LL.M RESEARCH PAPER

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A COMPARATIVE STUDY OF

DELEGATED LEGISLATION IN THE CUSTOMS AND EDUCATION AREAS

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1. INTRODUCTION

Over the last fifty years one has seen in New Zealand a rapid growth in the number of public administrative bodies. This expanding Government bureaucracy has brought with it an increasing need for more delegated legislation and consequently, a need for more controls over the exercise of these delegated legislative powers. Concern has been expressed as to the already wide abuse of delegated legislation in the economic area (1) and to the excessive amount of legislation and regulations (2). Because of this often constitutional principles become secondary considerations to administrative efficiency (3). Thus the need for both legal and political safeguards is a very real one. But how effective these safeguards can be is often determined by the particular area of Government in which the delegated legislation is made. This paper proposes to examine the use of delegated legislation in two such areas - namely Customs and Education. It is these two areas which provide a useful contrast with each other in terms of both the use of available safeguards and the effectiveness of those safeguards in preventing abuses of the legislative process.

2. THE EMPOWERING LEGISLATION

CUSTOMS

The major piece of legislation under which the Customs Department operates is the Customs Act 1966. However, the powers embodied in that Act also extend to the administration of all the Customs Acts as defined in S.3. These include the Sales Tax Act 1974, the Distillation Act 1971, the Motor Spirits Duty Act 1961, Part III of the Finance Act 1915 (dealing with beer duty) and various International Treaty Ratification Acts (4). These Acts contain

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(1) Korah, "Counter-Inflation Legislation: Whither Parliamentary Sovereignty" (1976) 92 L.Q.R. 42

(2) Palmer, "New Zealand's Avalanche of Laws" N.Z, Listener 28/5/77

(3) Note the criticisms of the recently retired ombudsman, Sir Guy Powles, with regard to Government Departments flouting the rule of law - 'the force of law is slipping through too much law on too many subjects. The old saw that ignorance of the law is no excuse is no longer justifiable.'- Evening Post 10/5/77

(4) i.e. The Trade Agreement (New Zealand and Canada) Ratification Act 1932, The Trade Agreement (New Zealand and Australia) Ratification Act 1933, The General Agreement on Tariffs and Trade Act 1948, The New Zealand-Australia Free Trade Agreement Act 1965.

extra powers of their own as well as those contained within the Customs Act itself. In particular, the powers of search and seizure (5) and the powers of forfeiture (6) as provided in the Customs Act extend also to the enforcement of the other Customs Acts. So also does the power of sub-delegation as provided under S.9(1) of the Act (7). This allows for the delegation of the Ministers powers to any officer of Customs provided it is in writing and S.9(2) allows the Comptroller as permanent head of the department to delegate his powers to any officer of Customs provided he has the written consent of the Minister.

In the Customs Act itself, there are a number of specific empowering sections under which regulations can be made on specific topics. For example, S.14 gives the Governor-General the power to make regulations in respect of the attendance of Customs Officers at any place for the purpose of performing or supervising any act required or permitted by the Customs Acts. S.48 gives the Governor-General a general power to prohibit imports including the power to conditionally prohibit imports subject to a licence. S.70 gives a similar power with respect to exports. SS.123-130 give various limited powers to alter the Customs Tarriff by Order in Council (as will be discussed below) and S.167 gives a power to suspend excise duty. S.232 gives a power to make regulations in respect of the licensing of Customs agents, including the power to prescribe fees, while S.237 gives a similar power with respect to the licensing of Customs carriers. There are also a number of other empowering sections dealing with specific areas (8) plus a general empowering section - i.e. S.306. This section appears in the "objective form" (9) and deals with a number of additional purposes for which regulations may be made with the residual clause of "providing for such matters as are contemplated by or necessary for giving full effect to the provisions of the Customs Acts and for the due

(5) As provided in ss.203-228,275-278

(6) As provided in ss.270-274 - see also s.4 Sales Tax Act 1974 which provides that the powers and authorities under the Customs Act shall extend also to the collection of sales tax under the Act; also s.95 Distillation Act 1971 which provides that Part XII Customs Act (which relates to forfeiture and seizure) shall apply in the administration of this Act.

(7) See also s.6 Distillation Act 1971 which repeats these powers of sub-delegation for the purposes of that Act references being made to the Chief Inspector as permanent head - although this position is also held by the Comptroller.

(8) e.g. s.102- restrictions on right of warehousing; s.148- determining country of origin; s.202- methylated spirits.

(9) c.f. 'subjective' - used to indicate that the delegate may prima facie make such regulations as he deems necessary; 'objective'- where an objective test of necessity can be applied -i.e. the view of the court (see post).

administration thereof."

Although the residual clause in S.306 may appear at first sight to have a wide effect in its application to all of the Customs Acts it is only intended to cover residual matters where the provisions of the Customs Act overlap with the provisions of the other Customs Acts. This is borne out in the fact that both the Distillation Act 1971 and the Sales Tax Act 1974 contain their own general empowering sections each with a similar residual clause - i.e. "providing for such matters as are contemplated by or necessary for giving full effect to the provisions of this Act and for its due administration" (10). Also S.306 itself only sets out the making of regulations for purposes relating essentially to matters covered in the Customs Act - eg. imports and exports matters, prescribing forms for purposes of Act, etc.

To Whom to Delegate?

Regulation making powers are usually delegated to the Governor-General whereas purely discretionary decisions of an administrative nature are left to the Minister. Delegation to public servants such as the Comptroller is usually limited to machinery matters - eg. S.26 Customs Act gives the Minister power to appoint ports of entry whereas S.27 gives the Comptroller power to appoint boarding stations within those ports of entry (11). Proper delegated legislation then, in the form of regulations, is kept in the hands of the Governor-General and cannot be sub-delegated unless specific power is given in the empowering section. (Delegated powers to the Minister and the Comptroller can be sub-delegated by virtue of S.9 as outlined above). By and large Customs legislation closely adheres to these principles but there have been in the past a couple of departures from these principles that require some mention.

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(10) s.98 Distillation Act and s.80 Sales Tax Act.
(11) Similarly ss.30,31 distinguish between the Minister's powers and the Comptroller's powers with respect to airports.

S.36 of Part III of the Finance Act 1915 is a curious exception to the principle of delegating regulation making powers only to the Governor-General. Under S.36 the Minister is given a general power to make regulations - "The Minister may make regulations for all or any of the purposes expressly provided or may be necessary for the effectual administration of this Part of the Act". By virtue of S.19(7) Customs Acts Amendment 1930 this power is extended to the licensing of malt and barley manufacturing plants and to the imposition of fees or other payments for that purpose. However no regulations have been made under it and the department seems to be oblivious of its existence. Later amendments to the Act have given regulation making powers for specific purposes to the Governor-General (12) and last year the Governor-General was given the further power to suspend rates of duty imposed under that part of the Act (13). Therefore, whatever the original purpose was in delegating such a power to the Minister, it is clear that it has never been used and preference has been given instead to acting under the extra empowering provisions inserted into the Act in which the Governor-General is the delegated authority. The result is that S.36 is largely superfluous although theoretically it does deal with the residual area of regulation making. However, Part III of the Finance Act 1915 is now undergoing some substantial updating by virtue of the new beer duty legislation. It is therefore likely that S.36 and S.19(7) Customs Acts Amendment Act 1930 will disappear along with the old legislation.

The principles surrounding sub-delegation were brought to the fore when the power to prescribe forms under the Customs Regulations (14) and the Sales Tax Regulations (15) was challenged (16). By virtue of both these regulations the Comptroller was given the power to prescribe forms. However, the empowering sections under both these Acts only gave that power to the Governor-General and therefore the power was held to be ultra-vires. As a result new sections

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(12) e.g. s.48(6) Finance Act 1917 which gives the Governor-General power to make regulations generally for the administration of the cancellation or refusal of licences where persons applying are considered not to be of good character or reputation.
(13) s.26 Customs Acts Amendment Act (No.2) 1976
(14) S.R. 1968/169
(15) S.R. 1974/157
(16) Collector of Customs v. Matusich - oral decision of Mitchell S.M. in the Auckland Magistrates Court 30/10/75 - held that it was not enough to change the definition of "prescribed" to include "prescribed by the Comptroller - must be a specific empowering section.

were inserted into both the Customs Act and the Sales Tax Act giving the Comptroller power to prescribe any forms under the Acts that were not otherwise specifically prescribed (17). It is interesting to note that the Distillation Act also gives power to the Governor-General to prescribe forms but that no similar provision has been inserted giving the Comptroller such power to prescribe additional forms. This is probably because the Distillation Regulations (18) do not offend in the same way as the above two regulations.

Powers to Impose Fees and Charges

These powers are of particular significance when it is recognised that they are tantamount to taxing provisions. In the Customs area a lot of use is made of such powers through the use of licensing measures under which license fees are made payable. There is also some inconsistency as to what licensing matters are to be dealt with in the regulations and what licensing matters are to be dealt with in the Customs Act itself. For example, the licensing of Customs agents and carriers is dealt with in the Customs Regulations (19) but the licensing of Customs warehouses is laid down in the Act itself (20). S.85 goes so far as to outline how the license fee for warehouses is to be computed but both SS.232, 237, dealing with the licensing of Customs agents and carriers respectively, leave these matters to the Governor-General. No logical reason can be given for the different licensing procedures except that perhaps more administration is involved in the licensing of Customs agents and carriers as compared to the licensing of warehouses.

In regard to the prescribing of licence fees and charges there is some variation in the width of the different empowering sections. Under the Customs Act the particular circumstances in which licence fees may be charged are specifically outlined in the Act itself - e.g. in the licensing of Customs agents and carriers. The power

(17) s.305A Customs Act and s.79A Sales Tax Act - these sections also validate previous forms that were prescribed by the Comptroller under the regulations.
(18) S.R. 1961/110
(19) As empowered by ss.232,237 and provided in reg.s 131-138 (Part IX) of the Customs Regulations 1968.
(20) Part IV Customs Act

is then given to the Governor-General to prescribe the amount of the fee and its form of payment. However, in both the Sales Tax Act and the Distillation Act the power is a wider one and provides that the Governor-General may make regulations "prescribing matters in respect of which fees and charges are to be payable under this Act or under the regulations, the amounts of the fees and charges and the persons liable to pay them (21). Both these powers occur in the general empowering sections of each Act but no such power occurs within the Customs Act. This latter power goes further than the power merely to prescribe fees as given in the specific licensing sections of the Customs Act. The Governor-General is given the further power to prescribe "matters in respect of which fees ..." are to be charged - i.e. under both these Acts the power to decide in what areas charges or fees will be levied is delegated to the Governor-General. Therefore, the Governor-General is given a fairly wide taxing power giving him the further power to decide the matters in which fees or charges will be levied. If it is recognised that the taxing power should be left in the hands of Parliament - i.e. statute (22) then this latter kind of empowering clause must be objected to. The far more acceptable form of empowering clause is that used in the Customs Act where the situations in which licence fees are to be charged is specifically laid down in the statute. In other words, the power to impose taxes has been used by Parliament and it is then left to the Governor-General to prescribe the amount of the fee and its mode of payment - these being purely administrative matters of detail.

Although both the Sales Tax Act and the Distillation Act contain this general empowering clause regarding the payment of fees, each Act contains specific provisions in it which imply where fees are to be prescribed. For example, S.5 of the Sales Tax Act dealing with the licensing of wholesalers, retailers and manufacturers mention is made in subsections (3) and (4) of "payment of the

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(21) ss.80(b) and 98(b) respectively.

(22) See the Report of the Committee on Ministers' Powers (1932) Cmnd. 4060 who expressed misgivings about the imposition of "direct or indirect taxation" by the executive. See also the comments made in Campbell v. MacDonald (1902) 22 NZLR 65, 70

prescribed fee (if any)". S.16 of the Distillation Act goes further by providing that generally "there shall be paid by the holder of any licence" the prescribed fee. Potentially the general empowering clauses under both these Acts also allow the Governor-General to impose fees or charges in other areas outside those specifically implied by the Acts but fortunately this power has not so far been abused in this way.

In acting under powers which allows for the imposition of fees or charges it is imperative that the person so acting should carefully consult the particular empowering clause, as any use of the power that may appear to be outside its empowering provision will be open to immediate challenge by people affected by it. A recent example of a careless use of such a power occurred in respect of the increase in Customs agents and carrier's licence fees. Previously an annual fee of $2 was charged for Customs agents licences (23) whereas no licence fee had been charged for Customs carriers. However, earlier this year the regulations were amended (24) by providing for an initial payment of $50 on receipt of the licence with a subsequent annual fee of $10. These new rates extended also to the licensing of Customs carriers. In making these amendments it is doubtful whether the department consulted the relevant empowering clause which only allows the making of regulations in respect of licence fees to prescribe "any annual or other fees" (25). The amendment to the above regulations would appear to stipulate two kinds of fee - i.e. an initial payment plus an annual fee. It could be argued though rather tenuously that the empowering clause does not go so far as to provide for the making of two kinds of licence fees. Although this may be a rather tenuous argument it is in an area where a challenge to the exercise of such a power is likely and it is also of some importance when, as will be seen later, the Courts tend to construe such empowering sections very strictly.

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(23) Under reg.135
(24) S.R. 1977/69
(25) See ss.232(e) and 237

EDUCATION

The Education Act 1964 is the main piece of empowering legislation in the Education area. Other legislation which is administered by the Education Department is the Education Lands Act 1949 and the Vocational Training Council Act 1968. These two latter Acts are of little interest for the present purposes - the Vocational Training Council Act contains no empowering provisions and the Education Lands Act gives the Governor-General only a limited power to declare by Order-in-Council that certain lands vested in the Crown for educational purposes are to be vested in an incorporated body for that purpose and there is also power to revoke or vary trusts on which any land is being held by the Crown for educational purposes (26). These provisions require no further discussion.

The power to sub-delegate under the Education Act is somewhat wider than that contained in the Customs Act. By virtue of S.5 the Minister may delegate to the Director-General as permanent head of the Education Department, all or any of his powers conferred on him or delegated to him under any Act as Minister of Education. But such delegation must be in writing and does not include the power to delegate or the power to consent to delegation under S.8. This latter section provides that the Director-General may delegate "to such officer or officers or employee or employees of the Department as he thinks fit" all or any of his powers exercisable by him and including any powers delegated to him. Again this has to be in writing and does not include the power to delegate. However, ministerial consent is only required for delegations of powers by the Director-General that have previously been delegated to him by the Minister. Under the Customs Act ministerial consent is required for all delegations by the Comptroller to officers of his department.

The Education Act itself contains a mass of empowering provisions

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(26) As provided in s.15

with the result that there are many overlaps and similarities in powers that are delegated under different empowering sections. For example, compare S.84 and S.59(2). S.84 provides that "every secondary school and every secondary department shall provide such courses of study in secondary education as may be prescribed in regulations made under this Act". S.59(2) specifically empowers the making of regulations "prescribing courses of study in secondary schools" with the proviso that "no such regulation shall place any restriction upon the method of teaching any subject included in any course of study so long as the method is consistent with the general aims of the course." (26A) These two sections are not exactly similar and do differ to the extent that S.84 is not a specific empowering section as is S.59(2). But this is not to say that S.84 does not also empower the making of such regulations. For example, S.193 allows the Minister to establish bursaries "which shall be awarded in accordance with regulations made under this Act in that behalf, and shall be of such annual value or other specified value as is prescribed by regulations so made". No specific empowering clause is given yet there are a number of bursaries regulations that have been purported to have been made under this section (27). Both S.84 and S.193 only speak of "regulations made under this Act" - no mention is made of where the power is to make these regulations or who is to make them (28). One can only assume then that both are implicit empowering sections and if this is so then S.84 would appear to make S.59(2) superfluous - so also would S.59(2) make S.84 superfluous. This then shows the incredible difficulty in trying to follow the administration of the Education Act when so many overlapping and similar empowering provisions are used.

This problem is further compounded by the many substantial amendments to the Act in which new empowering provisions have been added and old ones changed. For example in 1969 the Governor-General was given the power to make regulations

(26A) c.f. also s.203(c) where it is provided that the Governor-General may make regulations defining the courses of study which may be given under the Act.

(27) e.g. Secondary Schools Bursaries Regulations 1943/203, Technical Institutes Bursaries Regulations 1966/61 (now revoked), Tertiary Bursaries Regulations 1976/276

(28) Although by virtue of s.2 Acts Interpretation Act 1924, 'regulation' means a regulation prescribed by the Governor-General in Council.

prescribing the remuneration and conditions of employment of staff employed by the governing body of a secondary school (29) and in 1974 a similar power was given to make regulations in respect of persons employed by teachers college councils (30). But S.22 of the original Act has always given such a power to make regulations prescribing remuneration and conditions of employment for persons employed by Education Boards. Now, however, all these sections have been recently amended so that there is the further power to establish review committees to deal with conditions of employment (31). This latest amendment also specifically validates the Education Board's Employment Regulations 1958 (32) so that they will have effect as if the amendment had been in force at the time they were originally made. Previously they were clearly ultra vires as they purported to establish review committees to deal with conditions of employment for which there was no such power. Yet over the 19 years in which they have operated they were never challenged and the insertion of this validation clause was purely an internal move within the department when they were reviewing the area for possible updating of the legislation.

Form of the Empowering Clause

Since 1961 the law draftsman has adopted a policy of drafting empowering sections in an objective form as opposed to the pre-1961 subjective form which gave fairly wide regulation-making powers to the Governor-General (33). However, this policy had not been adhered to in the Education Act and there are a couple of empowering sections still drafted in the old form. For example, S.59(1) gives the Governor-General a general power to"make all such regulations as are necessary and expedient for the due control and administration of secondary schools" while S.59(2) outlines the particular purposes for which such regulation can be made under the section but "without limiting the general power conferred by

(29) s.60A Education Act
(30) s.67S(1)b) Education Act
(31) Education Amendment Act 1976
(32) S.R. 1958/106
(33) e.g. s.11(1) Economic Stabilization Act 1948, s.6 Education Amendment Act 1914.

subsection (1) of this section". The form usually adopted by the law draftsman is that, for example, of S.67S dealing with teachers colleges which provides: "The Governor-General may from time to time, by Order in Council, make regulations for all or any of the following purposes: ...(a) ... (j) Providing for such other matters as are contemplated by or are necessary for the due control and administration of teachers colleges". It can be seen that S.59 can easily be reformulated in this way thereby doing away with any need to resort to the general and fairly wide empowering clause in S.59(1). Indeed, S.192 which deals with the making of regulations in respect of grants to private schools, was also originally in this old form but was amended in 1975 to the more acceptable objective form as outlined above. Therefore it is surprising that S.59 was not also amended.

But none of the present empowering sections in the Act contain the objectionable drafting that occurred in pre-1964 Education legislation - e.g. S.6 of the Education Amendment Act 1915 which gave unlimited powers to the Executive and was the subject of much criticism in Reade v. Smith (34), also S.15 of the 1919 Amendment Act which also delegated wide subjective powers - i.e. "Notwithstanding anything to the contrary in the principal Act, the Governor-General may, by Order in Council, make regulations ..." The only empowering provision in the present legislation that comes anywhere near to this objectionable drafting is S.52(1) which states that "notwithstanding anything to the contrary in any other Act, the Governor-General may from time to time, by Order in Council, make regulations prescribing .... conditions as to the appointment and qualifications of members of Boards of Governors of secondary schools". But this only delegates powers for a limited purpose and the use of those powers cannot contradict the principal Act (but can any other Act). There are also other empowering sections which appear quite general in nature - e.g. S.76 which provides that regulations may be made "providing for the general

(34) [1959] N.Z.L.R. 996

control, management, organisation, and conduct of State primary schools and intermediate departments attached to secondary schools, including the admission of pupils, their attendance, and their courses of study". This provision could also be re-drafted in a more limited and clearer way.

SOME COMPARISONS

Even at this stage some comparisons can be drawn between the empowering legislation in the Customs area and Education area. The Education Act presents somewhat of a "quagmire" of different empowering provisions (34A). Some of these empowering provisions are limited in scope while others are left quite general with the result that there is often some overlap between different empowering provisions making some empowering provisions appear quite superfluous. Further the Education Act through considerable amendment over the years has lacked any logical form and it is hard to judge the reasoning behind the insertion of new empowering legislation. The Customs Act in comparison is far more logical in form and relatively easy to follow and by and large the empowering provisions in it are more definite in scope and subject to more controls. This is of particular relevance where broad and important powers are delegated to the Executive as under the Customs legislation. Of course the kind of empowering legislation used will be reflected in the regulations that are made and it is now intended to examine these.

3. THE DELEGATED LEGISLATION

CUSTOMS

Apart from the numerous Customs Tarriffs amendment Orders and Import and Export Prohibition Orders, the delegated legislation that is administered by the department is fairly small in number

(34A) c.f. Customs Act in which one out of 17 sections contains some form of regulation making clause. In the Education Act the figure is one out of 9 sections.

and reasonably coherent. The Customs Regulations 1968 (35) is the central piece of delegated legislation under the Act and deals with general administration matters such as the employment of Customs Officers, importing and exporting (but not licensing), and the licensing of Customs agents and carriers (36). Similarly the Sales Tax Regulations 1974 (37) and the Distillation Regulations 1961 (38) are the corresponding pieces of delegated legislation administered under the Sales Tax Act and the Distillation Act respectively. None of these particular regulations need any further comment but there are other areas of delegated Customs legislation that do require further comment - ~~namely~~ *in particular* import and export licensing.

Import Licensing

The central regulations in the import licensing area are the Import Control Regulations 1973 (39). These regulations have now been given to the Department of Trade and Industry to administer (40) but reference is still made in the regulations to "licensing officers" who may be members of either the Customs Department or the Department of Trade and Industry. Further the new empowering legislation in the Trade and Industry Act is slightly different from that previously used in the Customs Act (41). Previously six alternative grounds were listed under which the Governor-General could exercise this regulation-making power and one of these grounds was "the public interest". The new empowering section only gives the 'public interest' ground which in the past was the most common one used anyway. Also, S.308 of the Customs Act which effectively provides that no Order in Council made under the Act shall be invalid because it leaves any matter to the discretion of the Minister, has also been put into the new empowering section in the Trade and Industry Act - obviously as a safety measure (42).

But there have been two side effects in transferring the adminis-

(35) As reprinted in 1975 - S.R.1975/284
(36) As discussed above (p.7)
(37) S.R. 1974/157
(38) S.R. 1961/110
(39) S.R. 1973/86
(40) By virtue of ss.16A-16C Trade and Industry Act 1956
(41) i.e. s.48 Customs Act
(42) i.e. s.16B(4) - see post as to the reasons behind enacting s.308 Customs Act in the first place.

tration of the Import Control Regulations out of the Customs area. Firstly, as will be discussed in more depth below, they are no longer subject to the built-in safeguards of the Customs Acts. In particular S.131(4) where any Orders in Council made under the Customs Act can be revoked or varied by resolution of Parliament. No such provision occurs in the Trade and Industry Act and therefore Parliament has potentially less control over the Regulations. Moreover, as import controls is a fairly controversial area of Government policy it is imperative that Parliament should retain some close controls over it. Secondly under the Customs Act the powers of sub-delegation were more limited - ministerial consent is required for all delegations by the Comptroller. But under the Trade and Industry Act ministerial consent is only required for the delegation by the Secretary of Trade and Industry of those powers which the Minister originally delegated to him - no such consent is required for the delegation of other powers (43). Power is also given to the Secretary to delegate to employees of the Customs Department as well as to employees of this Department.

In regard to the Import Control Regulations themselves there are a number of important discretions given to the Minister that require comment. The Minister is given power, by notice in the Gazette to exempt particular goods from the requirement for an import licence or permit and similarly he can withdraw that exemption (44). He is also given power to restrict certain goods from being imported (45). These powers are important ones in that they affect the scope of the Customs Act - especially the 1st Schedule which sets out the prohibited imports. Yet when these powers are exercised by notice in the Gazette they need receive no further publicity as there is no requirement that they be included in the Statutory Regulations series under the Regulations Act 1936 (46). Current practice is that these Import Control Exemption Notices and Restriction Notices appear

(43) See s.11 Trade and Industry Act 1956
(44) Reg.17
(45) This power is given by virtue of s.10E(2) Industries Development Commission Act 1961 but such restrictions can only be temporary - see s.10E(3).
(46) For a discussion on the provisions of the Regulations Act see post.

only in the Gazette and they are not printed and published separately under the Regulations Act 1936 (47). This practice is unacceptable in terms of providing adequate publicity of the existence of such restrictions and exemptions. For even though everyone is deemed to know the law the average person on the street will not always have access to copies of the Gazette and even then it will be a further matter of having to laboriously search through them in order to find the relevant ministerial notice. Under the Export Licences Regulations (48) a similar power is given to the Minister to grant exemptions to any goods from the requirements for an Export licence. However, here the procedure is different and exemption notices made under these regulations are included in the Statutory Regulation Series (49). Therefore, this would seem to further strengthen the argument for including Import Prohibition and Exemption Notices in the S.R. series as well.

Export Licensing

There are two main sets of regulations dealing with Export licensing - an area which is still under the control of Customs. These are the Export Prohibition Regulations 1953 and the Export Licences Regulations 1966 (50). Because both these regulations deal with essentially the same matters the whole area has become rather confused. Both regulations prohibit the exportation of goods unless they comply with those particular regulations (51) and neither regulation refers to the other, yet they are both purported to be made under the same empowering section - namely S.47 of the Customs Act 1913 (52).

The Export Prohibition Regulations replaced the old war-time emergency regulations (53) which were continued in force after the war as supply regulations under the Supply Regulations Act 1947. Both these Acts - i.e. the Emergency Regulations Act 1939 and the Supply Regulations Act 1947, conferred substantially wide

(47) e.g. Import Control Exemption Notice 1968, Vol.I Gaz.,p.547, Import Control Restriction Notice 1968, Vol.II Gaz.,p.1459.
(48) S.R.1966/90 - in particular reg.11
(49) e.g. Export Licences Exemption Notice 1966/196
(50) S.R.1953/179 and S.R.1966/90 respectively.
(51) Reg.2 of the 1953 regulations and reg.3(1) of the 1966 regulations.
(52) Now s.70 Customs Act 1966
(53) i.e. Export Prohibition Emergency Regulations 1939/151

powers on the Executive because of the emergency conditions existing at the time. Therefore the Export Prohibition Regulations can be looked upon as essentially an emergency wartime measure containing many far reaching provisions. They provide for the prohibition of all exports except with the prior permission in writing of the Minister of Customs. It is further provided that the Minister may grant permission for the export of any goods or any class of goods and that such permission may be subject to such conditions as he may in his discretion impose. As well these powers can be delegated to the Comptroller or a Collector of Customs.

Finally there is the provision that "these regulations shall apply with respect to the export of all goods, notwithstanding that a license or other authority for the export of any such goods may be in force under the Customs Acts or any other Act or under any regulations other than these regulations", and the corollary that "the granting of permission to export goods under these regulations shall not absolve the exporter from obligations to comply with the requirements of any other Act or regulations with respect to the export of goods" (54). A similar provision to this latter one also occurs in the Export Licences Regulations (55) so that it would appear that both regulations are to apply to the exportation of goods but not to the exclusion of each other.

The major differences between these two regulations is that the Export Licences Regulations goes further into administrative detail than do the Export Prohibition Regulations (which as suggested above can be looked upon as merely an emergency wartime measure). The Export Licences Regulations provide for the actual licensing of exports and the different classes of licences that can be granted with various conditions attached. On the other hand the Export Prohibition Regulations do not talk in terms of the Minister granting a licence only that the Minister must give his specific

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(54) Regs.9
(55) Regs.3(2),3(3).

written permission to any export, though this is effectively the same as the granting of a licence. The prohibition clause in the Export Licences Regulations states that no goods shall be exported from New Zealand except in accordance with the regulations and with the terms of a licence issued under the regulations - but this is subject to certain exceptions. These are "any goods shipped as stores in any ship or aircraft about to depart for any country outside New Zealand and any other goods in respect of which the Minister by direction in writing determines that these regulations shall not apply" (56). The circumstances are set out in which the Minister may exempt goods but "without limiting the general authority conferred on the Minister". It is this latter provision which raises problems for the administrator. For are goods that are exempt under these regulations (57) also exempt from the provisions of the Export Prohibition Regulations, which only allows the exportation of goods with the written permission of the Minister? Clearly permission must also be obtained under the Export Prohibition Regulations as the regulations set out that they are to apply to all exports "notwithstanding that a licence or other authority" for the export may be in force under another regulation. As this latter provision is drawn fairly wide it can be interpreted to exclude Ministerial notices and provisions in other regulations that grant automatic exemptions such as the Export Licences Regulations. This has the absurd result that even goods being shipped as stores (because they would still come within the definition of exports) would also require the specific written authority of the Minister or his delegee under the Export Prohibition Regulations.

It would appear that the department itself has become aware of these anomalies in that it fears that the practice that is presently followed under the Export Licences Regulations might not comply with the Export Prohibition Regulations. The current practice in

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(56) Reg.11

(57) i.e. "any goods shipped as stores in any ship or aircraft ... " plus those goods specifically exempted (e.g. those included in the Export Licences Exemption Notice 1966/196)

issuing export licences has been to virtually ignore the provisions of the Export Prohibition regulations which if strictly adhered to would put a heavy burden on the department by requiring that every export had to have the written permission of the Minister or his delegee. Theoretically then by abiding only to the licensing provisions in the Export Licences Regulations the granting of such licences might be challenged on the ground of non-compliance with the provisions of the Export Prohibition Regulations. Therefore the Export Prohibition Regulations are now undergoing review within the department and what will probably emerge in the amended regulations will be a power in the Minister to impose restrictions on certain goods or classes of goods whereas the remainder of the exports will be free from any requirement for Ministerial consent - i.e. a provision to the effect that "the Minister may in his discretion prohibit the export of any goods or goods of any class either generally or to any country or countries or to any person or persons". This would still leave exporting to the requirements of the Export Licences Regulations and would also validate to a certain extent the present administrative practice.

However, it is suggested that a simpler if not more radical solution presents itself and that is the complete revocation of the Export Prohibition Regulations. This is because these regulations as largely an emergency wartime measure have become redundant and therefore should be revoked. It seems rather ironical that in a situation like today when Government is desparately trying to encourage our export market that they should still hold a draconian wartime power under which all exportation can be prohibited. The power to envoke such delegated legislation is still preserved in the Customs Act and therefore should such a situation present itself which requires a strict control of exports this power can easily be used by the Executive to reinstate such legislation. As far as the general control of exports is concerned this is adequately coped with in the present circumstances by the Export Licences

Regulations. As an aside one can only speculate as to why the Export Prohibition Emergency Regulations 1939 were not revoked completely instead of being replaced but obviously departments are very jealous of their powers and once such wide powers as contained within the Export Prohibition Emergency Regulations are given they can not be easily taken away. But because the co-existence of both these regulations only makes one of them superfluous then for the sake of administrative clarity one of them should be revoked. The obvious choice is the Export Prohibition Regulations in that it is they that are creating the administrative problems for the department.

EDUCATION

The "quagmire" of empowering legislation in the Education Act has brought about a multitude of delegated legislation some of which are of a dubious nature. As at the end of 1975 there were over ninety distinct regulations that were administered by the department (58) and over a quarter of these were made prior to 1936 which means they are not printed and published under the Regulations Act 1936 - i.e. one has to refer to the pre-1936 Gazettes to find them. It is surprising that some of these old regulations which are still being administered by the department have not been reprinted under the Regulations Act especially as amendments are continually being made to them. For example the Manual and Technical Instruction Regulations 1925 have been amended as recently as 1973 and this amendment appears in the S.R. series (59) yet its principal regulations still appears only in the 1925 Gazette. This raises two major objections: Firstly, it means that the publicity and availability of the regulations is minimal, and any person wishing to find them would have to laboriously search through old pre-1936 Gazettes. Secondly, it means that the department by working from outdated legislation such as these regulations runs the risk that its administrative practice might be challenged on the grounds that its

(58) c.f. Customs Department who were administering 14 distinct setsof regulations (not including the numerous tariff amendment orders).
(59) i.e. S.R.1973/68

modern administrative practices might not be in keeping with that envisioned by the old regulations. It is this latter objection that has caused many of the problems for the department and has made this area of Government unduly controversial.

Criticisms of Administration

In 1972 the Ombudsman heavily criticised the department for the way it was administering the Education (Assessment, Classification and Appointment) Regulations 1965 (60). The department had published a "New Scheme for Appointment to Scale 1 Positions" which was a considerable modification of the regulations and was in some respects directly contrary to the mandatory provisions in those regulations. The department then proceeded to administer this scheme which had received the consent of all interested parties, but did not bother to amend the regulations. Therefore, as the Ombudsman maintained, the scheme had no legal basis and the department were acting outside their powers. The Ombudsman further noted (61) that the department had done the same thing again a few months later after having been criticised by him about their original actions. This later incident involved the introduction of a new scale of grading of schools which when announced were purported to have immediate effect with the comment that "the Education (Salaries and Staffing) Regulations will be amended in due course". These changes were Gazetted and brought into force before the regulations were actually amended - an action which the Ombudsman in face of his previous warnings considered a "careless flouting of the law."

But despite the Ombudsman's criticisms this "careless flouting of the law" by the department still appears to be quite frequent. Recent examples of the type of procedure criticised above can be seen in the way that the Tertiary Bursaries Regulations (62) have been administered. The actual bursary regulations were not made law until the middle of October in 1976 yet they were administered by the

(60) S.R.1965/175
(61) 1972 Ombudsman Report p.18
(62) S.R.1976/276

department as from the beginning of the 1976 academic year. In other words the regulations were being administered for nearly six months without any legal basis. Recently in May of this year the department announced that it would no longer enforce the six hours a week employment rule as laid down in the Tertiary Bursary Regulations (63). But as yet this regulation has not been revoked so that although the restrictions on employment is still laid down as law it is not being enforced. One can assume that the regulations will be amended in due time but for the time being the department is acting outside the law in this area.

Criticisms of the Content of the Regulations

The existence of many dubious regulations in the Education area is probably borne out by the amount of successful litigation that has been brought challenging the actions of the department. The case of Reade v. Smith (64) has shown that even wide empowering clauses such as S.6 of the Education Amendment Act 1915 will not provide a blanket defence to abuses of the delegated legislative power and the recent case of Van Gorkom v. Attorney-General (65) is further support for the argument that the courts are prepared to take a stronger line in striking down dubious administrative practices. In Van Gorkom's case it was held that the practice of discriminating between married male teachers and married female teachers when laying down conditions as to payment for removal expenses under the Education (Salaries and Staffing) Regulations 1957 (66) was ultra vires. This resulted in the appropriate regulations being amended so that now it is mandatory that the Crown will meet the actual and reasonable removal costs of all transferring teachers but this is subject to the proviso that the Director-General may vary the operation of this regulation "in any case where the teacher transferred is not the breadwinner of the family". (67) There are two aspects of this new amendment that require some discussion. Firstly, the area is now governed by mandatory regulations but with

(63) Reg.8
(64) [1959] N.Z.L.R. 996
(65) [1977] 1 N.Z.L.R. 535
(66) As amended by S.R.1973/29
(67) S.R.1976/304 in particular reg.3 which amends reg.16 of the principal regulations.

power to vary these regulations being given, to the Director-General. Previously the whole area was governed by Ministerial discretion. But because it is far easier for the Director-General to sub-delegate his powers than the Minister and also such exercises of a sub-delegated power receive less publicity (68) this inevitably means that there are fewer checks on the exercise of that power. Therefore the important power of being able to vary the operation of these regulations becomes subject to a certain amount of arbitrariness and is open to potential abuse. The second aspect of the new amendment is the use of the word "breadwinner". One can immediately see problems in trying to place a legal interpretation upon it. Clearly it has been used to justify the previous practice of discriminating between married male teachers and married female teachers. But if both spouses are working then the question becomes: Which one is the breadwinner? Is it merely the one who has the higher income or does it consist of something more? Problems of course arise where both spouses are earning the same salary. But whatever practical problems there are in applying this provision, it seems clear that it will mainly be used to discriminate against married women. In which case it is highly likely that these regulations will be challenged again in the future.

Other examples of the many dubious regulations in the Education area are the Education Board Employment Regulations (69) which stood unchallenged for many years before the department, purely as an after-thought when extending the empowering Act, took any steps to specifically validate them. The most recent example that has arisen is in relation to the payment of School Certificate fees (70), for ~~which~~ although they have stood unchallenged for over fifty years there is some doubt as to whether there is actual power under the Education Act to charge them. The only relevant powers available to make regulations is for the purpose of "prescribing courses of study" in secondary schools (71) and the further provision which gives the Director-General power to issue certificates attesting the

(68) i.e. no ministerial consent is required by virtue of s.8 Education Act and decisions of the Director-General, unlike ministerial decisions, are usually made only within the department - i.e. there is no requirement that they need be published in the Gazette or anywhere outside the department apart from to the party concerned.

(69) S.R.1958/106

(70) As set down in the Education (Secondary Instruction) Regulations 1975/72 and recently amended (i.e. raised) by S.R.1977/147.

(71) i.e. s.59(2) - as discussed above (pp.9-10).

courses of instruction completed (72). No mention is made of the power to prescribe fees for the examinations undertaken in the courses of study prescribed. Indeed the Act goes so far as to say that all amounts payable for educational purposes shall be paid out of the consolidated revenue fund (73) - i.e. there is no provision for extra funding from other sources such as fees paid by School Certificate candidates. However, the department is now aware of this anomaly and is more than likely in the process of re-drafting the empowering Act to remove any doubts as to the validity of charging such fees.

SOME COMPARISONS

In the Education area, the administration of delegated legislation has largely pursued its own course independent of constitutional principles. This has brought with it a general amount of controversy. However, the Customs area remains largely free from such controversy and administration on even small technical matters is kept strictly to the relevant regulations and statutes. Various reasons can be advanced for the emergence of such a striking contrast between these two areas of administration and two such reasons immediately present themselves. They are, firstly, the structure of the empowering legislation and secondly the nature of the areas themselves.

Comment has already been made as to the structure of the empowering legislation and the effect on its administration. This would account for the large amount of dubious regulations in the Education area. Further because the Education Act lacks any substantial form it is hard to gauge what principles the Act is supposed to embody (74). When the Act was redrafted in 1964 it merely consolidated the existing legislation and no attempt was made to "clean-up" the area as did the Customs Act in 1966. Therefore perhaps it is right to say that the Education Act is "merely a skeleton form of legislation which has been left to be filled up by regulation" (75). However it is probable that the Act will, ...

(72) s.196
(73) s.9
(74) Even though Turner J. in Reade v. Smith (supra) said he was able to find some principles within the Act on which to find the regulations in question ultra vires.
(75) As argued in Park v. Minister of Education [1922] N.Z.L.R. 1208 - see post.

be substantially redrafted in the near future and then hopefully some improvements will be made.

The second reason is the nature of the area itself. The fact that in the Education area there are so many different subordinate bodies such as Education Boards, Boards of Governors, Teachers College Councils etc, creates its own distinct administrative problems with respect to the delineation of their functions and duties. But, by and large Customs remains free from these kinds of problems. Education is also an area where consultation with interested parties is an important part of the legislation making process. Otherwise if the consent of all interested parties is not obtained, the legislation cannot be effective. This can account for the apparent indifference of the department to formal legislation when it is faced with introducing schemes which already have the approval of all interested parties (76) - i.e. the new scheme will not be challenged for want of a legal basis and the relevant regulations need not be changed until later. Customs on the other hand is dealing more with coersive and penal legislation and therefore consultation with interested parties is a less important requirement in the legislation-making process (77).

4. CONSTITUTIONAL SAFEGUARDS

As suggested at the outset there is an important need to have adequate safeguards against the abuse of delegated legislative powers. Within our constitutional framework it is Parliament who is the supreme law-making body and therefore any delegation of this law-making power must be subject to Parliament's ultimate control. Similarly, if a purported exercise of a power to enact legislation has not been authorised by Parliament then the courts have power to declare that such legislation is void as being ultra vires of the empowering statute. As well there are further controls that can be exercised within the legislative process itself by

(76) As in the way the Education (Assessment, Classification, and Appointment) Regulations were administered which incurred the criticism of the Ombudsman.

(77) But this is not to say that consultation is an unimportant part of the legislation-making process in the Customs area - e.g. the Beer Duty Bill now before Parliament underwent a good deal of scrutiny by the breweries while it was being drafted.

the executive. Therefore all three branches of Government are in a position to ensure that there are adequate controls to prevent abuses of the legislative process. But the question for present purposes is how effective these controls are with respect to the making of delegated legislation in the Customs and Education areas.

a) Legislative Controls

Of particular importance here are the specific controls that can often be built into the empowering legislation. In this respect Customs legislation is fairly unique and tends to reinforce the importance of Parliamentary control especially with respect to the taxing function. For although it is important that the bulk of this function is carried out by Parliament especially in terms of imposing the conditions and levels of taxes, from an administrators point of view it is essential that there be some flexibility in varying these taxes to suit changing conditions without having to always resort to Parliament. Therefore, where a power has been delegated to vary the duty or other taxes payable on goods these are subject to severe limitations. In particular under the Customs Act 1966 the Governor General is given a number of powers under which he can alter the Customs tariff (78). But these are subject to various limitations:

S.123 gives the Governor-General power to amend the Tariff in so far as alterations in the nomenclature, but no such amendment "shall alter the duties or exemptions from duty applicable to goods classified under any item or heading so revoked"(79).

S.124 gives the Governor-General power to suspend the Tariff and to impose such duties "as appear to him to be just". But this power is subject to the Governor-General being satisfied of certain conditions (80) - of which the most commonly used is that the existing Tariff "is likely to operate in an injurious, unfair or anomalous manner in respect of the public interest" (81). Further any duties imposed under this section are not to exceed the duties

(78) Which is set out as the 2nd Schedule to the Act.
(79) s.123(2)
(80) As set out in the alternative in paragraphs a) to e) of s.124
(81) Contained in paragraph a)

in lieu of which they were imposed except in certain cases and these are specifically set out (82). But seldom is the rate of the Tariff increased under this section (83). Orders in Council made under this section must also be expressly validated or confirmed by Parliament otherwise they shall "expire on the last day of the present Parliamentary session it made before July 1st or on the last day of the following Parliamentary Session if made on or after July 1st" (84).

SS.125, 126, 127 give the Governor-General further powers to modify the Tariff in terms of imposing a different classification of Tariff rate and imposing duties corresponding with duties imposed by foreign countries on New Zealand goods. But all these three sections are subject to S.128 which lays down the precedent conditions as to the the exercise of these powers including that of the "public interest" - i.e. "In any case where the Governor-General is of the opinion that the exercise of these powers is necessary or advisable in protection of the public interest" (85).

S.129 allows the Minister in certain specified cases as set out, to impose a dumping duty in addition to other duties of Customs imposed. The determination of this rate of duty is also specifically set out in the section.

S.130 allows the Governor-General to vary duties paid on goods from non-Commonwealth countries and he can fix any amount he thinks fit provided it does not exceed 25% ad valorem on the goods.

Other taxing powers are also delegated to the Governor-General but these again are subject to limitations. For example, S.130 gives the Governor-General power to prescribe a rate of excise duty on cigars and snuff but it shall not exceed $9-15 per kilo (86). Also S.63 Distillation Act contains a similar power with respect to prescribing a rate of excise duty on spirits but again this duty is not to exceed $5-14 per proof litre. Both these examples put restrictions on the level of taxation that the Governor-General can impose but in practice it is usually the maximum level of duty

(82) This is where the Governor-General acts under paragraphs c) or d) of s.124(1) or where the new tariff is imposed for the protection of any New Zealand Industry. Paragraphs c) and d) relate respectively to excessive duties being made payable on New Zealand exports in that foreign country and where importation of New Zealand goods to that foreign country is prohibited or restricted so as to be prejudicial or injurious to any New Zealand industry, etc.

(83) Mainly because the "public interest" reason is the most commonly used one and which doesn't allow the Governor-General to increase the tariff. Note that some orders are made for the protection of New Zealand industry (e.g.S.R.1976/50, S.R.1977/233) with the further provision that they are also made under s.10E Industries Development Commission Act 1961 so that they are only of limited life.(see s.10E(3) and (4))

(84) As provided in s.131(2) - for a discussion of this provision see post.

(85) s.128(c)

(86) As recently amended by s.5 Customs Acts Amendment Act 1977 as budget legislation.

that is charged. Therefore, effectively the Governor-General only really has a power under these sections to lower the rate of excise duty. Other provisions dealing with powers to alter rates of excise duty are S.167 and S.134A - S.167 allows the Governor-General to suspend any excise duty in respect of goods manufactured in New Zealand - but again no power to vary or increase the excise duty. S.134A (87) now gives the Governor-General power to modify the rates of excise duty (88) provided that the new duty does not exceed that laid down specifically in the Act.

These strict controls over delegated taxing powers also extend to other Customs legislation. For example in the Sales Tax Act by virtue of S.12A (89) power is now given to the Governor-General to modify the rates of sales tax (90) but the modified rates are not to exceed those laid down in the Act. S.15 gives the Governor-General power to exempt certain kinds of goods from sales tax. Further in the schedule to the Act, goods which only incur sales tax of 10% of sale value include "such other goods as may from time to time be determined by the Minister and subject to such conditions as he may prescribe" (91). This is to be read in context with the residual part of the schedule dealing with "all other goods not subject to any other rates of tax" which imposes a sales tax of 20% of sale value.(91A) Therefore the effect of this part of the schedule is to act as a partial exemption to sales tax - the Minister having power to decide which goods will incur a lesser rate of tax. Mention should also be made of the Motor Spirits Duty Act 1961 which is to be read as part of the Sales Tax Act. Under S.11 of this Act the Governor-General has power to reduce the rates of motor spirits duty by Order in Council but such Orders will expire unless expressly validated or confirmed by Parliament.

It is important to note that most of these powers work in favour of the tax payer - i.e. they can only effectively lower the rate of tax as is set down by statute or Order in Council.

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(87) As inserted by Customs Acts Amendment Act (No.2) 1976
(88) Which are set out in the 3rd Schedule to the Act.
(89) As inserted by the Customs Acts Amendment Act (No.2)1976
(90) Which are set out in the 1st Schedule to the Sales Tax Act
(91) Part (f) of the 1st Schedule
(91A) Part (g) of the " "

There is also the important safeguard provided by S.131 which requires that some Orders in Council be expressly confirmed by Parliament (92) while others can be revoked or varied by resolution of Parliament. However, in practice the degree of Parliamentary control that is conferred by this provision is minimal. For it is clear that Parliament has not made any notable use of either its power to affirm or to revoke or amend Customs Orders. The yearly Customs Confirmation Acts as required by S.131 have been adopted with no difficulty and little debate. Further the practice has arisen of confirming all Customs Orders which vary tariff rates even though S.131 only requires that those made under S.124 be so confirmed (93). This tends to show the amount of indifference that both Parliament and the Customs Department have to such an important constitutional safeguard.

Further legislative controls in the Customs area were provided in respect of the making of International Treaties. By virtue of S.10(2) of the Customs Acts Amendment Act 1921 (now repealed) any treaty entered into by the New Zealand Government with any Commonwealth or foreign Government under S.10(1) of that Act had to be ratified by Parliament before it would have any domestic effect (94). Although a resolution of Parliament would have been sufficient to constitute ratification of such a treaty in some cases Parliament went further by passing specific Acts. The two examples which still exist today are the Australian Trade Agreement Ratification Act 1933 and the Canadian Trade Agreement Ratification Act 1932 (both deemed to be Customs Acts by virtue of S.3 Customs Act 1966). Both these statutes go further than merely ratifying the Agreements and provide that, when the Governor-General has proclaimed the agreement is in force, the specified duties and exemptions shall be levied and allowed. However, despite the references in the preamble and in S.2 of both Acts to ratification under S.10, the procedure contemplated by that provision was not employed (95). This is because no actual Order in Council was made giving effect, under S.10, to the agreements

(92) i.e those Orders-in-Council made under s.124 as discussed above pp25-26 all other Orders made under the Act can be revoked or varied by parliamentary resolution under s.131(4).

(93) This comment must be qualified for only those Orders made wholly or partially under s.124 are in practice confirmed by a special Act. It is with respect to those made partially under s.124 that this comment must be directed - e.g. Customs Tariff (Prepared or Preserved Fish) Amendment Order 1976/50 which was also made under s.10E(1) Industries Development Commission Act 1961 - such Orders are only of limited life anyway (see s.10E(3)-(4)) so that there seems little reason for specifically confirming them by Act.

(94) s.10(1) of that Act is now s.128 of the present Act (discussed above p.26)

(95) See Keith K.J., N.Z. Treaty Practice: The Executive and the Legislature (1964) N.Z.U.L.R. 272

with Canada and Australia - this was provided for in the ratification Acts themselves. But the procedure contemplated by S.10 was first the ratification of the agreement by Parliament and then the appropriate Order in Council being made amending the tariff so as to give effect to that agreement - i.e. Under S.10 it was the Order in Council and not the "ratifying" statute which changed the law. These ratification Acts also give further powers to the Governor-General to amend the tariff to give effect to amendments to the agreements without ratification - i.e. S.10 notwithstanding (96). In this sense then the executive has been able to give effect in New Zealand law, to other trade agreements without obtaining parliamentary "ratification".

This circumventing of S.10 became even more apparent in the Australia-New Zealand Free Trade Agreement Act 1965 (also deemed to be a Customs Act by virtue of S.3 Customs Act 1966). This Act gives wide powers to the Governor-General to suspend, revoke, or amend the tariff in respect of goods subject to the agreement, so as to give effect to it "notwithstanding anything to the contrary in any enactment"(97). S.10 of the Customs Acts Amendment Act is specifically deemed not to apply to the agreement (98) but an alternative safeguard is provided in that Orders in Council so made under the Act are to be laid before Parliament within 14 days after their making (99).

When the Customs Act was redrafted in 1966 the "ratifying" provision in S.10 was repealed and was not replaced in the new Act. This was not only attributable to the fact that S.10 was rarely applied and therefore became of limited value to the executive in giving effect to the tariff agreements but also to what Keith (100) called the "unfortunate" drafting of the section and the fact that it was difficult to apply. According to Keith the provision would have been better expressed by directing Parliaments approval towards the Order in Council and not towards the agreement itself as the

(96) s.2(2) of both Acts - see also s.3(5) General agreement on Tariffs and Trade Act 1948. Keith (op. cit.p.287) argues that this latter Act is more objectionable in that it goes further than required under s.10 by purporting to authorise (and approve) the signature of the Protocol and the acceptance of the agreement - i.e. they delegate powers to the executive which they already have thereby creating unfortunate confusion between the relative functions of the executive and of the legislature.
(97) s.3(1)
(98) s.4
(99) s.6
(100) op. cit. p.288

treaty power of ratification is one that belongs to the executive, not to the legislature. In practice, the provision was treated in this way in that a number of agreements, which were "ratified" by Parliament, became binding on signature and were in no way conditional on parliamentary ratification (1). Therefore the effect of the provision was to require parliamentary approval of the Order in Council making the relevant changes to the tariff and in this sense it provided an example of the affirmative procedure for scrutinizing delegated legislation (2). Therefore, in light of its use as a potential safeguard it is disappointing that S.10 was not simply redrafted to remove these anomalies rather than being completely repealed when the Customs Act was redrafted.

Within the Education Act no such specific legislative controls are provided, though some delegated powers are specifically limited in their scope - e.g. S.59(2) gives a general power to prescribe course of study in secondary schools but this is subject to the limitation that "no such regulation shall place any restriction upon the method of teaching any subject included in any course of study so long as the method is consistent with the general aims of the course" (3). But a lot of the empowering legislation in the Education area is fairly general in nature in which case safeguards against the abuse of these powers are left to be provided by other sources.

Another ~~Such an~~ important legislative control is that provided by the Regulations Act 1936. This Act provides for the printing and publishing of regulations and has given rise to the Statutory Regulations Series. As well in 1962 on the recommendations of the Algie Committee (4) the Act was amended so that all regulations published pursuant to it were to be laid before Parliament within 28 days of their making, or if Parliament was not in session, within 28 days of the commencement of the next Parliamentary session. Therefore the Act provides a number of important safeguards. Firstly by providing a means of publishing delegated legislation to the

(1) e.g. the agreements with South Africa, and Belgium, and the General Agreement on Tariffs and Trade - see Keith p.286
(2) Of which there are very few (if any) instances - see Robson, The British Commonwealth: Vol.4, New Zealand p.138
(3) As discussed above (p.9)
(4) Report of the Committee on Delegated Legislation, (1962) App. H.R. I.18

general public and secondly by providing the important testing procedure through which Parliament can exercise closer scrutiny of these powers. However, there are a number of deficiencies in the Act.

Firstly the Attorney-General has a discretion as to what will be published under the Act by virtue of his power to define what are to be regarded as regulations for the purposes of the Act plus his power to exempt certain regulations from publication "if he so thinks fit" (5). This means that the important safeguards in the Act are ultimately left to the discretion of the Attorney-General. and , as noted above with respect to Import Exemption and Restrictions Notices that a lot of important regulatory material is not carried in the S.R. Series (6).

A second deficiency in the Act is that there is no provision as to the effect of failure to lay the regulations before Parliament and whether this will necessarily make the regulations themselves invalid This question will depend in part on whether the provision can be construed as a directory or mandatory one. On this point there is support for the view that it is a mandatory provision (7) and that therefore failure to lay the regulations would probably make the regulations themselves invalid. There might also be the further question as to whether such failure to lay constitutes a criminal offence under S.107 Crimes Act 1961 (8) but it is hard to determine who would be actually criminally liable (9). But even these questions aside it is doubtful that the 1962 amendment has proved to be an effective means of control as envisioned by the Algie Committee. For although some measure of public notice is achieved through the tabling procedure, many dubious regulations going through the House have not been challenged and Standing Order 93(7)a) under which questions can be raised about regulations so laid, is very rarely used (10).

A third deficiency in the Act lies in the fact that it only applies to regulations, Orders in Council etc, made after its passing in 1936. Therefore, delegated legislation made prior to 1936 is not

(5) ss.2(2) and 3(1) respectively

(6) See also Cain, Regulation-Making Powers and Procedures of the Executive of New Zealand (1973) Legal Research Foundation Occasional Pamphlet No.7 at p.57 who cites numerous examples of regulatory material which is not carried in the S.R. series.

(7) See Cain op. cit. p.59 and also Adams v. Basham (1906) 25 N.Z.L.R.864 where it was held that failure to send a copy of a by-law to the Minister within one week as required by statute made that by-law invalid.

(8) But to be liable under this section any such omission must be wilful and the section does not extend to acts purely of an administrative or ministerial or procedural nature.

(9) Although Cain suggests it could be the Minister whose officers have wilfully ignored the direction to lay who might face criminal prosecution - strictly interpreted the section only makes the regulations themselves liable.

(10) See 27 N.Z.J.P.A. p.63 for a discussion of the practical problems in its use. [S.O.93(7)a)

covered by the Act.(10A) As was seen in the Education area where over a quarter of the delegated legislation administered by that department was made prior to 1936 none of these regulations have been updated or reprinted under the Regulations Act. Therefore the measure of control that is provided by the Act has in a sense been circumvented by not updating these regulations (11). It is perhaps worthy to note here that in the Customs area no pre-1936 regulations are administered by that department and they have endeavoured to ensure that most of their regulations are kept up to date (12).

(b) Ombudsman

Although the Ombudsman has no formal power to influence the way regulations are made, often when reviewing complaints that may be brought as a result of the effects of delegated legislation the Ombudsman will comment on the reasonableness of that legislation and the way it is being administered. This was seen with respect to the Ombudsman's criticisms of the Education Department in the way they were administering the Education (Assessment, Classification and Appointment) Regulations 1965 (13). However he can make no demands on the department, his role being purely an investigatory and advisory one. This was borne out in the later actions of the Education Department when they continued to defy the Ombudsman by administering other regulations in the same way. Other examples of the Education Department's stubborn attitude appear throughout the Ombudsman's reports. In one particular case (14) which involved the dismissal of a teacher by the department but without the laying of a formal charge and without affording the teacher in question a hearing, the Ombudsman questioned the legality of the dismissal under the Education (Assessment, Classification and Appointment) Regulations (15) and suggested that the department should compensate the teacher for the loss suffered(this was after several prior impasses

(10A) Although under s.3(2) of the Act the Attorney-General has a discretion to include such of the regulations that are made before the commencement of the Act to be printed and published under the Act.

(11) See the criticisms discussed above (pp.19-20) with respect to the administration of such outdated legislation.

(12) Note in particular the Customs Regulations 1968 which were reprinted with amendments in 1975 (S.R. 1975/284)

(13) As discussed above pp.20-21

(14) From the 1972 Ombudsman Report p.26 (case no.5362)

(15) In particular, whether the conditional classification of the teacher that was awarded under the Regulations (reg.55) was consistent with the teachers registration provisions of the Education Act.

had been met with respect to reinstating the teacher). However, the department refused to accept the Ombudsman's advice and in the end the teacher was forced to bring legal action against the department for wrongful dismissal. This litigation was successful and resulted in a substantial amount of compensation being paid to the teacher. Therefore, with respect to delegated legislation the Ombudsman will only influence its effects in particular instances. But where the attitude of the department is unco-operative as in the above example then what influence he can exercise is minimal and the aggrieved party is left to pursue other remedies.

The influence of the Ombudsman in the Customs area has largely been confined to simple administrative decisions. The main area of influence has been in respect to the various Ministerial discretions conferred by the Customs Acts such as the power to waiver forfeiture, power to approve entry of goods at a lower rate of duty, etc. Because the delegated legislation administered by the department is small and coherent in substance, few complaints are received in this area and therefore the influence of the Ombudsman over delegated Customs legislation is minimal (16). But although the Ombudsman's controls over delegated legislation may be in some cases be minimal, perhaps his most important function from the present point of view is to bring to the notice of Parliament in his annual report the way delegated legislative powers are being used.

(c) Judicial Controls

Judicial controls over delegated legislation rest in the discretionary power of the Courts to declare that such legislation is invalid as being ultra vires of the empowering statute. But the measure of control that can be achieved by the courts very much depends on the drafting of the empowering legislation - i.e. the drafting of broad empowering sections in parent Acts can

(16) In the 1976 Report the number of complaints receive by the Ombudsman in respect of the Customs Department was 39 - the corresponding figure for the Education Department was 78. (In 1972 the figures were 16 and 83 respectively).

effectively limit the control of the courts (17). In this respect it was the hope of the Algie Committee that the adoption by the law draftsman of the "objective" form of empowering clause would tighten up the courts control by helping to define specifically the scope of the delegated power (18). But as was seen above, there are still a number of provisions in both the Customs and Education legislation that confer fairly wide powers. Therefore, how effective judicial controls are in these areas is best gauged by ascertaining how active the courts have been in asserting their constitutional role in the face of such broad delegated powers.

In the Education area judicial activism has been fairly marked. The courts have often had the task of defining the respective roles of school committees, Education Boards, and the Education Department. Most of this litigation has been initiated by teachers who not only have sought delineation of the powers and duties of the various bodies established under the Education Act (19) but have also ensured that checks are kept on the administration of education generally - especially in respect of teachers conditions of employment. Therefore in The New Zealand Educational Institute v. The Marlborough Education Board (20) an attempt by an Education Board to appoint teachers from year to year so as to avoid teachers appeal provisions under the Act, was declared illegal.

Park v. Minister of Education (21) shows how an indirect attempt by the Minister to take a power which property belonged to an Education Board was checked by the court. This case involved the holding of an inquiry by the Education Board into certain charges laid against a teacher of disloyalty and insubordination. The result of the inquiry was in the teachers favour and no further action was taken by the Board. But the Minister apparently dissatisfied with the findings of this inquiry, proposed to institute a further investigation of the same charges with a view to the cancellation or suspension of the teachers certificate in pursuance of the regulations. An action was commenced for an

(17) This is because the ultra vires doctrine can be regarded as a branch of the law of statutory interpretation - i.e. the court is confined to the strict wording of the parent Act regardless of the reasonableness or otherwise of the regulations in question.

(18) See p.10 of the Report - 'subjective' empowering clauses only preclude the court from considering the necessity or desirability of the regulations.

(19) e.g. Wilkinson v. The Education Board of Otago (1888)6N.Z.L.R.307

(20) (1909) 28 N.Z.L.R. 1091

(21) [1922] N.Z.L.R. 1208

injunction to restrain him from taking his threatened proceedings. It was argued on the Minister's behalf that the Education Act was merely a skeleton form of legislation which had been left to be filled up by regulation, that the Minister had the executive power under the regulations and that the court had no jurisdiction over him. However, this argument did not succeed and an injunction was granted.

The Education Department using what can only be described as a "deliberate and poorly-concealed device for ousting the jurisdiction of the courts" (22) originally conferred regulation-making powers in wide and general terms - as was exemplified by S.6 of the Education Amendment Act 1915 (22A) and S.15(2) of the Education Amendment Act 1919. However, the courts stoutly refused to recognise the width of these empowering provisions. One such case was Reid v. Scriviner (23) where it was held in the Magistrates Court that a regulation allowing a parent to apply for exemption of their child from attendance at school was ultra vires as it conflicted with the Education Act which provided that all children between 7 and 15 years old must attend school. However, this part of the decision was only incidental to the main issue in the case which dealt with the prosecution of a parent whose child had not been in attendance at the school in which it was enrolled. The vires of the regulation was not specifically argued before the court and as it turned out the striking down of the regulation helped bring the decision down in the department's favour (i.e. the parent was convicted). The learned Magistrate also noted at the end of his decision that in striking down the regulation he had not "overlooked" S.6. of the Education Amendment Act 1915.

Reade v. Smith (24) probably saw the height of judicial disapproval of these wide and subjective empowering sections. This case also dealt with a prosecution of a parent for failing to send his child to school and centred on the vires of reg. 11 of the Education

(22) Algie R.M., A System Open to Abuse (1933) N.Z.L.J. 93

(22A) which reads as follows: "The Governor-General in Council may make such regulations as he thinks necessary or expedient for avoiding any doubt or difficulty which may appear to arise in the administration of the principal Act by reason of any omission or inconsistency therein, and all such regulations shall have the force of law, anything to the contrary in the principal Act notwithstanding."

(23) (1947) 5 M.C.D. 244

(24) [1959] N.Z.L.R. 996

(School Age) Regulations 1943. These regulations provided for the Education Board to transfer pupils from one school to another and to zone the surrounding districts to restrict enrolment to nearby schools. The parent in this case had refused to comply with a notice directing that his child be transferred to another school. The subjectiveness of the empowering legislation was held by Turner J. to lay on the court "the duty of inquiring whether the purposes of the regulation could reasonably as a matter of law have been considered by the Governor-General to be necessary in order to secure the due administration of the Act; and if the regulation cannot pass this test, it will become /the courts/ duty to declare that it is ultra vires and void" (25). Turner J. held that these regulations did not pass the test and therefore could not have been made under subjective empowering sections in the Education Act 1914. He then turned to consider S.6 of the 1915 Amendment Act. Talking of this section as amounting to the signing "of a blank cheque ratifying in advance whatever the Governor-General shall do by regulation, even if it is in conflict with the express provisions of the Act itself" (26), Turner J. held that in construing such a section the court will strive to give it a restricted interpretation, preferring to regard Parliament as not having made any more complete surrender of its powers than must necessarily follow from the plain words used. Agreeing with the Magistrate below, Turner J. said that the power was confined to cases where a doubt or difficulty appears to the Governor-General to arise in the administration of the Act by reason of an omission or inconsistency therein and that it was not possible to point to any such doubt or difficulty in the present case. Therefore the regulation was struck down.

Although S.6 of the 1915 Amendment Act S.15(2) of the 1919 Amendment Act was finally repealed in 1963 and the Education Act itself was consolidated in 1964, the courts have still taken a fairly active role in this area. The latest litigation has been that of Van

(25) op. cit. p.1002
(26) op. cit. p.1004

Gorkom v. Attorney-General (27). The question in this case was whether, having regard to regulations (28) which enabled a teacher on promotion from one permanent position to another to claim removal expenses, the Minister acting pursuant to the regulations in laying down conditions governing payment of removal expenses, could differentiate between married male and female teachers. Cooke J. held that although the regulations giving the Minister power to lay down conditions governing payment of removal expenses were quite within the scope of the empowering Act, the Minister could not lay down conditions that discriminated between the sexes as there was nothing in the Act or the regulations to authorise such discrimination. The learned Judge gave a number of reasons as to why sex discrimination was not within the powers conferred by the Education Act. Perhaps the two most important reasons given were firstly, that the Education Act itself contained some provisions that specifically barred such discrimination (eg S.150), there being a general feeling that no discrimination was wanted at all in the Education field; and secondly, that sex discrimination was barred by the Universal Declaration of Human Rights and that discrimination against married women did not accord with the spirit of this document. This latter part of the decision has been seen as an encouraging judicial development especially in light of the fact that legislation is now presently before Parliament that will establish a Human Rights Commission to generally implement in New Zealand the provisions of the Universal Declaration of Human Rights (28A).

Similarly, in the Customs Area there has in the past been a willingness on the part of the courts to intervene even where broad powers have been delegated. This was particularly prominent in the Import Licensing Area which brought forth a series of litigation before the area was substantially redrafted in 1966. The major litigation that started the ball rolling was that of Jackson and Co. Ltd v. Collector of Customs (28B) which held that the Import Control Regulations 1938 were ultra vires of the Customs

(27) 1977 N.Z.L.R. 535
(28) i.e. Education (Salaries and Staffing) Regulations 1957
(28A) Human Rights Commission Bill which is particularly concerned with sex discrimination in the employment area - see Part IV of Bill.
(28B) [1939] N.Z.L.R. 682

Act 1913. Two reasons were given by Callan J.:
Firstly, the empowering section under the Customs Act 1913 (29) only gave power to the Governor-General to prohibit the importation into New Zealand of any goods. The Import Control Regulations effectively prohibited the importation of all goods collectively unless a licence was given by the Minister. This was held to be outside the empowering section which only went so far as to give power to the Governor-General to prohibit the importation of classes of goods of which the Governor-General must specify in a prohibitory Order in Council. Secondly, it was held that only the Governor-General in Council can exercise these powers, in accordance with the advice tendered by the Executive Council, and that the Governor-General can not delegate these powers and responsibilities to the Minister of Customs or to anyone else. Therefore the Customs Act could not authorise regulations such as the Import Control Regulations that left everything to the "uncontrolled discretion of the Minister".

The result of the Jackson decision was that the empowering legislation was amended so as to give the Governor-General the power to prohibit the importation of any or all goods whatsoever (30). A further provision was also added which in substance provided that no Order in Council or regulation would be invalid because it left any matter to the discretion of the Minister or of any other person (now S.308 of the Customs Act 1966). The Import Control Regulations were also expressly validated. However, although over 20 years passed before the court was again invited to determine the scope of these amendments, it was still found that there were further deficiencies.

In Finch v. Collector of Customs (31) it was argued that the validation provision did not go far enough in stating that the Import Control Regulations had been made under the amended empowering section - i.e. S.46 Customs Act 1913. This argument was accepted by the court with the effect that any offences committed

(29) s.46 - now s.48 Customs Act 1966
(30) s.8 Customs Acts Amendment Act 1939
(31) [1961] N.Z.L.R. 257

under the regulations were only liable to the penalties set out in the regulations. They could not be dealt with under the more severe penalty provisions of S.46 - i.e. the purported empowering section. The result of this case was a further amendment to the validation provision so that it declared that the Import Control Regulations were "to be and to have always been valid and to have been made under S.46". Further litigation was still to come and the following year the court was invited to determine the effect of breaches of import licences granted under the regulations prior to this latter amendment. In Reelick v. Collector of Customs (32) it was argued that any breach of the conditions imposed by import licences granted prior to the amendment could only be dealt with under the regulations and not under S.46 even where these breaches themselves had occurred after the new amending legislation had been passed. However Woodhouse J. had no hesitation in rejecting this argument on the grounds that the amendment did not automatically involve penalties being put on import licences. It only took effect when licencees chose to defy the conditions on the licence which earlier they had accepted. (33)

Therefore judicial activism has been prominent in both areas even where the courts have been faced with broad empowering legislation. Within the Education area there is still much dubious delegated legislation that has yet to be looked at by the courts and therefore it remains to be seen whether they will achieve their fullest potential in this area. But this apart, the courts have shown their willingness to intervene when they have been asked to do so and the above judicial decisions tend to show how jealous the courts are of their supervisory jurisdiction. Therefore in the final analysis it would seem that if effective controls are to be exercised over the actions of the executive then the courts may be the appropriate "watchdogs".

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(32) [1962] N.Z.L.R. 1031

(33) There is also the recent Magistrate's Court case (i.e. Collector of Customs v. Matusich) mentioned above (p.4-f.n.16) in which the Comptroller's power to prescribe forms was successfully challenged - it was held that it was not enough merely to change the definition section, there had to be a specific empowering section in the Act. Further the onus was on the Crown to prove that the form in question had been prescribed by the Comptroller. (Both these deficiencies have now been remedied by s.305A Customs Act and s.79A Sales Tax Act)

d) Political Controls

The nature of the legislative process itself is such that some internal checks can be kept on the exercise of delegated legislative powers. These checks are non-legal in nature and in most part rest upon the political remedies available. To understand the connection of these different political controls it is best to outline the procedure usually adopted in making delegated legislation (34)

(1) Idea originates either from within the department, or from the Minister or Cabinet,(sometimes Caucus)

(2) Ministerial approval given for department to draft regulations - sometimes joint ministerial app. sought where regulations may affect another department and Cabinet approval sought where regulation may have wide political repercussions

(3) Draft prepared in department, checked by legal division

(4) Final draft sent to parliamentary counsel who checks vires, style and reasonableness.(Part of this function was previously carried out by the Attorney-General's staff)

(5) Sent back to department who prepare Cabinet papers and send run-off copies to Government Printer

(6) Final checked draft sent to Cabinet for ratification

(7) Presented to Executive Council for formal signature

(8) Notice put in the Gazette

(9) Department lays regulations before the house.

(34) This procedure will vary depending upon who is the delegated authority. The procedure outlined is that usually followed where the Governor-General is the delegated authority which is in most cases with respect to delegated legislative powers. Other powers which are delegated to ministers and departmental heads follow a far less involved procedure and there are fewer internal checks that can be exercised over them.

Throughout the different stages of this process checks can be put on the content and validity of the power being exercised. Some of these checks such as the tabling procedure and publication requirements have already been examined so it is now intended to briefly examine the other checks that exist within the political structure and to see how effective there are.

(i) The Department

The Department represents the first check in the legislating process. Their function is to draw up the preliminary draft and to carry out the necessary research. This will sometimes mean consultation with interested parties - a particularly important function in the Education area where any regulations so made depend largely on the cooperation of other parties. Similarly in the Customs area there are a number of instances where some consultation will be required with interested parties as was evidenced in the recent beer duty legislation which underwent considerable modification during consultation with the breweries. On the other hand, especially in the Customs area there is a lot of budget legislation that has to be made in secret and without the need to consult interested parties - in particular the exercising of powers to vary duties and taxes.

At the departmental level there are two types of checks that can be kept on delegated legislation : Interdepartmental and internal.

Interdepartmental checks are of particular relevance in the Customs area where the department is dealing with wide and important powers. Where regulations are to be drafted which contain penal clauses then the approval of the Justice Department

must be obtained before the draft can be sent to parliamentary counsel. In this way checks are kept on the department's powers preventing any obtrusion of civil liberties. Similarly regulations involving the paying out or collecting of fees or other charges require Treasury approval. These checks are also important in controlling the drafting of empowering clauses.

Internal checks within the department are more obscure but perhaps the most important check is that carried out by the legal division of the department (if there be one). Both the Customs and Education Departments have only had legal devisions in the last three years. Prior to this any checking that was done fo the drafts was carried out by senior clerks who had no legal training at all. But, with the adoption of legal personel within both these departments, the making of delegated legislation and other administrative pracitices is now being more closely checked. Though, especially within the Education area, this job is made that much harder by the empowering legislation under which they have to work. The importance of these internal checks can also be seen with particular regard to the regulatory material that parliamentary counsel does not see - i.e. departmental notices and instructions.

(ii) Ministerial Controls

The checks that Ministers can impose on delegated legislation lie in the fact that ministerial approval must be obtained before any drafting of regulations is commenced and the Minister must also specifically approve the draft that is sent to the Parliamentary Counsel.

The effectiveness of this control is dependent upon the principle of ministerial responsibility. There are two aspects to this principle : Individual responsibility and collective responsibility.

Individual responsibility means that the Minister is politically answerable not only for his personal acts, but also vicariously for the conduct of his department. This usually involves answering questions in Parliament, explaining the actions of his department and accepting responsibility for their mistakes. This responsibility will only lead to his resignation if he can to some degree be considered blameworthy and if his cabinet colleagues do not feel that they can support him

Collective responsibility means that every member of Cabinet must be willing to give public support to every policy adopted by Cabinet and that if he is unable to do so he must resign. However, there are exceptions to this rule, as, for example, in 1953 when the Minister of Education persisted in asking that a special loan be raised for educational purposes, despite the opposition of his Cabinet colleagues. (35)

In recent times, more emphasis has been placed on the collective aspect of ministerial responsibility (35A) and the principle of individual responsibility has been weakened - due in part to the increasingly active role of civil servants. Ministers are now little more than spokesmen for their departments, who act only when maladministration is exposed. But even this political accountability for gross maladministration by their departments has recently been ignored.(36) Thus ministerial responsibility is no longer as effective a control on executive activity as it once was and Ministerial checks on departmental actions are few and far between.

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(35) As cited by Scott K.J., The New Zealand Constitution (1962) at p.114. Scott says with respect to this particular example that it is not surprising that a minister should be enthusiastic about his department and consequently these breaches do little or no harm. He cites other more serious departures from collective responsibility.

(35A) See Attorney-General v. Jonathan Cape Ltd 1975 3 All E.R. 484

(36) e.g. in the Police Department and the 'Overstayers Issue' last year when the Minister of Police publicly acknowledged that the Police had been overzealous in carrying out their orders and that he could not support their actions (although originally he had supported them until the full facts became known). The minister did not resign using the argument that the police were independent of the executive and therefore they had a certain amount of discretion in the way they chose to carry out their duties.

Therefore although the checks that the Minister actually keeps on the making of delegated legislation may depend on the personality of the Minister involved, the decline of individual ministerial responsibility has meant that such checks will be ineffective in the long term - i.e. a Minister no longer feels compelled to resign should his department act with gross maladministration.

Sub-delegation of Minister's powers in both the Education and Customs area also effectively take much of the control out of the Minister's hands - although of course he still has the authority to revoke any such sub-delegations.(37) However this means that ministerial discretions given under statute are often exercised without the specific knowledge of the Minister. This has fairly important repercussions when it is seen that in both the Customs and Education areas more powers are being delegated to the Minister which were previously only delegated to the Governor-General (who cannot sub-delegate them). (38)

(iii) Parliamentary Counsel

Parliamentary Counsel perform a vital function in the internal checking of delegated legislation before it is made law. They are responsible for scrutinising the vires, style and reasonableness of the departmental draft before it is sent to Cabinet for final approval. However they only examine that regulatory material that needs Cabinet approval - their essential function being legal advisors to Cabinet. Therefore a lot of regulatory material such as Ministerial and departmental notices and perhaps material exempted from publication under the Regulations Act 1936 (39) will not come under their scrutiny. Further their function is essentially an advisory one; they have no actual

(37) And of course such sub-delegations must be in writing - see s.9 Customs Act and s.5 Education Act.

(38) e.g. the power to waiver forfeiture under s.287 Customs Act is now put into the minister's hand (previously this power was exercisable by the Governor-General), under s.50(1) Education Act the power to vary the constitution of the governing body of a secondary school with their consultation is now in the minister by 'notice in the Gazette' (previously this power was exercised by the Governor-General by Order in Council). Cain op. cit. pp.45-46 cites other examples and notes an increasing tendency for Parliament to delegate lower.

(39) i.e. exempted by the Attorney-General under s.3(1) as discussed above (p.31).

power to reject a draft which they may consider to be ultra vires or unreasonable (40). However seldom would the comments of parliamentary counsel ~~would~~ be ignored by the department when it is recognised that such advice would carry a lot of weight at Cabinet level. Often only minor changes in style are needed to bring otherwise ultra-vires legislation within the scope of its parent Act; but where differences may arise between Parliamentary Counsel and the department they are usually resolved on middle ground depending again on the personalities involved.

Therefore Parliamentary Counsel have the potential for being an effective check on the executive in the making of delegated legislation but unfortunately this scrutinising function is often only carried out superficially. This is especially the case when Parliament is in session and Parliamentary Counsel become bogged down with the drafting of statutes, in which case delegated legislation becomes secondary legislation and is treated as such. For it is a well-known fact that our Parliamentary Counsel are very much overworked and therefore the checks that they can keep on delegated legislation will often be sacrificed in place of their more important duties.

(iv) Attorney-General

One of the original backstops in the system was the Attorney-General to whom all regulations were sent after being drafted. However this scrutinising function is now carried out by Parliamentary Counsel. Previously it was carried out by one of the Attorney General's staff attached to the Justice Department who, on his retirement, was never replaced. (41) The current practice appears to be that regulations are never

(40) 'Reasonableness' in the sense that it could be challenged under the Statutes Revision Committee procedure as provided under S.O.378 and 379 (see post).

(41) See Cain op. cit. for a discussion on the old procedure followed when regulations were referred to the Attorney-General's staff.

referred to the Attorney-General or any of his staff unless a special question is raised about them. Therefore it is probably no longer true to say that the Attorney-General exercises "a thorough and painstaking supervision over the content and validity of delegated legislation"(42). Certainly better use could be made of this control by the Attorney-General especially in light of the fact that Parliamentary Counsel's work load often results in there being only a superficial scrutiny of such legislation.

(v) Cabinet

This is effectively the last checkpoint before the draft legislation becomes law. Although usually it is the Executive as represented by the Governor-General in Council who signs the final document that gives effect to the law, this is little more than a formality once they have been approved in principle by the Cabinet. Cabinet approval may also be required at an earlier stage, i.e., before the regulations are drafted by the department. This can be seen as an extension of the Minister's collective responsibility to Cabinet in that if the proposed legislation has wide political repercussions the Minister may refer the matter on to Cabinet for their specific approval before he gives his own. Examples of the types of delegated legislation that will probably require Cabinet approval in the pre-drafting stages are seen in the many taxing powers that are delegated to the Governor-General in the Customs area. Usually the initiative in implementing these powers will come from Cabinet and in this way Cabinet can keep close checks in their use. Similarly in the Education area regulations such as the Tertiary Bursary Regulations which require the paying out of

(42) Paragraph 17 of the Algie Committee's Report

public money would probably have required full Cabinet approval before they were drafted. On the other hand, regulations on purely administrative matters (43) would probably only come before the Cabinet in their final draft and their adoption by Cabinet would probably be a mere formality. Therefore although Cabinet can be seen as the last checkpoint in the process, the acceptance or rejection of the draft will depend purely on the policy involved in the legislation. They are not concerned with technicalities. Usually regulations drafted on contentious matters would have obtained Cabinet approval (and sometimes Caucus approval) in the pre-drafting stages therefore their presentation to Cabinet in their final form will be accepted without further checking.

(vi) Statutes Revision Committee

On the recommendations of the Algie Committee, Parliamentary Standing Orders 378 and 379 were introduced which enabled the Statutes Revision Committee to consider regulations referred to it by the House or on its own volition. In this sense it can be seen as a direct parliamentary control that can only be exercised once the regulations are made. It is not like the many checks that can be exercised within the legislation-making process as discussed above and which were esentially "contraceptive"safeguards.(44)

The Statutes Revision Committee can draw the attention of the House to a regulation on any of the following grounds : -

(1) that it trespasses unduly on personal rights and liberties; or

(2) that it appears to make some unusual or unexpected

(43) e.g. Education (Assessment, Classification and Appointment) Regulations 1965
(44) "contraceptive v. ante-natal" safeguards - S.A. de Smith, Constitutional and Administrative Law (2nd ed. 1973) at p.341

use of the power conferred by the statute under which it is made; or

(3) that for any special reason its form or purport calls for elucidation.

However it is doubtful whether these changes have so far achieved any substantial improvement in parliamentary control. Prior to this year the procedure since its creation in 1962 has only been used once and even then the Committee made no formal recommendation (45). But the reference of the Rock Lobster Regulations (46) to the Committee earlier this year may be an encouraging indication that Parliament or at least the Statutes Revision Committee is prepared to take a more active role in exercising this control over delegated legislation. When the Committee reported back to the House it found that these regulations which imposed a total ban on the commercial diving for rock lobsters, trespassed unduly on personal rights and liberties. The Committee therefore recommended that the regulations be either revoked, or amended so as to only impose a partial ban. The Chairman of the Committee also made the following comments regarding the use of this power : -

> "...I regard the power of referral and also the power of review that is vested in the Committee as both being of a limited nature. Certainly they are powers that have been used sparingly in the past, and, in my opinion, should continue to be used sparingly if they are to be regarded as effective." (47)

With respect, it is submitted that the effectiveness of this power very much depends on its being more open and flexible and that the Chairman's comments seem rather empty in light of the fact that the Committee has seldom been asked to use this power

(45) Food Hygiene Regulations 1952 - but the reference of regulations such as these that had been operative for some years was not contemplated by the Standing Orders so the difficulty was overcome by the Attorney-General laying them on the table and moving that they be referred to the Committee.
(46) Amendment No.8 (S.R.1976/293)
(47) N.Z.P.D. (Hansard) 3rd June 1977

in the past. Therefore how effective this control will be on delegated legislation in the Customs and Education areas is uncertain and has yet to be determined. Certainly it will have some effect on the Customs area, where broad and important powers often affecting individual liberties are delegated to the executive. Should these powers be abused then the advantage of this procedure other that of the courts is that the Statutes Revision Committee is not confined to examining the vires of the power exercised (48) but can extend its examination to the whole policy behind the exercise of that power. In this respect it can prove to be a valuable check on the activities of the executive especially in light of the further fact that it can sit while the House is not in session.

5. CONCLUSION

At the outset, this paper proposed to examine the use of delegated legislation in two areas of Government - namely Customs and Education, with the aim of showing how each particular area can determine the availability of safeguards and the effectiveness of those safeguards. How has this prediction been borne out in these two areas?

Between these two areas a number of striking contrasts have been found, the most prominent of which has been the difference in emphasis on legal forms. In the Education area it was seen that there was a general lack of regard for legal forms while in the Customs area there was special emphasis placed on their use especially in terms of limited empowering clauses and legislation providing extra safeguards.

(48) In the Statutes Revision Committee's report back to the House on the Rock Lobster Regulations they expressed the view that the regulations were infra vires and that they did not make some "unusual or unexpected use" of the empowering section but because they trespassed unduly on personal rights and liberties it was recommended that they be revoked or amended.

This striking contrast can probably be attributed to the basic functional differences between the two areas.

Customs is essentially a revenue collecting area whereas Education represents one of the biggest spenders of public money. This earner-spender relationship underlies the whole comparative study and accounts for the vast differences that have been exposed in the use of delegated legislation. Because Education is a big spender then it will no doubt be subject to more political controls. Customs, on the other hand, as a big earner will be subject to more legal controls. This is accounted for in the fact that Customs must seek wide powers capable of restricting individual rights in order to carry out its function. Therefore there is seen a corresponding need to have stringent legal safeguards so that should individual rights be unduly infringed they can be adequately redressed. Parliament also ensures that strict controls are kept on the taxing powers that are delegated to the executive and these again are safeguarded by legal means - i.e. legislation. But this is not to say that controls are lacking in the Education area - even though from a legal point of view there is much controversy here. As suggested above the controls are of a different emphasis being more political in nature and less dependent on legal forms - i.e. it is an area where legislation will only work by the mutual consent of all interested groups such as teachers and students groups. Customs, on the other hand, depends more on the coercive element of legislation. Therefore legal safeguards have become less effective in the Education area when compared to the Customs area.

...

This brief functional analysis of the two areas explains how the means of controlling delegated legislation will largely depend on the area of Government in which they are exercised. Ultimately abuses are safeguarded in both areas but it is the means by which these safeguards work that are utterly different and tend to differentiate the two areas.