ROBIN MONCRIEFF OLIVER

# CRIMINAL TRESPASS, THE TRESPASS ACT 1980, AND THE NEW ZEALAND LEGISLATIVE PROCESS

Research paper for Law and the Legislative Process
C.O.P. (LAWS 537)

Law Faculty
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Robin Moncrieff Oliver
September, 1981.

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## I INTRODUCTION

The Trespass Act 1980 was described by the Honourable J.K. McLay, the Minister of Justice and the Minister responsible for the Bill, as a piece of legislation which "reforms the law relating to trespass".[1] The progress of this piece of legislative reform from a gleam in the eyes of its proponents to an act in the statute books is the subject of this paper. By following the progress of this legislation it is hoped that some general comments can be made on the state of the legislative process in New Zealand in the 1980s. Particular attention will be given to the questions: who makes law? and what is the nature of New Zealand's law making process? So, although the paper concentrates on New Zealand's trespass law, its ambitions are wider.

The Trespass Act was chosen for study for a number of reasons. First, its passage was controversial. On the one hand, the Minister of Justice claimed that the Bill, "represented a compromise between competing interest".[2] On the other hand, one writer saw the legislation in quite a different light and claimed that it resulted in the "scuttling (of) what many New Zealanders consider their most important heritage."[3] This writer went

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1. McLay, J.K. (1980) 430 N.Z.P.D. 1090.

2. Idem.

3. Auckland Star, 23 August 1980, p. 6.

on to state:

> The line between the rights of the landowner and the the rights of the public to use our wonderful scenic countryside seem to have been obliterated by this Bill. 4

It could be argued that the choice of a controversial piece of legislation for study distorts our view of the legislative process. Every year Parliament brings into being a number of new volumes of New Zealand Statutes. Most of the Acts contained therein are not controversial but are either 'black letter law' or are non-controversial machinery legislation. While this is accepted, it nevertheless seems reasonable to claim that it is controversial legislation which brings into sharp relief the influences and pressures which affect all legislation.

An important influence on legislation is the influence of pressure or interest groups.[5] A second reason for selecting the Trespass Act for study was that it involved clear battle lines between competing pressure groups thus enabling the influence of these groups to be studied. A third reason for selecting the Trespass Act for study was that it is of manageable proportions capable of being studied by a relatively short paper. Finally, the Act had a long history. By reviewing this historylegislative reform can be placed into the context of long-term changes in the law.

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4. Idem.

5. The terms 'pressure' and 'interest' groups are here used synonymously. In this paper the term 'pressure group' is preferred.

Before placing the Trespass Act into historical context, a summary of the stages of the legislative process in New Zealand is called for.

In the traditional Westminster parliamentary system there are five stages in the passage of a bill through the House: the three readings, the committee stage and the report stage. Like most of the British constitution these stages have been handed down to us after many years of slow evolution. For instance, the number of readings have not always been three; a bill going through the Elizabethan House of Commons might have had to undergo many more readings than three.

At its first reading a bill is formally introduced to the House of Representatives. Before this the House, theoretically, has no knowledge of the existence of the bill. Thus when a draft of the Public Finance Bill, which was passed into law in 1977, was referred to the Public Expenditure Committee for comment before being formally introduced into the House, the Committee had to refer the Bill back to the Minister of Finance rather than the House since officially the House had no knowledge of the Bill. The first reading debate begins with the Minister responsible for the bill, or the Member in the case of a private member's bill, outlining the general purpose of the billand the effect of the bill's main clauses. A Minister's speech is usually prepared by his Department (the Standing Orders against reading a speech are not enforced in such cases) and often follows in outline the Parliamentary Counsel's 'Explanatory Note' to the bill. It is worth noting that frequently a bill is not distributed to Members until the

Minister in charge of the bill rises to speak on its first reading. Once the Minister has resumed his seat the first reading debate will be continued by other Members. At this stage the principles which underlie the bill are not in question. Members instead question whether a bill in this area is necessary. The first reading also provides Members with an opportunity to question the Minister on the effect of the bill's various clauses. Normally the debate ends with the Minister rising again to answer these questions.

Following its first reading a bill proceeds to the second reading stage. This is the most important formal debate on a bill which, in the case of controversial legislation, becomes a set piece battle between the political parties in the House. Here the principles which underlie the bill are "stated, attacked . . . vindicated" [6] and placed into the context of the wider political battle between the Government and the Opposition.

The second reading is followed by the committee stage in which the bill is referred to the Committee of the Whole House. The Committee of the Whole was a development of the seventeenth century. It was, and remains, a committee consisting of all Members, but distinguished from the House itself by being presided over by a Chairman (the Chairman of Committees) rather than the

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6. Griffith, J.A.G. Parliamentary Scrutiny of Government Bills (1974), p. 30.

Speaker, and by having a less formal debating procedure. Here the bill is debated clause by clause as opposedto the more general debates of the three readings. It is at this stage that Members have the opportunity to propose specific amendments to the bill.

Since the Committee of the Whole is not the House, the bill has to be reported back from the Committee to the House. This is the report stage. Those amendments to the bill which were passed by the Committee are recommended to the House. The House then either incorporates the proposed amendments into the bill or rejects them. Given the fact that the membership of the Committee of the Whole and the House is the same, and given the whips' control over Members' votes, the rejection by the House of an amendment proposed by the Committee will be a rarity.

The fifth and final stage in a bill's progress through the House is the third reading. The bill, as amended at the report stage, is considered and voted on. If the bill is very controversial, then the Opposition will fight the measure even at this late stage. With most bills, however, the Opposition, having wrung as much publicity as it can out of the measure and keen to get on to the next item on the Order Paper, will put up only a token fight. The third reading is normally thus a formality and frequently a division is not even called. The third reading marks the end of a bill's journey through the House. In New Zealand the bill then proceeds to the Governor-General for the royal assent. Once this is given it becomes law.

While the above is an outline of the Westminster model of the parliamentary process, this model misses out many stages important in the New Zealand legislative process. First, no mention is made in the Westminster model of how a draft bill comes into being.

As we shall see, most of the really important stages in the passage of the Trespass Act 1980 occured well before the first reading of the bill. Reflecting the importance of this 'pre-legislative' stage Marilyn Waring M.P. has drawn up the following model of the translation of an idea into law [7]:

(1) Citizen - idea,
(2) Party policy and philosphy - the idea must be compatible with this,
(3) Members of Parliament - access point to the process,
(4) Minister of the Crown - another access point to the process and the Minister's approval is necessary if the idea is to advance to the next stage,
(5) Departmental report - this can either initiate a policy or an idea, or the report can develop an idea put forward in one of the previous stages into workable form,
(6) Caucus committee - which will discuss and approve the bill,
(7) Full caucus - will also discuss and approve the bill,

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7. Waring, M. "Power and the New Zealand Member of Parliament: Selected Myths About Parliamentary Democracy" in Levine, S. (ed.) Politics in New Zealand (1978), p. 86.

(8) Cabinet committee - approves the idea of a bill in principle and recommends that Cabinet do likewise. One or more Cabinet committees may be involved at this point. For instance, if the proposal is to initiate legislation in a new area of social policy, and if the proposal involves the expenditure of money, then the proposal will go first to the Cabinet Committee on Family and Social Affairs which will refer the proposal, with recommendations, to the Cabinet Committee on Expenditure,

(9) Treasury report - any proposal to a Cabinet committee or Cabinet which involves the appropriation of funds or which has financial or economic implications is accompanied by a Treasury report. In theory the Treasury report advises the Minister of Finance on what attitude he should take on the proposal. In practice Treasury reports are used by Ministers as a second opinion, independent of the initiating department, on the proposal,

(10) Cabinet - asseses the idea and recommends approval,

(11) Caucus - discusses the measure again and approves it,

(12) Department - prepares details of the idea for drafting,

(13) Parliamentary Counsel - prepares a draft bill,

(14) Cabinet Committee on Legislation and Parliamentary Questions - approves the detailed content and format of the draft legislation and gives its approval for the bill's introduction into the House,

(15) Leader of the House - is responsible for the organisation of the Government's legislative

programme,
(16) Caucus - gives its final approval of the details of the bill,
(17) First reading in the House,
(18) Select Committee - the bill is referred to to the appropriate Select Committee,
(19) Report back to the House - the bill is reported back to the House by the Select Committee with or without recommended changes,
(20) Second reading,
(21) Committee of the Whole House,
(22) Report stage,
(23) Third reading,
(24) Royal assent from the Governor-General,
(25) Idea becomes law.
The fact that the first reading does not come until the seventeenth stage of this outline of the New Zealand legislative process demonstrates the importance of the pre-legislative stages.

The above, of course, is only a rough outline of the legislative process. Not all bills will go through all these stages (bills dealing with companies facing economic collapse may, for instance, proceed from initiation to assent in one day) and the order in which each satge takes place is not in all cases fixed. In particular the origin of legislative policy is varied. The idea for legislative change may come, as Marilyn Waring suggests, from a citizen, a Member of Parliament, a Minister, or the civil service. Alternative sources are Royal Commissions, Committees of Inquiry, law reform committees, and parliamentary Select Committees. The list is endless and more often than not the idea will eminate from more than one source. Some idea of the way in which

legislative policy is formulated is given by Professor Griffith who writes: [8]

> Government bills gestate slowly, being conceived in some policy statement or the administrative failings of earlier legislation; or more grandly, in the digested thoughts of Royal Commissions or inter-departmental committees; or less grandly (and less likely), in the idiosyncracies of individual Ministers or civil servants; or in party committees or election manifestos.

Professor Griffith was writing of Britain but his comments apply equally as well to this country.

One aspect of the New Zealand legislative process which deserves further comment is the influence of the party caucuses. Caucuses are well established in the New Zealand parliament. Originally their purpose was to husband the party's resources and present a united front so as to better seek the party's main object; political power. This is still their main purpose but, as Geoffrey Palmer has observed, they also act as a "sounding board for the condition of public opinion on questions of the day." [9] It is in fulfilling both these roles that caucus discusses and approves the broad outlines of bills. Caucus warns the Government about measures which could either divide the party or bring the party into public disfavour.

More recently caucus has taken on a more detailed

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8. Griffith (1974), op. cit., p. 13.

9. Palmer, G Unbridled Power? (1979), p. 26.

role reviewing draft legislation clause by clause, and sometimes initiating legislation. It is not caucus itself which does this but rather caucus committees. The National caucus has had standing committees since the mid-1940s, the Labour caucus since the mid-1950s. Only recently, however, have caucus committees assumed great importance. There are now caucus committees shadowing all Select Committees. The caucus committees scrutinise bills before they are introduced into the House, question civil servants, conduct investigations into areas of concern, and review amendments to bills contemplated by Select Committees. Since 1978 they have become one of the most important bodies in the legislative process. For instance, Mr. Douglas Kidd, the National Member of Parliament for Marlborough, has stated that caucus committees are, "reshaping proposals to the point of sometimes reversing departmental suggestions" [10].

The growing power of caucus has caused concern amongst some Parliament watchers. [11] Its cause appears to lie in the growing size of the House and the increasing quality of the Members elected. As a result of these two factors talented Members can no longer expect rapid and semi-automatic promotion to Cabinet. To compensate for this they have demanded and gained much greater influence via the caucus and its committees.

The Westminster model of the progress of a bill

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10. Evening Post, 16 June 1981, p. 2.

11. Jackson, K. "Caucus - the Anti-Parliament System?" (1978) 59:3 Parliamentarian p. 159.

not only fails to mention the pre-legislative stages of a bill, it also fails to mention the important Select Committee stage (the eighteenth step in Marilyn Waring's outline). This is because the New Zealand Select Committee system is unknown to the Home Parliament.

Literally defined aSelect Committee is a committee the members of which are selected from the personnel of the House. In this sense all parliamentary committees are select committees, but the term was more precisely used in seventeenth century England to distinguish those committes which were appointed on a temporary basis and given special powers to investigate some legislative proposal from the more permanent Committee of the Whole and Standing Committees which handled the 'committee stage' of bills.

In Westminsterhave remained confined to two roles: an administrative and a pre-legislation role. The former involves the administration of the House's internal affairs, the latter consists of proposing legislation or reviewing legislative proposals before they are presented to the House in the form of a bill. The New Zealand House of Representatives in 1979, the year in which the Trespass Bill received its first reading, had both forms of Select Committee. The Following administrative Select Committees were in existence: Petitions, Privileges, Private Bills, Standing Orders, House, Library, and Selection. There were also in existence the following pre-legislative Select Committees: the Select Committee on Ancillary Licences and Other Matters (which was looking into aspects of New Zealand liquor legislation), the Select Committee on Violent Offending (which was looking into this broad

policy area with a view to legislative change), and the Select Committee to Review the Electoral Act 1956 (which was reviewing New Zealand's electoral laws).

Thus far New Zealand's Select Committee system is in line with the system handed down to us from the Imperial Parliament in the 1850s. New Zealand has varied this heritage by creating two new types of Select Committee: the investigatory and the legislative committees. Investigatory Select Committees investigate and examine aspects of the executive. Those in existence in 1979 dealt with: defence, foreign affairs, island affairs, and public expenditure. Legislative Select Committees deal with legislation during its passage through the House. Those in existence in 1979 were: Statutes Revision, Labour, Maori Affairs, Lands and Agriculture, Social Services, Education, Local Bills, Road Safety, and Commerce and Mining.

The legislative Select Committees are perhaps New Zealand's most important innovation to the Westminster system. The innovation dates back to 1864 when the first such committee with a semi-permanent existence and a general brief covering bills in a specified area, the Waste Lands Bills Committee, was established. By 1881 the innovation was well established with the appointment of the Statutes Revision Committee.

Once a bill has been referred to one of these Committees, the Committee will usually seek submissions from the public on the bill. It has now become the general practice for the secretary of the Committee to place a public

notice in all leading newspapers inviting any person or organisation wishing to make a submission to do so by a certain date. Having received the submissions the Committee will usually provide the opportunity for an oral hearing. The Committee will then deiliberate, in secret, and decide what amendments to the bill it should recommend to the House.

There have been two recent changes to Select Committee procedure. .The first relates to the timing of the referral of a bill to a Committee. Prior to 1972 bills were normally referred to a Select Committee after the second reading which was then usually taken pro forma. In 1972, however, Standing Orders were amended so that bills are now normally referred after the first reading.[12] This gives the Select Committee a greater opportunity to amend the bill in a substantial way since it means that the bill is referred before the House's acceptance of the principles of the bill in the second reading.

The second major change to Select Committee procedure occurred in 1980. Prior to last year it was always a decision for the House whether a bill was to be referred to a Committee since the Select Committee stage was not part of the 'normal' legislative process. The result was that in the 1950s and 1960s only two thirds

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12. S.O. 223 (1)

to a third of all bills were ever actually referred to a Select Committee.[13] In the 1970s there was little change to this percentage so that in 1978, counting the Statutes Amendment Bill as one bill, only twenty-six of the seventy-one Government Bills were sent to a Select Committee for perusal. A bill was only referred if the Government considered this to be in its best interests. This meant that important and controversial legislation often escaped a Select Committee airing. An example is the Security Intelligence Service Bill 1977 which the Government refused to refer.

Standing Orders did, however, provide that all Local Bills[14] and all bills relating to Crown land[15] were automatically referred to a Select Committee. Throughout the 1970s there was mounting pressure for all bills to be referred in this manner. In 1977 W.F. Birch M.P., then Chief Government Whip, argued that such a proposal was unrealistic.[16] Unrealistic or not, the basic argument was accepted by the Standing Orders Committee 1979,[17] and then by the House. As a result Standing Orders were amended so that all Government Bills are now automatically referred to a Select Committee[18] unless the bill is of a financial or budgetary nature[19] or urgency has been accorded it.[20] The House is left with

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13. Mitchell, A.V. Government by Party (1966), p. 72.

14. S.O. 265.

15. S.O. 223.

16. Birch, W.F. "The Law, Making It . . . " 86 (1977) New Zealand Listener, p. 22.

17. Appendices to the Journals of the House of Representatives, 1979, I 14.

the discretion of referring or not referring a Private Member's Public Bill. [21]

The above outline provides the bones of the New Zealand legislative process. A detailed look at the passage of the Trespass Act 1980 will, hopefulle, fill this out with some flesh.

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18. S.O. 223.

19. S.O. 223 (3).

20. S.O. 223 (4).

21. S.O. 224.

## II THE LAW OF TRESPASS

The common law action of trespass originated in the writs by which mediaeval royal justice was dispensed, the writs being a passbook to the royal courts. These early writs have been divided by legal historians into two groups: praecipe writs and trespass writs.

Praecipe writs ordered the sheriff (the local representative of the king) to command the defendant to so some act or else come before the king's courts to explain why he (the defendant) would not. Common examples of this writ were: the writ of right, by which a plaintiff sought the return of rights over his land, the writ of detinue, by which a plaintiff sought the return of a chattel, and the writ of covenant, by which a plaintiff sought to force a defendant to keep a covenant made between them. The praecipe writ, therefore, was the action by which a plaintiff sought the restoration of a 'right'.

Where a plaintiff sought not to have a 'right' restored, but instead sought to have a 'wrong' amended, the plaintiff's action was initiated by a different writ, This writ commanded the sheriff to summon a defendant to the royal courts to show why he had done the alleged wrong. Since the writ was concerned with wrongdoing, rather than rights, the writ, and the action which it led to, came to be known as trespass.

The desirability of having the royal courts handling all litigation in the realm concerning wrongdoing was deemed to be strictly limited.

Only those wrongs which were wrongs against the king were considered to be of sufficient weight to warrant the intervention of the royal courts. Other wrongs were considered more appropriately dealt with by local courts. The most common form of wrong against a plaintiff which met this requirement of also being a wrong against the king was a wrong committed with force and arms whcih thus breached the king's peace (trespass vi et armis et contra pacem regis).

Within this concept of forcible trespass there were three forms of action to meet different types of wrongdoing. These were: trespass ostensurus quare clausum fregit (trespass to land by breaking a close), trespass ostensurus quare bona et catalla cepit et asportavit (trespass to goods by taking and carrying them away), and trespass ostensurus quare in ipsum X insultum fecit et ipsum verberavit, vulneravit et male tractavit (assault and battery). Briefly, the first covered trespass against land, the second trespass against goods, and the third trespass against the person.

The action of trespass, then, was a forerunner of our law of torts - the writs provided a vehicle for remedying by way of damages the wrongs suffered by one individual because of the actions of another. The fact that it was trespass contra pacem regis, and therefore seen as a wrong against the king as much as a wrong against one of the king's subjects, did, however, bring trespass into the area of criminal law as well as tort law. Criminal trespass embraced all the lesser crimes such as administrative misdeeds, ravaging of other people's land and assaults on persons. The

sanction for such crimes was normally a fine. Criminal trespass was distinguished from those intrinsically horrible acts which demanded a horrible punishment such as murder and treason. These felonies, derived from the word for wicked or treachorous, were considered unemendable and thus those guilty of them lost everything they had: their life, lands and goods.

In mediaeval law, then, trespass was both a crime and a tort. As Professor Potter has put it: [1]

> It was by degrees only, therefore, that the law of crimes and torts became distinct, and the judges treated them as providing different remedies for a wrong.

By the mid-fourteenth century, however, the distinction between a civil and a criminal action was becoming clearly drawn. Criminal trespass became an action quite distinct from normal trespass and became known as a misdemeanour. On the other hand the contra pacem vi et armis aspect of civil trespass, although still pleaded, became a fiction. It was still necessary to allege that the trespass was committed with 'force and arms', but the royal courts took a liberal interpretation as to what this meant. For instance, a group of actions were allowed against blacksmiths for injuring horses 'with force and arms'. The 'force and arms' was a fiction allowing an action of what we would now call negligence to be brought before the

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1. Potter, H. Historical Introduction to English Law and its Institutions, fourth ed. by A.K.R. Kiralfy, (1962), p. 355.

the royal courts. [2]

By the end of the fourteenth century it was not necessary to plead even a fictitious use of 'force and arms'. It was decided that writs of trespass could be brought in the royal courts with a special case instead of the force and arms. The special case was a recital in the writ of a set of special facts which the plaintiff claimed made it appropriate for the action to be heard by the king's courts despite the fact that the trespass was not forcible. This non-forcible trespass came to be known as trespass on the special case or more simply 'trespass on the case'.

As every law student knows trespass on the case became the foundation stone for that body of the common law we now know as the law of torts. It is the fertile mother of tort law. As every law student also knows an action of trespass remains as a distinct action to an action on the case. THis is not the place to dealve too deeply into the much argued question of what the nature of this distinction is. [3] It is sufficient to say that in the eighteenth century, in an attempt to rationalise an accident of history [4], the courts drew a distinction between trespass, which applied where an injury resulted directly from the action of the defendant, and case, which applied where the injury was consequential or an indirect result of the defendant's action.

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2. Milsom, S.F.C. "Trespass from Henry III to Edward III" (1958) 74 L.Q.R. p. 195 at p. 220.

3. See the discussion in the judgements of Denning M.R., and Danckwerts and Diplock L.JJ. in Letang v. Cooper [1965] 1 Q.B. 232.

The distinction was illustrated in Reynolds v. Clarke [5] by Fortescue J. His Honour described a situation in which a man threw a log into a road and hit someone, and a situation where a man threw a log into a road and later someone tripped over it. In the former case an action in trespass lay. In the latter case, the correct action was one on the case.

For our purposes the distinction which developed between criminal misdemeanour and civil trespass is more important than the latter distinction between trespass and case. As a result of this development the common law does not recognise any crime of trespass. Under the common law, then, a person whose land is trespassed on cannot seek protection through the criminal law, but must instead rely on the tortious action of trespass quare clausum fregit. This action lies where, without lawful excuse, a person intentionally or negligently enters or remains on, or directly causes any physical matter to come into contact with, land in the possession of another. Where the plaintiff succeeds in his action he is awarded normal tortious damages for the loss suffered as a result of the trespass. For instance, where the trespasser causes damage to property, the measure of damages is the depreciation in the resale value of the property which has resulted from the damage. The derivation of this trespass

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4. Baker, J.H. An Introduction to English Legal History, 2nd. ed., (1979), p. 59.

5. (1725) 1 Stra. 634.

from trespass vi et armis means that the courts will award damages even where it cannot be shown that the trespass caused actual quantifiable loss. In such cases, however, the quantum of damages will be nominal.

The inconvenience in both time and money of bringing a civil action and the fact that nominal damages only will be awarded where there is no actual damage to property has made a tort of trespass seem an inappropriate remedy in certain circumstances. In such cases statutory intervention to provide criminal sanctions has been deemed to be justified. Thus, in the United Kingdom section 20 of the Firearms Act 1968 provides:

> (1) A person commits an offence if, while has a firearm with him, he enters or is in any building or part of a building as a trespasser and without reasonable excuse (the proof whereof lies on him).
>
> (2) A person commits an offence if, while he has a firearm with him, he enters or is on any land as a trespasser and without reasonable excuse (the proof whereof lies on him).

An offence under s. 20 (1) is punishable on indictment with five years' imprisonment, and an offence under s. 20 (2) is punishable on summary conviction with three months' imprisonment. This section replaced section 4 of the Firearms Act 1965 which was the same as the new s. 20 (2). Section 18 of the 1968 Act makesit an offence to have a firearm with the intent to commit an indictable offence, and s. 19 makes it an offence to have a firearm and ammunition with you in a public place. Section 9 of the Theft Act 1968 is similarly worded to s. 20 of the Firearms Act 1968. It provides, inter alia,

for an offence of burglary which is defined to include entering a building as a trespasser with an intent to steal, rape and so on.

It is clear from the surrounding statutory law that the creation in the United Kingdom of an offence of trespassing with a firearm was prompted by two concerns. First, it was considered necessary to have an offence which would catch those trespassing on property with some felonious intent. Section 20 (1) of the Firearms Act seems to be specifically aimed at this. Secondly, it was considered necessary to have an offence which would cover those simply trespassing on land with a firearm. The rationale for this being that a trespasser with a firearm could cause mischief out of proportion to remedies available in tort law. The association of trespass with firearms made it seem reasonable to make this into a minor offence. Section 20 (2) seems directed at this purpose.

## III THE TRESPASS ACT 1968

Like England, New Zealand has statute law regulating and controlling the use of firearms. In particular, the Arms Act 1908 and s. 298 (a) of the Crimes Act 1961 controls the abuse of firearms, especially abuse which results in damage to property. The Arms Act, as amended, makes it an offence to discharge or otherwise deal with a firearm, without reasonable cause, in a manner likely to injure or endanger the safety of any person or property

Just as in England it was considered desirable, in s. 20 (2) of the Firearms Act 1968, to make provision for those going on land with a firearm and thus possible disturbing stock, so in New Zealand a similar provision, going beyond the statutes regulating firearms in a general way, was considered necessary. This perceived need found form in s. 4 of the Stock Amendment Act 1927 and its successor s. 103 of the Animals Act 1967. This latter Act made it an offence to trespass upon private land with a firearm or a dog and disturb any "domesticated animal" on that land.

This legislation, specifically designed to prevent disturbance to farmers' stock, was buttressed by section 6A of the Police Offences Act 1927. This section was enacted by the infamous Police Offences Amendment Act 1952 which was passed by Parliament in the wake and shadow of the 1951 waterfront strike. The section made it an offence to wilfully trespass on any place and refuse to leave when ordered to do so by the owner or occupier.

It is to be noted that neither provision made trespass per se an offence. The distinction between the civil action of trespass and the criminal law which, as we have seen, was established in the fourteenth century was kept intact by making trespass an element in the offences rather than the offences themselves. Some other mischieve or damage had to occur before the state applied criminal sanctions. This is what has become known as the "double mischieve principle". Thus, for an offence to be committed under the Animals Act one not only had to:

a) trespass
b) on private land
c) with a firearm or a dog;

one also had to commit the 'mischieve' of disturbing a domseticated animal on that land. For an offence to be committed under the Police Offences Act one had to:

a) trespass
b) do so wilfully
c) commit the mischieve of refusing to leave the land when ordered to do so by the owner or occupier.

The reason for the 'mischieve principle' was not an adherence by our law-makers to historical precedent. It was instead a result of conflicting pressures on Parliament. On the one hand, farmers pressed for legislation which would protect their land and stock from 'irresponsible' hunters, sportsmen, trampers and members of the general public who, intentionally or out of ignorance, could cause considerable damage to the farmer's livelihood. Farmers argued that their rights as owners or occupiers of the land deserved protection by the criminal law. Hunters, sportsmen, and trampers, on the other hand, pressed for

the retention of what they saw as New Zealand's tradition of free access to the countryside. They argued that provisions regulating firearms and the landowners' rights under tort law were sufficient protection of farmers' interests. The mischieve principle was a compromise between these contending arguments and interests.

In 1968 the Trespass Act was passed. The Act, in the words of one commentator, "raised controversial issues in both public and social spheres." [1] The same writer saw the measure as, "the direct result of agitation from farming interests, who backed demands for stronger legal measures with evidence of heavy stock losses in the main." [2] Basically what the Act did was to incorporate in strengthened form the previous trespass provisions in the Animals Act and the Police Offences Act within one act dealing with the general trespass problem.

Section 6 A of the Police Offences Act 1927 was largely repeated in section 3 of the 1968 Trespass Act. Section 3 made it an offence if a person:
a) wilfully trespasses on property, and
b) is warned to leave by the owner or occupier of the property, and
c) after being warned to leave fails to do so.
The previous provision in the Police Offences Act was extended by section 4 of the new act. This section provided for an 'on-going warning' lasting for six months. Under the section, if

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1. Cowie, J.B. "the Trespass Act 1968"(1968-70) 5 V.U.W.L.R. p. 378

2. Ibid., p.389.

a person trespassed, wilfully or otherwise, was then warned to stay off the property by the owner or occupier of the property, and the person then wilfully trespassed on the property within six months of the date of the warning, an offence under the Act was committed. The section also contained a proviso which made it not an offence if the defendant proved that:

(a) The person by whom or on whose behalf the warning was given is no longer in lawful occupation of the place; or
(b) It was necessary for the defendant to commit the trespass for his own protection or for the protection of some other person, or because of some emergency involving his property or the property of some other person.

Section 103 of the Animals Act 1967 was repeated and extended in section 5 of the new act. This made it an offence to enter upon private land without the consent of the owner or occupier and either disturb any domestic animal on the land by means of a dog, firearm or vehicle (this roughly equated with the provision in the Animals Act), or wilfully or recklessly disturb any domestic animal on the land. Whereas under the Animals Act it was enough for the offence if there was a disturbance of a domestic animal as long as one was accompanied onto the land by a gun or a dog, the new provision made a connection between the disturbance and the gun or dog necessary.

Two new offences were also created by the 1968 Act. Section 6 made it an offence to discharge a firearm, without reasonable excuse, on any private land or from any place or vehicle into

or across any private land. The connection between this and trespass law is tenuous. This illustrates the point that in this area legislators are trying to deal with a tangle of firearm regulation, farmer protection, the environmental consideration of access to the countryside, and general trespass law. The second new offence which the Act created is found in section 7. This made it an offence to:

> (a) Wilfully trespass on any private land, and open and leave open a shut gate, or unfasten and leave unfastened a fastened gate, on or leading to any land used for the farming of domestic animals; or
>
> (b) With intent to cause loss, annoyance, or harm to any other person, open and leave open a shut gate, or unfasten and leave unfastened a fastened gate, or shut an opened gate, on or leading to any land land used for the farming of domestic animals.

One other section of the Act deserves comment. Section 9 (1) provided that where an offence was committed or alleged to have been committed under the Act only the occupier of the land in respect of which the offence was committed could lay information. By itself because of section 37 (2) of the Summary Proceedings Act 1957 which reads:

> Except as provided in this section or in any other enactment, no person other than the informant may appear at the hearing of any charge and conduct the proceedings against the defendant.

this would have meant that the occupier of the land would have to prosecute and conduct proceedings in court. Section 9 (2), however, gave the police a discretionary power to "appear at the hearing of the charge and conduct the proceedings

on the informant's behalf".

Section 9 (2) was not in the original Bill but was added at the Committee stage of the Bill's progress through the House. The original bill provided that only the occupier could lay information. This unusual provision which in effect meant that the Act was to be enforced by private prosecutions was designed to ensure that only land occupiers, and not 'busy bodies', could initiate proceedings under the Act, and it was designed to ensure that the police were not forced to become constantly involved in the enforcement of the Act. The provision also recognised the quasi-civil nature of offences under the Act because of its connection with the tort of trespass.

Under the procedure shich operated at the time [3] the Bill was given a pro forma second reading and, since it was a 'Justice'related bill, it was referred to the Statutes Revision Committee. In its submissions to the Committee, Federated Farmers objected strongly to the burden of having to conduct a private prosecution to enforce the Act being placed on farmers. When it reported the Bill back, however, the Select Committee left the clause unchanged. Federated Farmers then made further representations to the Government with the result that the Minister introduced an amendment, by way of Supplementary Order Paper, to include section 9 (2) when the Bill went through the Committee of the Whole.

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3. Ante, p. 13.

This was not the only example of Government intervention to correct 'errors' made by the Statutes Revision Committee. While the Bill was before the Committee, the Committee received evidence from the Ministry of Agriculture and the Forest Service that what became section 6, which made it an offence to discharge a firearm on private land, would give too high a degree of protection to noxious animals. It was argued that this section would make it too difficult to legally hunt wild deer, opposum and rabbits. The Select Committee agreed and struck the clause out of the Bill. Federated Farmers, however, argued that the clause was necessary to protect farmers against marauding hunters. Again the Federation appealed against the Statutes Revision Committee's decision to the Government. As a result the clause was reinstated when the Bill came before the Committee of the Whole.

Similarly, section 7, which made it an offence to fail to shut a gate, was amended by the Government after having been amended by the Statutes Revision Committee. The clause reported back from the Committee made it an offence to fail to shut a gate on or leading to any private land "on which there is for the time being any domestic animal which may move to other land if the gate is left opened or unfastened". This was replaced by the much wider wording of the enacted section [4] under which potential annoyance or inconvenience to

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4. Ante, p. 27.

the landholder, rather than positive harm or danger, was sufficient to constitute an offence.

A number of other changes were made to the Bill during its passage through the House. First, the short title was changed from the Criminal Trespass Bill to simply the Trespass Bill. It was felt that criminal trespass, although perhaps more technically correct, sounded too Draconian. Originally what became section 4 was a sub-clause of what became section 3. The Statutes Revision Committee clause 3 (2) of the original bill and inserted as clause 4 an amplified definition of what constituted 'prior warning'. Thirdly, a new clause was added to the bill which made it an offence for a trespasser to fail to give particulars of name and address to the landholder or occupier. The new clause became section 8 of the Act.

One change which Federated Farmers advocated which was not enacted related to what became section 5 of the Act. As we have seen, for an 5 offence under section 5 to be committed, a trespasser with a gun or a dog must also disturb a domestic animal with the gun, dog or vehicle. The section was so worded in order to retain the 'double mischief principle'. Federated Farmers pressed for an offence of trespassing on land with a firearm with no other element in the offence. The Select Committee rejected this submission arguing that the mere possession of a firearm in a rural area was not in itself offensive

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5. Ante, p. 26.

and that legislation should be aimed at the improper use of a firearm only. In this case, the Statutes Revision Committee's recommendation was not over-turned by the Government.

## IV PRESSURE FOR CHANGE

Federated Farmers did not regard the failure to have section 5 of the Trespass Act 1968 as a permanent defeat. It was seen as a set-back only; a set-back which called for more lobbying. Almost as soon as the Trespass Act appeared on the statute books, the Federation began calling for more changes in the trespass law. As Ruth Richardson, former legal adviser to the Federation, has put it: "Ever since the enactment of the Trespass Act in 1968, there has been general ferment in farming circles to have the law strengthened. . . . Federated Farmers of New Zealand (Inc.) has been a consistent and persistent advocate of the creation of an offence of trespassing on private land accompanied by a gun or dog." [1]

It was this pressure which led to the 1980 Trespass Act.

The Federation's lobbying was sustained. For instance, in 1971 the Wanganui Provincial District of the Federation made detailed submissions to one of its local Members of Parliament, Sir Roy Jack, then Speaker of the House, the Minister of Justice, Mr. Riddiford, the Parliamentary Under-Secretary to the Minister of Agriculture, Mr. Dick, and the Leader of the Opposition, Mr. Kirk. These submissions called for:
a) a grafting onto the Trespass Act a section with the effect of section 4 of the Firearms

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1. Richardson, R. "Access and Trespass" (May 1977) New Zealand Grasslands and Tussock Institute Review, p. 45.

Act (U.K.) 1965. [2] This would make an offence of trespassing with a firearm, the concession being that "reasonable excuse", if prooved by the defendant, would be a defence;
b)penalties for trespassing with a firearm of cancellation of the registration of the firearm and confiscation of it for the first offence and five years for the second offence. It was proposed that these penalties be additional to fines.
The view was also expressed that the necessity to prove wilful wilfull trespass rather than just trespass in order to bring a charge under section 3 of the Trespass Act made the section "toothless". In the normal case of a hunter trespassing on farmland it was found to be very difficult to prove that the hunter knew that he was trespassing on the complainant's land and was thus wilfully trespassing.

The Government's reaction to this submission was cautious. It conceded that the farmers had grounds for complaint but argued that the problem was partly dealt with by the Arms Act and that if changes in the law were necessary these changes could be better affected by having the Arms Act rather than the Trespass Act amended. Even at this early stage, then, the Government was committed to some form of legislative change.

After the change of Government at the end of

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2. Ante, p. 21.

1972, discussions between the Government and interested parties, including farmers' groups and sporting organisations such as the Deerstalkers' Association. The latter association suggested to the then Minister of Justice, Dr. Martyn Finlay, that the problem lay in the high prices which could be obtained for deer carcasses. Fines for trespassing were merely considered part of the operator's costs. The Association suggested that the only solution was a change in the law allowing the courts to remove a convicted trespasser's right to own a firearm. The association also suggested that the setting up of a sporting federation with regulatory powers over its members might also go some way towards a solution to the problem.

The reference by the Deerstalkers' Association to the high price of deer carcasses indicates that the nature of the trespass problem had undergone a significant change. Record prices in the 1970s for venison and opossum skins provided an incentive for an increase in commercial hunting. This meant that the trespass problem became more clearly associated with the hunter shooting for pecuniary gain rather than the trophy-hunting sportsman.

The change in hunting from a sport to a lucrative commercial enterprise created more problems in the trespass area. Instead of the sporting shooter on foot, farmers were now faced with commercial hunters who used helicopters, jet-boats, and well-equipped four-wheel-drive vehicles in their hunt for deer and opossum. This added to the farmer's problem of finding and apprehending trespassers. The commercial hunter was also

more likely than the sportsman to cut chained gates and fences because for the commercial hunter time was money. Section 3 of the 1968 Act proved no real protection against this new form of hunter. If apprehended, the hunter left the property and committed no offence. The six month warning-off period under section 4 similarly proved not particularly successful for the hunter could either return to the area after six months or hunt at night when the chances of detection were even less than normal. The professional hunter, knowledgeable on the law and aware of what the land boundaries were, thus created new problems for farmers.

The lucrative market for deer and opossum also changed the attitude of many farmers. Deer and opossum hunting now became a useful supplement to the farmer's other income. So, instead of co-operating with the hunting sportsman who was seen as helping rid the farm of pests which were damaging the farm, the farmer was now very often going to great lengths to prevent hunting not only on his own land but also on neibouring Crown land. The police were of the view that many false complaints under the Trespass Act were made by farmers to this end. The police concluded that the sport had now become "a lucrative commercial enterprise where the ethics on both sides are determined solely by pecuniary gain."

Federated Farmers could now, therefore, argue that the trespass situation had changed quite radically since the passing of the Trespass Act in 1968. The law thus needed amendment. Given the fact that the Federation had always pushed for reform, the new situation in reality merely buttressed their long-standing arguments.

The whole trespass trespass question came to the fore in 1974. The Labour Government wanted to review all the Dominion's laws on noxious animals principally to investigate the possibility of deer and rabbit farming which were seen as offering potentially large export earnings. An attempt to legalise rabbit farming in the Agricultural Pests Destruction Amendment Bill 1974, however, met with considerable opposition and the relevant clauses were struck out by the Select Committee dealing with the Bill. To look at the entire area of noxious animals the Government appointed a caucus committee - the Government Caucus Committee on Noxious Animals and Related Matters. The appointment of this committee, along with the Caucus Committee on Health which replaced a Royal Commission, marks the beginning of the rise in importance of caucus committees in our legislative process.

One of the questions which the Committee looked at was whether the control of noxious animals was being hindered by access problems or existing tenures. This, of course, forced the Committee to look at the tangled question of the adquacy of the provisons of the 1968 Trespass Act.

The Caucus Committee reported in August 1974. In making its report the views of all interested parties were canvassed: farmers, sportsmen, and commercial hunters. Federated Farmers again made the case for an amendment to the Trespass Act which would make it an offence to trespass on land with a gun or a dog, and argued that no other elements should be necessary for the offence. Again, however, this suggestion was

rejected. The Committee concluded on this point:

> Although the committee considerd that action is necessary to provide landholders with a greater degree of security from trespass with a firearm than exists at present we are not convinced that the amendment proposed to the Trespass Act is the most appropriate means of achieving this objective. Trespass with a firearm, by itself, must be considered a lesser penalty than, for example, failing to leave the property when ordered to do so by the land owner or occupier and accordingly it should attract a lesser penalty. This is unlikely to be an effective deterrent to those who presently flout the law. Furthermore, the very nature of the back country with its large areas and lack of marked boundaries present situations where unwitting and accidental trespass by recreational hunters is inevitable. . . . Further action is, however, essential but this action should be cautiously taken rather than risk the premature introduction of inappropriate and ineffective legislation.

To deal with the problem the Committee looked favourably on the suggestion that commercial hunters be licensed and on the suggestion, noted earlier[3], that a regulatory sporting federation be established. The Committee also recommended:

> That the registration of firearm users with provision for theloss of use of firearms be further investigated through discussions with outdoor sportsmen, landholders, land controlling departments and other affected groups.
>
> That the investigation include a review of the Arms Act 1958, the Dog Rgistration Act 1955 and the Trespass Act 1968 with the objective of providing adequate security to land owners or land occupiers from trespass with gun or dog.

A departmental working party was then set up

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3. Ante, p. 34.

to implement the Caucus Committee's report. The working party then established a sub-committee, convened by the Justice Department and comprising representatives of the Departments of Lands and Survey, Internal Affairs, Transport (Civil Aviation Division), the Police and the Forest Service, with the task of considering the trespass aspects of the Caucus Committee's report.

The proposals which the sub-committee made favoured reform of specific sections of the existing Trespass Act over a more comprehensive reform of the trespass law. It was recommended that the fines for offences under the Trespass Act be increased by between fifty and five hundred per cent. It was also recommended that the courts be empowered to confiscate any firearm involved in a Trespass Act offence. Minor amendments were proposed to section 7 . For instance, it was proposed that section 7 (a) be amended by making the word 'wilfully' qualify the words 'opens' and 'unfastens'.

The major amendments proposed concerned sections 4 and 9. It was proposed that section 9 be amended so that enforcement of the Act would be no longer dependent upon the initiation of a private prosecution. It was considered that an offence under the Act should be treated no differently from an offence under any other act. In other words, a person should either lay a complaint and seek prosecution by the Police or otherwise conduct a private prosecution. The need for a complainant to bring a prosecution had long been a complaint of Federated Farmers. The changing nature of the trespass problem made their case now a reasonable one.

With respect to section 4, it was proposed that:
- an owner or occupier be empowered to administer a warning-off notice upon the conviction of a person for any offence under the Act and not just for trespassing;
- the scope of the section be extended to include an owner who is not an occupier thus making the section the same as section 3;
- the period for which the warning-off notice lasts be extended from 6 months to 2 years thus dealing with the problem of the commercial hunter who after being warned-off returns in 6 months;
- proof of service of a warning-off notice be made sufficient as proof of the matters preceding the second act of trespass unless evidence to the contrary is adduced.

On the most contentious question, whether trespass with a gun or dog per se be made an offence, the sub-committee was divided. The Departments of Justice and Internal Affairs opposed such an approach, agreeing with the Caucus Committee that such an offence would have to have a lesser sanction than other offences under the Act and would thus not act as much of a deterrent, and such an offence would in any case be difficult to enforce. The Department of Lands and Survey, the Forest Service and the Police, however, supported the creation of such an offence. They argued that this was now necessary to control the activities of the professional meat hunter. Hence there waw no agreement reached on this point.

Following the committee's report to the Government in 1975 there was a period of inactivity. Two

related measures were, however, made in that year. The Civil Aviation Regulations were amended so as to require those hunting wild animals by air to gain the written approval of the occupier of the land prior to the flight. The New Zealand Walkways Act 1975 was passed with the aim of establishing a system of walkways throughout the New Zealand countryside for trampers and others seeking this form of outdoor recreation. Since the Government did not want to buy the necessary land, the implementation of the Act instead relied on landowners making the necessary land available for walkways. Federated Farmers were not slow to realise that this was a good opportunity to press their case for an offence of trespass with a gun or a dog. At the Select Committee stage of the Bill the Federation threatened the withdrawal of farmers' co-operation and support for the ideas behind the Bill unless unless the offence they had long been seeking was enacted. As a compromise, the Select Committee inserted what is now section 40 into the Act. This makes it an offence to leave a walkway with a gun or a dog and to go on to the adjacent private land without the authority of the occupier. This was, however, regarded, by the Justice Department at least, as a special concession made to elicit the co-operation of farmers for the walkways scheme and it was also seen as compensating landowners for the increased danger of trespass which the scheme created. Needless to say, Federated Farmers saw it as a precedent which had more general application.

The reaosn for the lack of action after the sub-committee's report on trespass in 1975 appears to have been that the departments and the Government wished to wait until the noxious animals legislation

which also reulted from the Caucus Committee's report was completed. The Noxious Animals Bill, amending and consolidating the Noxious Animals Act 1956, was introduced into the House on 19 August 1977. It was eventually passed into law as the Wild Animal Control Act 1977 receiving its third reading on 16 December 1977. The Act had a number of measures affecting trespass law.

The 1956 Act had conferred on the public a general authority to hunt or kill noxious animals with a proviso that the Act did not of itself "confer on any person the right of entry to any land" [4]. In Dowdell v. Police [5], however, this was interpreted to mean that a trespassing hunter of noxious animals did have a lawful, proper and sufficient purpose for possessing a firearm for the purposes of the Arms Act. Federated Farmers had pushed for an amendment to the Noxious Animals Act in order to plug this loophole which in its opinion encouraged trespassing. Section 8 of the 1977 Act dealt with this problem by changing the proviso to read that the general authority to hunt or kill noxious animals did not "authorise any person to hunt or kill or have in his possession any noxious animal on any land without the authority of the owner or the occupier."

The Wild Animal Control Act also, in section 9, denied ownership of noxious animals to people

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4. Section 3.

5. [1970] N.Z.L.R. 486.

who have taken them unlawfully. Section 38 of the Act provides that where a person is found in any area where noxious animals are usually prevalent and where the person has with him or under his control a weapon that could be used for hunting or killing a noxious animal, then the court may infer that the person was hunting or killing noxious animals. In such a case the liability is on the person to prove that he was on the land with the necessary authority. Thus section 38 and section 9 go a long way towards meeting Federated Farmers' case for an offence of trespass with a gun. The Act also increased penalties for offences providing, for instance, for the confiscation of weapons.

As soon as the above bill began to reach something like final form pressure again mounted for another bill amending the trespass law. It appears that Federated Farmers was effectively lobbying politicians in early 1977. Leading politicians involoved appeared to be The Seaker, Sir Roy Jack, the Chairman of Committees, Mr. Harrison (both represented farming seats and was a farmer with a legal background making him a particularly good access point for the Federation), Mr. Quigley, another lawyer representing a rural electorate and a member of the Cabinet Committee on Legislation and Parliamentary Questions, Mr Thomson, Minister of Justice, and Mr. McIntyre, Minister of Agriculture. The police were by this time also pressing for a 'toughening up' of the trespass laws. They argued that the conflict in the countryside between farmer and hunter was escalating with incidents being reported of shots being fired into poachers' vehicles and helicopters, and

of farmers' stock being shot and taken. The police saw themselves as a buffer between irate landowners and professional meat hunters. The police saw an offence of trespass with a gun or a dog as one solution to the problem. To this end they wanted the sub-committee which had previously looked at the Trespass Act 1968 and the report of the Caucus Committee on Noxious Animals and related matters to reconvene. The Department of Justice meanwhile took the view that while the adjustments to penalties and the other amendments to the Trespass Act agreed on by the sub-committee were justified, the provisions of the Wild Animals Control Act outlined above removed the necessity for the creation of an offence of trespass with a gun or a dog.

At the same time as these interdepartmental discussions were continuing went public with their lobbying. In the May 1977 issue of the Tussock and Grassland Review Ruth Richardson, the legal adviser to the Federation and an ex-employee of the Justice Department and thus with first-hand knowledge of the history of attempts to reform the trespass law on both sides of the issue, published an article presenting the Federation's case for reform.[6] In this article the validity of the Justice Department's argument that the real problem of back-country trespass lay in the difficulty of apprehending trespassers, especially trespassers who travel by helicopter. Nevertheless

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6. Loc cit.

Ruth Richardson argued that changes to the Trespass Act were necessary to make the Act a much more effective deterrent to the potential trespasser. The changes proposed were: an amendment to section 9 so that private prosecutions by the landholder would not be necessary, stiffer penalties including a provision empowering the courts to confiscate firearms, the changes to the offences under section 4 proposed by the subcommittee to the Caucus report - indeed these proposals were reproduced in the article verbatim much to the annoyance of the Justice Department.

Even with this pressure progress on the reform proposals was slow. It was not until mid-1978 that a meeting of officials from the Police Department, the Forest Service and the Justice Department took place; a meeting proposed by the police almost a year earlier. As a result of this meeting a number of reform proposals were agreed upon. Essentially these were the same proposals as were agreed to by the sub-committee back in 1975.[7] There were, however, a few changes made to the original proposals. The penalties for an offence under sections 4, 5 and 6 were recommended to be strengthened not only by increasing the fines but also by providing for imprisonment as was already the case for an offence under section 3. Secondly, the obligation of a trespasser to give particulars of name and address under section 8 of the Act was recommended to be widened so that the obligation extended

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7. Ante, p. 39.

to the police as well as the landholder. This seemed to be a natural consequence to the changes proposed to section 9 - allowing the police to lay information. Finally, the most important change in the proposals recommended was the deletion from section 3 of the word wilfully so that one did not have to trespass wilfully before being warned-off the property. It was argued that because an effence was only committed after a trespasser failed to leave after being warned off the property it was not necessary under the 'double mischief' principle for the initial trespass to be 'wilfull'.

This argument is not entirely convincing. One can, for instance, envisage the situation where a sportsman is hunting legally on Crown land and inadvertently crosses an unmarked boundary into a farmer's property. He is trespassing, but not wilfully. Confronted by the farmer, and believing that he is on Crown land and that the farmer is merely trying to save the hunting ground for himself, the hunter refuses to leave. Strictly read the ommission of wilfull would then mean an offence has been committed, an offence in which there is no mens rea. It is possible, however, that the courts will imply a wilfull intent following the long-established judicial opposition to crimes of strict liability. Credence is given to this by the English case of Collins v. D.P.P.[8] In this case the Court of Appeal interpreted section 9 of the Theft

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8. [1972] 2 All E.R. 1105.

Act (U.K.) 1968 which provides for an offence of trespassing with intent to commit a crime. [9] It was held that: [10]

> for the purposes of section 9 of the Theft Act 1968, a person entering a building is not guilty of trespass if he enters it without knowledge that he is trespassing.

Only litigation will determine whether the same conclusion is reached here.

The real reason for the deletion of 'wilfull' from section 3 appears to have been that it was a concession by the Justice Department to the police and Federated Farmers for not incorporating in the recommendations an offence of trespass with a gun or a dog.

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9. Ante, pp. 21-22.

10. [1972] 2 All E.R. 1105 at 1109 per Edmund Davies L.J.

## V THE TRESPASS BILL 1979-80

The recommendations of this inter-departmental committee of representatives of the police, Justice Department and the Forest Service were referred for approval to the Minister of Justice who, in September 1978, referred them on to the Parliamentary Counsel to enable a draft bill to be prepared. A draft bill was completed by early 1979 so that at last Federated Farmers could see some concrete result of their years of agitation since the passage of the 1968 Act.

The draft bill was then referred to interested departments (Justice, Police, Forest Service, Lands and Survey, Agriculture, Transport) for comment. Since the bill had no financial implications, no Treasury involvement was required which probably placed the bill in a minority category. The result of this round-robining of the bill was a few minor changes. For instance, the draft bill provided for a fine for an offence against sections 3 and 4 of up to $500. The police argued that this maximum fine would not prove to be enough of a deterrent to professional live deer hunters who could expect $1,200 for a live deer. Furthermore it was argued that the courts would be reluctant to impose prison sentences for these relatively minor offences. The police therefore suggested either a straight increase in the maximum fine, or alternatively that the $500 fine could be retained for first offences but that a higher maximum fine could be set for second and subsequent offences. As a result of these suggestions the maximum fine in the draft bill was increased to $1,000. Another change which resulted from this process

was the addition into the bill, as clause 5, of a definition of what constituted the delivery of a warning under sections 3 and 4.

Once this process was completed a final draft bill was prepared. This bill was then submitted to the Minister of Justice for his approval and was then referred to the Cabinet Committee on Legislation and Parliamentary Questions. Members of the Committee were: the Hon J.K. McLay (Chairman and Minister of Justice), the Rt. Hon. B.E.Talboys (Deputy Prime Minister), the Hon. D.S. Thomson (Leader of the House), the Hon. T.F. Gill (Minister of Health, and the Hon. D.F. Quigley (Associate Minister of Finance - a Finance Minister is on all such committees to ensure that financial implications of bills or other matters under discussion are not overlooked.) It is a feature of New Zealand's Cabinet Committee system that officials are always present at meetings to enable Ministers to ask questions about proposals under consideration. This compares with Cabinet which meets with only the Secretary to the Cabinet present as a minute-keeper.

When the Trespass Bill was referred to the Legislation and Parliamentary Questions Committee in July 1979, officials present were Mr. P.W. Williams of the Parliamentary Counsel's Office, who drafted the bill, and Mr. W.D. Sisarich of the Department of Justice, who was Justice's desk officer on the bill. The presence of these officials meant that Ministers were able to ask questions such as why imprisonment was provided for as a penalty for an offence under the bill. Officials were able to reply that an imprisonment penalty empowered the police to arrest and detqin suspected offenders.

The Committee did want a couple of minor changes made to the bill but decided that these changes could be made when the bill was referred to a Select Committee. It is quite a common practice now for the Government to approve bills on the understanding that minor changes will be made by the Select Committee. This saves delays in having to have the bill redrafted before its introduction to the House. Prior to the full flowering of our Select Committee system these changes would have been made when the bill was referred to the Committee of the Whole. Subject to these minor amendments being made by the Select Committee, the Cabinet Committee approved the Trespass Bill being referred to caucus and introduced into the House.

The bill survived caucus scrutiny unscathed and was introduced to the House on the 19 July. The bill was introduced in the name of the Minister of Justice, the Hon J.K. McLay, who stated that the Bill, "implements the recommendations of the subcommittee set up to investigate the trespass aspects of the caucus committee report on noxious animals and related matters" [1]. He admitted that "the proposal that trespass with a gun or a dog be made an offence of itself was the most contentious of the reform proposals" and argued that the absence of such an offence in the Bill demonstrated that the Bill retained the balance between the interests of "the farmer

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1. McLay, J.K. (1979) 424 N.Z.P.D. 1651

and the property owner insisting on those rights incidental to ownership and possession" and the interests of "the sporting lobby insisting on the retention of its traditional rights of free access across the countryside." [2]

Labour's response to the Bill was mutedand largely limted to asking questions such as whether the Deerstalkers' association had been consulted and the effect of the Bill on Crown lands. The Bill was read and introduced without a division being called. The Minister then moved that the bill be referred to the Lands and Agriculture Committee, and that the hearing of evidence before the committee be open to accredited representatives of the news media. This too was agreed to without division. The reason for referring the Bill to the Lands and Agriculture Committee rather than the Statutes Revision Committee, which heard submissions on the 1968 Act and which is the committee to which bills such as this with a 'Justice flavour' are normally referred, was never made clear by the Minister.

During the second reading Mr. McLay did state that the Bill made better progress in the Lands and Agriculture Committee than it would have done had it gone to the Statutes Revision Committee.[3] One assumes that this was a reference to the differing workloads of the respective committees and not the ability of their membership. Workload

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2. Idem.

3. McLay, J.K. (1980) 430 N.Z.P.D. 1090.

on the Statutes Revision Committee may have been one reason for the Bill's eventual destination. Another possible reason was the experience of the 1968 Act which, as we have seen [4], was substantially re-written by the Committee on the Whole after being reported back from the Statutes Revision Committee. It may have been felt that although this bill dealt with some technical legal issues, nevertheless the Lands and Agriculture Committee had a better understanding of the problems facing farmers and therefore the pressures which led to the Bill being introduced. It is of note that the decision to refer the Bill to the Lands and Agriculture Committee had been made by mid-July 1979 when the Bill was referred to the Cabinet Committee on Legislation and Parliamentary Questions.

Whatever the reason for referring the Bill to the Lands and Agriculture Committee, this decision did have the unusual consequence of a bill being referred to a select committee of which the Minister in charge of the Bill was not a member. It also meant that the Bill was referred to a committee which had, in mid-1979, only one legally qualified lawyer as its member, Mr. W. Peters, who was a very junior Member of the House. The predominance of non-legal, farmer members on the committee probably meant that the farmer viewpoint got a sympathetic hearing, but it also probably increased the influence of the

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4. Ante, pp 27-29.

Justice Department, which acted as the Committee's adviser, because it meant that the legal expertise of officials was not matched by that of members. This would have made it particularly hard to change the Bill in any substantial way.

The Committee received twenty-nine submissions, nine of which were heard orally. These submissions divided between that of Federated Farmers which supported the Bill although it still would have preferred to see an offence of trespassing with a gun or a dog written into the Bill, and recreational and civil liberties groups which opposed the Bill for denying access to the countryside. Among the latter submitters were: The New Zealand Hand Loaders Association, the Parawai Tramping Club, the South Island Council of the Acclimatisation Society, Mr. R.W. Stanley from Kaiapoi and 130 others, the Federation of Mountain Clubs of New Zealand, the New Zealand Deerstalkers Association of New Zealand and some of its branches, the Wellington Tramping and Mountaineering Club, the New Zealand Federation of Rifle, Rod and Gun Sportsmen, the Wellington Association of Mountain Clubs, the Salmon Anglers Association, and the Council for Civil Liberties. The Royal Aero Club and the New Zealand Law Society made submissions on some aspects of the Bill.

A number of submissions obviously misunderstood the Bill and sought measures to enforce access orders to children in the custody of another (usually the ex-spouse). These submissions obviously had no influence on the Committee's

recommendations.

A large number of the submissions opposed the whole basis of the Bill by arguing that any attempt to 'toughen up' New Zealand's trespass laws was unnecessary and oppressive. Typical of such submissions was the petition of Mr. R.W. Stanley which in part read:

> My ancestors came to this country from England at a time when a man could be hanged or deported for shooting the landowner's deer or rabbits, or catching his fish. Although I do not advocate poaching I cannot condone locking up our back country, and I think many landowners should be reminded of their moral and social obligations to young New Zealanders.

This sort of submission to a select committee may make good press and may be good for the soul of the witness but it will seldom have any effect on the legislation under study.

By the select committee stage the Government is normally committed to the broad policy content of the bill and is not prepared to appear to suffer a defeat by having the bill radically changed. Also, as the present Minister of Foreign Affairs, the Right Honourable Brian Talboys, has written: [5]

> it may be said that any bill introduced in the House has already received a large measure of agreement and support. The aid of colleagues is sought and necessary compromises are reached.

Having made all these consultations the Government is usually reluctant to disrupt the result by

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5. Talboys, B.E. "The Portfolio of Minister of Agriculture" in Cleveland, L. and Robertson, A.D. Readings in New Zealand Government (1972), p. 80.

allowing the bill to be radically changed at the select committee stage. This has led Richard Prebble M.P. to complain [6] that the function of select committees is "quite limited".

In the case of the Trespass Bill there were, for instance, compromises between the Justice Department, the Police, and Federated Farmers on issues like deleting 'wilfull' from section 3 and not incorporating an offence of trespass with a dog or a gun into the bill. From what has been said above it seems fair to say that the Government had no intention of allowing the Lands and Agriculture Committee to alter either of these aspects of the Bill. Head-on attacks of bills at select committees, therefore, are either propoganda stunts or a sign of political naivety.

Effective submissions are much less ambitious and seek either drafting changes or seek changes which lie between the poles of drafting and radical alteration.

As a result of submissions a number of drafting amendments were made. The Long Title was changed to reflect the fact that the Bill did not really consolidate the law on trespass. The date of the Short Title was changed to 1980. A change was made to the definiton of "domestic animal" in clause 2 to make allowance for rabbits the farming of which had become legal. This change followed representations from the Minister of

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6. New Zealand Herald, 23 April 1977, p. 7.

Agriculture. Finally clause 10 was changed following representations from the police so that the occupier or police could lay information for all offences rather than those in clauses 6 to 9.

Some substantial changes were also made. For instance, a new sub-clause was added to clause 3 (clause 3 (2) ) which provided for a defence to a charge under clause 3 in cases where trespass was necessary because of emergency and so on. This change followed submissions from a number of bodies including the Royal Aero Club which was particularly concerned with glider pilots being prosecuted for trespass after being forced to make an emergeny landing on private land. Another substantial change was made to clause 9. The Council for Civil Liberties argued that both clauses 9 (1) (b) - which required a trespasser to provide to the occupier or police satisfactory evidence of name and address - and 9 (2) - which made it an offence to refuse to do so - were "objectionable" since it would create an offence of not carrying means of identification. This clause, which became section 8 of the Act, was regarded by the Committee as necessary if farmers and police were to enforce the Act but as a concession the clause was rewritten in a more agreeable form.

When the Bill was reported back to the House on 3 June 1980 the Chairman of the Committee stated, quite fairly it seems, that : "The Bill remains basically unchanged apart from some

minor amendments. . . . The main objective of the Bill is retained." [7] This probably sums up the normal function of select committees.

Where the select committee stage of the Trespass Bill varied from the norm was in its partisan nature; Labour opposed the Bill in toto throughout the select committee hearings. Labour continued this opposition through the debate on the reporting back and on the second reading which followed it. Labour attacked the Bill on a number of grounds. They argued that it was oppressive. In the words of Geoffrey Palmer: "The powers in the Act are so wide and so all embracing that it might have been better entitled the Suppression of Hunting Act". [8] Secondly, Labour argued that the Bill was unnecessary because of the wide range of powers already available under the Crimes Act, the existing Trespass Act, the Arms Act and the Wild Animals Control Act. Thirdly, Labour argued that the Bill would be ineffective in dealing with the trespass problem that did exist. Again Geoffrey Palmer put this argument the most succinctly arguing that trespassers "can be dealt with only if they are caught., Nothing in this Bill will ease the problems of detection, which plague the protection of property in the back country." [9] A fourth argument raised by Labour was that the Bill represented "class legislation", and as Richard Prebble put it, Labour "is totally opposed to class legislation

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7. Shultz, L. (1980) 429 N.Z.P.D. p. 412.

8. Palmer, G. ibid., p. 413.

9. Idem.

designed to strengthen greatly the position of the landowning class as opposed to those who do not have land." [10] Finally Labour argued that this legislation, supposedly designed to solve the problem of trespass on rural land, will in fact be used more often for cases of trespass on urban land. Furthering this argument Mr Caygill stated: [11]

> The historical record of the 1968 Trespass Act shows it has been used in urban areas more than in rural areas. On seven occasions the Trespass Act has come to the courts and the decisons have been sufficiently noteworthy to be recorded in the New Zealand Law Reports . Six were urban cases.

The real rationale for the Bill, Labour continued, was as a means of dealing with peaceful protesters during the approaching Springbok tour of the Dominion.

The Government replied that the Springbok tour issue was a "red herring" [12] and that the Bill was a reasonable response to the valid complaints of farmers dealing with a severe trespass problem. Furthermore, it was argued that the Bill only recognised what were the valid rights of landowners, rights which the Labour Party, if it had its nasty way would abolish. In the words of Winston Peters: [13]

> We believe that those people who own land, and especially those who farm it, and put up with many sacrifices and other difficulties, have an entitlement to some rights. Under the Bill they will be given those rights, . . .

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10. Prebble, R. (1980) 430 N.Z.P.D., p. 1210.

11. Caygill, D. (1980) 429 N.Z.P.D. p. 518.

12. McLay, J.K. Press Statement, 5 July 1980.

13. Peters, W. (1980) 429 N.Z.P.D., p. 510.

The Government's majority in the House ensured that the Lands and Agriculture Committee's report on the Bill was accepted (10 June) and that the Bill passed its second reading (2 July). On 13 November the Bill was sent to the Committee of the Whole House where the amendments made by the Committee were read into the Bill. The Government's majority was then used to defeat a string of Opposition amendments. The Government did, however, take this opportunity to make a few last minute drafting changes to the Bill. With a few exceptions, such as the major changes made to the 1968 Trespass Bill, this is now the prime function of the Committee of the Whole. A new clause 7 was substituted so that the clause no longer dealt with the discharging of weapons on private land. This it was felt was now adequately dealt with by the Arms Act and the Wild Animals Control Act. Clause 10 was amended to delete subclause 10 (2) which which was superfluous now that the police could lay information for an offence under the Act. Clause 12 was also slightly amended. The Bill was then reported back to the House on 14 November.

The Trespass Bill then received its third reading on 25 November. The debate was kept very short. For the Government, only the Minister in charge of the Bill, the Hon, J.K. McLay, spoke. For the Opposition, only Mr. Geoffrey Palmer, the leading opponent in the House to the Bill, and Mr. Ralph Maxwell, who was a Labour Member on the Lands and Agriculture Committee, spoke. Both sides largely re-iterated the points which they had made on the reporting back stage and during the third reading. To show its opposition to the Bill, however, the Labour Party did call

a division on the third reading. This, of course, the Government won.

The Bill was then sent for the royal assent. This it received on the 17 December, and it thus became law.

## VI CONCLUSION

The British politician and Labour cabinet Minister of the 1940s and 1950s, Nye Bevan, once gave the following commentary on the source of political power. "When I was a boy", he said, "I thought power lay with the local council. When I got on the council I reasoned it must lie in the mayor's office. When I became mayor I realised that the seat of power was at Westminster. When I became a Member of Parliament I concluded that one had no power unless one had a seat in Cabinet. Now I am in Cabinet I am still looking to see where power lies." What Bevan was saying was that in a political system such as ours, political power is dispersed to such an extent that it at times seems like a mirage, forever being beyond the seeker's grasp. One finds the same thing when one tries to answer the question: who makes the law?

The real answer is that vast numbers have a hand in the making of most laws and no individual is dominant to the extent of being a 'law-maker'. In the case of the Trespass Act 1980, during the second reading of the Bill, Sir Basil Arthur argued that Ruth Richardson was the law-maker. "The authorship and parentage of the Bill," he stated, "come from the isolated view of Ms Ruth Richardson." [1] As we have seen this was not the case. Ruth Richardson was an important member of the cast, but she was by no means solely responsible for the Bill. There were many actors: politicians, the Caucus Committee,

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1. Arthur, Sir Basil (1980) 430 N.Z.P.D., p. 1207.

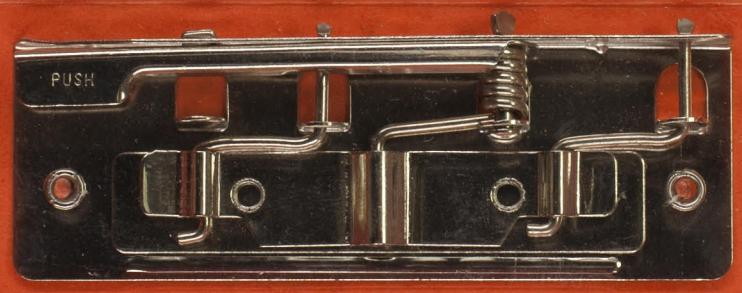
civil servants, and pressure groups. No one can be said to be the author of the Trespass Act, and in this the Act is typical of most of our legislation.

Of all these actors, however, it does seem fair to say that parliamentarians were the least important. Cabinet Ministers prodded the Bill along when progress slackened. Pressure groups lobbied and negotiated with the civil service and Ministers. The civil service negotiated with pressure groups and between themselves. Out of this a compromise draft bill was produced. Parliamentarians were left dealing with a 'mopping-up' operation.

What we can say about the New Zealand legislative process, therefore, is that, despite the growth of select committees, it is still largely an executive process. If anybody is the law-maker it is the executive. This perhaps explains the rise of caucus committees. They provide a means by which backbench Members of Parliament can have an input into the executive side of law-making;,like Bagehot's Cabinet they provide a buckle between the legislature and the Government. As such caucus committees have an enormous advantage over select committees, an advantage which today's more sophisticated backbenchers have not been slow to realise.

The rise of caucus committees should not therefore be seen as the dominance of party over Parliament. Instead they should be seen as one way in which parliamentarians can exert real effective influence over the legislative process. Given the continuation of a largely bi-partisan House, and given the continuation of our present constitutional arrangements

the caucus committee system is probably the only way in which parliamentarians can become effective actors in the law-making play.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