

## REGULATIONS REVIEW IN THE NEW ZEALAND PARLIAMENT

CAROLINE MORRIS\* AND RYAN MALONE\*\*

### I INTRODUCTION

The doctrine of separation of powers, the cornerstone of modern government, has an ancient and venerable history. It can be traced back to Aristotle, who is recorded as the first to have considered the allocation of distinct roles to government.<sup>1</sup> Developed and refined by Montesquieu and Locke, the doctrine evolved to encompass the idea that governmental power should be divided between different branches, and that each branch should engage in some form of scrutiny over the others, to ensure that its allocated powers were not being exceeded or misused.<sup>2</sup>

This latter point deserves some emphasis, for the theory of the doctrine of separation of powers never fully marries itself with political and legal realities. Even the United States of America cannot be cited as an example of the 'pure' doctrine in action, notwithstanding that its founding fathers divided, and then allocated, legislative, executive and judicial powers with unbounded enthusiasm. As Winterton has noted, there are instances where each branch of government in the United States encroaches on another's prerogatives: the President can veto legislation and appoint judges, the Courts can strike down legislation and review executive action, while Congress can impeach and remove executive officers including Presidents and judges.<sup>3</sup> This cross-over of responsibility does not invalidate the doctrine of separation of powers, but rather, redefines its essential purpose so that separation is not the goal in itself, but is instead a means to promote the checking of each organ of government to produce constitutionally limited government.<sup>4</sup>

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\* Lecturer, Faculty of Law, Victoria University of Wellington.

\*\* PhD Student, Faculty of Law, Victoria University of Wellington and manager of Regulations Review Digest project, New Zealand Centre for Public Law, Victoria University of Wellington.

<sup>1</sup> Stephen Everson (ed), *Aristotle The Politics* (1988) 102.

<sup>2</sup> MCJ Vile, *Constitutionalism and the Separation of Powers* (1962) 58.

<sup>3</sup> George Winterton, *Parliament, The Executive and the Governor-General: A Constitutional Analysis* (1983) 54.

<sup>4</sup> *Ibid* 54.

Delegated legislation provides another example of the practical limits of the doctrine of separation of powers. In absolute terms, the doctrine prescribes that the Executive governs but must not have a capacity to make new laws since this is the domain of the legislature. In its pure form then, it is breached when Parliament imparts a legislative power to the Executive. Yet despite New Zealand's subscription to the doctrine of separation of powers,<sup>5</sup> many of the Acts that Parliament passes do grant the Executive powers to legislate. As will be discussed shortly, this is done because Parliament does not have the time, resources or expertise to pass all laws needed to fully implement the policy underpinning each Act and so it often leaves this task to the Executive. As Howard explains, '[t]he substance of the matter is that even in countries committed in principle to a separation of powers, theory is modified by the demands of practical government'.<sup>6</sup>

Thus the focus of those concerned with delegated legislation should not be the absence of a failure to adhere to the strict separation of powers doctrine for the reality is that the New Zealand Parliament frequently grants - and the Executive exercises - powers to make delegated legislation. In 2002 for instance, the New Zealand Parliament enacted 90 statutes; in the same year, 424 regulations were promulgated. Thus regulations are pervasive; they affect almost every aspect of life.

Instead attention should be directed at whether the underlying aim of separation of powers - namely the reciprocal checking of each organ of government - is satisfactorily achieved given the manner in which the Executive makes delegated legislation. In this regard, the attainment of constitutionally limited government is hampered if the Executive exercises legislative powers in such a way that it usurps Parliament's role as primary legislator. Thus, before embarking upon an examination of regulations review scrutiny in the New Zealand Parliament, it is first necessary to consider the advantages and dangers that come with delegated legislation. The second part of the article will consider the curious historical reluctance of the New Zealand Parliament to provide specialised committee scrutiny over delegated legislation. It then examines in some detail several instances where the Regulations Review Committee has found regulations and regulation-making powers to be wanting and made recommendations accordingly, as well as its efforts to improve existing practices regarding delegated legislation. The article concludes by considering the value and future direction of parliamentary scrutiny of regulations in New Zealand. Given the similarity in the grounds of review, processes and powers between the New Zealand Committee and its Australian counterparts, there may be some useful insights for Australians in the New Zealand experience.<sup>7</sup>

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<sup>5</sup> The Constitution Act 1986 sets out various core provisions relating to each organ of government under the headings 'The Executive', 'The Legislature' and 'The Judiciary'.

<sup>6</sup> Colin Howard, *Australian Federal Constitutional Law* (3<sup>rd</sup> ed, 1985) 231.

<sup>7</sup> See generally Dennis Pearce and Stephen Argument, *Delegated Legislation in Australia* (2<sup>nd</sup> ed, 1998).

## II THE ADVANTAGES OF DELEGATED LEGISLATION

The publication of *The New Despotism*<sup>8</sup> in the United Kingdom in 1929 caused a constitutional and political storm. Written by Lord Hewart of Bury, the then Lord Chief Justice of England and Wales, it alleged that a bureaucratic conspiracy utilising delegated legislation had produced a ‘despotic power’ enabling government departments to place themselves above Parliament and beyond the Courts.<sup>9</sup> In response, the UK Parliament quickly set up the Donoughmore Committee. The report of that Committee is generally regarded as the starting place for those concerned with modern regulations jurisprudence. The first tasks for the Committee were to investigate the necessity of delegated legislation, and provide some answers to its critics.

The Donoughmore Committee put forward six reasons justifying delegated legislation.<sup>10</sup> Firstly, the Committee acknowledged the pressures on Parliament’s time. If matters of procedure and subordinate issues can be withdrawn from Parliament’s agenda, then more time will be available to Parliament to consider matters of principle and greater import. Secondly, much modern legislation is highly technical and thus outside the competence of Parliament to discuss effectively. Related to this is the concern that the implementation of an overarching administrative regime must usually accompany technical reforms. It is usually impossible to foresee all the contingencies which might arise in these cases. Delegated legislation allows necessary changes to be made more simply. Fourthly, delegated legislation brings with it the advantage of flexibility; adjustments can be made without recourse to Parliament. Fifthly, the Committee considered that delegated legislation afforded an opportunity to experiment. Finally, in an emergency situation such as war or natural disaster, regulations may be needed to deal effectively and expeditiously with the crisis.

These reasons obtain now as they did then; many of them have acquired an even greater salience as pressures on Parliament’s time increase and modern life becomes more sophisticated and complex. Yet to acknowledge the necessity of delegated legislation does not equate to the granting of *carte blanche* to the Executive to legislate as it sees fit, for delegated legislation is not without its dangers.

## III DANGERS OF DELEGATED LEGISLATION

### A *Executive Legislating on Matters of Policy*

An overarching principle in the area of delegated legislation is that Executive law-making powers are permissible if they allow a government to bring into effect the administrative machinery necessary to allow a parent Act to meet its intended purpose. They should not allow a government to implement policy as this is a

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<sup>8</sup> Lord Hewart of Bury, *The New Despotism* (1929).

<sup>9</sup> *Ibid* 14.

<sup>10</sup> The Donoughmore Committee, *Report of the Committee on Ministers’ Powers* (1936) 51-52.

matter for parliamentary enactment. The reasons for this ‘unwritten rule of parliamentary democracy’<sup>11</sup> are democratically sound. The membership of the House of Representatives represents the democratic will of the citizens as expressed through a general election.<sup>12</sup> If a government policy is to become law, it is not enough that the Executive should declare it to be such. Instead, the Executive must submit its policy proposals to the House in the form of government Bills, where the House (along with the Sovereign) must decide in its collective wisdom whether to pass those Bills into law.

The parliamentary process is preferable for implementing government policy for several other reasons. First, Parliament’s legislative process is deliberately staggered (multiple readings and, usually, two forms of committee scrutiny) to encourage detailed scrutiny of the proposal by Members of Parliament.<sup>13</sup> Conversely, if government policy is implemented by the comparatively simple act of the Governor-General signing an Order-in-Council, opposition parties are denied the opportunity to scrutinise, debate, mould, and possibly even view the legislation before it becomes law. Second, the public nature of the parliamentary process alerts interested media to proposed policies. Media outlets can then provide a forum for on-going public debate as to the merits of those policies and the Bills that seek to implement them. In the case of delegated legislation, because the legislative process is internal to the government, the media may not even be aware that regulations are going to be made, let alone facilitate debate on what that law should be.

Consequently when the Executive is able to legislate on matters of policy, it is likely that there will be less awareness of the legislation and less vigorous scrutiny of it. Furthermore, with the ability to implement its chosen policies into law without having to resort to Parliament, there is a genuine danger that delegated legislation will make serious inroads into personal rights in the interests of the policy being promoted.<sup>14</sup> Ultimately, this is because the first priority for a government is to maintain its hold on the government benches. If successful implementation of government policy is deemed to be one of the means by which this can be done (and undoubtedly it is) then individual liberties that conflict with the implementation of that policy may suffer as a result. As Ratnapala has ventured, ‘[I]ike all possessors of valuable assets, the wielders of coercive authority tend to employ their power in the service of their own private ends’.<sup>15</sup>

Of course, this is not to say that Acts of Parliament never infringe on personal rights and liberties, because they can and they do. Nevertheless, the parliamentary process at least encourages awareness and debate on those breaches in a way that legislation by Order-in-Council can never match. In addition section 7 of the *New Zealand Bill*

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<sup>11</sup> Suri Ratnapala, *Australian Constitutional Law: Foundations and Theory* (2002) 101.

<sup>12</sup> Unlike Australia, New Zealand has had a single-chamber Parliament since 1951.

<sup>13</sup> It is acknowledged that the overuse of urgency will undermine the extent and value of parliamentary scrutiny.

<sup>14</sup> The Donoughmore Committee, above n 10, 53.

<sup>15</sup> Ratnapala, above n 11, 7.

of *Rights Act 1990* (NZ) imposes a statutory obligation on the Attorney-General to notify the House if he or she considers that a Bill is inconsistent with any of the rights and freedoms contained in that Act.<sup>16</sup> No such obligation exists on the Attorney-General to do likewise for delegated legislation.<sup>17</sup>

### B *Limiting the Executive's Legislative Faculties*

How then does Parliament prevent the Executive from legislating on matters of policy, instead of leaving it to deal only with matters of technical detail? The key is the terms of the delegation. In particular, Parliament must exercise considerable caution when specifying the purposes for which the Executive can legislate. In particular it should not enact a regulation-making power that will deprive Parliament of its rightful role as primary legislator. To use a relatively simple example, a regulation-making power that allowed the Governor-General to promulgate regulations specifying the circumstances in which a person is guilty of murder would be fundamentally unconstitutional. It would allow the government to decide for itself whether such things as mercy killings and abortion were classified as murder. Patently these are matters only Parliament should decide.

Equally, Parliament must not fall into the trap of enacting laws that contain regulation-making powers which lack sufficient specificity as to the circumstances in which the Executive may legislate. There is probably no better example of an overly broad regulation-making power than that contained in the *Economic Stabilisation Act 1948* (NZ). Section 11(1) provided that:

The Governor-General may from time to time, by Order-in-Council, make such regulations ... as appear to him to be necessary or expedient for the general purpose of this Act and for giving full effect to the provisions of this Act and for the due administration of this Act.

For all intents and purposes, section 11(1) granted the Executive a free hand to legislate to implement any policy it liked, provided that the regulation carrying the policy could be linked with maintaining prices. Indeed former Prime Minister Robert Muldoon was recorded as saying that 'you can do anything provided you can hang your hat on economic stabilisation'.<sup>18</sup> Thus Parliament must lay down with much care the exact purposes for which the Executive can legislate. Doing so ensures that matters affecting the public interest receive both the approval of the fully representative House and the procedural safeguards it offers.

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<sup>16</sup> See Geoffrey Palmer and Matthew Palmer, *Bridled Power* (4<sup>th</sup> ed, 2004) 194.

<sup>17</sup> Cabinet Office, *Step by Step Guide* (2001) ch 8. Vetting draft regulations for consistency with the *Bill of Rights Act 1990* is a matter for the executive to do itself.

<sup>18</sup> Palmer and Palmer, above n 16, 209. See also Hon Doug Kidd, 'Executive v Legislature: The struggle continues – Observations on the work of the Regulations Review Committee' (Occasional Paper 3, New Zealand Centre for Public Law, Victoria University of Wellington, 2001) 2-3.

Preventing the Executive from legislating on matters of policy in the first instance is, however, but one step in the process of ensuring constitutionally proper use of law-making powers. The second step is for the non-Executive arms of government to try to identify and remedy instances when the Executive has used its power to effectively legislate on matters of policy. The Courts do play an important role in this regard when they invalidate regulations on the basis that they are ultra vires the empowering Act. In the last twenty years, judicial review of New Zealand regulations has been sought 19 times.<sup>19</sup> On these figures alone, it would be easy to underestimate the value of judicial review as a restraint on the way in which the Executive exercises regulation-making powers. Yet the ever-present threat of judicial disallowance unquestionably provides a perpetual incentive for the Executive to ensure that its regulations sit firmly within the squares of the legal authority Parliament has permitted it. Nevertheless, the scope for judicial review is limited in regards to regulations that have already been promulgated. If the regulations themselves can be construed as being within one or more of the purposes for which the Executive was allowed to legislate, then they are legal, and the fact that they legislate on matters of policy is, strictly speaking, not a concern of the Courts.<sup>20</sup>

Herein lies the value of specialised parliamentary committees which have responsibility for scrutinising existing regulations. If provided with the authority to do so, they are able to warn Parliament of regulations that, even though legally made, generate policy outcomes that only the latter should have authorised through an Act of Parliament. This power is especially pertinent when the policy outcome is such that there have been significant inroads into rights and liberties, for those affected will be unable to seek redress via the Courts.

The other advantage of these committees is that they can scrutinise regulation-making powers before they are enacted into law. If they find regulation-making powers that allow the Executive to legislate on a matter more suitable for parliamentary enactment, or contain powers that are overly broad in terms of the purposes for which regulations can be made, they can recommend changes to the Bill to remedy these concerns. If Parliament then adopts those recommendations, the instances of the Executive usurping Parliament's proper function as primary legislator will diminish. As discussed below, it took the New Zealand Parliament some considerable time to follow the lead of Australia and the United Kingdom and recognise that a parliamentary committee could and should fulfil these two important roles.

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<sup>19</sup> Ryan Malone, *Regulations Review Committee Digest* (2003) 9.

<sup>20</sup> See also Phillip Joseph *Constitutional and Administrative Law in New Zealand* (2<sup>nd</sup> ed, 2001) 898-936 for an excellent summary of the principles surrounding judicial review of delegated legislation in New Zealand.

#### IV REFORMING THE PARLIAMENTARY SCRUTINY OF REGULATIONS IN NEW ZEALAND

Parliamentary scrutiny of regulations as a whole has several aspects. These are: access to regulations via improved publication; the confirmation of regulations by Parliament before they take effect; the ability of Parliament to annul problematic regulations once promulgated; and ongoing scrutiny by a disinterested and bipartisan parliamentary committee.

The New Zealand Parliament has been slow to address concerns over delegated legislation. Reform has been piecemeal and largely reactive. The first stage was to remedy the problem of knowledge of regulations; some years later, Parliament considered whether more systematic control might be exercised over regulations.

##### A *Public and Parliamentary knowledge of Regulations*

At the time of the Donoughmore Committee's report, the general ability of the public (and even parliamentarians) to gain access to New Zealand regulations was poor. Since 1910, the only systematic publication of regulations had been in private hands.<sup>21</sup> To remedy this, in 1936 the New Zealand Parliament enacted the *Regulations Act 1936* (NZ).<sup>22</sup> Under the authority of this Act, all regulations were now to be published in the official *Statutory Regulations* series (unless, in the Attorney-General's opinion, it was considered that publication was unnecessary or undesirable).<sup>23</sup>

This had the effect of enhancing Parliament's checking function by bringing all regulations into the public arena. Regulations could now be scrutinised, and the actions of the Executive brought to light. However, the defect of this reform was that any scrutiny would have to take place privately – there were no practices in place for systemic checking.

In addition, there was no standing requirement for regulations to be laid before Parliament and then be subject to parliamentary debate, a motion of confirmation, or some other means of parliamentary validation. Parliament, therefore, was not always aware as to which regulations have been promulgated, nor was it always in a position to pronounce judgment on the instrument in question. In 1960, it was estimated that only about half of New Zealand statutes required regulations made

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<sup>21</sup> This was *Rules, Regulations, and By-laws under New Zealand Statutes*, published by the Law Book Company. Prior to 1910 the full text of regulations was published in the *New Zealand Gazette*.

<sup>22</sup> Consolidated, amended, and re-enacted as the *Acts and Regulations Publication Act 1989* (NZ).

<sup>23</sup> *Regulations Act 1936* (NZ) s3.

under that statutory authority to be laid before Parliament.<sup>24</sup> This somewhat haphazard approach to laying regulations represented a tilt in the balance of law-making power to the Executive, enabling it to make regulations without being held accountable by Parliament. However no further steps were taken to increase Parliament's control over regulations until the 1960s.

### B *Review of Regulations by Parliamentary Select Committee*

In 1925, the House of Lords, perhaps prescient of the charges to come in *The New Despotism*, established the Special Orders Committee. This Committee was directed to consider all secondary legislation requiring an affirmative resolution and report to the House if it considered that further inquiry and debate were required. A similar committee, the Committee on Regulations and Ordinances, was established in the Australian Senate in 1931. By 1944, the House of Commons select committee on Statutory Rules and Orders had been set up in light of the concerns attendant on the flood of wartime regulations.<sup>25</sup> Of the lower houses of Parliament in the Australian states, South Australia had such a committee in 1938,<sup>26</sup> Victoria in 1956,<sup>27</sup> and New South Wales in 1960.<sup>28</sup>

In contrast, the only regular form of scrutiny within the New Zealand Parliament was the practice, lasting from 1949 until 1957, of having the Attorney-General vet all draft regulations, paying attention to their drafting, form and content, and the scrutiny of important regulations by the governing party caucus.<sup>29</sup> However, no moves were made to change the situation, until in 1960, New Zealand's system (such as it was) for scrutinising delegated legislation was judged and found wanting.<sup>30</sup> J E Kersell considered the Australian, Canadian, UK and New Zealand approaches to scrutiny of delegated legislation and concluded:

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 to persons who find themselves subject to subordinate laws.<sup>31</sup>

Stung by this criticism, the New Zealand Government set up a select committee to consider the question of systematic regulations review by Parliament (the Algie Committee). It noted that the standard empowering clause for regulations had recently been narrowed, thus limiting instances where the Executive was delegated

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<sup>24</sup> J E Kersell, *Parliamentary Supervision of Delegated Legislation* (1960) 22. Note however, that 'debate' was perfunctory, and on only three occasions post-WWII (1948, 1952 and 1953) were regulations laid before Parliament the subject of actual debate: Kersell, 108.

<sup>25</sup> The Committee's name was changed to the Select Committee on Statutory Instruments in 1946.

<sup>26</sup> Dennis Pearce, *Delegated Legislation in Australia and New Zealand* (1977) 56.

<sup>27</sup> *Ibid* 47.

<sup>28</sup> *Ibid* 41.

<sup>29</sup> J E Kersell, above n 24, 68-69.

<sup>30</sup> *Ibid* 162-163.

<sup>31</sup> *Ibid* 162.

an overly broad regulation-making power.<sup>32</sup> Several reforms to the then-existing scrutiny measures were then considered. The Committee recommended legislative changes to enable the laying of all regulations before Parliament.<sup>33</sup> They affirmed the process by which certain regulations (primarily those infringing on personal liberties) were required to be confirmed by Parliament or lapse.<sup>34</sup> Finally, the Committee turned to the question of specialist committee review.

The Algie Committee considered the various Commonwealth developments in this area, noted that each had its merits, but concluded that New Zealand did not need a specialist committee to review regulations. The Committee's view was that effective scrutiny was already being carried out by law drafters and the specialist legal adviser at the Department of Justice.<sup>35</sup> Furthermore, 'no evidence of abuses had been adduced'.<sup>36</sup> However, the Committee did acknowledge that Parliament played only a limited role in overseeing regulations; the current system could be better characterised as 'ministerial', 'official' or 'bureaucratic'.<sup>37</sup>

As a compromise measure, the Algie Committee recommended that the Statutes Revision Committee's functions be enlarged to include scrutiny of regulations on three grounds (undue trespass on personal rights and liberties; unusual or unexpected use of the powers conferred by the empowering statute; and where its form or purport called for elucidation).<sup>38</sup> This was not a success.

In 1985 the Statutes Revision Committee made its first report on delegated legislation and reported that it had only considered 11 regulations in 20 or so years.<sup>39</sup> During that period, the Department of Justice adviser responsible for scrutinising draft regulations had retired and not been replaced.<sup>40</sup> The Committee noted that it had 'not greatly influenced practices in the delegated legislation field'<sup>41</sup> and concluded that the establishment of a dedicated scrutiny committee was advisable.

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<sup>32</sup> Delegated Legislation Committee (the Algie Committee) *Report* (1962) Appendices to the Journals of the House of Representatives I.18, 6-7.

<sup>33</sup> Ibid 9. This was effected by inserting a new section 8 into the *Regulations Act 1936* (NZ).

<sup>34</sup> Ibid.

<sup>35</sup> Ibid 8-9. The Government might also refer draft regulations to MPs whose constituents were likely to be affected.

<sup>36</sup> Ibid 11.

<sup>37</sup> Ibid.

<sup>38</sup> Ibid 12.

<sup>39</sup> Statutes Revision Committee, *First Report on Delegated Legislation* (1985) Appendices to the Journals of the House of Representatives I.5A 4. Between 1962 and 1977, only one regulation was referred to the Committee. Pearce, above n 26, 80. The Committee did not report on the regulation: Pearce, above n 26, 80.

<sup>40</sup> Statutes Revision Committee, above n 39, 4.

<sup>41</sup> Ibid 5.

## V THE REGULATIONS REVIEW COMMITTEE

At last, some time after many Commonwealth Parliaments had acknowledged the importance of systematic review of delegated legislation and established regulations scrutiny committees, the New Zealand Parliament followed suit. The Regulations Review Committee (RRC) was established as a standing select committee under Parliament's Standing Orders in 1985.

### A Powers of the RRC

It was noted previously that the Executive may be in a position to legislate on matters of policy when a regulation-making power specifically allows it to do so, or when such a power has been drafted too broadly. It was also noted that the Executive may use its law-making powers delegated to it by an Act of Parliament in a way that encroaches on Parliament's territory as legislator, and sometimes in a way that infringes on rights and liberties. The powers given to the RRC under Standing Orders are sufficiently wide for it to alert Parliament and chastise a government in both these regards.

Under Standing Order 377(3) the committee 'may consider any regulation-making power in a Bill before another committee and report on it to the committee'. Initially, the Committee could only consider regulation-making powers referred to it by another select committee. In recognition of the valuable work it can do in this field, Standing Order 377(3) now grants the Committee itself this power. This ability provides the mechanism by which the RRC can voice concerns about a Bill that will allow the Executive to legislate for a purpose which should remain within Parliament's legislative domain.<sup>42</sup> Likewise, it allows the Committee to raise a flag to what it considers to be overly broad regulation-making powers before they are enacted into law. Several instances where the Committee has made recommendations to narrow the scope of a regulation-making power will be discussed below.

Standing Orders 377(1) entitles the RRC to 'examine all regulations'.<sup>43</sup> In practice, the bulk of the Committee's work occurs in examining regulations once they have been promulgated.<sup>44</sup> Regulations are referred automatically to the Committee; in addition, they may also be asked to consider a regulation some time after its promulgation upon receipt of a complaint from an individual or organisation.

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<sup>42</sup> In the case of regulation-making powers in Bills, the Committee gives its findings and any recommendations it has made to the select committee considering the Bill in which the power is housed rather than to the House itself.

<sup>43</sup> As defined in section 2 *Regulations (Disallowance) Act 1989* (NZ).

<sup>44</sup> In 2002, the Committee scrutinised 465 regulations; by contrast, in the 18 years of its existence it has reported on approximately 30 complaints on regulations.

Though the Committee has a discretion to consider draft regulations under Standing Order 378(2), time constraints mean that they are infrequently considered.<sup>45</sup>

Standing Order 378(2) ) provides that the Committee may draw a regulation to the special attention of the House on the grounds that it:

- (a) is not in accordance with the general objects and intentions of the statute under which it was made;
- (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 dependent upon administrative decisions which are not subject to review on their merits by a judicial or other independent tribunal;
- (e) excludes the jurisdictions 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 compliance with particular notice and consultation procedures prescribed by statute;
- (i) for any other reason concerning its form or purport, calls for elucidation.

Each of the nine Standing Order grounds constitutes an important part of the Committee's ammunition to promote constitutionally limited government.

Standing Orders 378(2)(a), much like Standing Order 378(2)(c), allows the Committee to call into question regulations that appear to depart from the intention or spirit of the authority delegated by Parliament, and in so doing, wade into areas of policy. Though the RRC does not address the question of vires (it considers this a matter for the Courts<sup>46</sup>) where a regulation does not meet with any of the purposes laid down in the regulation-making power, it is eminently possible that the Committee will find both Standing Order 378(2)(a) and (c) to have been breached.

Standing Order 378(2)(b)) allows the Committee to alert the House to regulations that trespass unduly on personal rights and liberties. From the perspective of individual citizens, this is a most valuable ground for it can provide redress against regulations that impose significant impositions on individual liberties notwithstanding that the regulations themselves sit within the stated purposes of the empowering provision. When considering a possible breach on this ground, the

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<sup>45</sup> An exception exists for draft civil aviation, maritime transport and land transport rules which are automatically referred to the Committee by the Minister of Transport.

<sup>46</sup> Regulations Review Committee, *Inquiry into instruments deemed to be regulations* (1999) Appendices to the Journals of the House of Representatives, I.16R, 9: 'We ... concentrate our attention on the implementation of the policy behind regulations, rather than allowing ourselves to call into question the merits, or otherwise, of the basic policy itself. Neither do we make direct findings on whether the regulations are within the powers of the principal Act. Ultimately such questions are for the Courts to decide.'

Committee will balance the public good that the regulations purport to realise against both the severity of the trespass and the value of the right or liberty being infringed upon.<sup>47</sup>

Standing Orders 378(2)(d) and (e) target regulations that fail to satisfy certain natural justice principles. Regulations are often used to establish and guide administrative bodies, such as those that issue licenses and permits or decide on immigration applications. Standing Order 378(2)(d) entitles the Committee to alert the House to those regulations that do not provide a satisfactory appeal mechanism to review the substantive validity of a decision that impacts on rights and liberties. This is distinct from an appeal to the Courts on the strict legality of a decision. Standing Order 378(2)(e) covers a situation of even greater concern, that is, where the Executive has used its law-making powers to exclude the jurisdiction of the Courts without Parliament's say-so. Such an action amounts to a fundamental attack on the ability of the Courts to check misuses of Executive powers to legislate.

Standing Order 378(2)(f) – that the regulation in question contains matters more appropriate for Parliamentary enactment – is an explicit direction from the House to the Committee to alert it to regulations that deal with matters of such import that an Act of Parliament was the more appropriate instrument to bring those matters into law. Where this ground has been breached, it is likely that it will have done so because Parliament made an unsuitable initial delegation, or because the delegation lacked specificity of purpose.

Concerns over retrospective legislation are well known. The law must have certainty in order that people can make decisions that meet their legal obligations. To then modify those laws with retrospective effect can be both manifestly unfair to individuals affected by the new law while simultaneously generating uncertainty about existing laws. Yet it is also well established that retrospective laws are acceptable if 'Parliament has made that intention unmistakably clear'.<sup>48</sup> It is for this reason that Standing Order 378(2)(g) will be breached when a regulation is retrospective in effect, unless Parliament has clearly decided to allow the Executive to contravene the rule against retrospective legislation. In a similar vein, Standing Order 378(2)(i) is designed to ensure regulations are clearly articulated so that those who are subjected to the law have certainty about what it is they must do in order to meet the requirements that the law imposes.

Standing Order 378(2)(h) provides parliamentary scrutiny of the procedures that lead to the making of certain regulations. In combination with the power of the Courts to invalidate procedurally invalid regulations, there exist strong incentives

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<sup>47</sup> This is a similar exercise to that which the House must undertake when alerted to a Bill that the Attorney-General believes to be in breach of the *New Zealand Bill of Rights Act 1990* (NZ) with the difference being that the balancing takes place after the law has been made.

<sup>48</sup> Tony Blackshield and George Williams, *Australian Constitutional Law & Theory: Commentary and Materials* (2nd ed, 1998) 1142.

for the Executive to ensure that it adheres to the conditions that attach to the law-making power delegated by Parliament.

Finally, it should also be mentioned that the Committee has a power under Standing Order 377(4) to consider any matter relating to regulations, and report to the House thereon. This provides a valuable opportunity for the RRC to tackle troublesome issues in the field of delegated legislation, and to make recommendations accordingly. This paper will consider a report by the Committee into one such issue, namely the proper status of deemed regulations.

### B *Sanctions*

The RRC, like all other select committees, undertakes parliamentary business on behalf of the House. The committee itself has no power to amend regulation-making powers in Bills, only to recommend changes it considers should be made. Likewise, it cannot amend or revoke regulations that breach any of the nine standing order grounds just discussed. As a result, the success of the Committee lies first and foremost in persuading Ministers to adopt the course of action the committee has advised.

Two factors assist the Committee in this regard. Firstly, the government must actually take heed of the changes that the Committee has recommended for it is obliged to table a response to a RRC report within 90 days of the Committee presenting its report to the House.<sup>49</sup> Secondly, the Committee offers itself up as an objective constitutional scrutineer whose overriding concern is better regulation-making practices. By convention, its Chair is an Opposition MP, and its membership is drawn from all parties in Parliament. Moreover the Committee does not examine issues of policy, taking the view that this is a partisan matter best left to political debate. Together these factors combine to encourage ministers to put aside the partiality that dominates parliamentary practice in the interests of addressing the concerns the RRC has identified.

Nevertheless, in the case of existing regulations, if the arguments put forward by the RRC prove insufficient to convince a minister to amend or revoke a regulation that offends against one or more of the Standing Order 378(2) grounds, the Committee has one last weapon in its armoury. As well as reaffirming the requirement that all regulations be laid before the House,<sup>50</sup> the *Regulations (Disallowance) Act 1989* (NZ) gives the House the power to amend or substitute regulations by resolution, as well as implementing procedures for moving ‘motions for disallowance’. Crucially, a regulation subject to a motion of disallowance is deemed to have been revoked if the motion is successful. Motions for disallowance laid by RRC members take effect if not disposed of within 21 days.<sup>51</sup> Thus the government must ensure a debate in the House takes place to save a regulation subject to a motion. In so

<sup>49</sup> Standing Order 251.

<sup>50</sup> *Regulations (Disallowance) Act 1989* (NZ) s 4.

<sup>51</sup> *Ibid* s 6. Those motions laid by other MPs must be debated within one week or they will lapse.

doing, it must face the possibility that the House will exercise the ultimate sanction of revocation.

## VI THE COMMITTEE'S USE OF ITS POWERS

This section considers some examples of the RRC using its powers under Standing Orders to: consider a regulation-making power in a Bill before another select committee; to examine and report to the House on existing regulations; and to report to the House on a matter of general interest. They provide useful illustrations of the Committee trying to ensure that the Executive is limited to legislating on matters of detail, as well as alerting the House to regulations that do legislate on policy, and promoting changes to produce better regulation-making practices.

### *A Regulation-making Powers in Bills*

#### *1 Children and Young Persons Bill*

In 1988 the RRC wrote to the Department of Social Welfare to inquire as to how the Department intended to use a regulation-making power contained in the Children and Young Persons Bill that appeared to the Committee to amount to an inappropriate delegation.<sup>52</sup> Clause 244(e) of the Bill provided that regulations could be made for the purpose of 'defining the rights of children and young persons placed in any institution established pursuant to section 221 of this Act'.

The Committee's concerns were warranted. The potential for an undue breach of the rights and liberties of children and young persons placed in the specified institutions was real. It was not Parliament that was to define what their rights were to be, but the same government department (through the Executive Council) that placed them in the institution in the first place. Thus it was entirely conceivable that the Department would not want to include certain rights (such as access to family, privacy rights, freedom from unreasonable search and seizure, and access to legal counsel) even though there would have been a strong case for maintaining that such rights should in fact exist.

In an attempt to ease its concern over the regulation-making power's lack of particularity, the Committee asked the Department 'whether it intended that regulations created pursuant to this clause would limit or define the rights of children and young persons, and if so, in what way'.<sup>53</sup> That the Committee felt it had to seek guidance on what rights were likely to be created, reflected the fact that the regulation-making lacked sufficient particularity as to the way in which it was to be exercised. This was clearly a matter upon which citizens would expect Parliament – and not the Executive – to legislate. The rights of children and young

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<sup>52</sup> Regulations Review Committee, *Report on the Activities of the Committee in 1988 and 1989* (1990) Appendices to the Journals of the House of Representatives, I.16A, 7.

<sup>53</sup> *Ibid* 7.

persons in any situation are a sensitive subject, not least when they relate to children that are taken under the protection of the State. As the Committee noted, 'in principle individual rights should not be defined by ministerial decrees'.<sup>54</sup>

## 2 *Misuse of Drugs Amendment Bill*

The Misuse of Drugs Amendment Bill 1999 was designed to address the problem of new drugs becoming established before the *Misuse of Drugs Act 1975* (NZ) could be amended to make them illegal.<sup>55</sup> The difficulty lay in the time it took the House to enact a Bill that added the drug to one of the schedules to the Act (which classified drugs according to Classes A, B and C). The Misuse of Drugs Amendment Bill proposed that the schedules be removed from the principal Act and placed in regulations. These schedules could then be amended by further regulations. This new process was designed to take advantage of the comparatively quicker legislative process of an Order-in-Council, and would provide the mechanism to keep the law in tune with rapid changes in the drugs market.

The case for Parliament alone exercising the power to decide which drugs were to be illegal, and the appropriate classification for those drugs, was compelling. It is somewhat trite to point out that the legality of drugs, and to a lesser extent their appropriate classification, is one issue upon which there is much disagreement in society. Given this disagreement, it is only appropriate that Parliament retain the right to decide what the law shall be. Yet as the Committee noted, '[b]y moving the schedules into regulations, the Bill will allow regulations to define the magnitude of an offence committed under the principal Act'.<sup>56</sup> Thus it would be possible for a government that projected an image of being 'tough on drugs' to transform all Class B and C drugs into Class A drugs simply through delegated legislation. Equally, a socially liberal government may do the exact opposite, potentially to the point that no recreational drugs were deemed illegal. The inevitable outrage that would follow either action strongly suggested that it was entirely inappropriate for the Executive to be granted such a power.

Still this was not a case where the Committee could adopt a strict separation of powers approach. The monopoly Parliament had over the contents of the schedules was cumbersome and did not lend itself toward a flexible law capable of responding rapidly to new circumstances. For this reason the Committee proposed a compromise where the schedules remained in the *Misuse of Drugs Act 1975* (NZ) but could be altered by an Order-in-Council. To ensure Parliament retained ultimate control over changes made to the schedules, regulations that made new drugs illegal, as well as those that reclassified drugs that were already illegal, would have to be approved by a resolution of the House before coming into effect. The Bill was then enacted with the new scheme in place.

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<sup>54</sup> Ibid 7.

<sup>55</sup> Regulations Review Committee, *Activities of the Regulations Review Committee during 2000* (2002) Appendices to the Journals of the House of Representatives, I.16I, 35-36.

<sup>56</sup> Ibid 36.

## B Reporting to the House on existing Regulations

### 1 Access to the Courts: Executive Legislating on Policy

Concerns about access to justice led to a RRC report on new fees charged for lodging a claim with the Disputes Tribunal.<sup>57</sup> The fees were set out in two sets of *Disputes Tribunal Amendment Rules* made pursuant to the *Disputes Tribunal Act 1989* (NZ). The first set of Rules increased fees only slightly. The Committee considered these rises acceptable. The second increase raised the level of fees quite significantly. The Department for Courts justified the increases on the basis that they were consistent with the Government's user-pays policy and provided incentives to promote a more efficient use of the Tribunal system.

Two community groups asked the Committee to review the changed fee structure. The Committee found that the second set of Rules breached Standing Order ground 378(2)(a) in so far as they were not in accordance with the general objects and intentions of the *Disputes Tribunal Act 1989*. The purpose of the Act was to provide relatively low-cost access to a small-claims court. In the opinion of the Committee, the Rules had set the fees at such a level that this object was being unjustifiably frustrated. In declaring its opposition to this outcome, the Committee declared it to be simply 'fundamental that the Disputes Tribunal remain accessible to any person wishing to make a claim'.<sup>58</sup>

This amounted to a classic example of a misuse of a delegated law-making power by the Executive. The Executive was entitled to set a fee for those individuals who wanted to use the Disputes Tribunal, since regulations could be made for this purpose. Yet the second fee hike was so significant the Committee found that it undermined the very reason for having a low-cost tribunal in the first place. Not only could it deprive those of low-income from accessing the Courts, in some cases it would deter otherwise valid claims because the cost of using the service would be too high a proportion of the amount under dispute. It is unlikely that Parliament intended such a result when it originally delegated the Executive a power to set a fee. Indeed had Parliament decided to radically alter accessibility to the Disputes Tribunal to this extent then the appropriate means to do so would have been by Act of Parliament rather than by delegated legislation.

In accordance with its findings, the Committee recommended to the Government that it revoke the Rules and that it review its fees policy. The Government responded by deferring the fee increases until it could fully consider the

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<sup>57</sup> Regulations Review Committee, *Report on the Investigation into the Disputes Tribunal Amendment Rules 1997 and the Disputes Tribunals Amendment Rules 1998* (1998) Appendices to the Journals of the House of Representatives I.16L.

<sup>58</sup> *Ibid* 5.

Committee's recommendations.<sup>59</sup> Having done so, the Government then decided to reduce the new fees for smaller claims while retaining those for higher claims.

## 2 *Infringement of Rights and Liberties*

On occasion, regulations may be considered so defective that they breach several Standing Order grounds. This was the case with the *Biosecurity (Ruminant Protein) Regulations 1999* (NZ).<sup>60</sup> The Regulations were designed to prevent an outbreak in New Zealand of bovine spongiform encephalopathy (commonly known as mad cow disease) by placing a ban on the feeding of ruminant protein to ruminant animals. All those subject to the regulations were required to prepare an acceptable protein control programme. Failure to do so left operators liable to prosecution.

Initially the Committee objected to the broad definition of 'operator' in the regulations. It found the definition to be so widely drafted that it covered people who were never intended to come under the scope of the regulations. For this reason the regulations constituted an unusual and unexpected use of the regulation-making powers (Standing Order 378(2)(c)). The regulations also required elucidation due to their form (Standing Order 378(2)(i)).

The Committee found the obligations created by the regulations to be equally unclear. Rather than setting out strict requirements as to what a programme must contain, the regulations placed an onus on the operator to come up with a satisfactory programme 'specifying how the operator will ensure that it does not commit an offence against the regulations'. Added to this uncertainty was the power of the Director-General to suspend or cancel an operator's business until satisfied that a programme met the requirements of the regulations. The Committee concluded that the regulations unduly trespassed on personal rights and liberties (Standing Order 378(2)(b)). The absence of any appeal mechanism from a decision of the Director-General further meant that the regulations unduly made the rights of persons dependent upon administrative decisions not subject to independent review on the merits (Standing Order 378(2)(d)).

The regulations also created a number of offences designed to encourage compliance. These offences were of concern to the Committee in two respects. Firstly, two of the offences were considered to be unjustifiably ambiguous, broad and vague. Secondly, five of the offences were offences of absolute liability. The Committee pointed out that New Zealand law had just two instances of absolute liability offences and both were contained in statute rather than in regulation. The Committee considered their inclusion to be excessive and altogether unnecessary to

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<sup>59</sup> *Government Response to the Report of the Regulations Review Committee on its Investigation into the Disputes Tribunal Amendment Rules 1997 and the Disputes Tribunals Amendment Rules 1998* (1998) Appendices to the Journals of the House of Representatives A5.

<sup>60</sup> Regulations Review Committee, *Report on the Investigation into the Biosecurity (Ruminant Protein) Regulations 1999* (2000) Appendices to the Journals of the House of Representatives I.16A.

achieve the purpose of the regulations. All seven offences were found to have breached multiple standing order grounds.

The report is a useful example of the RRC upholding the spirit of the doctrine of separation of powers by exposing a defective use of regulation-making power that, in the Committee's opinion, unduly infringed on personal liberties. Not only was it unclear to whom the law was to apply (thus creating uncertainty at the point of application) but the law itself was vague and uncertain. The net effect of the regulations was that a business could be shut down on the basis of a failure by the operator to satisfy requirements not stated with any degree of particularity. The inclusion of offences of absolute liability showed remarkable indifference to Parliament's own reluctance to create offences of this type in its own statutes. There was certainly nothing in the regulation-making power contained in the *Biosecurity Act 1993* to justify placing operators under such presumptive and harsh laws.

Ultimately, and rather surprisingly, this was a case where the Government chose to adopt the Committee's recommendations only in part.<sup>61</sup> Even then, it did so only to a degree by accepting the suggestion that the Ministry of Agriculture and Forestry consult with the Ministry of Justice on the issue of the categorisation of offences within the regulations. Rather surprisingly, no other Committee recommendations were accepted. The risk of an outbreak of mad cow disease was, it seems, simply too pressing to warrant a more precise expression of the effect and scope of the regulations. Nevertheless, the Committee's contribution to the limited government ideal was evident. Not only had the Committee raised the objections to the House, but it had forced the government to publicly defend the use of delegated law-making powers to make such dramatic inroads into personal liberties.

### C Reporting on any Matter Relating to Regulations

As noted, the scrutiny functions of the RRC extend to all 'regulations' as defined by statute (the *Regulations (Disallowance) Act 1989* (NZ)). This statutory definition of regulations includes some delegated legislation which is not secondary, but rather tertiary legislation (legislation made under delegated authority from secondary legislation),<sup>62</sup> such as maritime safety and penal operation rules, codes of practice, food safety and financial reporting standards, and legal services instructions. Tertiary legislation comes within the purview of the RRC if it is deemed to have the status of a regulation in the empowering statute. However, not all tertiary legislation has the status of a deemed regulation.

This situation is troubling, principally because tertiary legislation (whether it has the status of a deemed regulation or not) is not subject to the pre-promulgation

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<sup>61</sup> *Government Response to the Report of the Regulations Review Committee on the Investigation into the Biosecurity (Ruminant Protein) Regulations* (2000) Appendices to the Journals of the House of Representatives A5.

<sup>62</sup> Regulations Review Committee, above n 46, 9-10 (noting that this definition itself is not uncontroversial). In Australia, tertiary legislation is termed 'quasi-legislation'.

controls that affix to secondary legislation. It is particularly concerning in light of the trend, identified by the Committee, where ‘material that was once contained in traditional regulations is being shifted into deemed regulations’.<sup>63</sup>

Unlike secondary legislation, tertiary legislation is not drafted by the Parliamentary Counsel Office but by the department responsible for administering the legislation. There is thus no standard drafting form or reliance on a skilled drafter expert in the nuances of delegated legislation. Tertiary legislation is not approved by Cabinet, nor made by the Governor-General in Executive Council, but made by a Minister or on the authority of a departmental official, without formal Executive approval. It need not comply with the requirements of the *Cabinet Manual* (including checks on whether the legislation unreasonably restricts personal freedoms, or is outside the objects and intents of the parent Act). Depending on its status as a deemed regulation, tertiary legislation may or may not be published in the *Statutory Regulations* series. Access to this legislation is therefore not always straightforward. Once promulgated, the differences continue: some tertiary legislation is deemed to be a regulation for the purposes of the *Regulations (Disallowance) Act 1989* (NZ) meaning that it may be subject to a motion for disallowance and the scrutiny of the RRC, but not for the purposes of the *Acts and Regulations Publications Act 1989* (NZ) meaning that there are no obligations to publish it in the official *Statutory Regulations* series. In other cases, the reverse situation obtains. These inconsistencies between the different types of delegated legislation have become more obvious since the significant growth in tertiary legislation since 1990.<sup>64</sup>

Concerned by this state of affairs and its potential for deficient law-making, in 1999 the Regulations Review Committee initiated an *Inquiry into instruments deemed to be regulations*. The RRC examined the following issues:

- (a) when Parliament should allow deemed regulations to be made;
- (b) the printing and publication of deemed regulations;
- (c) the desirability of drafting standards for deemed regulations;
- (d) consultation requirements for deemed regulations; and
- (e) the incorporation of material by reference into deemed regulations.

The Committee made the following recommendations to Parliament:<sup>65</sup>

- (a) that the principles identified in its report concerning the making of traditional or deemed regulations should be taken into account when legislation is being developed;<sup>66</sup>

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<sup>63</sup> Ibid 36.

<sup>64</sup> Ibid 10. The Committee identified at least 50 Acts which authorise the making of deemed regulations: 6.

<sup>65</sup> Ibid 4-5.

<sup>66</sup> Ibid 16-17. These were: the importance of the delegated power; the subject matter of the power; the application of the power; and the agency to whom the power is delegated.

- (b) that the Cabinet Manual should be amended so that any power to make deemed regulations is identified and conforms to the Committee's principles;
- (c) that deemed regulations be subject to Cabinet approval as part of the promulgation process;
- (d) that standard notification and publication requirements be introduced for deemed regulations;
- (e) that the Government enhance the public accessibility and availability of deemed regulations for inspection and purchase (through deposit at the National Library, online, or by listing them in the *Statutory Regulations* series if not published therein);
- (f) that the Chief Parliamentary Counsel develop detailed drafting guidelines for deemed regulations and that the Government ensure that these are applied to all deemed regulations;
- (g) that the general principles for consultation, the incorporation of materials by reference, and the use of advisory materials and guidance notes apply to all deemed regulations; and
- (h) that the Government investigate opportunities for adopting a negotiated rule-making process (or 'reg-neg' as it is known in the US).<sup>67</sup>

The Government's response came in two stages. In 1999, it agreed to implement the Committee's first two recommendations, directing that all draft Bills being considered by Cabinet Legislation Committee note whether the Bill contained any provision for empowering the making of deemed regulations, and if so, note the reasons for the provision, taking account of the principles identified by the RRC; and, in the case of Government Bills, that this note justifying the making of deemed regulations be included in the explanatory note to the Bill.<sup>68</sup>

In 2000 (and after a general election that saw a change of government), the new Government concluded its response.<sup>69</sup> It affirmed the response of the previous Government to the first two recommendations.<sup>70</sup> It declined to require Cabinet approval of all deemed regulations, stating that such technical matters were best dealt with at the ministerial or departmental level. However, the Government undertook to require that regulatory agencies conform to the principles relating to traditional regulations when drafting deemed regulations. On the questions of improved access and publication, the Government endorsed much of what the Committee had to say about better publication of regulations, including recommending that deemed regulations should be published in the *Statutory Regulations* series, unless there was good reason for separate publication (mainly technical application or application to a defined group). The Government also

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<sup>67</sup> On reg-neg generally, see Geoffrey Palmer, 'Deficiencies in New Zealand Delegated Legislation' (1999) 30 *Victoria University of Wellington Law Review* 1, 32-34.

<sup>68</sup> *Government Response to the Report of the Regulations Review Committee on its Inquiry into instruments deemed to be regulations* (1999) Appendices to the Journals of the House of Representatives, A.5, 3.

<sup>69</sup> *Further Government Response to the Report of the Regulations Review Committee on its Inquiry into instruments deemed to be regulations* (2000) Appendices to the Journals of the House of Representatives, A.5.

<sup>70</sup> *Ibid* 4.

agreed to encourage publication of deemed regulations on the internet and the listing of deemed regulations in the *Statutory Regulations* series if not published there. On good drafting practice, the Government asked Parliamentary Counsel Office to develop detailed drafting guidelines for deemed regulations, and that they be made available to regulatory agencies in tandem with other drafting advice. The Government endorsed the Committee's recommendations as to consultation, the incorporation of materials by reference, and the use of advisory materials and guidance notes and requested that the Legislation Advisory Committee undertake further work on the technique of incorporation by reference. Finally, the Government declined to consider further the use of negotiated rule-making, given the peculiarities of the American situation that made it inappropriate for use in New Zealand. It noted that regulatory agencies were free to consult with interest groups, but should be wary of giving undue weight to attaining consensus at the expense of the public interest.<sup>71</sup>

Although not all of its recommendations were adopted, the Committee has secured significant improvements to good practice in delegated law-making. Since that report, it has maintained a close interest in (a) improving public access to deemed regulations which are not subject to statutory publication requirements and (b) ensuring that government departments publicise the fact that deemed regulations (where applicable) are subject to the jurisdiction of the Regulations Review Committee.<sup>72</sup> On the subject of deemed regulations, the Committee is showing itself to be a vigilant constitutional watchdog.

In July 2001, the Committee commenced a further inquiry of its own motion into the principles determining whether delegated legislation is given the status of regulations. This is closely linked to its work on deemed regulations, for if delegated (tertiary) legislation does not have the status of a regulation (either 'deemed' or as traditionally understood) then it falls outside Parliament's review mechanisms. It is in the area of pure tertiary legislation that concerns about the dangers of delegated legislation remain most relevant. In such situations, there are few safeguards against abuse of Parliament's delegation; nor is Parliament able to oversee what results from its delegation of law-making responsibilities. The main question before the Committee is the appropriate boundary of its jurisdiction. It is also considering the general principles of delegated law-making and the appropriate principles that should underpin and determine the legislative status of a statutory instrument.<sup>73</sup> Its inquiry was interrupted by the 2002 general election. The Committee reported back in late June 2004 and recommended some amendments to the statutory definition of regulations. This would have the effect of bringing more forms of delegated legislation within their supervisory jurisdiction.<sup>74</sup>

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<sup>71</sup> Ibid 19-20.

<sup>72</sup> Regulations Review Committee, *Activities of the Regulations Review Committee during 2002* (2003) Appendices to the Journals of the House of Representatives, I.16B, 23-24.

<sup>73</sup> Ibid 30-31.

<sup>74</sup> Regulations Review Committee, *Inquiry into the principles determining whether delegated legislation is given the status of regulations* (2004) Appendices to the Journal of the House of

## VII THE VALUE AND FUTURE DIRECTION OF PARLIAMENTARY SCRUTINY OF REGULATIONS

What should be made of the efforts by the New Zealand Parliament in its general scrutiny of regulations? Without doubt, the improvements in access to regulations are much improved since the dark days when availability was limited to a select few. Not only are regulations tabled in the House and published in the *Statutory Regulations* series, but the general public now has free on-line access through the 'Public Access to Legislation Project'.<sup>75</sup> Availability of regulations promotes awareness of regulations, and this in turn assists greatly in scrutiny by the public and parliamentarians alike.

The original decision to furnish the Committee with the capacity to report to the House on any matter relating to regulations was a prudent one. It allows a specialised committee to undertake an investigation into what is a specialised area of the law. It is a useful means of providing guidance where there appears to be some confusion, or a concerning trend, in the making of regulations and regulation-making powers. At the time of writing, the Committee had presented 17 such reports to the House.<sup>76</sup>

The Committee's power to scrutinise regulation-making powers is, in many ways, its most valuable. Regulation-making powers can be no different from a factory that makes cars. If the design of the cars is sound, then the likelihood that the cars will have to be recalled at later date to be fixed is much reduced. Similarly, if the regulation-making powers are drafted with a fundamental adherence to the detail-policy distinction, the chances that regulations made pursuant to that power will breach one or more of the nine Standing Orders 378(2) grounds can be lessened.<sup>77</sup>

With its discretionary power to consider any regulation-making power contained in a Bill before another select committee, the RRC can contribute greatly to this outcome. A glance through any of the Committee's Annual Activities reports reveals that the Committee will raise concerns with a good number of regulation-making powers (typically around 10) that appear to make an inappropriate delegation, or frame a Bill too broadly. What makes the Committee's work in this area so valuable is that the select committees to whom the recommendations are made usually place great importance on them. According to Kidd, recommendations made by the Committee are 'given serious consideration in view

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Representatives, I.16E. The time of release of this report has prevented further substantive analysis.

<sup>75</sup> Available at <<http://www.legislation.govt.nz>> at 25 June 2004.

<sup>76</sup> The *Regulations Review Committee Digest* has a full list of these reports in Appendix B. The Digest is available at <[http://www.lawschool.vuw.ac.nz/vuw/content/display\\_content.cfm?id=1496](http://www.lawschool.vuw.ac.nz/vuw/content/display_content.cfm?id=1496)> at 25 June 2004.

<sup>77</sup> Kidd, above n 18, 4. Doug Kidd, twice chairman of the Regulations Review Committee, has described the task of scrutinising regulation-making powers in Bills as 'the committee's most important function in that it is a top of the cliff function and of enduring value'.

of the committee's expertise on delegated legislation. They are almost invariably adopted wholly or substantially by subject committees'.<sup>78</sup>

The value of the RRC's scrutiny over existing regulations is two-fold. First, there is an undoubted preventive value. In much the same way that the Executive knows that the Courts can invalidate regulations that are outside the terms of the empowering Act, and mostly (but not always) frames its laws accordingly, so do the nine Standing Order grounds act as a invisible hand guiding the law drafter to ensure that a regulation-making power is properly exercised. Second, the Committee has a surprisingly high success rate in seeing its recommendations agreed to. Analysis has shown that the views of the RRC are acted on by the government in approximately 84% of cases.<sup>79</sup> The Government has only refused to wholly implement the Committee's recommendations on seven occasions, whereas it has partly or wholly implemented its recommendations (or undertaken further review of the matters raised) on thirty-six occasions.<sup>80</sup> Thus from a purely quantitative point of view, the Committee can be said to be considerably more effective in scrutinising regulations than its predecessor, the Statutes Revision Committee.

That the Committee has proved itself to be such an influential committee distinguishes it as something of a rarity in the New Zealand parliamentary system. Prior to the advent of the Mixed-Member Proportional (MMP) electoral system adopted in 1996, government backbenchers held a majority of seats on each select committee as well as the position of committee chairperson. While committees did operate, at least to some extent, in a non-partisan manner, their decisions and powers of recommendation lay ultimately in the hands of a Cabinet vitally interested in outcomes favourable for the government.<sup>81</sup> To some extent, these problems have been mitigated under MMP as it becomes more common for a select committee to have both a non-government chairperson and a non-government majority membership.<sup>82</sup> The result has been a weakening of the link between Cabinet and select committee decision-making. In contrast to this recent development, the RRC has always exercised its scrutiny of regulations functions in a remarkably forthright manner, while displaying considerable independence from the government of the day. While this independence can partly be accounted for due to the absence of a government chairperson, primarily it has been due to the Committee's aversion to debating government policy. Governments will typically prove more willing to adopt recommendations if they are perceived to be of a

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<sup>78</sup> Ibid 4.

<sup>79</sup> Mai Chen, 'Practical Problems for Practitioners with Regulations' in George Tanner and Mai Chen, *Delegated Legislation* (Speech delivered at the NZ Law Society Seminar, Wellington, May 2002) 70.

<sup>80</sup> Ibid.

<sup>81</sup> See Geoffrey Palmer, *New Zealand's Constitution in Crisis: Reforming our Political System* (1992) 114-115.

<sup>82</sup> For an outline of the changes to select committees under MMP see Elizabeth McLeay 'Parliamentary Committees in New Zealand: A House Continuously Reforming Itself' (2001) 16(2) *Australasian Parliamentary Review* 121-139.

technical character rather than if they require a policy about-face. The way in which successive governments have generally responded to the many recommendations made by the RRC over the years has proved no exception.

The value of the *Regulations (Disallowance) Act 1989* (NZ) is a little harder to gauge. Certainly there is much to be said about the 21 day automatic revocation provision if the motion to disallow moved by a RRC member is not debated. This at least ensures that the Committee can effectively force the House to address a regulation about which the government has not allayed the Committee's concerns. The Committee has itself argued that the very existence of this power to disallow is a considerable deterrent; it 'provides the sanction that ensures that a Committee's views are taken seriously'.<sup>83</sup> Yet the fact remains that a disallowance motion has only been moved on four occasions, none of which has proved successful.<sup>84</sup> In this light, Joseph's criticism that the Act '... has failed to fulfil its promise'<sup>85</sup> appears to have some statistical validity. The symbolic value, and potential damage for the government, of a full scale debate in the House where the government is defending an alleged misuse of a regulation-making power should not, however, be underestimated.

With the advent of minority governments under MMP, some commentators<sup>86</sup> (and indeed the Committee itself<sup>87</sup>) have suggested that governments will be increasingly eager to implement policy through regulation rather than trying to build cross-party support for implementing those policies through Bills. Consequently, minority governments can in theory present a greater threat to the separation of powers doctrine than majority governments for they are more likely to succumb to the temptation of usurping Parliament's role as primary legislator. Thus where a minority government exists, parliamentary scrutiny over the use of regulation-making powers arguably assumes an even greater importance. Yet whether or not minority governments have shown an increased prevalence to legislate on policy by regulation rather than by Act of Parliament is something that can only accurately be gauged with the passage of time. It will be interesting to see whether subsequent Committees feel this has indeed been the case. The danger posed in this regard should not be overstated though. The RRC is now well established and the types of regulations it is likely to find objectionable are fairly predictable. For a minority government to try to slip its policies under the radar of the House via regulations, it must first be willing to tackle a vigilant constitutional watchdog in the form of the

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<sup>83</sup> Regulations Review Committee, *Proposals for a Regulations Bill* (1987) Appendices to the Journals of the House of Representatives I.16B, 36.

<sup>84</sup> Regulations Review Committee Digest, above n 19, 14.

<sup>85</sup> Phillip Joseph, 'Delegated Legislation in New Zealand' (1997) 18 *Statute Law Review* 85, 101. In reply, see Regulations Review Committee, *Eighth Australasian and Pacific Conference on Delegated Legislation and Fifth Australasian and Pacific Conference on the Scrutiny of Bills* (2003) Appendices to the Journals of the House of Representatives, I.16A, 11: 'Significantly, automatic disallowance acts as an incentive for the Government to co-operate with the committee to satisfactorily resolve issues, so as to avoid disallowance.'

<sup>86</sup> Palmer and Palmer, above n 16, 225-226.

<sup>87</sup> Regulations Review Committee, above n 46, 36.

RRC. Still the warning remains valid, and it is one the Committee would be wise to heed.

A further likely development is that public knowledge of the Committee, and what it can offer, is likely to continue to grow amongst lawyers and the public generally. The Committee can expect the number of complaints about regulations to grow year by year. Two recent developments will encourage this trend. First, the Committee has put out a publication providing basic information on the Committee and how to make an effective submission to it.<sup>88</sup> Second, a *Regulations Review Committee Digest* has now been compiled which summarises the Committee's past treatment of the nine Standing Order grounds.<sup>89</sup> This provides those considering making a complaint with a detailed guide as to the kinds of tests the Committee has laid down and when it is likely to recommend a regulation be amended or revoked. In addition, until very recently, Committee reports were available only in the Appendices to the Journals of the House of Representatives. They are now available online, complete with an independent editorial headnote, and cross-referenced to the Digest.<sup>90</sup> This represents a significant advance in making the work of the Committee available to the general public, lawyers, and parliamentarians.

In summary, the RRC has made an invaluable contribution to checking the way in which Parliament enacts regulation-making powers and the way in which governments use those powers. There are times, no doubt, when Ministers look longingly on the days when the Committee did not exist, and non-judicial scrutiny could be as little or great as the Executive wanted it to be. Yet it is virtually beyond question that a regulations review committee, in one form or another, will remain part of the parliamentary landscape for as long as legislative powers are delegated to the Executive. The RRC affirms and enhances the application of the doctrine of separation of powers in New Zealand by acting as the primary parliamentary restraint on government misuse of the powers Parliament has delegated to it. Perhaps Kidd put it best when he likened the Committee's brief to 'do[ing] the parliamentary equivalent of God's work'.<sup>91</sup> The Committee is here to 'educate, guide, persuade, correct, chastise and reform Government – a congenital sinner. Above all, we are here to protect and promote liberty and the rule of law.'<sup>92</sup>

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<sup>88</sup> *Making a Complaint to the Regulations Review Committee* <<http://www.clerk.parliament.govt.nz/Publications/Other>> at 25 June 2004.

<sup>89</sup> *Regulations Review Committee Digest*, above n 19 <[http://www.lawschool.vuw.ac.nz/vuw/fca/law/files/RRC\\_Printer\\_Friendly\\_Digest.pdf](http://www.lawschool.vuw.ac.nz/vuw/fca/law/files/RRC_Printer_Friendly_Digest.pdf)> at 25 June 2004.

<sup>90</sup> The headnoted reports are also available at <[http://www.lawschool.vuw.ac.nz/vuw/content/display\\_content.cfm?id=1496](http://www.lawschool.vuw.ac.nz/vuw/content/display_content.cfm?id=1496)> at 25 June 2004. Selected reports are also available at <<http://www.clerk.parliament.govt.nz/publications>> at 25 June 2004.

<sup>91</sup> Doug Kidd, above n 18, 14.

<sup>92</sup> *Ibid* 1.