F W Guest Memorial Lecture 1994

THE POTENTIAL POWER OF COMMITTEES IN A "HUNG" PARLIAMENT

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Francis William Guest, MA, LLM, was the first Professor of Law and the first full-time Dean of the Faculty of Law in the University of Otago, serving from 1959 until his death in 1967. As a memorial to Professor Guest a public lecture is delivered each year upon an aspect of law or some related topic.

A SMALL PIECE OF REMINISCENCE

I am here tonight as the F. W. Guest Memorial lecturer because the Council of the University of Otago made a better decision in choosing Professor Francis William Guest as the Foundation Professor of Law than in appointing tonight's Guest Memorial lecturer. Yes, at age 29 I applied unsuccessfully for the foundation chair of law in the University of Otago.

Exactly 35 years ago today I received a letter dated 2 August 1959 from my friend Frank Guest. I knew and greatly respected him as a lawyer who, in the best traditions of the profession, was always willing to give his time and advice to us younger practitioners when we sought his help. I also knew him as a highly qualified philosopher and I knew of his reputation as a meticulously careful and inspired law teacher, for I was just too old to be a student of his.

His letter to me of 2 August 1959 shows his kindness, thoughtfulness, humanity and humility. After all this time, I don't think Frank would chide me for putting these parts of it on the historical record:

> "Dear Doug,
>
> [Y]ou probably know by now that I have been appointed to the Chair. I trust that you are not too disappointed about the matter yourself. I might say for your ears alone, that you were favourably considered, and that it was the shortness of your experience that militated against you.
>
> You will remember that I told you on at least two occasions that I had not applied for the Chair – the last time just recently – and, indeed, this is true . . . . A feeler was put out to see whether I would be prepared to accept an invitation. After a long hard look at the proposition, I finally was too much tempted, and with a curiously divided sense of accepting a prize, and suffering a defeat, I accepted.
>
> Now that the moment of decision is past, I feel that I have made the right choice."

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I believe that not only did Professor Guest make the right choice, but the University also made the right choice. I had been urged by the then Dean, Aubrey Stephens, and others, to apply. Although I had been offered and had accepted a partnership at age 22, at the time of applying for the Chair I had had less than a year's experience as an academic and, because of my own lack of academic experience, I had urged Frank Guest to apply. Thus parts of my letter in reply are as follows:

> "Dear Frank,
>
> I was very pleased to get your letter of 2 August this afternoon.
>
> May I take this opportunity of extending my congratulations and very best wishes to you? I have always had an extremely high regard for your legal ability and I am sure that you will fill the Chair with great distinction.
>
> As I said to you in urging you to apply and again when we spoke recently, I think you are, of course, well fitted for such a post. My one slight regret, however, is that I always thought you were Dunedin's best hope for a [Supreme Court] Judgeship in the next five or so years!"

I trust that Frank forgives me for making our correspondence public.

May I add three footnotes from my file?

First, the information for candidates for the post shows that the enrolment for the whole University for 1958 was 2,360 and that the law enrolment for 1958 was 91. It jumped to 99 for 1959. Mind you, the salary for Professors has also increased a little since then – it was 2,190, admittedly pounds and not dollars.

Secondly, my file shows the great care that the University went to in making that appointment. I had individual appointments with every member of the committee who did not know me well.

One was Professor Guy Manton, Professor of Classics, and that had a sequel when I was appointed to a chair in Australia a few years later. Professor Manton, who had by this time become the Foundation Dean of the Faculty of Arts at Monash University, read my Inaugural Professorial Lecture and wrote me a most charming letter of congratulations.

But there was a slight sting in the tail. I spoke on the law, computers and privacy – a way out thing to do in the 1960s, and the media commented about this foolish, alarmist, ivory tower professor, who was talking all this nonsense about computers and privacy. Actually, things have happened even more rapidly than I predicted. I had taken *habeas corpus* and invented the phrase *habeas notas* to cover privacy matters. Just as you could demand that a person be brought before a court – *habeas corpus* – you could demand that information secretly held about you be supplied – *habeas notas* – oh, terrible solecism! And Professor Manton wrote, quite generously, I thought: "Whalan, this may be a misprint, but, if it is not, I hope that you didn't do Latin 1 in my classes at Otago." In my letter of thanks to Professor Manton I indicated that it was a misprint and that, in fact, it was Professor T. D. Adams whose classes I attended.

Thirdly, another of my referees was that incomparable teacher of the Conflict of Laws, Charles Byers Barraclough. In my note asking him to

be a referee, I said that I was embarrassed at applying because of my youth and he sent a telegram.

> "Delighted act referee. Age unimportant. time will cure. Sorry can't lend grey hairs. Anyway William Pitt was younger. Regards. Barraclough."

Time and history roll on 35 years, but I think that you may understand why I feel that it is a very, very great privilege to give this lecture in honour of my friend, Professor Francis William Guest.

Parliament and the Executive

Tonight I speak of the potential power of committees in a "hung" or evenly balanced Parliament. It is my thesis that committees of the New Zealand Parliament will become very significant under the new MMP electoral system.

As a student I always annotated my text-books dreadfully (they were my tools) and folded up the examination papers and put them at the front of the text-book.

Recently I was looking at my old Wade and Phillips on *Constitutional Law* that I used in 1950, when I was fortunate to be in the first class that Maurice Joel taught. The text states:[1]

> "Parliament controls the Executive."

Alongside the sentence "Parliament controls the Executive", I see that I wrote in large capital letters and exclamation marks:

> "HA! HA!"

I unfold the exam paper and you can see that, like me, it is rather falling apart from age. Mind you, although I am ancient, I am not quite ready to go and live in an institution I saw in a piece of delegated legislation the other day – the Autumn Lodge Retirement Village. And I am certainly not ever going to live in another institution on the list – the Hostel for Frail Aged People Preflight.

But speaking of flight (this time in earthly aeroplanes and not self-propelled ones), since I have been reading Civil Aviation Orders, as a natural coward, I wonder why I ever get on an aircraft.

Many of the Orders deal with problems that need to be fixed and would put you off flying for ever. Most Orders are coy or euphemistic. One said something like this:

> "When you next have a spare hour or two and feel like doing a bit of aircraft maintenance, may we gently suggest to you that you look at the forward drive shaft and connecting bolts to the main gearbox oil cooler fan assembly as there is a bit of a tendency for the connecting bolts to corrode and this has led on a few occasions to engine separation."

1 Wade and Phillips (3rd edition 1946) 21.

As that aeroplane only has one engine, you begin to hope that your average aircraft maintenance engineer actually reads the Civil Aviation Orders.

Or one that I read a little while ago. It was dealing with the Douglas DC9 and instead of saying "The tail fell off" it said:

> "There have been instances of tailcone departure."

Or one that I read just before getting on the jumbo jet to fly home to New Zealand. It dealt with brake wear on (you've guessed it) – 747s. It referred to brakes being

> "unable to absorb the required energy on landing and, as a result, there had been a few runway excursions".

I was not exactly cheered up.

I got diverted from my old exam paper. In it I found some very good questions. Some of the same questions could be used today. Mind you, I am sure that, by now, all good professors would naturally have changed the answers.

Part of one question is:

> "What are the principal methods of: . . . political . . . control over the exercise of Delegated Legislation?"

And there under "political", written in Stephens best Royal Blue Washable Ink, to my immense surprise I found the phrase "Scrutiny Committee". I had totally forgotten that Maurice Joel had told us about them.

So, at age 20, I thought the sentence "Parliament controls the Executive" was a joke, but that at least a "Scrutiny Committee" was a good way to exercise some sort of Parliamentary control over the Executive. I haven't changed my views since 1950!

THE CONTRACTION OF NEW ZEALAND'S LEGISLATIVE SYSTEM AND THE CENTRALIZING OF POWER

Since the passing of the Constitution Act of 1852, there has been an enormous contraction of the legislative system in New Zealand and an accompanying centralizing of power.

On the Act's passing there were Her Majesty, with substantial reserve powers that were, in fact, regularly exercised in practice. There was the Governor, also with some reserve powers. There were the Legislative Council and the House of Representatives. There were the Superintendents of the Provinces who had reserve powers, powers to initiate money Bills and power to suggest amendments to ordinances, which Professor Morrell[2] suggests made them "in effect a Provincial Second Chamber". And there were the Provincial Councils.

2 W P Morrell, *The Provincial System in New Zealand 1852-76,* s2d (rev) ed (1964) 59.

Most of this panoply has gone. There is now the Sovereign in right of New Zealand, with quite modest powers that are exercised by the Governor-General.[3] And there is the House of Representatives, which is the whole of the elected arm of the Parliament.[4]

In passing, I suggest that the powers that can be exercised by the Governor-General, especially in relation to inviting a party leader to form a government, could, of course, again become important under the new MMP electoral system.

But, in fact, the changes have been more dramatic than this reduction to the Sovereign, acting through the Governor-General, and the House of Representatives.

First, the power of the Executive over the Parliament has increased immensely; and, secondly, the growth of the party system with strict party discipline has greatly enhanced this power of the Executive. I recently heard a retiring Australian Senator, Senator the Honourable Terry Aulich, say that, even if you are a member of the party in Government,[5]

> a small group in cabinet – . . . they are a group of about three or four – can win the vote of the cabinet. Cabinet then wins the vote of the ministry as a whole, because remember that being in the outer ministry is like being close to Siberia but not actually in Siberia, which is where the backbench resides."

And Senator Aulich was talking about being a member of the party in Government.

However, Senator Aulich did go on to say that this was not true in the Australian Senate. This was so, because of the conjunction of the fact that no Government has had a majority in the Senate for many, many years and wasn't likely to have a majority in the near future and, particularly, because of the powers exercised by the Senate Committees.

Moderating the Executive's Power in Non-Majority Houses of Parliament in Australia

I have observed the Australian Senate from close at hand as an independent legal counsel for the last 12 years, and have seen the enormous power of the Senate and the Senate Committees.

Of course, in the case of the Bills coming before the Parliament each House places a brake on the other, as agreement between the Houses must be reached if a Bill is to be passed. However, in the case of delegated legislation, the power of the Senate is totally unfettered as any regulation or other piece of tabled delegated legislation can be disallowed – negated – by one House alone.[6] The Senate does regularly disallow delegated legis-

3 Constitution Act 1986, s14(1).

4 Idem.

5T Aulich, "Parliament's Last Stand" in *Parliament: Achievements and Challenges,* Senate Papers on Parliament No. 18 (1992) 71 at 77. Before he was elected to the Senate, Terry Aulich had been a member of the Legislative Assembly of the State of Tasmania and had held a number of ministerial positions.

6 Commonwealth of Australia Acts Interpretation Act 1901, s48(4)-(7).

lation. On the other hand, the House of Representatives never disallows. Indeed, nobody even bothers to move a motion of disallowance, as they know what the result will be.

My observations of the Senate have been added to with my experience as the Legal Adviser to the Australian Capital Territory Legislative Assembly's Committee on Scrutiny of Bills and Subordinate Legislation which was set up in 1989. The Assembly is a unicameral legislature, but in none of the three Governments since self-government has a major party had a majority in the chamber. Because of this, Committees have been enormously influential in the Assembly.

Some commentators have suggested that, where there have been absolute majorities in Lower Houses and not in Upper Houses, those Upper Houses have been the repositories of true democracy. There is no Upper House in New Zealand, so that aspect has no application.

THE MMP ELECTORAL SYSTEM WILL END THE "THREE YEAR ELECTED DICTATORSHIP" IN NEW ZEALAND

I now look at New Zealand. I respectfully accept the conventional wisdom. Under the MMP electoral system, no single party will get a majority of seats in the Parliament. That is, there will be a balanced or "hung" Parliament.

As a consequence, the era of the three year elected dictatorship of the major political party that is in power at the particular time will end.[7] As a further consequence, the monolithic powers of the Executive in New Zealand will be challenged and probably diminished.

I argue that a considerable part of that challenge can be taken up by the various kinds of Committees of the Parliament.

There have, of course, been Committees in the New Zealand Parliament for many years, and particular as the Committee system has been changed and has matured in recent years, much has been achieved by committees.

But, like in the All Black scrum, when push comes to shove, it is the weight, the will to win and the numbers that count!

7 Lord Hailsham is generally credited with introducing this description in his Dimbleby Lecture. See also his "The Role of an Upper Chamber in a Modern Parliamentary Democracy" in The Parliamentarian (1982) p290. As Harry Evans points out Lord Hailsham was not only critical of the "elective dictatorship" while in opposition: Harry Evans' "Parliament: An Unreformable Institution?" in *Parliament: Achievements and Challenges,* Papers on Parliament No. 18 (1992) 21 at 23. However, as Ferdinand Mount has pointed out: "As far back as the 1860s, we find Bagehot declaring that 'we have in Britain an elective first magistrate as truly as the Americans have an elective first magistrate'. Morley in his life of Walpole, 20 years later, asserts that the Prime Minister's power is 'not inferior to that of a dictator, provided that the House of Commons will stand by him'. Laski deduced from the political dramas of 1931 that 'our government had become an executive dictatorship tempered by the fear of parliamentary revolt'. So you will see that Lord Hailsham's view, expressed in his 1978 Dimbleby Lecture, that we were suffering from the perils of 'elective dictatorship' has quite a long ancestry." ("Parliament and the Governance of Modern Nations" in *Views of Parliamentary Democracy* Papers on Parliament No. 22 (1994) 1 at 2.)

At the Australian and Pacific Conference of Parliamentary Committees in Melbourne in July last year the Hon. David Caygill (with whom Doug Kydd from the Government side agreed) put the current New Zealand position. He emphasised the strongly non-partisan way in which the Regulations Review Committee of the Parliament has always worked. The Regulations Review Committee is the New Zealand Parliament's "protection of rights and liberties" committee and such committees are the least party political committees in all Australasian Parliaments. But, as David Caygill said:[8]

> [T]he fundamental problem facing New Zealand Parliamentary committees . . . in my view is the degree of independence from the government they can achieve . . . .
>
> New Zealand of course has no Upper House and a first-past-the-post electoral system, so by definition the government commands a majority in Parliament. It is therefore the case that decisions of the Regulations Review Committee and other committees can be ignored if they are controversial or inconvenient."

I respectfully agree that that puts the present New Zealand position very accurately. However, I suggest that that position will change substantially in a "hung" Parliament. The Parliamentary committees will exercise considerable power that a Government of any political persuasion will ignore at its peril.

The Kinds and Roles of Parliamentary Committees in New Zealand and Australia

Probably most Parliamentary committees in New Zealand and Australia can be fitted into four categories. I shall not use the conventional terms, as they appear to have slightly different connotations in different Parliaments. For example, the New Zealand subject area committees are called "Select Committees', although they are, in fact, permanent committees.

First, there are the internal management committees. Secondly, there are "protection of rights and liberties" committees. Thirdly, there are *ad hoc* committees. Fourthly, there are the permanent subject area or general purpose committees.

I look at each of these in turn.

(a) *The Internal Management Committees*

First, there is the internal management type of Parliamentary committee. These include such committees as the house committee, staffing committee, library committee, privileges committee and similar committees. I suggest that this kind of committee is irrelevant in the present discussion.

(b) *The Protection of Rights and Liberties Committees*

Secondly, there are the "protection of rights and liberties" committees – the watch dog committees. These are the committees that I feel that

8 "The New Zealand Approach to the Scrutiny of Bills" in *Proceedings of Fourth Australasian and Pacific Conference on Delegated Legislation and First Australasian and Pacific Conference on the Scrutiny of Bills* (28-30 July 1993) 6.

I can speak about with most confidence as I have both looked at the theory in the area and, more importantly, have been lucky enough to have been involved in practice with several.

These committees break down into two: those that scrutinise Bills as they pass through the Parliament and those that deal with delegated legislation. Both are looking at trespasses on rights and liberties.

(1) Scrutiny of Bills Committees

There are only three "scrutiny of Bills" committees in Australasia at present: in the Australian Senate,[9] in Victoria[10] and in the Australian Capital Territory.[11] Queensland, another unicameral Parliament, is moving towards setting up a scrutiny of bills committee and there is agitation in New South Wales and in some other jurisdictions.

There is no New Zealand Committee equivalent to the Scrutiny of Bills Committees that exist in Australia. Since 1986 there has been the non-parliamentary Legislation Advisory Committee, which reports to the Minister of Justice on certain aspects of Bills, but it is really an advisory Committee to the Executive rather than a Parliamentary committee.

In the Australian Senate there is a separate committee that has operated for almost 13 years. The very creation of the Senate Standing Committee for the Scrutiny of Bills indicates the power and independence of the Senate. The Executive Government strongly opposed the setting up of such a committee and successfully stone-walled for a couple of years. In spite of this opposition, the Committee was eventually established on 19 November 1981 for a trial period of six months under the umbrella of another committee. It was then established as a separate committee in May 1982, but not enshrined in the Standing Orders until March 1987.[12] In short, the Committee was set up against the wishes of the Government.

In Victoria and the Australian Capital Territory the same committee is responsible for both scrutiny of Bills and scrutiny of subordinate legislation.

As the Scrutiny of Bills Committees work on the same kinds of principles and deal with the same kinds of issues as the delegated legislation committees, I shall mention those aspects when discussing delegated legislation committees.

9 In the Commonwealth Parliament there is the Senate Standing Committee for the Scrutiny of Bills, which was constituted in November 1981.

10 In Victoria the Scrutiny of Acts and Regulations Committee was constituted on the passing of the Parliamentary Committees (Amendment) Act 1992. There had been a delegated legislation committee since the passing of the Subordinate Legislation Committee Act 1956, which was replaced by the Parliamentary Committees Act 1968.

11 In the ACT the Standing Committee on Scrutiny of Bills and Subordinate Legislation was constituted in October 1989.

12 Standing Order 24. The story of what was seen by the Government as the recalcitrance of the Senate (including especially several Government senators who supported the Senate's independent line) in the determination of the Senate to establish the committee is told in *Ten Years of Scrutiny — a seminar to mark the tenth anniversary of the Senate Standing Committee for the Scrutiny of Bills* (1991).

(2) Delegated or Subordinate Legislation Committees

I now turn to look at delegated or subordinate legislation committees.

Everyone accepts that, in a modern society, it is impossible for the Parliament to make all the law. Indeed, there is a paradox now that, in many jurisdictions, the elected members of Parliament make less law than is made by non-elected people making delegated legislation.[13]

This occurs because the practice has grown up of inserting in Acts of Parliament powers authorising someone else to make legally binding rules on Parliament's behalf.

Although the practice has grown apace in the 20th century, the concept is not new. The first piece of delegated legislation that any of us has been able to find in English law was made as early as 1835, but it was Henry VIII who perfected the technique.[14] Henry VIII gets the blame, as he does for so many things.

For instance, I recall a poster advertising the London Underground when I was in London with the Senate Regulations and Ordinances Committee a few years ago to speak at the Third Commonwealth Conference on Delegated Legislation at Westminster. There was Henry VIII buying a ticket to travel on the Underground saying:

> "A return ticket to the Tower of London please."

This had been carefully annotated by a graffiti artist:

> "And a single for the wife."

The first protection of rights and liberties committee in Australia was the Australian Senate Standing Committee on Regulations and Ordinances, which was set up in 1932, partly as a response to the concerns expressed by Lord Hewart in his *The New Despotism* concerning the growth of[15]

> "a despotic power which at the same time places Government Departments above the Sovereignty of Parliament and beyond the jurisdiction of the Courts."

The Senate committee was established on 11 March 1932 and anticipated the signing of the *Donoughmore Report*[16] which recommended simi-

13 In fact, when I advised the Senate Standing Committee for the Scrutiny of Bills for 13 months while a colleague was on leave as well as my normal task of advising the Senate Standing Committee on Regulations and Ordinances, I spent almost three times as much time as delegated legislation as on Bills.

14 An enactment of 1385 concerning the Staple appears to be the first instance in English law, but various statutes of Henry VIII's time, including the Statute of Sewers 1531 and the Statute of Proclamations 1539, perfected the technique. More detail on the development of the concept appears in D J Whalan, "Scrutiny of Delegated Legislation by the Australian Senate" (1991) 12 Stat L Rev 87, 88-90.

15 *The New Despotism* (1929) 14.

16 Formally the *Committee on Ministers' Powers* Cmd 4060 (1932) Recommendation XIV at p67.

lar committees for each House of the Parliament at Westminster by six days. The Senate committee was 62 on 11 March 1994, but its arteries have not hardened. All nine Parliaments in Australia and New Zealand now have a committee that scrutinises delegated legislation.[17]

In some jurisdictions the committee is a statutory creation and in others it is a standing committee of the Parliament. In all jurisdictions there is some kind of additional statutory back-up, varying from merely conferring power to disallow instruments, which all jurisdictions possess, through to setting out quite detailed principles that the committee is to apply.

In the Australian Federal Parliament and, of necessity, in the unicameral legislatures of New Zealand, Queensland, the Australian Capital Territory and the Northern Territory they are one-house committees. In the other Australian jurisdictions, New South Wales, South Australia, Tasmania and Victoria, they are committees of both Houses. The two-house system seems to work quite well. However, one matter that can make things a little more difficult is that, in some jurisdictions, an instrument must be disallowed by both Houses and not just one.[18]

In all jurisdictions the delegated legislation committees endeavour to act in a non-partisan manner and have a considerable measure of success in doing so. This has perhaps been carried through most successfully in the Senate committee, for on every occasion since 1932 that the committee has recommended to the Senate that an instrument be disallowed, the Senate has done so without fail.

The non-partisan approach is crucial to success. I have been lucky enough to have attended meetings of five different scrutiny committees and I don't think anyone attending any of those meetings, who did not know the members, could divine correctly the party allegiances of the members. Indeed, over the years, many members of committees have said to me: "I enjoy my work on this committee, because I can take off my party political hat at the door."

I keep saying that both scrutiny of bills committees and subordinate legislation committees are protection of rights and liberties committees.

17 Commonwealth Parliament: Senate Standing Committee on Regulations and Ordinances (established under Senate Standing Order 23); New Zealand: Regulations Review Committee (Standing Orders); ACT: Standing Committee on Scrutiny of Bills and Subordinate Legislation (Standing Orders); NSW: Regulation Review Committee (Regulation Review Act 1987); NT: Subordinate Legislation and Tabled Papers Committee (Standing Orders); Qld: Committee of Subordinate Legislation (Standing Orders); SA: Legislative Review Committee (Parliamentary Committees Act 1991); Tas: Parliamentary Standing Committee on Subordinate Legislation (Subordinate Legislation Committee Act 1969), and an amending Act, the Subordinate Legislation Act 1992, is awaiting proclamation); Vic: Scrutiny of Acts and Regulations Committee (Parliamentary Committees Act 1968); WA: Joint Standing Committee on Delegated Legislation (Standing Orders).

18 Victoria is one Parliament that, at present, requires disallowance by both Houses, but this seems about to change. The Scrutiny of Acts and Regulations Committee recommended the change to disallowance by one House in its *Report upon an Inquiry into the Operation of the Subordinate Legislation Act 1962* (1993) in para 6.1.25 and the Government *Response* to the Committee's *Report* accepted this recommendation in para 4.12 and attached *Drafting Instructions for the Subordinate Legislation Bill 1994* p ix.

What does this mean? I shall attempt to answer that, first by indicating some principles and, secondly, by giving some examples where those principles operate.

All nine jurisdictions have a set of principles that appear either in a statute or in a standing order. I don't cover all nuances, but there are threads running through them. I shall indicate a few basic principles that are common to most, if not all, of the jurisdictions in relation to delegated legislation. Some of the principles are not applicable to scrutiny of bills committees, of course, but the protection of rights principles are relevant. Delegated legislation committees scrutinise legislation to see that the instrument:

(1) Is valid or does not breach the power conferred by the statute under which it is made;
(2) Does not trespass unduly on personal rights and liberties;
(3) Does not make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers;
(4) Does not make rights, liberties or obligations unduly dependent upon administrative decisions that are not subject to review on their merits by a judicial or other independent tribunal;
(5) Is not of such significance that the matter should be in a Bill and subject to Parliamentary debate and not merely in delegated legislation.

These five principles are common to most committees in one form or another and are broad enough to encompass changes, expansions and contractions as times and ideas change. It is not an exhaustive list. Indeed, my list of the principles of all scrutiny committees covering the measures and variations is some three or four pages long.

I give a few illustrations of the kinds of issues that are raised by the committees:

prejudicial retrospectivity affecting individuals;

criminal law provisions reducing rights to trial by jury;

strict liability offences imposing criminal liability without proof of guilt;

conferral on officials of unreviewable discretions that could affect reputation or remove the right to practice a trade or profession;

powers to make sub-delegated instruments that are not subject to disallowance or control by the Parliament;

power given to officials to issue search warrants instead of such powers being given to judicial officers;

powers to search premises and seize documents without judicially issued search warrants;

reversal of the onus of proof;

self-incrimination.

These are just a few illustrations, but they give the flavour of the kinds of protection of rights issues that the committees take up. Indeed there is a passing parade of issues. An issue is raised, it is argued about and

a resolution reached. Those sponsoring legislation learn not to include the matters or learn to explain fully the reason for certain exceptional things that will raise the ire of scrutiny committees.

The fact that those sponsoring legislation learn not to include matters that will cause problems was well made by the Commonwealth's then First Parliamentary Counsel, Ian Turnbull, QC, when he said:[19]

> "I think it is safe to say that the provisions [that infringe the protection of rights principles] that get into Bills and come before the Scrutiny of Bills Committee are the tip of the iceberg. I think that a far greater number that would have offended have not been put in the Bills because we have advised the departments and the departments have had the sense to withdraw them. After all, when we say that the Scrutiny of Bills Committee does not like something, that is a powerful weapon in our armoury."

In a sense both scrutiny of bills committees and delegated legislation committees are "get in first" committees that endeavour to have legislation changed before individuals suffer.

Of course, not all legislation is perfect and we scrutiny addicts occasionally come across some mistakes, or complicated, nonsensical or simply interesting pieces of legislation.

For instance, this one. In Indiana in 1897 the politicians were having problems with the concept of pi. I don't mean American apple pie, but the 3.14159 pi. So they passed a law saying that in future pi=4. It did mean, however, that all pendulum clocks made in compliance with the law ended up being almost a quarter of an hour out every hour.

I am not making up the name of the Australian Commonwealth Act called the Laying Chicken Levy Act 1988, section 3B of which, in effect, provides that 106=100.

And this one for unreadability:

> "A security is a paired security in relation to a second security if the first security is a paired security in relation to a third security that is a paired security in relation to the second security (including a pairing with the second security by another application or other applications of this paragraph)."

I offer no prizes for guessing that it comes from the Income Tax Assessment Act 1936 of the Commonwealth of Australia.

It is perhaps defeated by the well-known Nuts illustration:

> "In the Nuts (unground) (other than ground nuts) Order, the expression nuts shall have reference to such nuts, other than ground nuts, as would but for this amending Order not qualify as nuts (unground) (other than ground nuts) by reason of their being nuts (unground)."

Perfectly logical, of course.

19 "The five principles: The Committee's terms of reference" in *Ten Years of Scrutiny — a seminar to mark the tenth anniversary of the Senate Standing Committee for the Scrutiny of Bills* (1991) 41 at 62.

And we have Australian Commonwealth delegated legislation that says: " 'day old chick' means poultry that is not more than 72 hours old." I sometimes wish for a day that long – but not always. And for shell fish to qualify as "live shell fish" they "shall not be dead".

So there.

I emphasised before that committees act in a non-partisan manner.

Another reason why delegated legislation committees are successful is that, unlike most other Parliamentary committees, they do not deal with party political policy matters. They are endeavouring to protect individual rights and liberties, upon which it is often much easier to achieve non-partisan agreement.

This insistence on keeping out of party political policy issues has the potential to cause problems.

On a few occasions, I have seen a committee dealing with delegated legislation in which there were both political policy issues and true protection of rights issues.

I mention one example.

> The export of wood-chips raises political temperatures in Australia from time to time. One set of renewals was under political policy scrutiny and relevant regulations were made.[20] But, in addition to the party political matters, there were genuine trespass-on-rights issues. One of those issues was that, under the regulations, certain policy decisions could be made by a departmental officer. There was provision for a party to have those decisions reviewed by the Minister. However, the Minister could delegate the power to conduct that review to a departmental officer. Under the regulations as they were at first, it was theoretically possible for the departmental officer to make a decision, change hats Pooh Bah-like and, acting under a Ministerial delegation of the review power, review his or her own decision. This was obviously a matter for concern.

In fact, while the political policy issues were being pursued in the political arena, the Committee pursued the rights issues. Not one word was said out of place at any time in the committee room about the political issues and the Minister agreed to amend the regulation to meet the Committee's concerns. The Minister did so very promptly.[21] I admired the integrity of the committee members immensely who served in the best non-partisan traditions of the committee.[22]

I think that the classic position of scrutiny committees avoiding policy issues and acting in a non-partisan manner was well put by the then Chairman of the Senate Regulations and Ordinances Committee, Senator

20 Export Control (Unprocessed Wood) Regulations Statutory Rules 1986 No. 79.

21 Export Control (Unprocessed Wood) Regulations (Amendment) Statutory Rules 1986 No. 327.

22 The details of the Committee's consideration of the regulations are fully reported in the Committee's *Eighty-Third Report* (April 1988) paras 5.70-5.78. The Notice of Motion to disallow is reported in the Senate *Hansard* for 3 June 1986, 3218 and the Notice of Intention to withdraw Notice of Motion and its accompanying statement are reported in the Senate *Hansard* for 22 September 1986, 621.

23 Senate *Hansard* for 4 June 1987, 3526.

Cooney, in "briefly summarising for the record the bipartisan role of the Committee"[23] for the Thirty-fourth Commonwealth Parliament:[24]

> "It should be stressed, however, that the Committee itself assiduously avoids questioning the policy or merits of delegated legislation. Its task is one of technical scrutiny in which it examines the justice, the fairness or the propriety of the way in which regulatory measures are determined and imposed. Properly limited by its narrow remit, it does not look for the political acceptability of the policy being pursued. That is the province of the Parliament itself. Rather the Committee looks for wisdom, fairness, justice and restraint in the regulatory procedures to be followed in achieving that policy. The Committee is concerned with the justice and propriety of ways and means. It is because of its avoidance of issues of policy that the Committee has traditionally been such a strong bipartisan force within the Senate. It is a backbench Committee whose members can temporarily set political differences to one side. The Committee's remit thus allows strongly held and shared principles of liberty and propriety to create and underpin that bipartisan spirit which is the soource of the Committee's authority in the Chamber, and beyond that in the Government and the Public Service. Even though the pressures can occasionally be considerable, no Senator who has served on the Committee has ever been known to betray that bipartisan loyalty to principled scrutiny."

Although I have not been directly involved in such a problem, I think there could be a very difficult test for the scrutiny committee principles of non-partisanship and non-interference in policy matters. To illustrate, I choose a principle that appears in the briefs of all committees in one form or another. That is, the principle that a bill or subordinate law should not "trespass unduly on personal rights and liberties".

What if a bill or regulation does breach those principles blatantly? But is it a matter of quite deliberate Government policy to over-ride an existing right of the kind that the scrutiny committee would normally object to?

How does a committee that is committed to the protection of rights, but which does not involve itself in policy, deal with such a provision?

That is a difficult question to answer in a Parliament where the numbers of a majority party reign supreme.

However, I argue that, in a "hung" Parliament, all options are open to the committee and it is for the committee to decide what might be best to do in the particular circumstances of the case. Certainly, if it opted to go for an amendment to negate a provision in a Bill or for a motion for disallowance of a piece of delegated legislation, the committee would have a much better chance of getting acceptance of its considered view in a "hung" Parliament.

So, even in this area of protection of fundamental rights, the "hung" Parliament offers a greater opportunity for committees to exercise power.

(c) *The Ad Hoc Special Issue Committee*

Thirdly, there is the *ad hoc* one-off committee that is set up to look at a special issue, make a report and is then discharged. In the last few decades in New Zealand and also in Australia, particularly in the Australian Senate, there seems to have been a move away from this kind of

24 Ibid at 3528. Reprinted in the Committee's *Eighty-Third Report* (April 1988) 9, 15.

committee. Nevertheless, on occasion, a special problem will arise and a House will refer an issue to a committee on the basis that the less formal milieu may be a better forum to deal with the matter.

(d) *The Permanent or Semi-permanent Committee*

In all Australasian jurisdictions the move has been towards the setting up of the fourth kind of committee. This is the permanent or semi-permanent committee that looks after a specified area.

This move gained momentum in New Zealand in the 1960s after the *Algie Report* of 1962[25] and matured in the 1980s after the Statutes Reision Committee took some initiatives. The present position is that there are 13 subject-based committees. To someone like me who is not familiar with their working, they appear to cover virtually all aspects of public administration and the areas covered by every Government Department.[26] The Australian Senate inaugurated a full-blown committee system in 1970, although there have been additions to, and changes in, the list as well as the development of the relatively new procedure of referring bills to standing committees with the aim of reducing time and repetition in the Chamber.[27] A very recent Senate report flags further changes including the possibility[28]

> "that committee membership and the distribution of chairs should reflect the membership of the Senate not, as at present, provide a majority to the government of the day."

Of course, the New Zealand Regulations Review Committee has been chaired by a member of the Opposition since its inception, but this would be an innovation in the Senate and perhaps is yet a further demonstration of the way in which a "hung" chamber can operate.[29]

25 The Delegated Legislation Committee 1962 (1962) AJHR, 1.18. Incidentally, although recommending the expansion of Standing Orders to include protection of rights matters that are very similar to those that are in the terms of reference of the present Regulations Review Committee, the Algie Committee rejected the "idea of creating a separate Regulations Review Committee. It believed then that the work of supervision was already being carried out adequately by the law draftsmen and by an advisory officer in the Justice Department": *Statutes Revision Committee 1985 First Report on Delegated Legislation,* paras 2.5 and 2.6. As a believer in the Parliamentary Committee system, I have wondered where this idea that it was not appropriate to allow Parliament to scrutinise legislation made in its name came from in the Algie Committee.

26 Standing Orders Part XXIII deals in detail with the Select Committees and Standing Order 345 sets out the details and responsibilities of each of the 13 Committees.

27 The new procedure was adopted by the Senate in November 1989.

28 Senator Michael Beahan, President of the Senate, in a paper "Can the Senate Cope with Executive Accountability?" at the *25th Conference of Presiding Officers and Clerks* in Darwin on 23 June 1994. The report on possible changes was tabled in the Senate in June 1994 and will be considered in the Spring Session starting in August 1994.
At present all Standing or Estimates Committees are chaired by Government Senators. But, in a break with the past, of the four Select Committees in existence at the time of writing one is chaired by a Government Senator, two are chaired by Opposition Senators and one by an Australian Democrat Senator.

29 Since this Lecture was delivered, the Report has been adopted by the Senate and its detailed application will be developed and put into operation on 10 October 1994.

In both New Zealand and Australia, the committees appear to have been very active both in their consideration of current issues and their consideration of bills referred to them. In both jurisdictions extensive changes have resulted from action within the committees. Frequently the Bill that comes out of a committee is much altered from the Bill that went into the committee.

There has also been an active public consultation process and it would be interesting to know how much of the change in the Bill has been influenced by that consultation process. Committees take the Parliamentary process to the people. It is a public opportunity for people to influence the passage of legislation. Although there may be private lobbying, there is no such public opportunity for people to speak, if the Bills stay in the Chamber. If members of the public do comment in such circumstances, they are likely to be publicly removed or locked up!

ASSESSING THE IMPACT OF PARLIAMENTARY COMMITTEES

(a) *Some Australia-New Zealand Comparisons*

There is an even more important comparison that is relevant to the argument that I am advancing tonight about the possibly increased influence of Parliamentary committees in a "hung" Parliament.

This would be to look at the measure of changes made to legislation as a result of Parliamentary committee action in the three Australian jurisdictions where there are "hung" Houses.

First, in the Australian Federal Parliament we have noted that there has not been a party majority in the Senate for a long time and the impact and influence of committees have grown substantially. Secondly, although the experience only goes back to 1989 when self-government commenced in the Australian Capital Territory, and where there has not been a major party majority at any time, the power of the committees of all kinds in the unicameral Legislative Assembly has certainly been very great. The third Parliament is New South Wales where, in very recent times, the Houses have either been, or been close to being, "hung" Houses and the influence of those holding the balance of power appears to have been substantial.

It would be interesting to compare the measure of changes made as a result of committee initiatives in those three jurisdictions with the changes that have been made to Bills in the New Zealand system and in the other Australian jurisdictions where Governments have not had to contend with a "hung" House. This analysis would be very relevant to the "hung" Parliament debate. There has been no comparative statistical work done on this issue of which I am aware, so my view must be impressionistic.

Despite the success of committees in New Zealand, and the Australian jurisdictions with Government majorities, in getting changes, my impression is that the comment I quoted from David Caygill earlier that "committees can be ignored if they are controversial or inconvenient" holds true. It is not true for the three jurisdictions with "hung" Houses.

I gain some support for this, I believe, from my reading of a spate of writing in New Zealand in recent years, mostly in the context of arguing

for the return of a second chamber, as a means of tempering the power of the Executive and the three year dictatorship.[30] In short, the numbers still count and I retain the impression that the strict party system has meant that committees have had less success in achieving major policy changes than in the jurisdictions where there is more bargaining power.

(b) *Overcoming Possible Policy Paralysis under MMP — "This Damn Place is Starting to be run by Backbenchers"*

I have been concentrating on the potential power that committees are likely to have in the New Zealand Parliament under the MMP system. However, there are two sides to the exercise of this power. Responsibility should always go with power. Power can be exercised to make Parliament a more democratic and representative institution. But, on the other hand, an elected Government must be permitted to get on with governing, must not be unduly inhibited in that process and must be permitted to put its policies into place.

As always, the *Yes Minister* series helps us out in our dilemma.

On the one side the Minister, the Honourable James Hacker, complained that:[31]

> "the system was designed to prevent the Cabinet from carrying out its policy."
> "Well, somebody had to," was the unhelpful answer.

The opposite view was put at the legislation conference in Melbourne in July last year that I mentioned earlier. It was put by Adrian Cruickshank, who is the Government member who chairs the New South Wales Regulation Review Committee. He said:[32]

> "[T]here is a distinct division between the Executive and the rest . . . . One minute [Ministers] say they are grateful for having the Regulation Review Committee because they know nothing will get past it and everything will be fairly dealt with. That is until something goes against them and the next thing one is coming out of the lift and passes a Minister who says: 'This damn place is starting to be run by backbenchers'."

There will be a multi-party system under MMP and this will end the present three year elected dictatorship of any majority party in power at a particular time. However, under the MMP system, the danger is that the multi-party system could prevent a Government from putting its policies in place. Unless those who hold the balance of power exercise their

30 R J O'Connor "A second chamber for the New Zealand Parliament?" [1988] NZLJ 4; Editorial "Constitutional arrangements" [1990] NZLJ 341; Editorial "Electoral Reform" [1990] NZLJ 377; Editorial "A second chamber" [1990] NZLJ 421; and R J O'Connor "The form and powers of a new Second Chamber of Parliament" [1991] NZLJ 6.

31 Jonathan Lynn and Antony Jay *The Complete Yes Minister* (1988) 435.

32 Adrian Cruickshank "Why is regulatory scrutiny so far in advance of the scrutiny of Bills?" in *Proceedings of Fourth Australasian and Pacific Conference on Delegated Legislation and First Australasian and Pacific Conference on the Scrutiny of Bills* (28-30 July 1993) Transcript of Proceedings p69.

power responsibly, the possibility for stalemate or for policy paralysis exists, with the Executive unable to implement policy. The possibility that government of the country could be destabilized is a real one. This would be a very worrying prospect for New Zealand.

For the proper exercise of democracy, there need to be adequate checks and balances. While checks on power are important, it is equally important that there should not be just checks and no balances.

Other forces will be at work, too, but tonight I have concentrated on Parliamentary committees as a major factor in the Parliamentary and governing process. Although I have argued that the exercise of power by Parliamentary committees can be a significant aspect of the democratic process, that power will need to be exercised with responsibility to ensure that there is no policy paralysis. I adapt the ancient Chinese curse and suggest that, as the MMP electoral system comes into operation during the next few years:

> "Those involved in the Government and Parliamentary Committee processes will live in interesting times."

We recall George Ade's comment that:

> "The music teacher came twice each week to bridge the awful gap between Dorothy and Chopin."

Could Parliamentary Committees be an influence in bringing Chopin-like harmony to help to bridge the gap between the Executive and the Parliament and help to dispel Dorothy-like dissonance?