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**Spoilt for a Ha'p'worth of Tar:  
How Bureaucratic Law-making  
can Undermine the Ideals  
of Civil Liberty**

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## PAPERS ON PARLIAMENT

This is the first of a series of occasional papers on subjects related to Parliament and parliamentary government, published by the Department of the Senate, and written by persons working in and around parliamentary institutions.

There are not many vehicles for the publication of material about Parliament. It appears that there are only two Australian parliamentary journals: *Legislative Studies*, published by the Australasian Study of Parliament Group, and *The House Magazine*, a privately published news and information letter centred on Parliament House in Canberra. Other publications which should devote some attention to parliamentary matters show a decided lack of interest in, if not distaste for, items on parliamentary topics. This is understandable: publishing a journal is an expensive business, and there is room for only so many in the market. It is regrettably true that the market for parliamentary material is small. Those with an interest in Parliament as such are not numerous.

That in itself bespeaks a danger that parliamentary institutions may be, to use the word of this first paper, withering, and amply justifies this attempt to provide, without the costs and difficulties of a published journal, another vehicle for examination of Parliament.

This first issue consists of an article on law-making by executive governments, a reflection of the transfer of the legislative function away from parliaments which has been the most notable development in government during this century. A future paper will deal with another aspect of this problem. Another will show how a misinterpretation of precedents can lead to a distortion of constitutional practice. Other papers planned include a longer essay offering an analysis of the theory and practice of parliamentary government, an appropriately philosophical matter for an early issue.

It will be a mixed bag, and deliberately: no attempt will be made to impose themes or structures on the papers. The only connecting thread will be a belief that parliamentary matters are worthy of examination and discussion and, perhaps, that Parliament as an institution needs attention if it is to retain any relevance. It is hoped that the ends of reform and conservation (which, as Burke suggested, amount to the same thing) may be served by offering interesting and stimulating discussions of miscellaneous issues having to do with Parliament.

The authors of the papers will be identified, as is proper, and needless to say any opinions expressed will be those of the authors and not of the Senate Department. Opinions there will be, but not partisanship, and controversy will not be avoided, for such avoidance is of no help to any great institution.



## **Spoilt for a Ha'p'worth of Tar: How Bureaucratic Law-making can Undermine the Ideals of Civil Liberty \*\***

*Peter O'Keeffe*

“Bureaucracy is the term usually applied to a system of government, the control of which is so completely in the hands of officials that their power jeopardises the liberties of ordinary citizens.”<sup>1</sup>

“Delegated legislation can be important. For many waterside workers and their legal representatives, the amendments to the regulations under the *Transport Workers Act 1928* made by the Scullin government in 1930 were probably more important than all the rest of that ill-starred government's legislation put together.”<sup>2</sup>

“The government lawyer's duty ... is more than to remain within the law. He has a duty to use his best judgment to determine to what extent the resources of the government should be brought to bear on a particular problem. The problem is essentially one of fairness, that is, the responsible exercise of power.”<sup>3</sup>

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1. Harold Laski, *Encyclopaedia of the Social Sciences*, 1930, p.70
  2. Geoffrey Sawer, 'Who Controls the Law in Australia', *Australian Lawyers and Social Change*, Hambly and Goldring (eds.), 1976, p.118
  3. Patterson, L R and Cheatham, E E, *The Profession of Law*, 1971, p.184

[A former Chairman of the Senate Standing Committee on Regulations and Ordinances asked Sir Robert Garran about its role.] “As a man who helped with the framing of the Constitution, Sir Robert replied that this was the most important Committee in Parliament because its duty was to see that Parliament ran this country with legislation and that the Executive did not do so by regulations and ordinances.”<sup>4</sup>

## Introduction

The foregoing quotations are designed to give some flavour to the themes which I wish to pursue in this essay and which are illustrative of the dangers which attend the making of ministerial or departmental legislative decrees. A dramatic Australian critique of the abuse of delegated law-making came from Maurice Blackburn who was described as the conscience of the Labor movement in the 1930s and 40s and who, as a radical but committed parliamentarian, was one of the most remarkable and independent Labor Party back-benchers of his generation. In opposing the width of the regulation making power conferred on a Minister by the *National Security Bill 1939* he observed that “the Bill surrendered ‘the principle of democracy for which we are supposed to be fighting, and adopts our enemy’s principle of totalitarianism because like totalitarianism, it combined executive and legislative powers’”.<sup>5</sup> That is one arresting point of view. I propose to examine the issue of whether the use of delegated legislation is inimical to parliamentary government and the preservation of personal rights and liberties initially by discussing the concept of delegated law-making and then offering some views on justice and the ideals of civil liberty as they affect and are affected by the subordinate law-making process. I will then turn to examine the sociological nature of government bureaucracy and its role in the legislative process, particularly the role played by government lawyers. Through a number of references to the reports of the Senate Standing Committee on Regulations and Ordinances I hope to illustrate how bureaucratic law-making at the Commonwealth level could, but for the intervention of that Committee, have undermined particular personal rights and liberties. My examples spring from federal instruments though I do not doubt that similar transgressions arise in the states. Lastly, I propose to reveal the constituents of my ha’p’worth of tar to protect the rights of individuals, conscious of Franklin’s warning that “a small leak will a great ship sink”.

## The Practice of Delegated Legislation

Pearce has defined delegated legislation as those “instruments that lay down general rules of conduct affecting the community at large, which have been made by a body expressly authorised so to act by an Act of Parliament”.<sup>6</sup> Attitudes to such instruments have varied over time. When he published *The New Despotism* in 1929, Lord Hewart was trenchant in his condemnation of “departmental legislation”, “bureaucratic conspiracy” and “administrative lawlessness”. On the other hand de Smith, less anxious, referred to the “tedium of wading through a mass of obtruse

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4. Senator Ian Wood, Senate Hansard, 16 April 1970, p.868

5. Blackburn, S, *Maurice Blackburn and the Australian Labor Party 1934-1943*, 1969, p.23

6. Pearce, D, *Delegated Legislation in Australia and New Zealand*, 1977, p.1

technicalities barely comprehensible to anyone lacking expert knowledge of the subject matter”, a dull enterprise even for those who, like legislative scrutineers, possess the requisite moral stamina.<sup>7</sup> Yet, historically, the governmental practice of devolving law-making powers to a neo-sovereign delegate is an old and well established one in the common law world. There were, for example, many independent modes of legislation in medieval England, from manor by-laws to the regulations of city corporations and rules of court.<sup>8</sup> However, the scope of subordinate legislation was greatly increased during the nineteenth century by three developments. Firstly, with the passage of the *Reform Act 1832* there dawned the era of collectivism, “a period of social and legal reform unprecedented in our history”<sup>9</sup> when every aspect of social life came under review from public health and education to labour law and company law, from criminal law and family law to land law and judicial procedures, from scientific inventions to railways and waterworks. Secondly, these complex, at times almost revolutionary, initiatives were dealt with legislatively by a parliament which could not hope to anticipate the practical administrative problems with which the fledgling bureaucracies would be confronted in implementing grand principles and reform strategies. Thus, there grew up the practice of inserting in statutes which established special authorities wide regulation-making powers enabling, for example, Poor Law Commissioners, local authorities and other bodies to make rules and by-laws. With the development and growth of a centralised civil service capable of taking over these roles and powers, the ground-work for modern Westminster-style corporate democracy was laid on foundations of necessity and efficiency. Redlich and Hirst noted in 1903 that

“the new central departments, created in the nineteenth century, have been fitted into parliamentary government and brought under the sovereignty of Parliament. The task of the Legislature has been to extend and intensify the work of the internal Government without reviving the ghost of the Star Chamber, to preserve the rule of law without stinting or starving administration.”<sup>10</sup>

Thus, as Maitland had forecast in 1887, the “new wants of a new age [had] been met in a new manner by giving statutory powers of all kinds ...”.<sup>11</sup> In Wade’s view the stage reached now, after more than 100 years of bureaucratic development, is that “there is no more characteristic administrative activity than legislation”.<sup>12</sup> Indeed, Garner has observed that subordinate legislation has become a feature of all modern states “now that governments expect, and are expected, to intervene actively in economic, social and welfare matters”.<sup>13</sup>

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7. de Smith, S A, *Constitutional and Administrative Law*, 1977, pp.322-3

8. Harding, A, *A Social history of English Law*, 1966, p.229

9. Allen, C K, *Laws and Orders*, 1965, p.29

10. Redlich and Hirst, *Local Government in England*, 1903, p.364, quoted in Allen, C K, *Law in the Making*, 1969, p.532

11. Maitland, F W, *The Constitutional History of England*, 165, p.417

12. Wade, H W R, *Administrative Law*, 1977, p.695

13. Garner, J F, *Administrative Law*, 1985, p.48

Obviously such an abrogation of the central parliamentary principle of legislative sovereignty is problematic and the whole question of delegated law-making sits uneasily within the parameters of parliamentary government. Garner offers the presumption that in the “ideal democratic state the function of legislating should be restricted exclusively to legislators ‘responsible’ to the electorate”.<sup>14</sup> The theoretical compromise, which the rise and ascendancy of party-political government has negated, is that authority to legislate emanates from a free and sovereign Parliament, while the exercise of some of the power is entrusted to subordinate executive bodies. In practice, however, as Garner more realistically puts it, “the Government secures from Parliament such subordinate legislative powers as it wishes for itself”.<sup>15</sup> When the Parliament is restricted by the rigidities of the party system, then the scene is set for the dominance of executive government and the withering of parliamentary government. There is more than one Parliament in Australia where the executive has a greater control over the Parliament than the pure theory of parliamentary government would allow. The dangers inherent in this were unrestrainedly expressed by Lord Hewart who spoke of the making of regulations “behind the back of Parliament, which came into force without the assent or even the knowledge of Parliament”.<sup>16</sup>

It was fortunate that in 1932, the Donoughmore Committee<sup>17</sup> cleared the air somewhat when it reported on the real practical necessity for delegation of law-making powers. The Committee’s justifications are, of course, familiar to any administrative lawyer. Firstly, scarce parliamentary time should be spent in “the consideration of essential principles in legislation”<sup>18</sup> and not wasted in examining the technicalities of implementation and administration best delegated to subordinate instrumentalities. De Smith commented that

“Few members [of Parliament] will have the expert knowledge required to table and debate amendments to highly technical legislation; but a dogged group of the initiated can consume parliamentary time in this way often with the ulterior purpose of impeding a Government's general legislative programme.”<sup>19</sup>

Secondly, delegation of law-making discretion can ensure a timely response to unforeseen contingencies and lend flexibility to public administration enabling it to anticipate the unforeseen minutiae of day to day state management. It also allows for experimental initiatives which can be quickly terminated or adjusted as required. Lastly, the creation of enforceable legal rules by delegates on the spot is often the only realistic means of addressing emergency

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14. op. cit.

15. op. cit.

16. Hewart, *The New Despotism*, 1929, p.19

17. Report of the Committee on Ministers’ Powers, (1932), Cmd. 4060 (the Donoughmore Committee)

18. op. cit., para. 11, p.51

19. de Smith, *supra* n. 7, p.325



situations, for example during a parliamentary recess, or to deal with an urgent administrative problem of domestic or international origin. Certainly, a bill can be rushed through all of its stages in both Houses within a few hours, as was the case with the *Parliamentary Commission of Inquiry Act 1986*, but generally this can only happen in exceptional circumstances.

The uncritical acceptance of some of the traditional justifications for delegated legislation is, to some extent, dangerous to Parliament, liberty and democracy. The argument that Parliament does not have sufficient time to be concerned with all matters of detail inevitably leads to the enactment of “mere skeletons, with the appropriate Minister being empowered to add the details by means of regulations ...”.<sup>20</sup> This process can, of course, result not only in the practice of subordinate policy making but also in the rapid development and increase of large ministerial and administrative discretions, conferred by the Minister and the bureaucracy on themselves. Thus although the enabling bill is said to encapsulate the policy which will direct the administration of the programs established by it, there will inevitably emerge a myriad of administrative policy options from which important choices, involving issues of substance and principle, will be made and given the force and permanence of executive decree without direct parliamentary involvement. The Donoughmore Committee was aware of this problem and it reported that

“matters of principle transcending procedure and the details of administration, matters which closely affect the rights and property of the subject may be left to be worked out in the Departments with the result that laws are promulgated which have not been made by, and get little supervision from, Parliament”.<sup>21</sup>

Allen too has observed that

“there are a good many examples of leaving to delegated legislation ‘sticky details’ which are not really details at all but turn out to be matters of essential principle”.<sup>22</sup>

Indeed, when it amended its own principles of legislative scrutiny in 1979, the Senate Regulations and Ordinances Committee noted that

“it is very doubtful whether delegated legislation can now be restricted to ‘administrative detail’, if indeed it could even in 1932. Some delegated legislation, such as ordinances of the territories, by its very nature contains substantive legislation. The Parliament has also seen fit in recent years to pass an increasing number of statutes leaving substantive matters to delegated legislation”.<sup>23</sup>

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20. Garner, *supra* n. 13, p.49

21. Donoughmore Committee, *supra* n. 17, para. 12, p.53

22. Allen, *supra* n. 9, p.154

23. Pearce, *supra* n. 6, p.154

Of the Australian scene also, Pearce has written that

“There will be numerous occasions on which the parliament leaves the resolution of policy to its delegate because the nature of the subject matter is such that policy must be formulated on a day to day basis.”<sup>24</sup>

Thus, almost every Territory Ordinance made by a Minister will be a substantive enactment, little different in substantive policy content from the legislation passing through state parliaments. So too a wide range of statutory rules will make new policy initiatives, notwithstanding that these instruments represent administrative policy choices and not necessarily political policy choices though political policy choices do also appear entrenched in regulations. The list could include regulations concerning: customs and excise, banking and company law, public service employment and superannuation, extradition, defence force discipline, export control, diplomatic privileges and immunities, implementation of treaties, air navigation, the prevention of judicial review under the Administrative Decisions (Judicial Review) Act (for example, in the Builders Labourers' Federation deregistration controversy and the Parliamentary Commission of Inquiry Regulations) and limits on the scope of the operation of some Acts (for example the operation of the Sex Discrimination Act on state and territories legislation).

Another problem is the generally increasing complexity of legislation per se. Even a modest bill will be a complicated instrument. The trend to reduce apparent complexity by hiving off large areas of substance and policy to later promulgation by the executive outside Parliament may sometimes look as if it conceals an ulterior motive. Yet, experience has shown that mere length or complexity are not likely to deter “inexpert” members of parliament, who object to some aspect of a bill, from moving amendments prepared on request by expert parliamentary counsel where these are made available to parliamentarians.

Finally, it is true that delegated legislation has the attribute of being a flexible, responsive and versatile way of establishing a forceful and authoritative administration but so too was the monarchical power of decree under Henry VIII's *Statute of Proclamations 1539*. Its most useful attribute, of course, is the sheer power which delegation gives to those entitled to make and unmake the law, power which made it possible for the English author John Willis to write a scholarly work with the remarkable title “The Parliamentary Powers of English Government Departments”.

It is not, therefore, impossible to agree with Freund who, writing in 1928, said that “it is extremely difficult to formulate a generally valid principle of legitimacy of delegation”.<sup>25</sup> Parliament cannot realistically govern without delegating law-making powers to its subordinate executives, yet by doing so it mortgages a large dimension of its supremacy simply to allow parliamentary government to govern. However, few would argue that, whatever its hybrid and dangerous nature, delegated legislation is not a necessary adjunct of parliamentary government. It is, as the Donoughmore Committee pointed out, indispensable, and the complaint of critics “lies rather against the volume and character of delegated legislation than against the practice of

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24. Pearce, supra n. 7, p.154

25. Freund, *Administrative Power Over Persons and Property*, 1928, p.218, quoted in Pearce, supra n. 7, p.5

delegation itself”.<sup>26</sup> de Smith advances the argument that “root and branch attacks” on delegated legislation have been prompted by those with “a hearty dislike of public encroachments on freedom of property and contract”, who would have found similar regulatory provisions in Acts of Parliament no less offensive.<sup>27</sup> Although in Australia delegated legislation tends not to affect property or contract rights as much as more personal rights, the work of the Senate Standing Committee for the Scrutiny of Bills suggests that there is indeed a close correspondence between the respective criticisms of primary and secondary legislation advanced by both of the Senate’s legislative scrutiny committees.<sup>28</sup>

## Rights and Liberties in Delegated Legislation

Expressly arising from its dubious effect on parliamentary sovereignty, delegated legislation may have an inherent tendency to undermine personal rights and liberties. This is the view of those who subscribe to the idea that it is an inevitable requirement of the executive, and the bureaucracy that serves it, to reduce if not subvert rights, personal and parliamentary, in the interests of power and efficiency. Certainly Kamenka and Tay have suggested that

“the bureaucratic-administrative *society* elevates the concept of legality, of action according to regulations to which human beings are subject, by which their status and their consequent rights and duties are determined. It sees ‘justice’, when opposed to ‘legality’, as a subversive concept”.<sup>29</sup> (emphasis added)

Yet the justice of particular instruments of delegated legislation depends primarily on the scale of values which obtains in a given society and which is reflected in the legal system of that society. Rawls has offered a functional definition of a legal system as ‘a coercive order of public rules addressed to rational persons for the purpose of regulating their conduct and providing the framework for social co-operation’.<sup>30</sup> As Lloyd has pointed out, however, “in every legal system it may be said that there is, at least implicitly, built into it some kind of value system which the law reflects”.<sup>31</sup> Lloyd has also contended that “we cannot deny the existence of law when it admits of no softening of its asperities on equitable grounds”. Thus, he adds, while “law might lose its character of law by an excess of caprice in its administration ... it could hardly cease to

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26. Donoughmore, *supra* n. 17, para. 12, p.53

27. de Smith, *supra* n. 7, p.323

28. See for example, Tate, Senator M, *The Work of the Australian Senate Standing Committee for the Scrutiny of Bills*, Parliamentary paper No. 3/1984, and *The Operation of the Australian Senate Standing Committee for the Scrutiny of Bills*, parliamentary Paper No. 317/1985

29. Kamenka, E and Tay, A E S, ‘The Sociology of Justice’, in *Legal Change, Essays in Honour of Julius Stone*, 1983, p.113

30. Rawls, j, *A Theory of Justice*, 1980, p.235

31. Lloyd, D, *The Idea of Law*, 1968, p.135

be law because of its rigid application according to its tenor”.<sup>32</sup> Such a philosophy tends to ignore the belief that unjust laws are not ‘real’ laws, an outlook which has a respectable intellectual pedigree in legal philosophy.

To maximise its long term stability and effectiveness, the purest of positive laws cannot fail to resort to implicit or unwritten principles of legal decency and orderly government. *Pace* Ross, there must an *a priori* principle of justice to act as a template for the exercise of legislative power.<sup>33</sup> Ginsberg has theorised that

“the central core of the idea of justice is not the requital of desert but the exclusion of arbitrariness and more particularly the exclusion of arbitrary power. Hence the enormous importance of the growth of legality, the emergence of the notion that persons are under the rule of law and not of men”.<sup>34</sup>

For Ginsberg justice and legality are equated and ‘the aim of justice is to give protection against arbitrary power’.<sup>35</sup> Delegated legislation, no less than Acts, must reflect this quest for justice or fairness or decency. A bill for an Act is subject to the full scrutiny of two Houses of Parliament, the media, the courts, the legal profession and the public in a glare of analysis the mere threat of whose intensity is usually sufficient to prevent the drafting of undue infringements on personal rights and liberties. The justice of primary legislation is subject to constant public assessment and reassessment. On the other hand any particular instrument of delegated legislation at the Commonwealth level is one of up to 900 such instruments made annually. Most of these are not self-contained enactments and their significance can be assessed only after they have been pieced into the jigsaw of earlier instruments. Subordinate laws are subject to the scrutiny of a Senate Committee of busy Senators, assisted by one part-time legal adviser, one (occasionally legally qualified) secretary, one stenographer and one clerical assistant. With such limited resources parliamentary control over delegated legislation cannot be an effective means of protecting rights and liberties unless the drafting of the bulk of the legislation is consciously, constantly and consistently informed by, and based on, an *a priori* principle of justice.

In theory that should not be a difficult goal to attain nor indeed should its express and constant pursuit be a disputatious item on a legal drafter's agenda. Rawls has said of justice that it is

“the first virtue of social institutions ... [It] denies that the loss of freedom for some is made right by a greater goal shared by others ... [T]he rights secured by justice are not subject to political bargaining or to the calculus of social interests ... [A]n injustice is tolerable only when it is necessary to avoid an even greater

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32. Lloyd, *supra* n. 31, p.128

33. Ross, A, *On Law and Justice*, 1958, discussed in Ginsberg, M, *On Justice in Society*, 1971, p.53

34. Ginsberg, *supra* n. 33, p.63

35. *op. cit.*

injustice. Being first virtues of human activities, truth and justice are uncompromising”.<sup>36</sup>

In post-industrial society, law is hardly merely a matter of class interest, a single-purpose tool to protect *economic* interests. Yet at one level delegated legislation is functionally dedicated to the protection of administrative<sup>24</sup> interests. It is in my view arguable that for this reason delegated legislation as a source of law differs in kind from parliamentary and judge-made law. It contains inherent tendencies to displace from centre stage the human personality and its freedom so central to, for example, Ihering’s legal philosophy<sup>37</sup>, in order to elevate, *for its own sake*, the rationality, regularity and predictability of bureaucratic law as a rigid system of rules. This may be an inherent tendency since it reflects one of the essential characteristics of the traditional bureaucratic *modus operandi*.

This can have two effects. Firstly, positively, it can reduce potentially arbitrary, private, administrative discretions and locate them clearly and publicly within the identifiable framework of the rule of law. Secondly, negatively, however, it can reduce rights by excluding the principle of individual justice from a process which, by definition, focuses on collective administrative efficiency rather than on individual administrative justice. It is tailored to meet the needs of a large scale, impersonal, administrative endeavour, in other words to satisfy the requirements of the phenomenon of that same modern governmental bureaucracy which gave extra-parliamentary law-making its second birth. Kamenka and Tay have, to some extent, already explored this theory. They have noted, for example, that

“in the bureaucratic-administrative type of *regulation*, the presupposition and concern is neither organic human community nor an atomic individual; it is a non-human ruling interest, public policy, or organising activity, of which human beings and individuals are subordinates, functionaries or carriers ... The relation of bureaucratic administration to *people as subjects and not as objects* is never direct, but mediated through the policy, plan or *regulations that purport to have human needs* as well as technical requirements for their foundation”.<sup>38</sup>(emphasis added)

The primacy of the administrative imperative on which delegated legislation rests, inveighs against the secondary imperative of justice. If, for Stammler, right law was just law, for the traditional bureaucrat right law is administratively efficient law. For Stammler, “right law requires ethics, for only ethics produce the right attitude in rulers and ruled, namely, the commitment to the ‘right’, which is necessary for the realisation of right law”.<sup>39</sup> For the bureaucratic law-maker, right law requires only that it solves, with certainty, precision and

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36. Rawls, supra n. 30, pp.3-4

37. See Friedrich, C J, *The Philosophy of Law in Historical perspective*, 1969, p.155

38. Kamenka and Tay, supra n. 29, pp.113-4

39. Friedrich, supra n. 37, p.159

completeness an administrative problem. Considerations of justice and ethics do not automatically arise unless they are injected into the delegated law-making process by influences external to traditional bureaucratic concerns. Where those influences do prevail the postulates of justice are grafted on to the instrument of delegated legislation. I suggest that the instrument thereby commands the genuine obedience that makes society stable. Lesser laws and lesser forms of obedience will progressively unhinge social structures.

In 1928, Duguit wrote that “to refuse to obey a law which is contrary to what is right is entirely legitimate”.<sup>40</sup> A parliamentary power of disallowance over delegated legislation (on the grounds of principle rather than policy) reflects the philosophy of justice which lies behind this aphorism, though the *ex post facto* nature of the scrutiny, and the statutory protection of the *status quo* up to the point of disallowance (including the preservation of prosecutions and the imposition of penalties<sup>41</sup>) tends to pollute the purity of the ideal. In principle, however, the use of the parliamentary disallowance power at the request of a scrutiny committee operates as a condemnation of some element of injustice contained in the repugnant instrument which, in the eyes of the people's representatives, deprives it of legitimacy as an expression of right law. In my view, therefore, the role of justice as the validating ingredient of delegated legislation is pivotal to the legitimacy of executive or bureaucratic law-making itself. The implications are large, for as Friedrich says “if justice is relevant as a standard of law, the central error of all positivists is recognised and the totalitarianism which develops out of such positivism is basically refuted”.<sup>42</sup>

Friedrich has placed this theme at the centre of his own analysis of law generally, citing Hitler's rule as legal but not legitimate because it had no basis in right and justice. Indeed, what other view can be taken of, for example, the administrative decrees made under the *Reich Citizenship Law 1935* which defined a Jew in terms of descent from so called racially full-blooded Jews and provided that such a person “cannot be a citizen of the Reich. He cannot exercise the right to vote; he cannot hold public office ...”. (Article 4(1))<sup>43</sup> What other view would be taken of Executive Regulations under the South African *Public Safety Act 1953* which empowers members of the Forces to enter premises without a warrant and take such steps as each member may deem necessary for the maintenance of public order or the safety of the public? What other view would be taken of regulation 16 of these Regulations headed “Limitation of Liability” which, according to press reports<sup>44</sup> states in part that

“no civil or criminal proceedings shall be instituted ... against the State, the State President, Cabinet members, ‘Forces’ members, a person in the service of the

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40. Duguit, *Traite de droit constitutionnel*, 1928, Book III, p.661, quoted in Friedrich, *supra* n. 37, p.181

41. See for example, Senate debates concerning the ACT *Traffic (Amendment) Ordinance 1981*, Senate *Hansard*, 28 April 1981, p.1427 and 14 May 1981, p.2041

42. Friedrich, *supra* n. 37, p.188

43. See Oakeshott, M, *Social and Political Doctrines of Contemporary Europe*, 1949, p.211

44. Johannesburg Star, 13 June 1986

State or persons acting with the approval of the aforementioned by reason of any act of good faith ... performed by any person in carrying out his duties ... in terms of these Regulations with intent to ensure the safety of the public ... or in order to deal with circumstances which ... are likely to arise as a result of the ... state of emergency”.

This illegitimate regulation, also states that if

“in any proceedings against any member or person protected [by the Regulations] the question arises whether any act ... performed was done so in good faith, it shall be presumed that it had been, until the contrary is proved”.

What other view would be taken of the executive’s Regulation 34 of the former Northern Ireland Civil Authorities (Special Powers) Regulations, which provided that

“The Civil Authority, and any person duly authorised by him shall have right of access to any land or buildings or other property whatsoever”.

In these examples the response must surely be that an *executive* has no right, in justice, to make laws of this kind. However, what view might be taken of the Australian executive’s Health Insurance Commission Regulations which implicitly made it lawful for that Commission to transfer to the Department of Social Security all or any information held in the Commission’s computer system recording the physical and mental health of millions of Australians for over a decade, as that information is encoded in their insurance claims for identifiable medical treatment? And what view might be taken of the Australian executive’s Extradition Regulations which provided that a person could lawfully be extradited to South Africa for an offence punishable there by imprisonment for at least 1 year regardless of the minimum penalty that could be imposed on the accused had the alleged offence occurred in Australia?<sup>45</sup>

Indeed Australian extradition law provides a clear instance of how foreign law, at least, should be judged against a principle of justice before the Australian legal authorities will recognise that a ‘real’ law has been broken. Changes to Australian Extradition Regulations negotiated by the Senate Committee now provide that a person can be extradited to South Africa only after the nature of the alleged offence, the proceedings by which it will be tried and the minimum penalty<sup>46</sup> that could be imposed on conviction, have undergone a proper evaluation, in particular to ensure that the alleged extradition crime is indeed jurisprudentially or really of a criminal character as recognised by civilised international standards.

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45. Health Insurance REgulations (Amedment) (Statutory Rules 1985 No. 290) disallowed by the Senate on 15 April 1986.

Extradition (Republic of South Africa) Regulations (Statutory Rules 1985 No.14), Regulation 4; now repealed by Extradition (Republic of South Africe) Regulations (Amendment) (Statutory Rules 1986 No. 158)

46. Regrettably the maximum possible custodial penalty is not the subject of evaluation by Australian authorities.



These contemporary examples lend some weight to Friedrich's conclusion that

“the authority of law rests upon its reasonableness that is to say, its justice that the legitimacy of ... a statute ... rests upon its rightfulness, and its legality rests upon its accord with the positive laws. The same may be said of the ‘bearers’ of authority, legitimacy and legality, the rulers ... Their legality is a question of positive law ... their legitimacy is a question of right and justice and their authority is a question of reasonableness, that is to say their ability to realise the ideas and values and beliefs of the community's members”.<sup>47</sup>

## Principles of Justice

If, as I contend, a principle of justice is to be the *sine qua non* of the legitimacy of delegated legislation how will that manifest itself? Harding has pointed out that ‘Parliament will be presumed by the courts not to have authorised the making of rules infringing a citizen's fundamental rights or partial to a particular class’,<sup>48</sup> and the International Commission of Jurists has proclaimed that “in no event shall fundamental human rights be abrogated by means of delegated legislation”.<sup>49</sup> The Commission's manual on *The Rule of Law and Human Rights* should be issued *gratis* to every lawyer, let alone every drafter of legislation, primary or subordinate, as it contains a unique distillation of the standards of justice and personal liberty which should apply to human society and which it is the responsibility of lawyers to proclaim. Since the catastrophe of the Second World War there have been various attempts to express in a supra-national form the basic human rights which are regarded as the entitlement of all human beings. The preamble to the *Universal Declaration of Human Rights* notes that

“disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind ... [I]t is essential, if man is not to be compelled to have recourse as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law”.

When the International Commission of Jurists set about the task of drafting the requirements of the Rule of Law it postulated certain minimum conditions of a juridical system in which fundamental rights and human dignity could be respected. For example, no legislature should make laws which discriminate on the grounds of race, religion, sex or for other reasons not affording a just and proper basis for distinction. There should be no interference with freedom of religion, belief or observance, with universal franchise, or with freedom of speech, movement, assembly or association. There should be no retrospective legislation and procedural due process should protect and give effect to these rights. The Commission stressed in particular

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47. Friedrich, supra n. 37, p.205

48. Harding, supra n. 8, p.387

49. Congress of Delhi, 1959, Committee II, in Chapter 3, ‘The Executive and the Rule of Law’, in *The Rule of Law and Human Rights, Principles and Definitions*, International Commission of Jurists, Geneva, 1966, p.12

the vital importance of an honest and independent judiciary. In addressing the role of individual lawyers and the legal profession the Commission, at the Congress of Rio in 1962, wrote that

“lawyers should give guidance and leadership in the creation of new legal concepts, institutions and techniques to enable man (sic) to meet the challenge and the dangers of the times and to realise the aspirations of all people”.<sup>50</sup>

Is it in fact possible though, for the bureaucratic law-maker, the government lawyer, successfully to achieve these ideals, to be a guardian of personal rights and liberties, to live up to the International Commission of Jurists’ high ideals and “refuse to collaborate with *any* authority in *any* action which violates the Rule of Law”?<sup>51</sup>

## Public Service Bureaucracy

It may be as difficult to be a lawyer servicing government as it is to be a conservationist in the public relations department of a wood chipping company. It is difficult but, given the right attitude, not impossible. There are contradictory influences at work which tend to undermine the effectiveness and general peace of mind of all concerned. These influences arise from the very nature of bureaucratic organisation and the administrative imperatives which it brings to the making of delegated legislation in particular.

A bureaucracy is an administrative body of appointed officials. As a form of organisation it was characterised by Weber as having certain ideal-typical features of “a clearly defined hierarchy where office-holders have very specific functions and apply universalistic rules in a spirit of formalistic impersonality”.<sup>52</sup> Thus, in Weber's concept, disciplined and highly obedient, though personally free and remunerated, officials, appointed on merit on the basis of possession of certain intellectual and technical skills, and using resources and facilities supplied by the impersonal bureau, perform rational duties which are clearly defined within a command hierarchy. The officials are subject to systems of general and particular rules, (with emphasis on often secret and inflexible precedents, and on documentary record keeping) which govern the way each individual official performs his or her functions. Most critically the official possesses a vital delegated segment of impersonal and impartial authority within the limits of his or her particular duties, with the result that, in Weber’s words, “Bureaucratic administration means fundamentally the exercise of control, on the basis of knowledge”.<sup>53</sup> There are in my view two further critical characteristics of a bureaucracy: to preserve and increase the sum total of its size and authority, and to perform administrative tasks in a fashion which is controlled by a dictate of efficiency in harmony with the other characteristics of the phenomenon.

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50. Chapter 6, ‘The Legal Profession and the Rule of Law’ op. cit., p.34

51. op. cit., p.35 (emphasis added)

52. Silverman, D, *The Theory of Organisations*, 1970,p.11

53. Weber, M, *The Theory of Social and Economic Organisation*, 1964, pp.329-41

Many organisations and officials might satisfy these criteria (for example, a government teaching or medical service and its employees). My concern is with the government's administrative service and here the "crucial differentiating characteristic of civil services ... is their use of a vague criterion in decision-making known as 'the public interest'."<sup>54</sup> Albrow notes that the definition of that concept is notoriously vague and ambiguous so that "It is interpreted as it is implemented, and that process is in the hands of civil servants."<sup>55</sup> It is this which gives rise to "the problem of bureaucracy" namely the adverse effect on democracy and personal rights which arises when bureaucratic behaviour departs from the manifest functions for which officials are appointed. Are the practices of a modern public administration consistently compatible with the values of democracy, personal freedom and the rule of law? I have already alluded to the principles of justice on which delegated legislation should be based. Since the pressure on ministerial time and priorities often means that such legislation represents the will and ideas of the bureaucracy and not consciously the will of the Minister, these principles of justice will be adhered to only to the extent that they either reflect the objects and characteristics of the bureaucracy itself or an important part of it, or are imposed from without by accountability mechanisms, such as the disallowance activity of a parliamentary scrutiny committee.

An example appears in the development of freedom of information legislation and the whole corpus of the new Australian administrative law. These innovations reflected changed social values and produced a political willingness to legislate. The resulting legislation conferred on a powerful and strategic component of the bureaucracy, namely the Attorney-General's Department, responsibility for these law reform initiatives which, although frequently inimical to the interests of the wider bureaucracy, were central in re-establishing that Department as one of the country's major intra-bureaucratic power brokers. The success of the new legislation and of the Attorney-General's Department in ensuring that the principles therein embodied are reflected in delegated legislation is paradoxically measured by the current decline of the Department's authority, a decline which will continue without the stimulus of a new legal rights initiative such as a Bill of Rights or a Charter of Privacy or some other major legal novation affecting the power and status of the bureaucracy.

In a tangential comment Weber lent support to this immobility in bureaucratic thinking when he observed that

'The inclination to forego economic opportunity *simply in order to act legally* is obviously slight, unless circumvention of the formal law is strongly disapproved by a powerful convention".<sup>56</sup> (my emphasis)

A similar aversion to the loss of administrative opportunity, which in practice means power, characterises public service bureaucracy. It has always been a major threat to such power for

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54. Albrow, M *Bureaucracy*, 1970, p.95

55. op. cit.

56. Weber, M, *Law in Economy and Society*, 1954, p.38

administration and one of its characteristic tools, delegated legislation, to be circumscribed by the requirement to observe principles of justice. The examples I will cite below suggest that the tendency in delegated legislation to infringe personal rights and liberties arises, if not from occasional error or rare incompetence, from a desire by the legal drafter and his or her bureaucratic instructor to avoid the loss or circumspection of power which the legislative protection of rights and reduction of discretions entails. The practice of slavishly following precedent by inserting into every bill the same extremely wide regulation-making power has resulted in the accumulation of subordinate powers in the bureaucracy, almost by parliamentary default. This process, combined with the practical necessity for officials, on behalf of the executive, to make administrative arrangements by means of delegated legislation, is not the “fault” of individuals. Allen notes “many civil servants are just as much alive and hostile to dangerous executive tendencies as any other members of the public”.<sup>57</sup> The “insidious characteristics of the system” and not the “perverted views of individuals”<sup>58</sup> are responsible. A competent operator within the system will rarely fail to take advantage of wide legislative delegations, inadequate parliamentary scrutiny and the absentee land-lordism of the courts if this is necessary to achieve or facilitate the preferred administrative goal suggested by a Minister or “the Department’s view” of the implementation of an Act.

Because the principle of justice should infuse any instrument of delegated legislation, and because the Attorney-General’s Department is both the drafter of much subordinate legislation and the government’s legal policy maker, can it be assumed that the first loyalty of government lawyers is to justice? And if so, are they, in an ironically bureaucratic sense, sufficiently powerful, or at least influential, to ensure that delegated legislation is predicated on administrative justice and not on administrative expediency?

## Lawyers in Government Service

At the opening of the Eighteenth Australian Legal Convention in 1975, the then Solicitor-General said that “the just exercise of our calling requires us to remember that each of our decisions is about our fellow man, and that our procedures must recognise and admit his [or her] equal and constant presence”.<sup>59</sup> This is indeed the ideal but for the government lawyer there are two other possibly superior and certainly constant presences. One is the very bureaucracy of which he or she, first and foremost, is a member. The other is the Attorney-General who, although invariably a lawyer, is also a party-political figure and the executive’s legal voice. Conventionally, though not always in practice, the bureaucracy and the Minister, for legislative purposes, merge into the executive. On this basis Drewry wrote that “Professionals [like lawyers] in a bureaucracy serve two masters. They owe fealty both to their organisation and to their profession”.<sup>60</sup>

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57. Allen, *supra* n. 9, p.296

58. *op. cit.*

59. Quoted by Brennan, F G, in ‘Where Now’, 49 *Australian law Journal*, p.672 at p.677

60. Drewry, G, ‘Lawyers in the UK Civil Service’, (1981) in 59 *Public Administration*, p.15 at p.38

It has long been recognised that there is a functional difference between the role of a professional lawyer and the role of a bureaucrat, which can break out as tension and antipathy when one confronts the other. Other problems arise when the lawyer-bureaucrat attempts to internalise and resolve these conflicts, and reactions span the full spectrum from eager involvement in the drafting and clearing of “unjust” laws to discontent, isolation and resignation or dismissal. Hall discussed five attitudinal attributes of the professional generally, which tend to distinguish such a person from a bureaucrat. He referred to the presence and use of professional organisations as major reference points providing, at both a formal and informal level, a major source of ideas, values and judgments for a person’s professional life. A sense of public service, self-regulation and autonomy complement a vital sense of vocation. And it is this sense of calling which reflects a dedication to the professional work, not merely for its own sake, but because it involves practising a knowledge-based skill which is intrinsically personally satisfying and publicly valued.<sup>61</sup> For the legal professional however, there is a sixth and vital point of distinction - a commitment to the ideals of justice. This must be as much an attribute of a lawyer as a commitment to accuracy is an attribute of a mathematician, or a commitment to the preservation of life is an attribute of a surgeon.

The International Commission of Jurists has highlighted this ethical dimension in the work of the legal professional, noting that the modern lawyer cannot be merely content with the conduct of his or her practice, remaining a stranger to economic and social affairs and refusing to take an active part in the processes of social change. On the contrary, an active role must be played

“by inspiring and promoting economic development and social justice. The skill and knowledge of lawyers are not to be employed solely for the benefits of clients, but should be regarded as held in trust for society.

It is the duty of lawyers in every country, both in the conduct of their practice and in public life to help ensure the existence of a responsible legislature elected by democratic processes and an independent adequately remunerated judiciary, and to be always vigilant in the protection of civil liberties and human rights.”<sup>62</sup>

This view is, of course, very much at variance with the traditional role of the lawyer as "a disinterested, simpleminded advocate without even a social conscience and concerned only with the legal process and not with the results of his or her interventions".<sup>63</sup> Yet I would argue that by definition the lawyer’s role is to promote justice because justice is the very touchstone of legal method let alone the corner-stone of legal structures. Kamenka and Tay have suggested that justice is

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61. Hall, R H, ‘Professionalism and bureaucratisation’ in Salaman and Thompson, eds., *People and Organisations*, 1978, p.120 at p.122

62. Congress of Rio, supra n. 49 and 50, pp.34-5

63. Tomasic, R and Bullard, C ‘Lawyers and Legal Culture in *Australia*’, (1979), *7 International Journal of the Sociology of Law*, p.417 at p.419

“not so much an idea or an ideal as an activity and a tradition – a way of doing things, not an end state ... [Thus,] in the end the doing of justice, like all intellectual activity is an art in the sense that it calls for judgment, for creative imagination, for the ability to see or forge unsuspected connections”.<sup>64</sup>

The practice of that kind of art is not generally possible within a bureaucracy because, for the individual official, there is no immediately recognisable and assimilated external *Grundnorm* by which the rightness, the correctness or the justice of official actions can be judged by the official himself or herself. There is some evidence for example, that lawyers employed in the Department of Social Security “tend to see their profession as ‘bureaucratic’ or ‘administrative’, rather than legal”.<sup>65</sup> Thus, when Goldring and Hawker refer to a good lawyer as “one who develops flexibility and the capacity to innovate ... [One who has] an appreciation of the place of legal rules and institutions within the social order as a whole”,<sup>66</sup> by implication they exclude the lawyer who is isolated within a mainstream government department where the practice of such skills is difficult if not impossible. Indeed, a major limitation is placed on the capacity of government lawyers to function as legal professionals by both the organisational structures and the nature of the work they perform because each will tend to bureaucratise the professional role, stifle its independence and isolate the practitioner from the support of an external professional peer group and its objective standards. The same criticism has been launched against scientists in government employment, particularly those engaged in work associated with defence and weaponry. For the professional lawyer or scientist the ultimate justification for a professional act is that it is the right act, to the best of the professional’s knowledge. As Etzioni has noted however

“[T]he ultimate justification for an administrative act ... is that it is in line with the organisation's rules and regulations and that it has been approved directly or by implication by a superior rank”.<sup>67</sup>

Curtis, a senior official in the Attorney-General’s Department has noted that the government lawyer

“may find that his superior disagrees with his view or directs him to do whatever it is in a different way. This affects his freedom to do what he personally regards as right in any given situation”.<sup>68</sup>

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64. Kamenka and Tay, *supra* n. 29, pp.119-20

65. Goldring, J and Hawker, G, ‘Lawyers in a Government Department: A Report and Suggestions for Further Research’, (1985), *Australian Journal of Public Administration* Vol. XLIV No.3 p.287 at p.295

66. *op. cit.*, p.291

67. Etzioni, A, *Modern Organisations*, 1964, p.77

68. Curtis, L J and Kolts, G, ‘The Role of the Government Lawyer in the Protection of Citizen’s Rights’, (1975) 49 *Australian Law Journal*, p.335 at p.338

At the same time he has argued that the Attorney-General's Department (part of whose function is to draft Commonwealth Regulations and Territory Ordinances)

“has the advantage that the lawyers ... are better able to resist pressures to subordinate law to administrative convenience. They ought to be in a position of greater professional independence than if they were serving officers of the departments being advised”.<sup>69</sup>

A government law department can undoubtedly nourish a certain spirit of professional independence. For this reason the continuing development of specialised legal sections in other departments will affect the justice-orientation of government lawyers who are isolated from a truly legal professional ethos, its peer pressures and standards and its emphasis on the principle of justice. It is a moot point whether the Attorney-General's Department is aware of the full implications of this development other than in terms of a loss of power, influence and prestige.<sup>70</sup> If, as seems to be the case, instructing lawyers as well as instructing officials in government departments tend to view their responsibility in a bureaucratic rather than a legal professional context, two tendencies may develop. Officers may tend to rely on the initiative of the Attorney-General's lawyers to insert in draft legislation adequate protections of personal rights and liberties. Alternatively, they may exert bureaucratic pressure on those officers so that the lawyers intentionally omit protective provisions on the grounds that these would impede the attainment of the preferred administrative goals. Curtis identified a variant of this behaviour in the perceived role of the Human Rights Branch within the Attorney-General's Department itself when he noted that

“If it be accepted that there is a particular role for lawyers to play in the protection of civil liberties, then all the legal officers in the Department ought to be conscious of that role. Indeed, to regard concern for civil liberties as the peculiar province of only one branch of the Department might lessen the alertness which all the legal officers of the Department ought properly to display in this matter.”<sup>71</sup>

The same principle should, of course, apply to those other departmental lawyers who are involved in preparing drafting instructions for delegated legislation. The consequences of this lack of professionalism can be seen in some legislation where it is evident that either the legal drafters relied too readily on the “professionalism” of legal instructors in client departments to suggest that rights be protected, or they have been pressurised by client departments into drafting instruments which have trespassed on personal rights and liberties. In my view the question arises whether, for this reason, all government lawyers in mainstream departments should not have a formal employment relationship with the Attorney-General's Department itself and act for bureaucratic departments on short to medium term secondments only. I suspect that the Attorney-General's Department might prefer this but is no longer powerful enough to insist upon it. It is, therefore, left floundering in a secondary co-ordination, legal policy advising

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69. op. cit.

70. See, for example, Brazil, P, ‘Lawyers in Government Service: The Commonwealth Scene in 1985’, *Canberra Bulletin of Public Administration*, Vol. XII, No. 3 (Spring 1985) p.159 at p.161

71. Curtis and Kolts, *supra* n. 68, p.339



and drafting role, losing the influence, and increasingly the expertise, to make justice happen in delegated law-making.

Both in theory and in practice government lawyers are not free to perform as professionals. They will not, of course, be asked to draft modern versions of the Nuremburg laws. As Kolts has said “in our society, the possibility of a proposed law being so unjust as to warrant a draftsman’s (sic) resigning rather than participating in its preparation, is remote”.<sup>72</sup> Significantly he added that

“more often than not, it would be only a matter of detail that would offend the draftsman’s conscience and in general the draftsman would take the attitude that it is for the Parliament and not for him to be the judge of the desirability of a particular provision”.<sup>73</sup>

This is also the attitude of the legal policy makers in the Department. Curtis has observed that there is but a very remote and hence irrelevant possibility that a lawyer “would be instructed to take action that would as a matter of law, amount to unprofessional conduct”.<sup>74</sup> He suggested that what is more likely is that he or she could be instructed to do something which is regarded as *wrong in principle* but which he or she must nevertheless either do, without making a public issue of it, or resign. Yet these matters of principle tend to be significant for the protection of fundamental rights and liberties from erosion in delegated legislation. Legislative scrutiny committees operate under terms of reference that require them to make judgments as to whether legislation has infringed principles of scrutiny which equate to principles of justice and propriety. Curtis has conceded that the government lawyer has a duty to draw to the attention of his superior officers, or even to the Attorney-General, any proposed action that would prejudice or undermine the citizen’s rights. Although they were writing in 1975, the views expressed by Curtis and Kolts appeared to take the government lawyers’ freedom, independence and professionalism to the frontiers of what was then acceptable within the confines of their large, predominantly bureaucratic status and role. It is likely that these same standards remain in force today in that Department. However, the legal sections of other departments have developed beyond what may have been anticipated in 1975, and the high, but by definition imperfect, standards of professional commitment to the principle of justice, evident within the Attorney-General’s Department itself, are not always to be found in these other departments where, again by definition, and without personal culpability, functional bureaucratic standards prevail.

The work of the Senate Regulations and Ordinances Committee over the past two years provides some empirical evidence for these theoretical themes. I think that the evidence suggests not only a lack of sensitivity in some departments to preserving and promoting the ideals of civil liberty, but also a tendency within the Attorney-General’s Department itself for its professional commitment to justice to be overborne by the administrative imperatives of the

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72. op. cit., p.342

73. op. cit.

74. op. cit., pp.338-9

bureaucracy, by absence of an effectively policed policy on the protection of rights, by superior departmental authority, by time constraints, and by overwork. These are factors which will always have their greatest impact in those provisions of delegated legislation where rights and liberties should be protected.

## **Rights Under Threat and Undermined**

The Reports of the Senate Committee provide evidence that bureaucratic law-making tends to undermine personal rights and liberties. I have already made reference to the Health Insurance Regulations which were the subject of a special report by the Committee.<sup>75</sup> It should have come as no surprise that the proposed photographic identity card is to be administered by the Department of Health because the Health Insurance Commission has Australia's most comprehensive and most accurate data-bank of information on all of us. The Department of Social Security sought access to this to obtain a list of names and addresses for use with certain fraud prevention measures. Although the Health Insurance Act protects the privacy of Commission data by imposing criminal sanctions on unauthorised release of information, regulations could be made suspending this privacy requirement and allowing access to information by "prescribed persons". Regulations were made prescribing the Secretary of the Department of Social Security, with the effect that the Department could have access to *all* information held by the Commission. While the Minister for Health said that there was no intention that it should occur, under the Regulations it would have been lawful to transfer to Social Security information on the Commission's computer discs, which, with proper analysis, could reveal confidential medical profiles on millions of Australians spread over years of medical insurance claims. For obvious reasons the Minister for Health was persuaded by the Committee that the Regulations should be automatically disallowed to allow for the drafting of new regulations more protective of personal rights to medical privacy.<sup>76</sup>

I have also mentioned the Extradition (Republic of South Africa) Regulations. The Committee insisted that there be some comparability between the penalty that could be imposed for an offence had it been committed in Australia and the penalty that might be imposed by South African authorities. The Attorney-General was persuaded to amend the Extradition (Foreign States) Act itself to provide that, generally, extradition could occur only for offences which, had they been committed in Australia, would attract a penalty of at least 12 months. This was a useful precaution since in some parts of South Africa stealing milk from a doorstep appears to be regarded as little short of a capital offence. Had the law not been altered it would have made it lawful to extradite to South Africa a person charged with an offence which, in Australia, might be trifling but which, within the precepts of South African "jurisprudence", might be viewed as very serious. The Committee also insisted that since the Government refused, for obvious political reasons, to conclude an extradition treaty with South Africa, it should at least draft extradition regulations which contained treaty-like protections in regard to political and

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75. *Seventy-ninth Report*, Parliamentary paper No. 170/1986

76. See also O'Keeffe, P, 'How Secret is Your Medial History', *The House Magazine*, 30 April 1986, p.5

military offences, limitation periods and the use of special courts. The Attorney-General was also persuaded by the Committee to provide in the Regulations that there would be no surrender of a person to South Africa if the relevant offence could be punished by any cruel, inhuman or unjustifiable penalty. The Attorney-General has now given himself a curious, but in the Committee's view protective, double discretion not to extradite a person if it would be unjust, oppressive or incompatible with humanitarian considerations to do so.<sup>77</sup>

The A.C.T. *Crimes (Amendment) Ordinance (No. 3) 1985* continued in force provisions which in the early 1950's had abolished in the Territory the right to trial by jury for certain property offences where the value of the property involved fell below a financial threshold. Inflation had eroded that threshold and when the Attorney-General made an Ordinance to raise it, the Committee took the opportunity to threaten to disallow the whole instrument unless he restored the right to jury trial without qualification, as it currently exists in, for example, Victoria. The Committee's concern was that conviction, for a so-called less serious offence, by a magistrate hearing a case without the consent of the defendant, could result in the consequential imposition of severe disabilities under the Companies Code or Conciliation and Arbitration Act. Under these Acts persons convicted of offences of dishonesty punishable by not less than 3 months imprisonment could be denied the right to seek important offices. The Committee felt it was wrong in principle that a magistrate, sitting alone and without the consent of the accused, should have the jurisdiction to deal with offences, conviction for which could have such implications. The Committee considered that the significantly lower penalties that a magistrate could impose would be sufficient incentive for appropriate defendants to choose that course rather than risk the outcome of an expensive jury trial before the Supreme Court, but that those who wished to contest their innocence before a jury should have the fundamental right to do so.<sup>78</sup> The Committee was gratified to have taken this stand and obtained this result before the High Court handed down its decision in *Brown v The Queen*<sup>79</sup> in which Brennan J. referred to jury trial as

“the chief guardian of liberty under the law and the community's guarantee of sound administration of criminal justice ... It is the fundamental institution in our traditional system of administering criminal justice”.<sup>80</sup>

The *Blood Donation (Acquired Immune Deficiency Syndrome) Ordinance 1985* gave medical authorities in the A.C.T. a virtual statutory immunity from civil suit by persons who contracted AIDS from blood transfusions, provided those authorities had followed prescribed testing procedures to screen blood donations for the AIDS virus. This not only meant that a medical employee could not take an action for worker's compensation if he or she contracted AIDS in the course of employment. It also meant that if the state-of-the-art testing procedures outstripped in effectiveness those prescribed, then use of the old tests and standards could not be regarded as

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77. *Seventy-seventh* Report, Parliamentary paper No. 172/1986, para. 114, p.51

78. See *Sente Hansard*, 5 December 1985, p.3073

79. (1986), 60 A>L>R> 257

80. *op. cit.*, p.267

negligent. The Minister for Health agreed to amend the Ordinance to remove these unacceptable provisions.<sup>81</sup>

National Crime Authority Regulations gave that Authority power to serve summons documents on third parties (not necessarily solicitors acting for someone) with the presumption that this would amount to effective service, if the Authority itself could not effect service by the more usual means, and it considered that the third party could do so. The Committee felt that substituted service of this kind should be ordered only by a superior court judge in chambers who, detached from the hot-pursuit atmosphere of the Authority itself, could more equitably balance competing moralities in order to protect the reasonable interests of the person served and the person sought.<sup>82</sup>

In the *Electricity (Amendment) Ordinance 1985* a magistrate was given power to issue a telephone search warrant. This is a procedure which, in the absence of any face to face encounter between the applicant and the judicial officer who may authorise entry, including forceful entry, justifies the invasion of a person's home by officials of the state. No documents or affidavits are needed. The impersonal atmosphere is tense with the urgency and emergency redolent of a breakdown of normal surveillance and law enforcement methods. Formal documents would be prepared after the verbal warrant had been spoken. The Committee considered that only a superior court judge should be granted the exceptional power to issue telephone search warrants in order to ensure that this *ex post facto* type of warrant would be issued in truly exceptional circumstances. The Attorney-General was unable to accept this suggestion but he agreed to remove the telephone search warrant power from the Ordinance.<sup>83</sup>

During the period 1985/1986 there were more than 60 instruments of delegated legislation on which the Senate Committee raised questions about the infringement of personal rights and liberties. These related to: questions of *ultra vires*; whether plain English explanatory statements had accompanied legislation; legislative impediments to the use of Parliament's disallowance power; failure to provide for the tabling and disallowance of sub-delegated legislative instruments; inappropriate delegations of ministerial power to unspecified officials; legislatively authorised invasions of personal and medical privacy; absence of reasonable qualifications on the use of force by officials in executing search warrants; reversals of the onus of proof in criminal proceedings; strict liability offences; failure to provide for "reasonable excuse" defences; religious and sex discrimination and a lack of protection for genuine conscientious objection; the practice by officials, with powers of entry, of using non-photographic means of identity that could be easily forged and used for trespass by impostors; the protection of occupiers where state officials enter property "with consent"; retrospective application of legislation; rights to independent merits review by the Administrative Appeals Tribunal of discretionary administrative decisions, particularly where a right to a livelihood was at stake; the

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81. See Senate *Hansard*, 27 November 1985, p.2320

82. *Seventy-seventh Report*, supra n. 75, para. 125, p.56

83. See Senate *Hansard*, 26 November 1985, p.2221

provision of reasons for decisions; the adequate notification of appeal rights; and the fettering, by delegated legislation, of discretions conferred on Ministers by Acts.

A common characteristic of many of these matters was that, as originally drafted, provisions facilitated some aspect of bureaucratic convenience, administrative discretion or law enforcement expediency. This occurred because, without more, the protection of personal rights is an expendable objective if placed in opposition to the over-riding administrative imperatives of bureaucratic law-making. In the examples quoted, this tendency got the better of the guardians of justice in the Attorney-General's Department, as well as the legal policy advisers and the drafting counsel.

But what of those other guardians of justice, the judges and the courts? Without parliamentary scrutiny, could the courts and the judges in any event, not protect society from the more serious effects of bureaucratic law-making?

### **The Limitations of Judicial Review**

Unless one advocates a kind of benign totalitarianism which encourages judges to judge the law and not merely to judge according to the law, judges can rarely protect rights which bureaucratic law-makers have not conferred in the first place. Forsey has argued that “the protection offered by the courts is not enough ... because the sheer mass and scope of subordinate legislation is now so enormous that very little of it is likely to get before the courts at all [and] getting it before the courts takes time and money”<sup>84</sup>.

In this context it may be useful to recall Griffith's reference to the distinction between property rights and human rights.<sup>85</sup> Real Property rights are vested by the combined operations of the common law and statute and are seldom affected by so unsuitable a tool as delegated legislation. Since human rights concern people the functional administration of whose collective affairs is the *raison d'etre* of bureaucratic government, delegated legislation, as the principle tool of administration, is a constant threat to those rights. While recognising that judges have a vital role to play in protecting personal rights and liberties, Griffith remains sceptical of the imperatives of their political role. Writing of British judges he argues that where government attempts to exercise arbitrary and extensive powers which curtail liberty “it cannot be forecast how the judges would react”.<sup>86</sup> The decisions of the N.S.W. Court of Appeal and the High Court in *Osmond v Public Service Board of New South Wales*<sup>87</sup> in regard to the provision by the public service of reasons for discretionary decisions where legislation makes no express

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84. Forsey, E, ‘Subordinate Legislation, the Rule of Law and the Constitution’, an address to the Commonwealth Conference of Delegated Legislation Committees, 1 October 1980, *Transcript of the proceedings*, Vol. 3, AGPS, 1981, pp.90-1

85. Griffith, J A G, *The Politics of the Judiciary*, 1977, p.199

86. op. cit., pp.207-8

87. [1984] 3 N.S.W.L.R. 447 and 63 A.L.R. 559. The remarks of Deane J at 573 suggest that all may not yet be lost in the absence of express legislation.

provision for this, may serve as a passing illustration of the degree to which judges can disagree with each other on fundamental questions of administrative justice. Griffith's opinion is that freedom depends less on the judiciary than upon

“the willingness of the press, politicians and others to publicise the breach of these freedoms and on the continuing vulnerability of Ministers, civil servants, the police and other public officials and private interests to accusation that these freedoms are being infringed”.<sup>88</sup>

In other words the political climate and the courage of individuals is the real protection against authoritarianism. Albrow too felt that it would be the professional commitment of the official to democratic values that would be a more important safeguard for democracy than any formal system of control.<sup>89</sup> While that may be so, it leaves unchallenged tendencies in the bureaucratic law-making process which will result in the erosion of rights and the accretion of power to officials at the expense of people, courts and Parliament. It leaves unresolved the question of how to control, *ex ante*, functional and impersonal administrative imperatives and subject them to the weaker but human imperative of the principle of justice.

### **The Remedy of Last Resort - Parliamentary Scrutiny**

Against this background, a parliamentary committee system for the scrutiny of delegated legislation assumes a highly significant role. Any parliament which possesses such a committee, which is supported by effective disallowance powers and which meets with a true commitment to bipartisanship in the protection of rights and liberties from executive encroachment, possesses a uniquely protective instrument. Such a committee can, through its direct dealings with Ministers in the executive, control the bureaucracy by insisting on the reduction or review of discretionary powers, and the protection of rights. A parliament without such a committee runs the risk of losing to the bureaucracy not merely an important aspect of its very sovereignty. By leaving bureaucratic law-making unchallenged it condones tendencies towards totalitarianism inherent in any public administration system and it makes officials the ultimate arbiters of a vital dimension of the rights and freedoms of the citizen.

In 1986 Clause 73 of the Australian Labor Party platform provided that “all delegated legislation [is] to be publicised and subject to disallowance by parliament”. The clause goes on to state rules which are virtually identical to the principles of scrutiny of the Senate Committee, before these were amended and modernised in 1979 to take account of the existence of the Administrative Appeals Tribunal.

“Such legislation not to unduly trespass on civil rights and liberties; not to make the rights and liberties of individuals unduly dependent upon administrative

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88. Griffith, *supra* n. 85, p.116

89. Albrow, *supra* n. 52, p.117

rather than judicial decisions; and to be concerned with administrative detail and not matters of substance.”

Given the Rules of the Party concerning the absolute primacy of the Party in any parliamentary vote, the significance of this commitment should not be lost on any parliamentary or legal observer. The safeguarding of personal rights from the corrosion of bureaucratic law-making is greatly advanced by the assurance that parliamentary parties will act in the attempt to protect such rights. Reid has noted that the explanation for this attitude is deeply entrenched in the Labor Party's history. Thus in 1980 he wrote

“Just as social idealists in Britain such as G.D.H. Cole, R.H. Tawney, and Sidney and Beatrice Webb perceived that any abuse by an Executive government of its delegated law-making power would threaten the attainment of their social ideals, similar idealists in Australia, like Senators Barnes, Daley, Dunn and Rae in the 1930s and Senators Murphy, Cohen, Cavanagh, Evans and others in the 1970s, have all recognised that a misuse of delegated power by officials could be subversive to the moral bases of an ALP government's policies. Whatever their attitudes to the place of the Senate in Australian government, ALP parliamentarians, who from 1919 to 1979 stood for the Senate's abolition, have recognised the necessity for parliamentary scrutiny of delegated legislation, and they have actively supported the Committee of the Senate appointed to achieve that end”.<sup>90</sup>

Not every Australian state has as effective a scrutiny committee as its people might wish. The Senate Committee itself has identified serious flaws in the federal Acts Interpretation Act which can set at nought the Senate's power of parliamentary disallowance.<sup>91</sup> Also the absence of free or conscience votes on motions for disallowance of delegated legislation where questions of personal rights and liberties are at stake makes the ultimate parliamentary protection of rights a question not of principle but of party-politics. My ha'p'worth of tar is perhaps a penny worth. Firstly, as remedies of last resort bipartisan committees and effective statutory disallowance powers are meaningless if, when negotiations with the Minister and the bureaucracy actually fail, the whips come out and party is allowed to take the place of conscience in a disallowance division where the fate of a government cannot possibly be considered to be at stake. Our parliamentary democracy will have reached its terminal crisis when the life of an administration hangs on the fate of an unreviewable administrative discretion, a telephone search warrant power or a strict liability offence in delegated legislation. We will then indeed, as Griffith has already asserted, live in “a highly authoritarian society, fortunate only that we do not live in other societies which are even more authoritarian”.<sup>92</sup> In his 1986 address to the Fabian Society,

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90. Reid, G, 'Parliamentary Control of the Executive', an address to the Commonwealth Conference of Delegated Legislation Committees, supra n. 84, p.25

91. O'Keeffe, P, 'Parliamentary Disallowance and the Problem of Revival', forthcoming, *Federal Law Review*, 1988

92. Griffith, supra n. 85, p.213

McMullan, speaking about the Australian Labor Party observed “I know of no fraternal party in the Socialist International which insists that every member votes for every issue for ever. I know of no other party where agreeing with 99% of the policy isn’t enough”.<sup>93</sup> It may be that questions of personal rights and liberties in delegated legislation could be the starting point from which to revive and honour the ideals of parliamentarianism which put principles of justice before the infallibility of any party. Some Liberal Senators, like Senator Wood and the late Senator Missen, who had a long association with the Senate Regulations and Ordinances Committee, built part of their formidable reputations on their willingness to vote against their party on issues of principle arising from the work of the Committee.

Secondly, although parliamentary scrutiny committees are indispensable in the last resort, there is a remedy of first resort which has been the theme of this essay. Legislation should be predicated on the principle of justice which it is the professional duty of the lawyer to espouse and proclaim. Just as there is a deep moral obligation on engineers to build bridges that will not collapse, in serving the whole community there is a deep moral obligation on lawyers to build legal structures that will not deprive any member of the community of the fundamental rights and liberties of civilised society. Lawyers, individually and collectively, in their law schools, their chambers and their professional organisations must insist that their colleagues in government service who draft laws and frame the government’s legal policies should be bound by those high ethical and moral standards of conduct, the absence of which initiates corruption in society and precipitates the decline of the Rule of Law. I believe that in the matter of protecting rights and liberties in delegated legislation government lawyers should be guided only by professional judgment and the wisdom of their peers and leaders and never by bureaucratic pressure or convenience. If this precept of conduct were followed I believe that government lawyers, as readily as any other lawyers, could become truly great lawyers by the standards, not of men or women or the bureaucracy, but of the law itself, for as Freund said

“Amid the welter of intricacies, rules, and mandates of the law the great lawyer will see principles, standards, goals, an unforced unity of thought and moral order. The great lawyer will add to the prudential scrutiny of the owl, the soaring vision of the eagle”.<sup>94</sup>

## Note

\*\* This is an edited version of a paper circulated at the Eighth Annual Conference of the Society of Labor Lawyers in Hobart, Tasmania, 18 October 1986, at which the author was a non-partisan invited speaker.

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93. McMullan, R F, *Address to the Fabian Society*, Melbourne, 13 April 1986, p.25. Bob McMullan became a Labor Senator for the A.C.T. on 16 February 1988.

94. Freund, P A, ‘The Moral Education of the Lawyer’, 26 *Emory Law Journal*, (1977), p.3 at p.26



