I. 5. See also NZPD 1979, 1375 - 1384.

[59] NZPD 1979, 1375

[60] NZPD. 1979, 1378.

[61] NZPD 1979, 1378

[62] NZPD 1979, 1381

[63] Remuneration (New Zealand Forest Products) Regulations 1980 (SR 1980/29)

penalty and offence provisions. In stating its reasons for continuing the investigation the Committee made reference to the experience of the Australian Senate Committee that the scrutiny of regulations had an educative as well as a curative role.

It concluded that as the regulations had been revoked there was no need to draw them to attention of the House. The point was made, however, that while in force they had amounted to an unusual or unexpected use of the regulation making power. The offence provision was particularly drawn to the attention of the House. This was a "Henry VIII" provision setting aside the provisions of other Acts. The undesirability of this sort of provision was stressed. It was argued that if provisions were intended to set aside Acts then they should themselves be contained in Acts and not in regulations. Guidelines were also proposed relating to consultation.

The debate on the Committee's report was again substantial. The Opposition, particularly Palmer, used the occasion to argue a general case for less reliance on regulations in economic management, and greater scrutiny by the House of the use of regulations. [64] The use of the occasion to argue the merits of greater scrutiny of regulations was not limited to the Opposition however. Minogue (Government - Hamilton West) devoted his entire speech to the importance of the role of the Committee. More cautiously Thompson (Government - Horowhenua) added to his endorsement the warning of the need for the committee to -

> keep away from political motivation and to avoid using that power as some sort of political football to look at all the difficult and controversial issues of the day.[65]

For a second time the Opposition had succeeded in embarrassing the Government by referring regulations of great policy significance to the Committee.

Early the following year 14 Opposition Members referred to the Committee 10 sets of regulations related to recently imposed wage and price freeze.[66] This represented the high tide of the Government's attempt to manage the economy by detailed regulatory intervention. The Government was by now, however, no longer prepared to allow the Committee to be used as a means of attacking controversial aspects of policy and used its majority on the Committee to decline to investigate. The Chairman reported to the House that the Committee had decided to take no action on the grounds that the complaint involved Government policy.[67] The debate when this report was presented was predictably acrimonious. Palmer announced that "New Zealand is undergoing government by regulation".[68] It would be the Committee's last investigation of regulations until after the change of Government at the 1984 General election..

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[64] NZPD. Vol. 431 p. 1510.

[65] NZPD 1980, 1512

[66] These were -

Rent Freeze regulations 1982 (SR 1982/139)
Companies (Limitations of Distributions) Regulations 1982 (SR 1982/140)
Wage Freeze Regulations 1982 (SR 1982/141)
Price Freeze Regulations 1982 (SR 1982/142)
Professional Charges (Price Freeze) Regulations 1982 (SR 1982/143)
Financial Services Regulations 1982 (SR 1982/144)
Interest on Deposits Order 1982 (SR 1982/145)
Limitation of Directors Fees Regulations 1982 (SR 1982/146)
Remuneration Freeze Regulations 1982 (SR 1982/152)
Price Freeze Regulations 1982 Amendment No 1 (SR 1982/162)

[67] NZPD.1983, 362.

[68] NZPD.1983, 365

2.3 Origins of the Regulations Review Committee.

The fact that the Government had determined to block the referral of further politically contentious matters to the committee did not prevent pressure for the greater scrutiny of regulations from continuing. By this time a broadly based consensus had begun to emerge among members on both sides of the House which approved of the work done by the committee and sought greater scrutiny of regulations. While the matter had become part of the official policy of the Opposition Labour Party it remained contentious on the Government side. In May 1983 the independently minded member for Hamilton West (Minogue) circulated a memorandum among members seeking support for the establishment of a specialist regulations committee. A group of Opposition members undertook an informal scrutiny brief over regulation empowering provisions from within their own caucus.[69]

The Opposition, in particular Palmer, also continued to push the issue. In the debate on the 1983 Budget Palmer moved an amendment seeking to establish such a committee.[70] Minogue spoke in support of the amendment.[71] In September 1983 Palmer put a question in the House asking whether the Government had any intention of establishing such a committee. The response was that they did not.[72]

It thus came as something of a surprise when on 26 October 1983 McLay moved and the House resolved -

> "That the Statutes Revision Committee consider whether, and if so what, amendments may be necessary to the Standing Orders of this House to enable a more effective and comprehensive parliamentary scrutiny and control of delegated legislation and, in particular to consider the desirability of establishing a specialist Regulation Review Committee to scrutinise regulations and carry out the functions envisaged by the select Committee on Delegated legislation which reported to this House in 1962;.."

The shortcomings of the sort of limited jurisdiction that had been exercised by the Statutes Revision Committee had by now become obvious. The immediate and compelling symptom had been the extent to which the attempts of the committee to conduct the technical scrutiny of regulations had become politicised. At the same time it is equally clear that the degree of scrutiny the committee had been able to exercise was simply inadequate and ineffective.

In 19 years the committee had investigated 11 regulations. Over that period something in excess of 6,000 had been made. For all but the last 6 years of this period the power of the committee to examine regulations had been substantially forgotten. It is also clear that the problems which a regulations scrutiny committee is supposed to address were not being addressed. Acts with excessively broad regulation empowering provisions, such as the Economic Stabilisation Act 1949 and the Public Safety Conservation Act 1932 remained on the books, although in the latter case unused since 1951.

There also remained a great number of regulations made under subjective empowering provisions, despite the adoption of the standard provision in 1961. A submission to the Statutes Revision Committees Inquiry identified 10 examples in pre 1961 Acts which and since been amended without updating the regulation

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[69] See NZPD 1983, 3421)

[70] NZPD 1983, 1971.

[71] NZPD 1983, 2019-23

[72] NZPD 1983, 1971

empowering clauses. The same submission also identified 4 Acts enacted since 1961 which included such provisions, along with numerous examples of regulations which had the effect of amending or setting the effect of Acts.[73]

Several particular aspects of the committee's terms of reference can be seen as having given rise to these shortcomings. Firstly the task of scrutinising regulations was entrusted to a committee which had other substantial commitments. It was unable to give sustained attention to regulations. Secondly the committee had no warrant to address the question of the regulation empowering provisions in Bills. Thirdly the ability of the committee to address regulations required them first to be referred. This meant that the committee's scrutiny was necessarily ad hoc and did not amount to a continuous monitoring of regulations as they were made. As a result only a small number of regulations could be considered which in turn also severely limited the ability of committee members to develop a body of expertise in dealing with regulatory issues. The fact that the committee's examination of regulations relied on an ad hoc referral mechanism can be seen as underlying the problem of politicisation. Any committee charged with the scrutiny of regulations will attract politically contentious complaints or referrals. Where such a committee has a broad brief such as that subsequently given to the Regulations Review Committee these however comprise only a relatively small part of the Committee's work. Under a system of ad hoc referral there is the potential for them to become the dominant part of it.

Before the Committee had the opportunity to report the 1984 General election had occurred.

Following the election this mandate was renewed in somewhat broadened form. The investigation was now to consider amendments, not only to Standing Orders, but also to: "...Acts of Parliament, Regulations, ..., and other procedures relating to delegated legislation." [74] .

On the same day the House moved the establishment of a Standing Orders Committee, inter alia, to -

> "...study the organisation and powers of select committees and recommend such changes as may be necessary or desirable to ensure their effective operation..." [75]

Part 3

The Regulations Review Committee

3.1 Terms of Reference

The Committee received 19 submissions representing a cross section of "expert" opinion and the views of individuals and groups affected by particular regulatory regimes. These dealt with three broad issues -

the methods for the initiation of scrutiny;
the grounds for scrutiny;
the procedure to be followed in conducting scrutiny.

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[73] Keith K n 56
[74] NZPD 1984, 16,
[75] NZPD 1984, 15

In order that its recommendations might be incorporated into the report of the Standing Orders Committee, the Statutes Revision Committee presented an initial report on this aspect of the inquiry on 11 June 1985.[76] The remaining aspects of this inquiry were subsequently referred to the newly created Regulations Review Committee by motion of the House on 25 July 1985.[77]

The principal recommendation of the Committee was that a separate Regulations Review Committee be established[78]. The preponderance of opinion expressed to the committee had been that the present system was inadequate to ensure effective scrutiny. It was proposed that the system of ad hoc referral of individual regulations be replaced by one under which all regulations within the meaning of the Regulations Act 1936 should automatically stand referred to the committee. This was seen as allowing both initial scrutiny of regulations at the time they are made and further consideration at any time subsequently. This can also be seen as having two other significant effects Firstly it maximises the opportunity for the committee to exercise a pervasive influence over regulatory practice. Secondly it ensures that the work of the committee does not become overwhelmingly driven by potentially politically loaded complaints or referrals.

In addition to the general scrutiny of regulations it was proposed that the committee have three further roles. The first was to consider draft regulations referred to it by Ministers. In such cases the committee would report its recommendations to that Minister. The second was to consider regulation making powers in Bills before other committees when these are referred to it by the committee considering the Bill. The committee would report its conclusions to the other committee concerned. Thirdly, a general power to bring any other matter related to regulations to the attention of the House was recommended.

The ability to consider regulations in draft form gives the committee a preventive as well as a reactive aspect. The power to consider empowering provisions in Bills before the House can also be seen in this light. The concerns which had been expressed over many years concerning the use and abuse of delegated legislative powers had not simply been concerned with the exercise of these delegations. They were equally to do with establishing the proper bounds of such delegation. The controversy which had surrounded the use of regulations under the Economic Stabilisation Act was not to do with the abuse of the powers granted by the Act, but with the scope of those powers. Equally the concern with "Henry VII" provisions is with the empowering provisions. The same is true of subjective empowering provisions. The recommendation that the new committee should have the power to draw any matter related to regulations to the attention of the House clearly indicates an intention for the committee to exercise the widest brief possible.

It was recommended that the Committee was to have discretion to call for submissions and the ability to initiate reviews of any regulation. The breadth of these powers can be seen as analogous to those given the other new committees established in 1985 in relation to their inquiry functions. Specific procedures were recommended for the receipt and consideration of complaints from aggrieved parties. The Chairman was to be required to refer every complaint to the committee. Only if the committee agreed unanimously could a complaint not be investigated. Otherwise

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[76] Statutes Revision Committee 1985 First Report on Delegated Legislation AJHR. I.5A. See also NZPD 1985, 4710 and 4887-4895.

[77] NZPD 1985, 5973.

[78] Statutes Revision Committee 1985 First Report on Delegated Legislation paras 5.1 and 9.1

the complainant is to have the right to be heard. These recommendations can also be seen as rooted in recent history. The government would no longer have the ability to use its majority on the committee to prevent consideration of a complaint. In the extreme it would inevitably retain the ability to determine the outcome of any issue by party vote, but only after the complainant had been heard and the complaint considered.

In addition it was recommended that when the House was not sitting the committee would have the power to report instead to the government, but with the report to be made public and subsequently reported to the House. This can be seen as aimed at avoiding the situation where a report from the committee might have to wait some months for the House to re-convene before it could be presented. In the event this recommendation was not accepted. The notion of the committee reporting to government rather than to the House itself seems problematic. The revised timetable for the operation of the House which was introduced in 1985 to a large degree removed the underlying concern.

The problem of referral which impeded access to the Statutes Revision Committee previously was thus comprehensively overcome.

The Committee also recommended the expansion of of the matters amounting to grounds for review. These were to be that the Regulation:

> (a) Is not in accordance with the general objects and intentions of the statute;
> (b) Trespasses unduly on personal rights and liberties;
> (c) Appears to make some unusual or unexpected use of the powers conferred by the statute under which it is made;
> (d) Unduly makes the rights and liberties of persons dependant on administrative decisions which are not subject to review on their merits by a judicial or other independent tribunal;
> (e) Excludes the jurisdiction of the courts without explicit authorisation in the enabling statute;
> (f) Contains matters more appropriate for parliamentary enactment;
> (g) Is retrospective where this is not expressly authorised by the empowering statute;
> (h) Was not made in accordance with particular notice and consultation procedures prescribed by statute;
> (i) For any other reason concerning its form or purport calls for elucidation.

Items (b), (c) and (i) were the grounds available to the Statutes Revision Committee. The additional grounds emerged from the information put to the inquiry in submissions concerning the grounds for review available in other countries. To some extent the additional grounds elaborate rather than expand on those which had been available to the Statutes Revision Committee. The salient feature of the grounds recommended is their breadth, again reflecting the apparent intention to give the new committee the broadest brief practicable. Abols and Carson as part of their comparative study of Commonwealth practice included the consideration of the grounds available to committees. They make the point that despite the expression of the grounds for review in a variety of of forms in different jurisdictions, there a high degree of uniformity in the substance of the grounds that may be considered.. They conclude that most -

> ...focus on ensuring the legislations *vires* , constitutionally and clarity. They deal with substantive areas such as personal rights and liberties, taxation,and specific public expenditures and they alert governments to any incursions into these areas by delegated legislation.[79]

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[79] Abols and Carson n ?, 100

They compiled what they termed the standard criteria as used by most Parliamentary Committees or bodies reviewing delegated legislation. The grounds recommended accord broadly with the standard suggested. The most conspicuous difference is the absence in New Zealand of specific references to regulations imposing taxes or charges in the nature of a tax, or to regulations authorising expenditure. The absence of the former as a separate ground has certainly not stopped the Regulations Review Committee from devoting a great deal of attention to the issue.

A further point of interest was that the Committee explicitly made the points that the question of whether a regulation is in accordance with the objectives of the empowering Act-

> ...is not intended to open the Regulations Review Committee to discussion on matters of policy. It is intended that the Committee deal only with the policy as written in general terms. Neither are findings on *vires* to be made by the Committee directly. Ultimately these are questions for the Courts to decide.

The first point reflects the concern that the ability of the committee focus on the technical scrutiny of regulations on a bipartisan basis is in large measure reliant on not directly addressing issues of policy. This matter is dealt with in the nest section of this paper. The second point can be seen as an attempt to draw a boundary between the jurisdiction of the Committee and that of the Courts. It is contrary to the observation of Abols and Carson that such committees are usually concerned with questions of vires. It also needs to be considered in the light of the fact that the grounds for reporting regulations to the House effectively embrace the grounds the Courts will consider in determining vires. A finding by the committee that a regulation is not in accordance with the objects of the Act must in effect represent the same judgement as would be made by a Court. It is probably best regarded as making the point that the Committee is not to be regarded, or to regard itself, as acting in the role of the Courts. The issue has a more practical aspect however. If a particular set of regulations are both in the Courts and before the Committee, the committee might find itself embarrassed by coming to a conclusion at odds with that of the Court.

The recommendations made by the Statutes Revision Committee were incorporated into the subsequent report of the Standing Orders Committee, and ultimately given effect by SO 388 to 390 of the new Standing Orders. These were debated and adopted, with a small number of amendments by a Committee of the whole House between 23 and 25 July.[80] . The first appointments of members to the Committees were made on 26 July.and the new Standing Orders would come into effect from 1 August 1985.

3.2 Bipartisanship and the Policy Problem

The diagnosis that the failure of the regulations jurisdiction of the Statutes Revision committee was in part a product of its use for political purposes is significant. It is a general feature of parliamentary committees charged with the scrutiny of delegated legislation that they approach their task in a bipartisan fashion. Party political allegiances it is frequently said must be left at the door of the committee room.[81]

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80 NZPD 1985, 5845-5871, 5897-5922, and 5957- 5970

81 See Collins B *Practical Politics and the Art of Bi-Partisanship in legislative Scrutiny* and
Jasper K *Scrutiny in Victoria - Separating Policy and Principle A Progress Report*
Papers to the Second Conference of Australian Delegated Legislation Committees 1989

The idea that bipartisanship is a desirable quality of parliamentary committees is not limited to committees concerned with regulations. Indeed over recent years the apparent loss of this quality from the consideration of legislation by committee has attracted some comment. The idea that committees should or do attempt to maintain a convention of bipartisanship requires some attention. It can be seen as a device to mediate the discordance between the constitutional picture of parliament as a body charged with the supervision of the Executive, and the reality of a pervasive party political contest. The observed behaviour of parliament is not in most circumstances based on a division between the Legislature and the Executive. Rather it is the contest between the party of government and the alternative party of government.

To the extent that it seen as desirable for Parliament as a whole, or any group within Parliament, to act in concert for some common Parliamentary purpose it becomes necessary for Members to somehow abstract themselves from the political milieu. A convention of bipartisan behaviour in particular circumstances allows this to be done. It has been argued that before 1979 committees of the New Zealand Parliament generally observed such a convention. Since that time it would appear to have collapsed at least so far as the consideration of legislation is concerned. Two reasons can be seen for this. Firstly before 1979 only non-controversial Bills were routinely referred to select Committees. The role of the committee was primarily concerned with the quality of the legislation, in a technical sense, rather than with contentious matters of policy. The committees were playing an essentially parliamentary role. The fact that the most politically controversial legislation was not referred to committees helped restrict the political contest to the floor of the House.

The second reason can perhaps be related to the broader social and political context. With the decay of the post-war consensus on major issues, the range of matters which are politically contentious inevitably expanded. Increasingly debate about the scope and conduct of government activity as well as its content in terms of policy have become politically contentious. Palmer (1979) with his characterisation of New Zealand as producing the "fastest law in the west" sought to draw attention to the carelessness of the New Zealand Parliament in matters of constitutional form and procedural propriety. At the same time, however, he arguably contributed to a less constructive process of increasingly politicising constitutional and procedural issues. This is an important feature of the environment into which the Regulations Review Committee enters.

The task of a regulations scrutiny committee is inherently a job for Parliament rather than a job for party. The convention of bipartisanship is thus crucially important. This is one of the features which distinguishes it from the other committees established as part of the 1985 reforms. Abstraction from party also involves a large degree of abstraction from policy. The ideas of bipartisanship and technical rather than policy scrutiny are closely linked. It is the debate over policy which provides the basis for contention between the parties.

It is necessary to take a realistic view of the extent to which the avoidance of policy and the the bipartisan approach might extend. Clearly the sorts of matters which the committee is required to investigate will in substantial measure arise from the political battle. The committee works by providing an additional avenue for the opposition and for various interest groups to bring scrutiny to bear on the activities of government. Equally clearly the debate which ensues in the House upon the presentation of a report also provides political ammunition. Again this is a necessary part of the successful operation of the committee. At the end of the day the government is held to account politically. The convention of bipartisanship is one which relates narrowly to the consideration by the committee of the legislation before it. It is the bipartisan consideration of whether the regulations should be drawn to the attention of the House in terms of the criteria guiding the committee . It is the

requirement that this be done separate from considerations of party. Ultimately there is not in many cases a clear and fixed line that can be drawn between the policy behind regulations and the regulations themselves. The committee is enjoined by the convention, however, to draw the best line it can and avoid the policy issues becoming the central focus of its attention. Given the unusually rigid party discipline which characterises New Zealand politics, it should not be assumed that this is an easy matter to achieve.

The situation was well expressed by Emeritus Professor Douglas J Whalan addressing the Second Conference of Australian Delegated Legislation Committees.[82]

> The Committee has always been non-partisan and this has meant that it approaches its task from a truly Parliamentary perspective, which is different from that of the Executive.
>
> The Executive's aim is to put in place the best legislation that will carry through the policy the Government believes will benefit the community. The Regulations and Ordinances Committee,also in the service of the community does not concern itself with policy. Acts put decisions in place. In contrast, in theory, delegated legislation should merely reflect that policy and not make it.....Of course ....it is sometimes difficult to see were policy ends and elucidation of administration begins. That is one of the unspoken dilemmas that faces the ..Committee.[83]

It is thus an important aspect of viewing the work of the Regulations Review Committee to observe how successfully the "fence" between the technical scrutiny of regulations, and the consideration of the underlying policy has been maintained, and the related issue of the extent to which the convention of bipartisanship has been maintained. In a sense the

3.3 The New Committee

The task facing the Regulations Review Committee was in significant ways been different from that facing the other new Committees. The Subject Committees were given a broader brief than their predecessors in two respects. Firstly, each assumed responsibility for the consideration of the estimates for the government agencies within its area of responsibility. Each, in effect, inherited a fragment of the role of the former Public Expenditure Committee. Secondly, each was given a broad role of inquiry into the activities of the relevant government agencies. Each, however, retained a core responsibility for the consideration of legislation.

Attention has been given elsewhere to the difficulties experienced by Committees arising from the Government's heavy legislative programme over the period in question. The Committees have found themselves frustrated by an excessive work load and the need curtail their consideration of Bills because of the demands of the government's legislative timetable. High rates of substitution among the members of committees have also called into question the ability of committees to give proper consideration to the issues before them. Of particular concern has been the extent to which legislative commitments limited the capacity of Committees to exercise their

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82 Whalan was Legal Adviser to the Australian Senate Committee.Regulations and Ordinances Committee.

83 Whalan D J *Seven Years in a Parliamentary Hot Seat - Techniques of Advising and the Passing Parade of Issues Arising in Delegated Legislation Scrutiny Committees*.Second Conference of Australian Delegated legislation Committees 1989

powers beyond this traditional "core" function.[84] The Regulations Review Committee has not experienced such problems. Throughout its existence it has had a relatively stable membership and a low rate of substitutions. In contrast to the legislation focused committees it has also been able for the most to avoid sitting for long periods or at irregular hours. On the contrary its meetings, held weekly when the House is sitting have frequently not lasted much more than an hour.

The difficulties facing the Regulations Review Committee were of a different kind, and were primarily those of those of confronting a broad and substantially new jurisdiction. The brief of the Committee was greatly expanded from that of the former Statutes Revision Committee. The limited history of Select Committee scrutiny of delegated legislation in New Zealand offered only a meagre inheritance of practice and precedent upon which the new Committee might draw. What is more the wide brief given the committee meant it faced a potentially enormous task. It was not only to scrutinise regulations and empowering provisions as they are made . All current regulations stood referred to it . The necessity for the development of new skills should not be underestimated. The Committee was designed in part to allow members over time to develop a body of expertise in an area of considerable complexity. For the first appointed members however the imperative would be to acquire sufficient familiarity with with the area as quickly as possible in order to for the committee to function. The difficulty may have been to some degree reduced by the preponderance of lawyers among the membership of the in the committee during this period.[85]

In addition the task of designing the full system for the scrutiny of delegated legislation had not been completed by the Statutes Revision Committee. Yet to be addressed was the consideration of possible amendments to Acts Regulations and other procedures necessary to enable more effective Parliamentary scrutiny. Over much of the first two years of its operation the committee can be seen as having been involving in completing the design of its jurisdiction as much as actually exercising it. In retrospect the opportunity for the Committee to itself play the key role in the promotion of measures designed to promote the control of regulations can probably be regarded as fortuitous. It allowed the committee to establish a degree of authority in the setting of the ground rules for the scrutiny of regulations which would carry forward into its subsequent policing of them. It also provided the opportunity through the process of consultation on the general issues to develop contacts which would be of ongoing benefit. The Chief Ombudsman attended a meeting of the committee to discuss matters of mutual interest.[86]

The committee also started life with several significant assets. The circumstances that had lead to its establishment ensured that it enjoyed a high measure of support and good will among members of the House generally. Perhaps the most outstanding demonstration of this was the willingness of Palmer, as Attorney-General and Deputy Prime Minister to appear before the committee. On the first occasion Palmer attended to discuss the implications of the establishment of the State Owned Enterprises. The committee were concerned at the prospect of the SOE's retaining the regulatory powers of their departmental predecessors. Palmer was able to assure the committee that after a transitional period this would not the case. He agreed with suggestions made by the committee relating to this transitional period. This was a powerful example to other ministers who at various times were prepared to appear when requested. The committee also inherited the submissions which had

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[84] See in particular Report of the Business Committee On the Committee's Review of the Inquiry Function of the Select Committees November 1989. AJHR 1989 I 14B.

[85] The only non-lawyer for much of this period was Bill Dillon.

[86] Report on Activities 1987 n ?, 4

been made to the Statutes Revision Committee in relation to its uncompleted inquiry. These included information on overseas practice which would prove valuable.

Over the first year and a half the Committee had available to it the services of Dr CC Aikman an expert constitutional lawyer. A series of papers on a variety of issues related to the Committee's jurisdiction would be prepared variously by Aikman and the Committee's Advisory Officer which would eventually feed into two major Reports. The first was the Report on Regulation Making Powers in Legislation which was eventually tabled in August 1986. The second the Report on Proposals for a Regulations Bill which was tabled in December 1987.

In addition the committee obtained an important amendment to its terms of reference. The committee had the power to report on regulation empowering provisions which were before another committee when requested to do so by that other committee. It quickly became apparent that without prompting from the committee such requests did not eventuate. The committee sought the right to report to other committees on empowering provisions without being invited. The proposal was included in the Second Report of the Standing Orders Committee and adopted from November 1986 . Another significant change to standing Orders was also made at this time. The requirement for the government to respond to reports of parliamentary committees within 90 days was incorporated in SO 352.

Life was not so tidy as to allow the Committee to devote itself entirely to this process. In November 1885 the House referred two Bills to the Committee. These were the Agriculture (Emergency Regulations) Confirmation Bill and the Primary Products (Regulations Confirmation) Bill. Both Bills were reported back to the House without amendment . The first of these sought to validate charges which the Ministry of Agriculture and Fisheries had imposed for many years to recover costs arising from the inspection of dairy sheds.from farmers with unclear statutory authority. The committee expressed the view that the Agriculture (Emergency Powers) Act 1934, under which the regulations were purported to have been made, was no longer satisfactory. In the words of the Chairman -

> " the ...Act ..is considered in 1985 to be a blunt agricultural instrument of something close to medieval vintage. Its powers are extraordinary, and the use of them in this case verges on the outrageous".[87]

His condemnation of the Act was supported by Government members.[88] The committee determined to conduct a further investigation into the Act. At the conclusion of this investigation the committee recommended to the Cabinet Legislation Committee that the Act be repealed. It was suggested that the Ministry of Agriculture and Fisheries Act 1953 be amended to include the power to make emergency regulations subject to Parliamentary confirmation.[89]

3.4 Empowering Provisions

One of the Committee's first major reports was Regulation Making Powers In Regulations [90] In it the committee put before the House what it considered should

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[87] NZPD 1985, 8601

[88] Mallard NZPD 1985, 8603. Cullen NZPD 1985, 8604

[89] Regulations Review Committee Report on Activities of the Committee During 1986 AJHR 1.16C 1987

[90] Regulations Review Committee 1986 Regulation Making Powers in Legislation AJHR I.16

be the ground rules relating to empowering provisions. This was an important initiative for the committee. As the Chairperson stated when the report was eventually debated -

> The committee quickly grasped that empowering clauses in legislation were at the heart of the matter. If Parliament chooses to grant wide-sweeping and undefined regulation-making powers it is a little too late to start complaining about the contents of the regulations subsequently made.[91]

The report can be seen as serving two further functions. The first is the education of members generally. Secondly it can be regarded as clearly signalling to ministers and their officials the standards which the committee believed they should meet. There could be no element of ambush about the committee subsequently drawing transgressions to the attention of the House.

The report began by accepting the Algie Committee's rationale for the need for regulations. In outlining what was and was not to be regarded as appropriate matter for inclusion in regulations

> ...Parliament has overall responsibility for enacting general and essential principles, and therefore, for ensuring that this responsibility is not delegated. [92]

Attention was also drawn to two other matters which were the responsibility of Parliament. These were the responsibility for imposing and varying taxes, and the power to amend Acts.

The 1961 standard form of empowering provision was endorsed. Two further recommendations were added. When Acts containing deviant provisions were being amended, those provisions should be brought into line. Consideration was to be given to inserting additional provisions on such matters as consultation, and parliamentary confirmation. Attention was drawn to the need to ensure that all regulations were clearly within the ambit of the Regulations Act. This now had added significance since regulations not within the scope of the Act were also beyond the scrutiny of the committee. The committee would address this concern further in its report Proposals for a New Regulations Bill.

It recommended a that four types of regulations be subject to parliamentary confirmation. Two had been identified in 1961. These were emergency regulations and those involving the imposition of taxes. The committee added regulations amending or setting aside Acts ("Henry VIII" provisions), and regulations which embodied substantive policy decisions. In each case the alternative of the provision being made by Act rather than regulation was also commended.

Considerable attention was given to the question of consultation. The inclusion of requirements for consultation in empowering provisions was recommended. the need to consult on the making of regulations was drawn to the attention of departments. It was suggested that the government should issue a general administrative guideline on consultation. Reference was made to the administrative rule, in force since 1980, that in normal circumstances regulations should not come into effect until 14 days after they appear in the Gazette. It was recommended that the period be increased to 28 days.

The committee would not have been under the illusion that once it had stated these recommendations the practice of government would automatically fall into line with

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92 Regulations Review Committee n ?, 4

them. It was sufficiently aware of overseas experience to know better. In jurisdiction with similar committees which have sought to impose guidelines over many years infractions remain commonplace. Having stated the guidelines, however, the committee was in a position to set about policing them. On one point the committee got an immediate positive response. The guideline for the standdown period after regulations are Gazetted was increased to 28 days in July 1987.[93] The average period actually allowed by regulations made in the first half of 1987 was 10 days. In the second half after the change it rose to 22 days.

Over the next two years the committee reported to other committees on empowering provisions in Bills or corresponded with Ministers about them on 14 occasions.[94] On two occasions the committee did not push for changes merely determining to keep a watching brief on the matter. On 7 occasions the committee's recommendations were accepted. On one, they were not accepted by the other committee but an amendment was subsequently made in the committee stages of the Bill which meet the concern raised. This involved a "Henry VIII" provision in the Local Government Reform Bill. The amendment was engineered by Palmer as Attorney-General. It is significant that this Bill, on which action was only taken at the last moment, and the three Bills where the committee's concerns were not meet all involved important policy issues.[95]

3.5 Proposals for a Regulations Bill and Disallowance

The second major report which arose out of the uncompleted aspect of the earlier Statutes Revision Committee inquiry was the report Proposals for a Regulations Bill which was tabled in February 1987.[96] A number of the submissions to the earlier inquiry had addressed the issues under consideration and these were used. This would result in the introduction of a disallowance procedure. This was a further major advance in the development of mechanisms for the scrutiny of regulations. Arguably it completes the development of the system..

The report focused on several issues. The definition of regulations to be used was discussed at considerable length and the difficulties in arriving at an entirely satisfactory one were recited. The issue assumed new significance in this context for two reasons. Firstly the definition now defined the jurisdiction of the committee and thus the scope of effective parliamentary scrutiny. Secondly the definition of regulations would define the scope of the proposed disallowance procedure. The committee settled for a narrow definition and a reliance on empowering provisions to make the position clear in cases of doubt. This approach could be aided by the committee's own surveillance of empowering provisions.

The second significant issue was whether or not individuals should be faced with any civil or criminal liability arising from regulations which had not been published. This reflected the longstanding concern that the inadequate publication of regulations could lead to persons incuring liability with no way of being aware of the law concerned.

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[93] CO (87) 5

[94] Regulations Review Committee Report on Activities of the Committee During 1988 and 1989 AJHR 1 16A,

[95] Reserve Bank Bill relating to the powers of the Bank, Local Government Amendment Bill relating to local government reform and the Ministry of Energy Bill relating to the setting of royalties for the use of geothermal energy.

[96] Regulations Review Committee Proposals for a Regulations Bill 1987 AJHR, I 16B

The third and most significant issue was that of disallowance. A number of the submissions to the Statutes revision committee's inquiry had raised the issue and provided analyses of how this might operate. The committee recommended a mechanism which would allow any member of the House to move a motion in the House for disallowance of all or part of a regulation. If the motion was agreed to the government would have 12 sitting days in which to deal with the motion or it would automatically have effect. The power to move such motions was to be open ended in that it would apply to all current regulations irrespective of how long they had been in force. The proposal was that the motion of the House should not itself have the effect revoking the regulation but would act as a direction to the government to do so. The government would have 12 days in which to report that it had taken the required action.

The Government's response was tabled in April.[97] It welcomed the committees report and indicated that a legislative priority had been given to a Bill to implement the committee's proposals. The government's proposal as outlined in the response did differ from the committee's in some respects. On the question of disallowance it suggested that the effect of a motion should be to revoke the regulation concerned rather than acting as a direction to the government. It also equivocated somewhat of the suggestion for the removal of individual liability where regulations had not been published. While it agreed with the idea in principle it indicated that the drafting of such a provision would require further consideration.

The Bill took rather longer than expected to appear and was not introduced until July 1989.[98] ..As well as dealing with matters raised in the committee's report however, it also contained provision relating to the privatisation of the Government Printing Office. The Bill included the governments proposal for the effect of the disallowance motion and extended the period before disallowance took effect to 30 sitting days. Otherwise reflected the committee's proposals. It was referred to the Regulations Review Committee.

The committee took the unusual step of inviting its Australian counterparts to make submissions on the Bill. Three did, from Victoria, New South Wales and the Federal Senate. The Bill as reported back had been substantially rewritten to allow it to be divided into two separate Bills in the committee stages. The provisions dealing with the publications of acts and regulations which were affected by the sale of the Government Printing Office were to become the Acts and Regulations Publication Act. Those dealing with the disallowance procedure were to become the Regulations (Disallowance) Act. Interestingly the committee which had so far maintained a bipartisan approach in its scrutiny of regulations divided on party lines on some issues related to the Bill. These were not those related to the scrutiny of regulations however, but were the issues of the sale of the Government Printing Office and Crown copyright. So far as matters related to the committees ongoing work were concerned there were no such divisions.

The committee substantially recast the disallowance proposals. The power to move such motions was reserved to members of the Regulations review Committee. The period within which a motion for disallowance has to be dealt with before having automatic effect was altered again to a compromise 21 days. The committee had been concerned that allowing any member to move such a motion might give rise to the purely political use of vexatious disallowance motions.

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[97] Government response to Report of Regulations Review Committee on Proposals for a Regulations Bill 1987 AJHR I.20

[98] NZPD 1989, 11205

The enactment of a disallowance procedure represented s further major increase in the committee's influence. Faced with a motion for disallowance the government is forced to act. If it is not prepared to stand to account in the House by addressing the motion then the regulation will be revoked. While most of the Australian states have disallowance procedures many require the regulations as a whole to be disallowed. The ability under the New Zealand procedure to move disallowance against a particular provision in a body of regulations makes it a far more effective tool. The motion can be targetted to the mischief without the concern that unnecessarily wide disruption will result.

Experience in overseas jurisdictions is that disallowance procedures are not frequently invoked, but that when they are they usually succeed. The fact of their availability acts as a strong sanction. In the limited time the procedure has been available it has not yet been fully tested. A motion for disallowance has been moved in relation to the Civil Aviation Charges Regulations but the period available for the government to address the issue has not run out when the House rose.

3.6 Review of Regulations in Force

The other major exercise commenced by the committee early in its life gave rise to the Report on all Regulations in Force as at 14 November 1988.[99] This did not arise out of the earlier inquiry. It was more in the nature of a scoping exercise. All regulations in force stood referred to the committee. This exercise enabled the committee to assess just how big its task was and the extent of the problem represented by the persistence of out of date regulations.. In October 1987 the committee sent a questionnaire to all departments along with a list of the current regulations believed to be administered by each department. The questions asked related to -

(i) whether the regulations were still required;
(ii) how often the regulations were used;
(iii) which regulations could be revoked;
(iv) which regulations contained powers of search and entry; and
(v) which regulations imposed fees and charges.

The report which emerged only dealt with the responses to the first three questions. The other responses were set to one side to be pursued further at a later date. At the time the committee expressed the intention of following up on this exercise by looking in detail at particular department's regulations. This has not so far happened. Based on the responses received the committee recommended the revocation of 400 regulations which departments had identified as not longer needed. A further 106 regulations were identified which the committee considered should be revoked. Specific recommendations were made relating to a number of other regulations. Recommendations were also made concerning the desirable lifespans of commencement, constitution, and revocation orders. In response the government merely undertook to examine the regulations identified for revocation and other changes in the report.[100]

The immediate value of the exercise lies primarily in the information base it generated - a regulations doomsday book. There was never any reason to expect that ministers and departments would be enthusiastic about devoting resources to time consuming exercises revoking largely spent regulations in response to an

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[99] Regulations Review Committee Report on all Regulations in Force as at 14 November 1988 AJHR I 16B

[100] Government Response to Regulations Review Committee Report on all Regulations in Force as at 14 November 1988 AJHR I. 20

exercise of this sort. Such an exercise would be expensive on the resources of departments and have no obvious payoff for them. The committee itself appears to have retreated from the idea of further department by department scrutiny, and nothing has come of the other information gathered by the original questionnaire. It may well be that the members of the committee regard the prospect of such an exercise in the same light as departments. If a concerted push is to be made to get rid of old regulations someone is going to have to do all the work. An option open to the committee might be to follow the example of recent Victorian legislation. This placed sunset dates on old regulations, thus providing departments with necessary incentive to address the issue.

The committee has presented one other theme report . That arose, however, out of the scrutiny of regulations generally and issues which had been touched upon by other inquiries

3.7 Surveillance and Complaints.

The major set piece reports discussed above have taken up a substantial part of the committees time and resources. At the same time, however, the routine scrutiny of regulations and empowering provisions has carried on. At its regular meetings the committee reviews the most recent regulations and the empowering provisions in newly introduced Bills. Items of possible interest are highlighted by the committee's staff. Where the committee believes further information is required inquiries are made and depending on the outcome a fuller investigation may result. The majority of the matters which the committee decides to take up are, however, resolved by way of discussions or correspondence with ministers or. Either the concerns of the committee are met or on further investigation the committee decides to pursue the matter no further..The proportion matters which require a full scale investigation and report is very small.

In 1988 and 1989 751 new regulations were made. The committee's report for the period lists 40 which were of sufficient interest to be pursued further than initial informal inquiries. The majority of these were also brought to a satisfactory conclusion in a low key manner without the committee needing to report them to the House.

The sorts of major inquiry into particular regulations which had made up the diet of the Statutes revision Committee in its final years still arose. In the period 1987 to 1989 5 such investigations were carried out which resulted in separate reports to the House.

These first of these concerned amendments to the Geothermal Regulations 1961.[101] This was the first major investigation by the Committee into a particular regulation. It arose out of a complaint to the Committee about the regulations which imposed a system of resource rentals on the use of geothermal energy in Rotorua. The regulations were part of a package of Government measures which also included the closure of private geothermal bores in the City.

The inquiry is illuminating in a number of respects. Firstly it was the first occasion on which a report by the Committee challenged the actions taken by a Minister. Secondly the inquiry followed, and was followed by, unsuccessful recourse to the Courts by parties aggrieved by the effect of the package of Government measures of which the amendments to the regulations were part. In addition the inquiry was one of the Committee's first forays into an area which would over time become one of its

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[101] Geothermal Regulations 1961, Amendment No.2

major preoccupations. That is the question of the collection of revenue, through the charging of fees and otherwise, by government agencies under regulations.

The regulations were made under section 16 the Geothermal Energy Act 1953, an old fashioned subjective empowering clause. The committee awaited the outcome of the first court challenge before commencing its inquiry.

The Report of the Committee made four recommendations. These were:

> "The Geothermal Energy Act 1953 to be amended to provide a regime, similar to a water right application, for Geothermal Energy licences.
>
> The Minister rebate the charges under the regulations for six months from 1 April 1987.
>
> That serious consideration be given to amending the regulations charging all users rather than tappers.
>
> The Geothermal Energy Act 1953 be amended to provide for any power of entry considered necessary and the repeal of all regulations relating to powers of entry."

The particular concerns raised by the Committee and leading to these recommendations are summarised and discussed below.

The first recommendation arose from a concern with the arbitrary powers regarding the issue of licences. The Committee noted that the Minister has complete discretion over the granting of licences, that decisions are made in secret, that the decision criteria are not published in advance and that there are no appeal rights. This was described as "very unsatisfactory". The Committee recommended that the procedure be replaced by one modelled on that for the granting as water right. It was noted that this would require amendment to the Act, and that the Act was under review.

The second concern was with the inadequacy of notice notice given to the public regarding the regulations. The Committee recognised that the fact that Government action and its general purport had been a matter of widespread public knowledge for some time. The specific concern highlighted was the precise charging formula was not known in advance of the regulations being gazetted. The Committee recommended that the Minister give serious consideration to rebating all charges for the first six months. The concern underlying the recommendation displays a different assessment on the questions of notice and consultation from that taken by the Court.

The third was with the fact that the tapper of the energy is charged rather than the actual users. The Committee accepted the arguments put by the complainants that the charging of tappers rather than individual users was of itself unfair. It recommended that the matter be reconsidered with a view to directly charging all users.

The fourth concerned the powers of entry contained in the regulations. On this matter the Committee concluded that it considered the provisions to be "ultra vires" and that even if it were incorrect in that opinion it considered that the granting of a power of entry was " an inappropriate use of regulations".

The Government's response to the Committee's report was tabled on 30 September. It expressed disappointment that the committee had not accepted the point of view of the departmental officials and noted that that on 14 September 1987 Cabinet had

reaffirmed the existing policies in relation to the Rotorua Geothermal Management Programme. The Committee responded on 8 October with a further report. [102] I. This second report was debated in the House starting on 14 October and continuing on 11 November. Between the two parts of this debate the issue would again be the subject of a High Court decision.

A declaratory judgement was sought to the effect that the provisions in the regulations allowed entry of inspectors onto private property were ultra vires. [103] These were the provisions which the Committee had suggested were ultra vires in explaining its recommendation that provisions relating to powers of entry should be removed from the regulations and added to the Act. In a judgement 5 November it was determined that the regulations were not ultra vires on either ground.

The debate in the House again saw the Government stand its ground. Subsequently the Government would table its response to the Committee's second report. This represented a rather fuller and more considered response to the Committee than that given previously. The recommendation for a revision of the legislation was stated as being accepted. The recommendation on the rebate of fees was declined. The recommendation on changing the basis of the resource rental was not accepted although with fuller explanation as to the reasons. The recommendation that the powers of entry be included in the Act was accepted.

Four other investigations in this period resulted in regulations being drawn to the attention of the House. The first of these involved the establishment of the Kiwifuit Marketing Licensing Authority Board by regulations.[104] The committee took the view that this was inappropriate. It s major recommendation was that the regulations should be revoked and the Authority established by Act. It also recommended a review of the relevant legislation involving the enactment of a narrower regulation empowering provision. In response the government in effect accepted the particular criticisms made by the committee but declined to revoke the regulations. It saw the matter being dealt with at some future point in the context of the review of the acts.[105]

The committee got a more satisfactory response from its inquiry into fees charged under the Weights and Measures Act.[106] Its recommendations for amendments to the act were accepted.

The next investigation which lead to a report during this period involved the Reserve Bank Order 1988, which the committee saw as extending substantial new powers to the Bank which were not in accordance with the objects of the Act, made unusual and unexpected use of the empowering provision, and was more appropriately a matter for parliamentary enactment. In this case the government's response not only did not accept the committee's views but labelled them groundless and its

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[102] Regulations Review Committee. Report on the Government's Response to the Committee's Inquiry into the Geothermal Energy Regulations 1961. A.J.H.R I 16A.

[103] The Wharepaina Thermal Club v The Minister of Energy. M.181/87 High Court Hamilton.

[104] Regulations Review Committee. Report on the Inquiry into the Appropriateness of the Establishment of the Kiwifruit Marketing Board Through Regulations. AJHR I 16, 4-8

[105] Government Response to the Regulations Review Committee. Report on the Inquiry not the Appropriateness of the Establishment of the Kiwifruit Marketing Board Through Regulations. AJHR I.20

[106] Report on the inquiry into fees charged under the Weights and Measures Act.AJHR I 16, 9-12

recommendations unsatisfactory. The committee again responded with a second report but without dissuading the government from its position.

The last such report in this period concerned amendments to the Civil Aviation Regulations 1953 which imposed a variety of fees as a result of the move towards fuller cost recovery by the Air Transport Division of the Ministry of Transport. The complaints before the committee raised the issues of what was and was not fair in relation to the imposition of purportedly "user pays" charges and the circumstances under which such fees might involve undue trespass against individual liberties. Although the report finally only recommended minor changes to the fee regime the investigation marked the beginning of a deepening involvement in this area

3.7 Fees under regulations

As early as its report on its activities for 1986 the committee was moved to comment about the number of amendments to regulations which were being made to increase the fees payable for various government provided services. Throughout the committee's lifetime a wide range of government agencies have been moving towards full cost recovery charging policies. A general pattern was perceived of a greater level of the government's income requirement being derived from such fees. The resulting increases in the levels of fees of various types had given rise to given a number of complaints to the committee, and were a matter of some controversy generally. As the committee considered the implications of these developments it was drawn towards two particular issues.

The first was concerned with the attempt to clarify the distinction between a fee and a tax. The Bill of Rights of 1688 had reserved to parliament the right to tax. The principle was retained in modern form in section 22 of the Constitution Act 1986. Given the increasing sums being collected by government under fees of various types the question which suggested itself was whether at some point these might cross the ill defined line and become in effect taxes. The second question arose from the perception that a fee or charge that is in some sense unjust must amount to an undue trespass on personal rights and liberties. The committee became concerned to discover some rule or principle which might serve as a benchmark in considering these issues.

The Report which the committee eventually produced in the effort to address these issues had a long, and one suspects frustrating gestation. It had its immediate origins in an investigation into fees charged by the Land Registry and the Companies Office of the Justice Department. In both cases the department's financial statements made it clear that these offices did not just operate a policy of cost recovery but made significant surpluses. In this phase of the investigation It emerged that this had been the case for many years as a matter of longstanding policy accepted by successive governments. The committee then moved to address the more general issues.

The committee sought and received advice from a variety of quarters. The Auditor-General, the Clerk of the House, Sir Kenneth Keith, Chief Parliamentary Counsel, and a variety of officials from the Justice Department and Treasury all contributed at various points. The report went through a series of drafts which were circulated for comment and revised successively. In the final analysis it became clear that although the underlying questions were valid ones, there were few readily available answers. a large portion of the economists in the world earn their livings failing to agree on these sorts of issues. The report as it finally emerged in July 1989,reflects this.

The committee did, however,make recommendations. The first was that the House reaffirm its right to require the Crown to seek prior parliamentary authority to extract

any money from the public where it was compulsory, for the purposes of the crown, and enforceable by law. This seems to be the committee's working definition of a tax. It also suggested that Standing Orders by amended to require Bills which imposed fees to carry an explanatory note certifying whether or not the fees will exceed full cost recovery level and if so why. A Bill was suggested to impose a similar requirement on regulations. These recommendations can be seen as along the lines of the requirement for Regulatory Impact Reports on regulations which had recently been introduced in one of the Australian states.

The government in response, in declined to immediately make the changes proposed but indicated that it agreed with the committees aims and was establishing a committee to study the issues the committee had raised further . On 11 April 1990 the committee wrote to Prime Minister requesting advice on progress. The response, in May, was that the committee had yet to be convened. In June the committee wrote back expressing concern at the delay. When it had received no response by September it made a further report to the House recommending the government accord the matter urgent priority.

In the meantime, however, the issues had again under consideration by the committee in more concrete form. The committee had received complaints about the Civil Aviation Charges Regulations even before they had been made. The charges were the result of the Air Transport Division of the Ministry of transport moving a full cost recovery charging on a user pays basis. This involved substantial increases in many areas. The complaints centred on the question of how far the charges accurately reflected the user pay principle. The picture that emerged from the inquiry was that the Division did not have the necessary information on the precise nature of costs to be able to assure the committee that there were not elements of cross subsidisation involved. The committee held that there was a rebuttable presumption that fees involving cross subsidisation could not have been intended by parliament.

A draft of the committees report was sent to the Minister of Transport shortly before it was due to be tabled so as to allow him a final opportunity to comment on it. At the next meeting of the committee the Associate Minister of Transport was substituted onto the committee in place of one of the regular government members. He brought with him a prepared text of amendments to the draft report including an alternative recommendation. The amendments were made by majority vote on party lines. The Chairperson of the Committee responded by moving disallowance. Before the period for government response had run out the House adjourned for the General Election.

3.8 Conclusion

At the time of writing the story of the Regulations Review Committee is dramatically poised. The usual bipartisan convention has been broken, New Zealand's first motion for the disallowance of a regulation hangs poised to be determined when the House next meets. If the intention of the committees architects had been to avoid the sort of high drama which had characterised then doubtless they should feel some disappointment. Whether such a reaction is warranted is doubtful.

The committee has made an enduring contribution in furthering the development of mechanisms for the scrutiny of regulations. It has begun the long process of surveillance and persuasion which is the real heart of its task. The fact that hard cases will continue to be volatile at the margin does not amount to reason for despair.

APPENDIX.

REPORTS OF THE REGULATIONS REVIEW COMMITTEE 1985 TO 1989.

1985 -Report back of Agriculture (Emergency Regulations) Confirmation Bill and Primary Products (Regulations Confirmation) Bill Reported back without amendment.

1986 -Report on regulation Making Powers in Legislation

1987 -Report on Proposals for a Regulations Bill

-Report on Geothermal Regulations 1961 tabled.

-Report on Government's Response to report on the Geothermal Regulations 1961

1988 -Report on Activities in 1987

-Report on the Appropriateness of Establishing the Kiwifruit Marketing Board through Regulations

- Report on the Inquiry into Fees Charged under the Weights and Measures Regulations 1987.

- Report on the Inquiry into the Reserve Bank of New Zealand Order 1988.

- Report on Inquiry into all Regulations in Force as at 14 November 1988.

1989 - Report on the Inquiry into the Constitutional Principles to apply when Parliament Empowers the Crown to Charge Fees by Regulation.

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