PARLIAMENTARY AND EXECUTIVE CONTROL OF DELEGATED LEGISLATION UNDER THE LEGISLATIVE COUNCIL FOR PAPUA AND NEW GUINEA, 1951-63

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Part I—Introductory

1. Preliminary

The present paper is intended to achieve two main ends.

Firstly, a fairly recent reviewer has complained in this Journal that there exists no comprehensive account of the position as to Parliamentary supervision of delegated legislation in the Australian States.[1] The present article represents, in part, an attempt to remedy that lack as far as Papua and New Guinea is concerned. It may be particularly timely since in the last six years our legislature has been twice reconstituted,[2] in 1960-61 to give a majority in the Legislative Council to the non-officials for the first time, and in 1963-64 to give a representative[3] (though not yet a responsible) House of Assembly. During the same period parliamentary powers of supervision and control over subordinate legislation were greatly increased, so that the House of Assembly started off in 1964 with fairly adequate machinery for the purpose.

Additionally, however, I have attempted to give a picture of the history of this limited facet of constitutional development in Papua and New Guinea, an attempt which should be undertaken on a much wider scale by a better pen than mine. For this reason, a considerable amount of material has been included that might appear to be of only local or transitory interest, such as the names of members of Committees and so on. Such material may ultimately be of more value than may at first sight appear: for one thing, source material on various aspects of development in Papua and New Guinea

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1 Robin L. Sharwood, review of Kersell, *Parliamentary Supervision of Delegated Legislation: The United Kingdom, Australia, New Zealand and Canada* (3 M.U.L.R. 268).

2 See for example, Mattes, 'The Legislative Council of Papua and New Guinea' (1963) 37 *Australian Law Journal* 176; Mattes, 'The House of Assembly for Papua and New Guinea' (1964) 38 *Australian Law Journal 159*; Lynch, 'Constitutional Developments in Papua and New Guinea 1960-61' (1961) 15 *Australian Outlook* 117.

3 *i.e.* within the meaning of the Colonial Laws Validity Act, 1865 (Imp.), s.1: 'any colonial legislature which shall comprise a legislative body of which one half are elected by inhabitants of the colony.'

is not the easiest thing in the world to come by, and, for another, I have been forcibly struck in observing and to a minor degree assisting in such developments over the past fifteen years or so, by the enormous influence which personalities and personal preferences and interests have had in influencing trends within the legislature. This seems to be a clear reason, for example, for the relative inactivity of the Legislative Council's Standing Committee on Regulations and Orders after the success of the first two Reports—the late E. A. James (formerly elected Member for Papua), who of all Members was most opposed to 'government by regulation', had left the Council, and the other more influential non-official Members were at that stage primarily interested in the reconstitution of the Council itself. A study of the interests and activities of each of the Members would be of considerable value to the constitutional historian of Papua and New Guinea and indeed of Australia, but if it lost sight of the lack of overall programming and continuity of interest of the non-officials might give merely an intriguingly distorted view of their successes and failures. These, however, are more general issues than the limited subject-matter of this paper.

From this point of view, this paper represents a further attempted contribution to the study of the workings of the Legislative Council such as was undertaken, in the more directly political field, by B. P. Sloan and a few of my earlier notes,[4] amongst others. In spite of the fact that I shall make occasional references to the new House of Assembly, fundamentally this is a study of control under the Legislative Council from 1951 to 1963, as the House has not yet had real time or opportunity to make any impact in this respect.

I might add that this article could well be accompanied, or preceded, by a rather fuller analysis of the types of subordinate legislation in Papua and New Guinea and of the processing of such legislation, but in the circumstances this must be left to another occasion.

2. Composition of the Legislative and Executive Councils

Before proceeding to consider either the question of control of delegated legislation, or the legal powers underlying that legislation and control, it might be desirable briefly to describe the constitution of the Legislative and Executive Councils of Papua and New Guinea.

Until its supercession at the beginning of 1964 by the House of Assembly, the Legislative Council went through two very different

4 Sloan, 'The Uncommitted Vote in the Legislative Council for Papua and New Guinea' (1962) 7 Australian Political Science Association News No. 4 p. 16. Lynch, 'Appointed Members in the Legislative Council for Papua and New Guinea' (1962) 7 A.P.S.A. News No. 3. p. 1. 'Non-Official Amendments to Bills in Papua and New Guinea' (1963) 8 A.P.S.A. News No. 1 p. 7. 'Private Bills and Private Members' Bills in the Legislative Council for Papua and New Guinea' (1964) 9 A.P.S.A. News No. 4 p. 2.

stages as far as its constitution was concerned, without any alteration in its formal powers of legislation.

In the first stage, the Government majority was in full control. During that period—from November 1951, until the end of 1960—the Council consisted of—

(a) the Administrator[5] (*ex officio* President);
(b) sixteen official members;
(c) three non-native elected members, elected on an adult franchise of non-natives;
(d) three native members, appointed by the Governor-General;
(e) three members representing the Christian Missions in Papua and New Guinea, similarly appointed; and
(f) three other members, also similarly appointed.

The official majority was, therefore, if we omit the Administrator, 16-12.

The second stage lasted from the beginning of 1961 until the beginning of 1964, when the House of Assembly, with a 54-10 majority of elected over official members and no nominated or appointed non-officials, came into being. During this interim period, the Council consisted of—

(a) the Administrator (*ex officio* President, as before);
(b) fourteen official members (a reduction of two);
(c) six non-native elected members, elected as before on an adult, non-native franchise;
(d) six native elected members, elected by native electors by an indirect vote[6]; and
(e) ten non-official appointed members.[7]

The balance of power therefore swung in 1961 from an official majority clearly in the saddle to an unofficial one, albeit made up of a combination of elected and nominated members.

During the whole of the period 1951-63 the Legislative Council had, subject to the constituent Papua and New Guinea Act of Australia and any other applicable Australian Acts (of which relatively few applied of their own force to Papua and New Guinea), a plenary delegation to 'make Ordinances for the peace, order and good government'[8] of the country, but subject also to veto powers vested in the Administrator and the Australian Executive.[9]

[5] *i.e.* the Administrator of the Territory of Papua and New Guinea, appointed by the Governor-General under the Papua and New Guinea Act 1949-1964 (hereinafter called 'the Act') and 'charged with the duty of administering the government of the Territory on behalf of the Commonwealth' (Act, s.13).

[6] For details of the method of election, *see* Lynch, 'Constitutional Developments', pp. 123 and 127-133; Plant, 'The Election in Papua and New Guinea' (1961) 1 Australian Territories No. 5 p. 10.

[7] Appointed by the Governor-General.

[8] Act, s.52 (before 1963, s.48).

[9] Lynch, 'Constitutional Developments', p. 120.

The legislative power also included power to make Ordinances providing for delegated legislation in the ordinary way. The principal subordinate legislative body was the Administrator in Council—*i.e.* the Administrator acting with, but not necessarily on, the advice of his main advisory Council.[10]

This advisory Council was originally termed the Executive Council, but at the time of the 1960-61 reforms of the central legislature both its title and its composition were changed, although in practice its powers and functions apparently remained unaltered.[11]

The Executive Council was originally constituted in 1949 and from that time until 1961 consisted of not less than nine officials appointed by the Governor-General: in practice, the usual number was ten. After the constitution of the Legislative Council in 1951 these were almost invariably official members of the Legislative Council.

There was, however, no direct link between the Executive Council and the Legislative Council, this being eventually supplied by the Papua and New Guinea Act (No. 2) 1960 in the substituted Administrator's Council. This new Council consisted of—

(a) the Administrator (who was never a member of the older Executive Council);
(b) three official members of the Legislative Council; and
(c) three non-official members of the Legislative Council, of whom at least two had to be elected members.

The last two classes were appointed by the Governor-General, and there was no statutory provision for the elected members of the Legislative Council to have a say in the membership of the Administrator's Council.

A further link between the Administrator's Council and the Legislative Council was provided by a later Ordinance[12] in that where the Administrator acted contrary to, or failed to act in accordance with, the advice of his Council (as he remained free to do), he was bound to report the matter and his reasons therefor to the Legislative Council—before 1961, the equivalent report was to be made to the Australian Minister for State for Territories.[13]

These were the only relevant changes before the abolition of the Legislative Council in 1964.

3. The Regulation-making Power

As referred to above, the Australian Parliament gave to the Legis-

[10] It should be remembered that the Legislative Council was not in law just an advisory body, as has sometimes been stated—it actually made Ordinances which were then subject to administrative veto, and the Administrator had no independent legislative power.
[11] See Lynch, 'Constitutional Developments', pp. 123-124, 133-135.
[12] *Administrator's Council Ordinance* 1960, s.5(4).
[13] There is no published report of any such action.

lative Council (and has more recently given to the House of Assembly) a plenary delegation to 'make Ordinances for the peace, order and good government' of Papua and New Guinea, the power to make such a delegation being usually regarded as arising under Section 122 of the Australian Constitution[14], in spite of a few expressions of judicial opinion to the contrary.[15] In the exercise of that delegated authority the Papua and New Guinea legislature, as has been the case with all Parliaments, has found it necessary further to delegate the power to make subordinate legislation.

For the purpose of the general law of Papua and New Guinea, '"subordinate legislation" . . . includes regulations, rules of court, standing orders, by-laws, orders in council, proclamations, orders and notices made under any such instrument or under an Ordinance, whether those regulations, rules of court, standing orders, by-laws, orders in council, proclamations, orders and notices are of a legislative character or not.'[16] Such subordinate legislation may be made by a number of authorities, but the principal class consists of Regulations made by the local executive Government, and it is on this class that attention will here be mainly focussed.

A power to make Regulations is conferred by most of the Ordinances of the Territory, the usual empowering formula being along the following lines:

> The Administrator in Council may make regulations, not inconsistent with this Ordinance, prescribing all matters which by this Ordinance are required or permitted to be prescribed, or which are necessary or convenient to be prescribed, for carrying out or giving effect to this Ordinance, and in particular for prescribing . . .

followed by specific heads of powers. Regulations have usually (but not invariably) dealt with machinery and *minutiae*, but a major departure from this principle occurred when in 1923 the Governor-General in Council ordained the Administrator's Powers Ordinance 1923 of the Territory of New Guinea[17] under which power was given to make Regulations, not inconsistent with any Ordinance, under twenty-five major headings and four subheadings, varying from cinematograph censorship, to disease control, to navigation. However, that Ordinance must be regarded as having originally been merely an interim measure introduced to give some local powers of legislation

14 *Fishwick v. Cleland and others* (1960) 34 A.L.J.R. 190, 192.
15 See for example, Evatt J. in *Jolley v. Mainka* (1933) 49 C.L.R. 242.
16 *Ordinances Interpretation Ordinance* 1949-1965, s.6(1).
17 Although under Sections 9 and 10 of the Act the Crown Possession of Papua and the U.N. Trust Territory of New Guinea are 'governed in an administrative union', Section 8 expressly preserves their separate identities and statuses, while by Sections 32 and 34 the separate pre-War laws are continued in force in each Territory, but may be repealed or amended by legisation of the combined Territory.

for the Territory of New Guinea pending the establishment of a Legislative Council for that Territory, which occurred in 1933. It is, incidentally, still in force, although it was heavily amended and reduced in scope almost to nothing by an amending Ordinance passed in September 1964, and its total repeal has been forecast. Moreover no Regulations on new subject matters (as distinct from amending or repealing Regulations) have been made under it since 1953.

As stated above, the authority empowered to make Regulations is normally the Administrator in Council. Although in some few cases (mainly of pre-World War II. or immediate post-War origin) the power was conferred on the Administrator acting alone, as a matter of practice such Regulations were, at least after 1949, always placed before the Executive Council before being made, and by the Administrator's Council Ordinance 1960 it became mandatory for the Administrator to obtain (but not necessarily to follow) his Council's advice before making any regulation. As all the members of the Administrator's Council are necessarily Members of the Legislature and three of them, under the 1961-63 Legislative Council, had to be non-official (including two elected) Members while under the House of Assembly seven are elected Members, the composition of the advisory body itself has made since 1961 for an incidental degree of control by the legislature of a kind different from that exercisable in Australia through an Executive Council or Cabinet. This is to be contrasted with the situation before 1961 where the analogous body, the Executive Council, consisted merely of officials.

Some few Ordinances, however, confer the power to make Regulations on the Australian Minister of State for Territories, and since Rules of Court are subordinate legislation it might be noted that such rules are, in Papua and New Guinea as elsewhere, made by the Judges of the Supreme Court.

Control over delegated or subordinate legislation, especially Parliamentary control, necessarily involves publication or promulgation in some fairly-readily accessible manner, and in this regard Papua and New Guinea is perhaps in a more favourable situation than some other jurisdictions. While there is no Statutory Instruments Act as such, the Ordinances Interpretation Ordinance requires[18] that all Regulations or orders be notified in the *Papua and New Guinea Gazette,* which is published weekly at least, and it is necessary in the notification to specify the place where copies are available. They must also be laid before the legislature on its first sitting day after their making. The significance of the tabling of the Regulations is discussed later.

The Ordinances Interpretation Ordinance also imposes restrictions

[18] *Infra sub. tit. 'Addendum'.*

on the making of Regulations generally, and Regulations cannot take effect from a date before the notification in the *Gazette* where, if they so took effect—

(a) the rights of a person (other than the Administration or an authority of the Administration) existing at the date of notification would be affected in a manner prejudicial to that person; or

(b) liabilities would be imposed on a person (other than the Administration or an authority of the Administration) in respect of anything done or omitted to be done before the date of notification.[19]

Part II—Controls

4. Executive and Parliamentary Powers of Control

Having come thus far, we may now turn to the question of actual control, and as control is exercisable both by the Australian Parliament and Executive and by the local legislature it seems appropriate to deal with the matter in that order.

Unlike Ordinances, which must under Section 53 of the Act be laid before both Houses of the Australian Parliament (which has, however, no power of disallowance as such), there is no requirement in the laws of Papua and New Guinea for Regulations to be laid before that Parliament. The Senate Standing Committee on Regulations and Ordinances has, however, commented on Ordinances and in particular on regulation-making powers therein, but, apart from that power of criticism and the indirect influence which that Committee had on the Legislative Council's own Standing Committee on Regulations and Orders,[20] the Parliament has no direct control over Regulations.[21]

Turning now to the powers of the Australian Executive, Section 37(3) of the Ordinances Interpretation Ordinance provides for Regulations to be disallowed in whole or in part by the Governor-General, which disallowance operates from the date of publication of notice thereof in the *Gazette*. Unlike the case of Ordinances, it is not the practice to publish formal notice that it is not intended to disallow a Regulation.[22] This power of disallowance was in fact exercised only once during the life of the Legislative Council.[23]

The final element of control is that vested in the local legislature.

19 s.37(2).
20 *Infra*, Sections 5 and 6.
21 See Senator Willesee's comments reported in *Hansard* (Senate) 21 May 1964, p. 1438.
22 As to Ordinances, see Lynch, 'Constitutional Developments', p. 120.
23 In the case of Regulations No. 21 of 1960 (Amendment of the Education Regulations 1958), Gazette No. 5, 19 January 1961, p. 70.

As in other respects, here again the powers of the legislature have recently been extended.

Until 1961, the Legislative Council had no power to disallow Regulations, although as a matter of practice Regulations were tabled in the Council at the commencement of each meeting.[24] Some degree of informal 'control' was at this stage supplied through the Council's Standing Committee on Regulations and Orders, established in 1957, to which reference is made below, but on the whole the Council was fairly powerless to act, as distinct from protesting or criticising. As could be expected, however, 'government by regulation' aroused a good deal of criticism from the non-official side, and not always without effect.

As an example of what could occasionally be done, in September 1956, and February 1957, E. A. James (elected Member for Papua), who later successfully moved for the establishment of the Standing Committee on Regulations and Orders, attacked the Liquor Regulations 1956 which provided for a fairly high scale of licensing fees based on sales, on the grounds that, if additional taxation were necessary, the type and method adopted was wrong and that, in any event, such a tax should not be imposed by regulation. His attack was, incidentally, supported by Mrs D. Booth (nominated non-official Member), D. Barrett (elected Member, New Guinea Islands) and H. L. R. Niall (official Member, District Commissioner, Morobe District). It was met by a statement by the then Acting Secretary for Law (W. W. Watkins) that the points raised would be included in a projected meeting to discuss the fees.[25] This was followed by a further attack by D. F. Jones (elected Member, New Guinea Islands) in his opening address at the first meeting of the next Council.[26] In the same meeting amendments to the Customs and Excise Tariffs were introduced[27] to increase the duties on liquor while simultaneously the Liquor Regulations were amended to reduce licensing fees to a purely administrative level, thus meeting this particular objection.

More important, however, and clearly associated with, if not due to, the non-official complaints spear-headed by James against 'taxation by regulation' in the Liquor Regulations and culminating in the second recommendation in the First Report of the Legislative Council's Standing Committee on Regulations and Orders, was an official statement by the Senior Official Member (Dr J. T. Gunther, Assistant Administrator) that fees of a revenue-producing or taxing nature, and not designed merely to cover the particular administrative costs of the

[24] Legislative Council Debates (Leg. Co. Deb.), 7 October 1952, p. 33 and 6 May 1953, p. 36 (E. A. James).
[25] Leg. Co. Deb., 27 February 1957, pp. 36, 38, 39.
[26] Leg. Co. Deb., 30 September 1957, p.10.
[27] Leg. Co. Deb., 1 October 1957, pp. 22, 23, 24.

particular matter, 'should be left to the Legislative Council and should not be imposed by regulation.'[28]

However, in 1961 Section 37 of the Ordinances Interpretation Ordinance was amended in a manner the significance of which, as will be seen, is underlined when it is remembered that it was in that year that there ceased to be an official majority in the Legislative Council. It is fair to state, however, that the final initiative in this regard stemmed from the official side, and the amending Bill was in fact introduced[29] by the Secretary for Law (W. W. Watkins).

It will be remembered that Regulations were not at that stage required to be laid before the Legislature. This was the effect of the first of the 1961 amendments to the Ordinance Interpretation Ordinance, and was itself significant enough, although the amendment did not make failure to table result in invalidity. However, the amendments went much further, and provided[30] as follows:

> The Legislative Council, may, by resolution passed at the meeting at which regulations are laid before it, or at the next succeeding meeting, disallow the regulations in whole or in part and a regulation so disallowed shall thereupon cease to have effect.

Thus, the Administration introduced the negative resolution procedure into a legislature dominated, if not by elected members, at least by non-officials.

Now, before turning to the mechanics of parliamentary consideration (*i.e.* the Standing Committee on Regulations and Orders), it seems worthwhile to mention the effect of the disallowance of a regulation, whether by the Australian Executive or by the local legislature.

Firstly, 'the disallowance of . . . [a] . . . regulation shall have the same effect as a repeal of the regulation, except that, if the regulation amended or repealed any law in force immediately before that regulation took effect, the disallowance of that regulation shall revive the previous law . . . '[31] This provision is essentially the same as that regulating the effect under the Act of the disallowance of an Ordinance by the Governor-General, and is quite different from Section 48(6) of the Commonwealth Acts Interpretation Act which provides merely that 'the disallowance of the regulation shall have the same effect as a repeal of the regulation': hence, no reviver.

Secondly, a disallowance quite naturally fetters the future discretion of the executive:

28 Leg. Co. Deb., 22 September 1958, p. 468.
29 Leg. Co. Deb., 21 September 1961, p. 191.
30 Now *Ordinances Interpretation Ordinance* 1949-1965, s.37(4).
31 *Ibid.* s.37(6).

> Where a regulation is disallowed under this section, no regulation being the same in substance as the regulation so disallowed shall be made within six months after the date of the disallowance, unless—
> (a) in the case of a regulation disallowed by resolution of the . . . [local legislature] . . . that resolution has been rescinded; or
> (b) in the case of a regulation disallowed by the Governor-General, the Governor-General has approved.[32]

A regulation made in contravention of that provision is 'void and of no effect'.[33] These provisions are essentially the same as those of Section 49 of the Commonwealth Acts Interpretation Act.

5. The Instrument of Parliamentary Supervision—The Standing Committee on Regulations and Orders

We come now to the Legislative Council's principal instrument of control—the Standing Committee on Regulations and Orders.

The Committee arose out of an amendment to Standing Orders of the Legislative Council moved by the then elected Member for the Papua Electorate (E. A. James), seconded by the elected Member for New Guinea Islands (D. F. Jones), and supported by the Senior Official Member (Dr J. T. Gunther, Assistant Administrator). In speaking to his motion, Mr James stated—

> I think most Honourable Members are aware of my antipathy to government by regulation . . . The object of the Motion, Sir, is not to stop the Executive from making regulations at this stage . . . it is designed to enable this Council to review all Regulations passed by the Executive, to report on them and to give Honourable Members the right to debate their feeling and to make recommendations to the Executive where necessary . . . Incidentally, it may also have the effect of making the Executive more cautious in the framing of Regulations and give them cause to remember, quite often unintentionally overlooked (*sic*), the rights of individual residents.[34]

The relevant Standing Order, which was taken from Standing Order 36A of the Australian Senate, read as follows:

> (a) A Standing Committee, to be called the Standing Committee on Regulations and Orders, shall be appointed immediately on the making of this Standing Order and thereafter at the commencement of each Session.
> (b) The Committee shall consist of five Members appointed on Motion, of whom two shall be Official Members and three Non-Official Members.
> (c) The Committee shall have power to send for persons, papers and records.
> (d) All Regulations, Rules, By-Laws and Orders made or given under an Ordinance laid on the Table of the Council shall stand referred to the Standing Committee for consideration and, if necessary, report

[32] *Ibid.* s. 37(7). [33] *Ibid.* s.37(8).
[34] Leg. Co. Deb. 10 October 1957, p. 182.

thereon. Any action necessary, arising from a report of the Committee, shall be taken in the Council on Motion after Notice.[35]

In addition, the provisions of Part VII. of the Standing Orders (which related to Select Committees) were applied, with certain exceptions, to the Committee, perhaps on the face of it the most significant provision being that the Committee elected its own Chairman, who was to prepare the initial draft Report.

This leads to the question of the composition of the Standing Committee. The Senate Standing Committee on Regulations and Ordinances consists of four Senators nominated by the Leader of the Government in the Senate and three nominated by the Leader of the Opposition in the Senate;[36] on the other hand, the Legislative Council Standing Committee was mixed but contained a non-official majority, and consisted of five members appointed by the Council.[37]

For the record, the first Standing Committee consisted of:

D. F. Jones (Elected Member of New Guinea Islands), Chairman.

I. F. G. Downs (Elected Member of New Guinea Mainland).

E. A. James (Elected Member of Papua).

H. L. R. Niall, C.B.E. (Official Member—District Commissioner, Morobe District—later, as an elected Member, to become the first Speaker of the House of Assembly).

W. W. Watkins (Official Member—Secretary for Law).[38]

The second and last Committee of the Legislative Council consisted of:

W. W. Watkins, Chairman.

A. L. Hurrell, M.C. (Non-native elected Member, New Guinea Coastal Electorate).

H. L. R. Niall, C.B.E.

J. R. Stuntz (Non-native elected Member, Eastern Papua Electorate).

Vin Tobaining (Native elected Member, New Britain Electorate.[39]

A number of points might be noted concerning the composition of the Committee. Firstly, in each case the mover was the Senior Official Member (the Assistant Administrator—later Assistant Administrator (Services)—Dr J. T. Gunther) who did not become a member of the Committee. Secondly, in each case all the non-official members were elected Members of the Council and the non-officials were in the majority. Thirdly, while Committees were appointed for the Third (September 1957 to May 1960) and Fifth (February 1961 to November 1963) Legislative Councils, there was none for the Fourth

35 Standing Orders of the Legislative Council, S.O. 182A.
36 Senate Standing Orders, S.O. 36A.
37 Leg. Co. S.O. 182A(*b*).
38 Leg. Co. Deb., 10 October 1957, p. 183.
39 Leg. Co. Deb., 6 June 1961, p. 67.

Council. That Council, however, met only once, in October 1960, and was then prorogued to allow of new elections under a new constitution. Finally, the Secretary for Law (the head of the Department of Law and the nearest analogue of an Attorney-General) was a member of both Committees and, in spite of non-official majorities both in the Legislative Council and in the Committee, was made Chairman of the Second Committee.

6. Activities of the Standing Committee

The next question to be dealt with is as to the practical working of the Committee. It might here be noted again that, while until the Ordinances Interpretation Ordinance 1961 came into effect there was no statutory requirement that Regulations should be tabled in the Legislative Council and hence made available to the Committee, this was in fact done *ex gratia* by the Administration.[40]

The basic functions of the Committee were set out in its First Report in June 1958 as follows:

Functions of the Committee

1. Pursuant to Standing Order 182A, all regulations and orders laid on the Table of the Legislative Council stand referred to the Committee for consideration and, if necessary, report thereon. Any action necessary, arising from a report of the Committee, shall be taken in the Council on Motion after Notice.
2. In Section 6 of the *Ordinances Interpretation Ordinance* 1949-1956, 'regulations' is defined as meaning regulations made under an Ordinance and including rules and by-laws so made.
3. In considering its functions, the Committee has had recourse to the opinions expressed from time to time in the Reports of the Standing Committee on Regulations and Ordinances of the Senate of the Commonwealth of Australia.
4. (1) It is considered that the functions of the Committee are 'to scrutinize regulations and orders to ascertain—
   (a) that they are in accordance with the Statute;
   (b) that they do not trespass unduly on personal rights and liberties;
   (c) that they do not unduly make the rights and liberties of citizens dependent upon administrative and not upon judicial decisions;
   (d) that they are concerned with administrative detail and do not amount to substantive legislation which should be a matter for ordainment by the Legislative Council.'
   (2) It is intended to follow the principle that 'questions involving

40 *Supra* n.23.

Government policy in regulations, etc., do not fall within the scope of the Committee'.

5. It is pointed out that, pursuant to Standing Order 182A, all regulations and orders laid on the Table of the Legislative Council *stand* referred to the Committee for consideration, and if necessary, report thereon. Thus it is competent for, and indeed the duty of, the Committee to keep under review any regulation or order which the Committee considers in its use and operation may present a changed aspect in so far as the Committee's earlier consideration of it disclosed.
6. (1) The Committee has no executive power and may only submit reports to the Legislative Council, which may adopt or reject its recommendations.
   (2) More particularly it is to be noted that no power is conferred upon the Legislative Council to disallow any regulation, order or by-law made under an ordinance. Any resolution of the Council concerning regulations, etc., therefore is limited to an expression of the opinion of the Council.[41]

These principles were requoted in the Third Report.[42]

In the First Report, the Committee commented that the Legislative Council had no power to disallow a regulation. In the course of the debate, Dr Gunther stated that this question was receiving the close attention of the Administration. It was finally dealt with by the 1961 amendments to the Ordinances Interpretation Ordinance.

The second recommendation commented adversely on an amendment to the Liquor Regulations, and expressed the opinion that no licence fees under the Liquor Ordinance should be a matter for prescription by the Administrator in Council but a matter for the Legislative Council itself. While no amendment in such terms was made consequent on the Committee's Report, Dr Gunther stated that in the matter of fixing fees the Administration is giving thought to providing that fees of other than of an administrative nature, in other words, fees of a revenue gathering nature, should be left to the Legislative Council and should not be imposed by regulation.

The third comment was that two sets of pre-War regulations, brought to the Committee's attention because of minor amendments, should be re-enacted as Ordinances. Those Regulations (the Native Administration Regulations 1924 of the Territory of New Guinea and the Native Regulations 1939 of the Territory of Papua) are essentially similar and provided, firstly, for a special series of native courts; secondly, for a simplified code of minor criminal law applicable to natives; and, thirdly, for certain administrative arrangements

41 Leg. Co. Deb., 9 June 1958, pp. 298-9.
42 Leg. Co. Deb., 19 September 1961, p. 137.

and powers relating to natives. In reply, Dr Gunther advised that this matter also was under active consideration and the Minister for Territories later[43] announced policy decisions along the lines of the Committee's recommendations, although not expressed to be consequent upon them. A Bill (the Local Courts Bill 1962) to repeal the Regulations was introduced into the Legislative Council in June 1962, passed in September 1963, and came into force in 1965.

Finally, the Committee adversely criticised certain provisions of the Personal Tax Regulations dealing with the fixing of the time for payment of personal (or 'head') tax. While not accepting the Committee's recommendations, Dr Gunther, in effect, stated that the Committee's misgivings would be dealt with administratively if they proved well-founded.

The Second Report was brought down in September 1958.[44] In that Report the Committee commented on only two Regulations. It recommended that the pre-War Coastal Shipping Ports and Harbours Regulations 1938 of the Territory of New Guinea be re-enacted as an Ordinance, and criticised two provisions of the Education Regulations 1958. It stated that Regulation 15(1) of the latter Regulations, which made it an offence for the parent of a child subject to the compulsory education provisions of the Education Ordinance not to advise the reasons for any non-attendance of the child at school, was 'too harsh in its application to some parents', suggesting that the regulation 'should be amended at least by providing that the parent or guardian of a child shall receive a request to furnish the reason for the non-attendance of a child'; further, the Committee felt that a provision requiring, under penalty, a person finding a lost certificate or other document which had been replaced under the Regulations to forward it to the Director of Education was 'harsh and unnecessary' and 'should be deleted.'

In replying to the Report,[45] Dr Gunther agreed with the criticism of the Coastal Shipping Ports and Harbours Regulations, and stated that action was in hand to repeal these Regulations and replace them by an Ordinance. The first criticism of the Education Regulations was rejected on the grounds that no reason was given, nor was one seen, why the requirement was unnecessary; that, in the circumstances of the country, it would be difficult, if not impossible, for a Truant Officer to check upon absences without it; and, finally, that the subregulation complained of 'was included in the original draft Education Regulations at the unanimous request of all Mission repre-

[43] *Justice in Papua and New Guinea,* Statement in the House of Representatives, Canberra, by the Minister for Territories, the Honourable Paul Hasluck, M.P. (1961), p. 6.
[44] Leg. Co. Deb., 16 September 1958, p. 391.
[45] Leg. Co. Deb., 22 September 1958, p. 468; 9 March 1959, p. 503.

sentatives on the Education Advisory Board'.[46] The final recommendation was accepted, and the provision objected to was later repealed.

After this, the Committee lapsed following the resignation on two occasions of the elected Members,[47] until it was re-constituted at the opening of the Fifth Council in April 1961. It might here be noticed that E. A. James the original prime mover and, right or wrong, arch-opponent of 'government by regulation' was by this time no longer a member of the Council.

On 19 September 1961, the Third Report was brought down, but, apart from referring without comment to three sets of Regulations, the Committee contented itself with reiterating the general statement on its functions made in the First Report.[48]

The Fourth Report was presented on 5 March 1962.[49] It, however again merely referred to thirteen sets of Regulations, without comment.

The Fifth Report was brought down on 11 June 1962.[50] The Committee had considered fifteen sets of Regulations, one set of Rules and one set of By-laws. Its only criticism was of Regulation 5 of the Public Hospitals (Charges) Regulations 1962, on which its comment was—

> The Committee considers that the method by which any person may present themselves to an Administration Hospital or Doctor for free medical treatment, or hospitalization, irrespective of their financial position, is wrong in principle.[51]
> The Committee considers that some form of the Means Test, as known in Australia, should be applied to patients claiming free medical treatment or hospitalization.[52]

It is rather difficult to reconcile such a comment with paragraph 4(2) of the Statement of Functions by the first Committee in the First Report. However, no comment was made on this matter in the Council, and the Director of Public Health (Dr R. F. R. Scragg) limited himself to the statement that 'Clause (*sic*) 5 is now under considera-

46 Leg. Co. Deb., 9 March 1959, p. 503: The Education Advisory Board is set up under the *Education Ordinance* 1952-1963 and consists of the Director of Education *ex officio*, and four mission representatives and not more than four others all appointed by the Administrator. Its functions are to—
'consider, and tender advice to the Administrator concerning, any matter relating to education in the Territory or arising under . . . [the] . . . Ordinance.'

47 The resignations were in protest against the introduction of income tax: Leg. Co. Deb., 12 March 1959, pp. 560, 561, 562, 565, 569; 20 April 1959, p. 580; and 28 and 29 September 1959, pp. 726-33, *passim*.

48 Leg. Co. Deb., 19 September 1961, p. 137.

49 Leg. Co. Deb., 5 March 1962, p. 308.

50 Leg. Co. Deb., 11 June 1962, p. 425.

51 It should be noted that this applied generally only to persons attending the equivalent of public wards which have replaced the former 'native' wards and hospitals.

52 Fifth Report Standing Committee on Regulations and Orders.

tion by the Administration'. In fact, no action in relation to a Means Test has as yet been taken.

The Sixth Report, presented on 3 September 1962,[53] again made no comment on the twenty sets of Regulations and one set of By-laws before the Committee.

No further report was presented until 12 August 1963, when the Seventh and final Report was tabled, once more with 'no comments to make' on the twenty-three sets of Regulations.[54]

7. The General Position

What then was the general position at the end of the Legislative Council period?

It is clear that the Australian Executive had adequate powers of review. The Parliament, too, had some limited possibility of control in that Ordinances were tabled, and hence stood referred to the Senate Committee on Regulations and Ordinances: however, in its Fifteenth Report that Committee said as follows:

> The terms of the Senate Standing Orders constituting this Committee are probably wide enough to bring the Territorial ordinances within the scope of the Committee's consideration. But the general purpose of this Committee is not felt to be to supervise the legislation of a territorial Legislative Council . . . The view which the Committee has taken is that it has no responsibility to scrutinize the ordinances of the Legislative Councils . . .[55]

It is also clear that the Parliament has in practice no direct power of review of Papua and New Guinea regulations and little or no real control over Ordinances.[56]

Within Papua and New Guinea, however, the local legislature has powers which are formally about as full as can reasonably be given, not only because of composition of the Administrator's Council (*i.e.* at the stage of the making of Regulations), but also by way of the negative resolution procedure through the Standing Committee. The non-official element, indeed, has far wider statutory powers than has the Opposition in the Australian Parliament, having not only a majority in the Administrator's Council and in the legislature but also an absolute majority on the Standing Committee. The remaining question is as to how those powers have been exercised in Papua and New Guinea.

Firstly, it might be noted in passing that the Reports made by the Standing Committee in the period under review—even in those sec-

53 Leg. Co. Deb., 3 September 1962, p. 498.
54 Leg. Co. Deb., 12 August 1963, p. 806.
55 Fifteenth Report of Senate Committee on Regulations and Ordinances.
56 This has been the subject of occasional adverse comment: see for example, *Hansard* (Senate), 21 May 1964, p. 1439.

tions which criticized the Government's use of the regulation-making power—were apparently unanimous, and, secondly, that of the six specific recommendations made by the Committee only one was rejected outright, while one recommendation for the total repeal of a regulation was accepted: on the other hand, the Committee's comments on the legal powerlessness of the Legislative Council were noted and acted upon.

However, it might also be noted that comment was made on only six of the Regulations tabled between the time of the appointment of the first Committee and the time of the Sixth Report, which seems to argue either that Regulations in general conform with the principles laid down by the Committee (which does not agree with the views expressed by the originator of the Committee and quoted above); that the Reports were the result of a process of bargaining within the Committee; or that the Committee for one reason or another has been unable to function as efficiently as was hoped: in this last regard it should be remembered that the Legislative Council was (and the House of Assembly is still) emphatically a part-time body (averaging to date 3-4 weeks of meetings per year), and that only one of the non-official members of the Committee was a permanent resident of Port Moresby which is the administrative capital of the country.

While the history of the Legislative Council Committee was thus too short, and its activities too limited, for a proper assessment of its potential influence on the Executive to be made, it is noteworthy that relations between it and the Administration appear to have been amicable; that, as illustrated above, it elicited reasoned explanations from the official side of the Council and in particular on the one rejected recommendation; and that it succeeded in having one major recommendation and one suggestion implemented. However, it also seems clear that the Committee did not use its position to the best advantage, as is strongly suggested by the facts that only five Reports were presented at the ten meetings of the final Legislative Council (1961-1963), and these commented on only one out of seventy-seven pieces of subordinate legislation before the Committee.

The truth, I fancy, is that the Committee in operation provides a first-class illustration of what was at once an outstanding weakness and an occasional source of strength in the Legislative Council—the importance of personalities and the absence of a non-official policy *as such*.[57] Without in any way derogating from the effectiveness, in various fields, of the non-official contribution,[58] it seems clear from the record that the interest in and the pressure for (and the ultimate

[57] Sloan, *op. cit.* and Lynch, 'Appointed Members' and 'Non-Official Amendments.'
[58] See papers referred to in n.4 above.

achievement of) a degree of legislative control over the regulation-making power can be credited almost entirely to E. A. James: it is significant that, with his retirement from politics at the close of the Third Council, the Standing Committee, which had secured for the Council the right to disallow regulations and had criticized, with some effect, five cases of regulation-making in two Reports, ceased to be really effective. This sort of phenomenon is not, of course, limited to Papua and New Guinea, though it is occasionally lost sight of.[59]

However, the principle had been established and the machinery set up, both primarily on non-official initiative, and that was a real achievement—perhaps a sufficient one.

8. Comment

Even this fairly superficial study of the workings of the Legislative Council Standing Committee suggests possible improvements that might be looked at. Indeed, the new House of Assembly Committee, as well as Australian jurists, might well care to devote some attention specifically to some aspects at least of its jurisdiction, powers and procedures.

Firstly, the first Committee of the House of Assembly on Regulations and Orders has already commented in the following words on what has apparently been a procedural defect that must have militated against the effectiveness of the Legislative Council Committee:

> Your Committee draws the attention of the House to the desirability of it receiving from each Department administering a regulation or order an explanatory memorandum showing the necessity for, and the effect of, that regulation or order. It is also desirable that these explanatory memoranda be forwarded to members of the Committee on the making of the regulation or order so that the members of the Committee may have time to study them before the regulations or orders are actually tabled in this House.[60]

Such memoranda, or similar ones, must in any case necessarily be drawn up for the consideration of the Administrator's Council at the time when Regulations are made, so that it should not be a major task to prepare them for the Committee. This is, of course, standard procedure in the Australian Senate.[61]

Secondly, the Legislative Council Committee, so far as its Reports show, did not call formal evidence as to Regulations, or at least did not report evidence. This might suggest a procedural weakness, although Standing Order 182(c) of the Standing Orders of the

[59] I fancy that Sloan, *op. cit.* is to some extent guilty of this.
[60] House of Assembly Debates, 10 September 1964, p. 315.
[61] Odgers, *Australian Senate Practice* (2nd Ed., 1959) 195. Under the House of Assembly, this practice is now adopted. (*Infra* Section 11.)

Council (now Standing Order 22(3) of the Standing Orders of the House of Assembly) provided that 'the Committee shall have powers to send for persons, papers and records', which incidentally involved the power to compel attendance, to administer oaths, etc. I might here refer, for the sake of comparison, to the long evidence from the Australian Parliamentary Draftsman and others on the subject of Commonwealth Statutory Rules No. 92 of 1955, reported in the Tenth Report of the Senate Committee, or the examination of the Chief Inspector of Licensing, Australian Department of Customs and Excise, reported in the Eleventh Report, although as is usual with Committees, of course, sometimes the evidence itself is not reported. The calling of evidence is clearly, for the Senate Committee, not necessarily solely or even mainly directed at obtaining ammunition to fire at Regulations already implicitly condemned, or even an attempt to allow the Department concerned to defend itself, but seems to be largely for the purpose of understanding the purpose and effect of the Regulations in the first instance.

Such understanding, of course, may also in many cases be obtained by correspondence, as may even the correction of what the Committee considers may be errors. Judging from references in the Senate Committee's Reports, this sort of correspondence forms a not-insignificant side of that Committee's activities, although it was not used in Papua and New Guinea, at least to the best of my knowledge.

I note also that in India the Secretariat of the House of the People itself apparently takes an active and positive part in the clarification of points raised by Regulations, and even in preliminary decisions as to whether matters should be raised before the Committee on Subordinate Legislation.[62] With a legislature meeting as infrequently and as briefly as in Papua and New Guinea, consideration might be given to a similar approach, perhaps using the permanent staff of the House of Assembly. The lack of secretarial and other assistance for members of the latter House has already been criticized by individual members of it.[63]

The foregoing procedural suggestions might perhaps simplify and streamline the working of the Committee. However, more suggestions of a more substantive nature might also be considered.

Firstly, one wonders whether the presence of the Secretary for Law, who is ultimately the legal adviser to the Government and is the Permanent Head of the Department of Law (including the Office of the Legislative Draftsman, which prepares almost all Regulations) —not only as a member but as Chairman of the Committee—might not have had an inhibiting effect on the other members. In India, for

[62] Jain, 'Parliamentary Control of Delegated Legislation in India—I' [1964] *Public Law* 33, 38.

[63] For example, *H. of A. Deb.*, 19 May 1965, pp. 65-6.

example, it appears that a Minister cannot be a member of the Committee on Subordinate Legislation, perhaps for this reason.[64]

In this regard, it is noted that the Australian Senate Committee, not being satisfied with the offer of a legal officer of the Attorney-General's Department to assist it but preferring to have legal assistance from outside the Public Service, obtained the appointment, in 1945, of J. A. Spicer, Q.C., as Legal Adviser at a fee of 200 guineas per annum (subsequently increased to 250 guineas).[65] Spicer was a former Australian Attorney-General and a former Chairman of the Committee itself, and so was in perhaps a much better position, with his experience in this somewhat specialized field, than any member of the small non-official Bar at present in Papua and New Guinea. But even if this were admitted, there seems little reason why consideration should not be given to calling in an experienced member of the Australian Bar to assist the Committee.

Incidentally, in the United Kingdom, the Scrutiny Committee of the House of Commons is assisted by the Speaker's Counsel,[66] who is a parliamentary officer appointed by the Speaker.[67] and so is clearly 'neutral'. Carr[68] also reports a South African proposal for the appointment of an official as a sort of 'legislative auditor-general': the strength of an auditor-general's position, like that of an Ombudsman, of course, lies precisely in his detachment from ordinary financial administration, his independence of the Government of the day, and his primary responsibility directly to the Parliament.

The next matter that might be looked at is the question of the instruments which may be dealt with by the Committee. This was, somewhat inconclusively, considered in the Ninth Report of the Senate Committee, but might well be the subject of further scrutiny here. In particular, the question of determinations, by-laws and Local Government rules[69] at present not open to the Committee, might warrant consideration in some way.

Another point that has been raised in the Senate Committee is that Regulations *stand* referred to the Committee—they do not have to be merely reported on and forgotten by the Committee. This implies a right to provide a continuing oversight of the practical operation of Regulations, hitherto, in Papua and New Guinea, unexercised.[70] In

64 Jain, *op. cit.* 36.
65 Odgers, *op. cit.* 195; Kersell, *Parliamentary Supervision of Delegated Legislation The United Kingdom, Australia, New Zealand, and Canada* (1960), 34-5.
66 Carr, 'Parliamentary Control of Delegated Legislation' [1956] *Public Law* 200, 209, and foreword to Kersell, *op. cit.*, p. viii.
67 Wilding and Laundy, *An Encyclopaedia of Parliament* (1958) 548.
68 Carr, *op. cit.* 212. 69 *Infra* p. 356.
70 The possibility was, however, specifically adverted to in the First and Third Reports of the Legislative Council Standing Committee: it may perhaps explain the somewhat peculiar comment in the Third Report of the House of Assembly Committee (see Section 11 below).

this connexion, as well as in relation to Committee procedure generally, it is as well to remember that matters could be brought specifically to the attention of the Committee by other members of the House and, presumably, by members of the public, again a prerogative apparently not availed of.

We might now turn (but as briefly as practicable) to the question of the adequacy of the functions of the Papua and New Guinea Committee as expressed in the Standing Orders of the Legislative Council and the Committee's own formulation of them. It was noted above that the Legislative Council Committee's original formulation follows that of the Senate Committee, which in turn was based on part only of Recommendation 1 (d) of the Report of the Senate's 1929-30 Select Committee upon Standing Committees. The part that was not included read as follows:

> That such Standing Committee shall be charged with the responsibility of seeing that the clause of each bill conferring a regulation-making power does not confer a legislative power which *ought* to be exercised by Parliament itself.[71]

In its Fourteenth Report, the Senate Committee did in fact consider two clauses of the Civil Aviation (Carriers' Liability) Bill 1959 (Cth), then before the Senate, and in the Fifteenth Report defended its right so to do. In the meantime, a point of order had been taken and upheld against the motion to print the Fourteenth Report, on the ground that it dealt with a subject with which the Committee itself was not competent to deal. Odgers, after discussing the circumstances and the issue, concludes that—

> On a strict interpretation of . . . [the relevant Standing Order] . . . the Regulations and Ordinances Committee may not be justified in reporting upon the proposed regulation-making powers contained in a Bill before the Senate. A broad interpretation is that . . . [the Standing Order] . . . is not exclusive, and that the Committee is in order in drawing the attention of the Senate to aspects of a proposed regulation-making clause of a Bill. Certainly the broad interpretation best serves the Senate's function as a House of review.[72]

Odgers also states that the Indian Committee on Subordinate Legislation (described by Carr[73] as 'evidently a vigorous and independent body') ' . . . scrutinizes Bills as well as orders, and it is reported that it does not hesitate to advise the Government on its legislation or to suggest amendments to rules.'[74]

It will be interesting to see if Odger's 'broad interpretation' is ap-

71 Report of Select Committee upon Standing Committees 1(d). Italics inserted.
72 Odgers, *op. cit.* 194.
73 Carr, *op. cit.* 215.
74 Odgers, *op. cit.* 194.

plied in Papua and New Guinea in the future, as Senate practice does not necessarily apply.[75]

With relevance to the defined functions of the Committees (both Senate and Legislative Council), Carr raises an interesting question in discussing the Senate Committee's formulation of its guiding principles. 'The first of those four points—whether the order is in accord with the parent statute—seems to raise the question of *vires, ultra* or *intra*'.[76] The Senate Committee, has, on occasion, adverted to that point, as in the Tenth Report where, contrary to the view expressed by the Australian Parliamentary Draftsman and reported in the Appendix of evidence, the Committee reported its opinion, 'That the Regulation is not authorized by the Act.' In the result, the offending regulation was repealed.[77]

Such an interpretation of the functions of the Committee, allowing it to give an opinion on a technical and abstruse legal point, seems at first sight to be merely an accidental over-reaching of its authority, especially in a House which prohibits even the asking of a question seeking a legal opinion.[78] Further investigation shows, however, that it was by no means accidental, as the following extract from the Report of the 1929-30 Select Committee suggests:

> Witnesses referred to the difficulties likely to be experienced by persons seeking the judgment of the High Court on the validity of regulations. Your Committee was impressed by the probable usefulness of affording such persons an opportunity of submitting their criticisms of regulations to a Standing Committee, a submission which from the point of view of persons affected would be both more timely, and obviously cheaper than attacking the regulation in Court.[79]

Frankly, the thought of solving a legal problem, presumably as to the rights of individuals, and perhaps even rights as between individuals, by reference to what could well be a legally-unqualified and perhaps politically divided Committee seems to be taking the old-fashioned English concept of the 'High Court of Parliament' a little too far.[80] Particularly in Papua and New Guinea, a more restricted view of the Committee's functions seems not merely desirable but even essential if the Committee is not to bring itself into disrepute at least in legal circles.

However, Carr does approve of the other three 'guiding principles'.

75 In cases where there is no express provision, Papua and New Guinea parliamentary procedure follows the Australian House of Representatives, which in turn falls back in similar circumstances on the House of Commons (Legislative Council S.O. 189; H. of A. S.O. 301; H. of R. S.O. 1).
76 Carr, *ibid.* 212.
77 Tenth Report Senate Committee.
78 Odgers, *op. cit.* 80.
79 Report of Select Committee upon Standing Committees.
80 *Cf.* Carr, *op. cit.* 206-7.

In this general connexion, the functions of some other similar committees elsewhere may be worth mentioning.

According to May

> In 1924 the House of Lords . . . set up a 'Special Orders Procedure', so that a sessional committee of the House examine . . . [certain rules and orders] . . . and report, in effect, whether the provisions raise important questions of policy or principle, how far they are founded on precedent, and whether there should be any further inquiry . . .[81]

The order of reference of the Commons' Scrutiny Committee appear, at least to me, more relevant:

> This Select Committee's order of reference does not empower it to consider merits or policy, but enables it to draw the attention of the House to provisions which (i) impose a charge on the public revenues, (ii) are made under an enactment which excludes challenge in the law courts, (iii) appear to make some unusual or unexpected use of the powers conferred by the statute, (iv) purport to have retrospective effect where the parent statute does not so provide, (v) have been withheld from publication or from being laid before Parliament by unjustifiable delay, (vi) have not been notified in proper time to the Speaker in cases where they come into operation before being presented to Parliament . . . or (vii) call for elucidation of their form or purport.[82]

Carr comments on point (iii)—

> That ingenious formula has proved its value. It catches cases which a member might think were *ultra vires,* cases where a Minister purports to sub-delegate legislative authority either to himself or to somebody else (quite a serious constitutional issue), and cases where a department has been guilty of some sin of omission or commission which, had it occurred in a Bill, would certainly have been pounced upon by the common sense of members of Parliament.[83]

However, there might well be merit in combining the particular formulations of the Commons Committee with the more general formula of the House of Lords. Especially (but not only) if a Committee system charged with general supervision and report to the legislature is envisaged for Papua and New Guinea, the general formula might enhance the importance and widen the scope of the Regulations and Orders Committee by allowing it to initiate further opportunities for debate on Government policies and practice in its field.

Another comparable committee is the Indian Committee on Subordinate Legislation referred to above. Carr describes its functions as follows:

In India a Committee on Subordinate Legislation was set up . . .

81 May, *Treatise on the Law, Privileges, Proceedings and Usage of Parliament* (17th Ed., 1964) 610.

82 *Ibid.* 83 Carr, *op. cit.* 209.

to scrutinize and report to the House whether the powers to make regulations, rules, sub-rules, by-laws, etc., conferred by the Constitution or delegated by Parliament are being properly exercised within such delegation.

Directed to examine the subordinate legislation which is required to be laid before the House (a requirement infrequently prescribed in pre-1947 statutes), it has now decided to examine all the subordinate law-making, whether so required or not. It is told to look out for the same points as our Commons Scrutiny Committee, with two more in addition, namely—

Whether the provisions are in accord with the general objects of the Indian Constitution or the parent Act; and
Whether they contain matter which the committee thinks should more properly be dealt with by Act of Parliament.[84]

Jain gives its functions, as laid down in the Rules of Procedure of the House of the People, in more detail as follows:

More specifically, the Committee is to scrutinize each Order laid before the House and to consider:
(1) whether the Order is in accord with the general object of the Constitution or the Act pursuant to which it is made;
(2) whether it contains matter which in the opinion of the Committee should more properly be dealt with in an Act of Parliament;
(3) whether it contains imposition of any tax;
(4) whether it directly or indirectly bars the jurisdiction of the courts;
(5) whether it gives retrospective effect to any of the provisions in respect of which the Constitution or the Act does not expressly give any such power;
(6) whether it involves expenditure from the Consolidated Fund of India or the public revenue;
(7) whether it appears to make some unusual or unexpected use of the powers conferred by the Constitution or the Act pursuant to which it is made;
(8) whether there appears to have been unjustifiable delay in its publication or the laying of it before Parliament;
(9) whether for any reason its form and purport call for any elucidation.[85]

Points (1) and (4), incidentally, seem to hint at the possibility of a Committee extending its scope to specific consideration of the implications of any piece of subordinate legislation for accepted principles of the Rule of Law as laid down, for example, in the Declaration of Delhi or, in vaguer but local terms, in the recent Port Morseby Proposals.[86]

These examples are, of course, by no means exhaustive (even leav-

[84] Carr, *op. cit.* 214-215. [85] Jain, *op. cit.* 36-7.
[86] As to the latter, *see* 'The Rule of Law in New Guinea' (1965) 39 *Australian Law Journal* 150 and St. John, *Law Council Newsletter (Sydney)* October 1965, p. 12. It is expected that the Proceedings of the Port Moresby Conference will be published by the International Commission of Jurists during 1966.

ing out of account the rather different United States system), but they do suggest that it is by no means inevitable that the present limited formulation be adhered to. Certainly, if the House of Assembly Committee, or the House itself, decided to re-examine the functions and functioning of the Standing Committee (preferably I should think, with a view to detailing them in Standing Orders or in a Statute), there is a considerable amount of comparative material available such as was not available to the Senate's 1929-30 Select Committee from which the Papua and New Guinea Standing Committees descended.

The other miscellaneous points to which I wish here to refer are, firstly, the timing of the tabling, reporting and disallowing of regulations; secondly, the available types of checks on subordinate legislation; thirdly, the available procedure following a report by the Commitee; and, finally, the right of the Standing Committee to report on itself.

On the first point the Senate Committee has on a number of occasions criticized certain provisions of the laws of the various Australian Territories because their tabling provisions are defective, either because they contain no penalty for failure to table (*e.g.* voidness) or because the times allowed for tabling, consideration and disallowance are such as frequently to make corrective action impossible.

In Papua and New Guinea there is no provision making regulations which are not properly tabled void. However, on the question of timing the situation appears to be in order—Regulations are tabled on the first sitting day after their making. However, in the case of Regulations made during a meeting of the House and not printed until afterwards, I doubt whether the statutory requirements are in fact met, the Regulations being tabled on the first day of the next meeting.[87]

So far as time for consideration is concerned, Regulations may be disallowed either at the meeting at which they are *tabled* or at the next meeting—in practice, therefore, there is at least three months available for study if need be.

These provisions seem to have been reasonably satisfactory in practice. However, it could be argued that a definite sanction attached to non-compliance with the tabling provisions might provide a safeguard against accidental failure: in practice, the requirement of the gazettal of all Regulations removes any real danger.

87 For practical reasons, statutory instruments in Papua and New Guinea are at present made in roneod form (as indeed are Ordinances), and there is some delay in printing. They are normally, however, not brought into operation until after printing and general circulation, so that no issue of practical importance arises in most cases. The period allowed has just recently been extended (*Infra sub. tit.* 'Addendum').

The second miscellaneous matter to which I referred was the available type of checks on subordinate legislation. Here, I think, one can hardly do better than quote May as to the general position:

> The conditions of the making of Statutory Instruments and the degree of parliamentary control over them will depend in each case upon the particular statute which authorizes them. Under one type of procedure the resultant instrument has no effect, or no continuing effect, until Parliament has expressly approved it. Under another type it can be annulled if, within a time-limit, either House records its disapproval... The two procedures may be spoken of as the *affirmative* and the *negative* types... Sometimes the purport of the instrument is not deemed important enough to need any form of control. If the enabling Act seeks the maximum of parliamentary supervision, it will probably direct that the document be laid as a draft and that it have no effect unless approved.[88]

Of these methods, only the second, the negative type, is in use in Papua and New Guinea. Incidentally, at the present stage of political evolution, and with the legislature meeting roughly every 3-4 months and then only for a short time, the positive procedure would have obvious practical disadvantages.

The third matter relates to the procedure after the making of a report by the Committee. The fundamental point is that the Papua and New Guinea Committee takes no action itself, but merely reports its opinion or findings to the House. As Odgers remarks in respect of the Senate Committee—

> The . . . Committee has no executive power. It may only submit reports to the Senate, which may adopt or reject its recommendations. A motion for the disallowance of a regulation . . . must always be submitted, upon notice, by a Senator, who may, of course, be a member of the Committee.[89]

No such motion has ever been moved in Papua and New Guinea.

The reason for this lack of executive authority in the Committee is well set out by Farmer in dealing with Select Committees in the Commons:

> All select committees have certain characteristics. First they possessed no authority except that which was derived from the House when they were appointed. In other words they had no executive power, they did not initiate policy, nor act as pressure groups on the Government. Their only duty was to carry out the order of reference given to them by the House itself and to follow any special instructions which might be given to them by the House. Committees were not set up which might tend to rival the Departments of State. Their reports when made were made to the House and not to the Government and it was up to the House to decide whether any action should be taken on the reports of their committees.[90]

88 May, *op. cit.* 603. 89 Odgers, *op. cit.* 195.
90 Farmer, 'The Committee System'. Summary of Proceedings of the Eleventh Parliamentary Course (1962) 105, 105-106.

Committees are used 'to take some of the load of work off the shoulders of the House itself'.[91]

As Carr puts it, in relation to the Scrutiny Committees recommended by the Donoughmore-Scott Committee—

> These committees would not go into merits or policy, but would merely give the Private Member the knowledge he had no time to acquire for himself; he would then be equipped to follow the matter up at his discretion by criticising or objecting.[92]

This, however, raises as a side issue the extremely important question of whether the private member (in the case of Papua and New Guinea, the elected member) has any real opportunity to actively do something about a report.

It never occurred in the Legislative Council, to the best of my knowledge, that a non-official member was unable to obtain Parliamentary time to introduce his business. If anything, the tendency was rather the other way—that is, to curtail Government business in favour of the non-officials and to meet their requirements as far as practical. However, pressure of business in an enlarged House might change this. May notes that

> In the House of Commons, a Member, if he does not avail himself of the facilities of 'exempted business' to move a 'prayer' for the annulment of delegated legislation, might move it on another occasion; but it will be difficult for him to find time during the ordinary sittings of the House.[93]

To some extent, the inclusion of a more general clause or clauses in the terms of reference of the Standing Committee and provision for a more general debate might overcome this, by allowing more opportunity for debate and the bringing of pressure to bear on Government and on Departments. Even though this might not be a method of actually initiating disallowance, the fact remains that it is largely through open criticism and the fear of it that such influence acts most effectively.[94]

Finally, I have referred to the right of the Committee to report specially on itself. An instance has already been given of a report of the Senate Committee being rejected on the ground that it had exceeded its jurisdiction, and it might be contended in some quarters that the Committee would be exceeding its functions if it considered and reported on the matters raised in this section. The Commons Committee's "special report", commenting on general tendencies[95]

91 Farmer, *op. cit.* 105.
92 Carr, *op. cit.* 206.
93 May, *op. cit.* 603.
94 *Cf.* Carr, *op. cit.* 201; as a recent example close to home, *Hansard* (Senate), 30 September 1965, p. 783ff. records an undertaking by the Australian Government to repeal and replace the Tuberculosis Act 1965 of the Territory of Christmas Island in the face of the Twentieth Report of the Senate Standing Committee and a disallowance motion.
95 Carr, *op. cit.* 211.

might furnish a useful precedent. Indeed, Carr says of the Commons Committee on Statutory Instruments that

> Its effectiveness in exposing specific lapses has been less than its unforeseen success in establishing (by means of its admirable Special Reports) some general canons of good law-making.[96]

In this section, I have, in general though with one obvious exception, refrained from expressing an opinion on the points raised, mainly so as not to prejudice discussion. As my aim in earlier sections was mainly to present a factual statement of the activities of the Legislative Council's Standing Committee, so at this stage my purpose has been not so much to advocate as to raise issues and suggest possible lines of investigation and action.

Part III—Miscellaneous

9. Some Special Cases

In this study of the mechanics of control over delegated legislation, no account has been taken of a number of particular types to which brief reference will now be made. They are Rules of Court of the Supreme Court and other judicial authorities, rules made by Local Government Councils, and certain miscellaneous instruments. In each of these cases there are special provisions relating to control and disallowance.

Supreme Court rules are made primarily under Section 19 of the Supreme Court Ordinance 1949-1958, but provision for Rules is also made in a number of other Ordinances. In practically all cases, however, the same provision is made for publication and disallowance, and it is sufficient to quote that one section:

(4) Copies of all rules of court shall, within twenty-one days after the date of publication thereof, be forwarded by the Chief Justice to the Minister through the Administrator.

(5) The Minister may, by notification in the *Gazette*, disallow any rule of court, and thereupon the rule of court so disallowed shall cease to have effect.

In view of this special provision relating to Rules of Court, and of their peculiar nature, it is doubtful whether Section 37 of the Ordinances Interpretation Ordinance[97] applies to them, and in fact such Rules were never in practice tabled in the Legislative Council.

Rules made by Local Government Councils were formerly made under Section 12 of the Native Local Government Councils Ordinance 1949-1960, by which 'a Council . . . [could] . . . make rules, not inconsistent with any law in force in the Territory, for the peace, order and welfare of the natives within the area in and for which it

96 Carr, Foreword to Kersell, *op. cit.* p. viii.

97 *Supra* p. 335.

. . . [was] . . . established, and in particular for' seventeen specified subject matters. The section specifically provided that the Ordinances Interpretation Ordinance did not apply to rules made by the Councils, thereby excluding the operation of Section 37 of that Ordinance, but provided for administrative control only.

Section 12(2) of the Native Local Government Councils Ordinance related to publication and control, and read as follows:

> (2) Any rule made under this section by a Council shall:
> (a) be reduced to writing in a language approved by the District Officer;
> (b) be submitted to the District Officer by the Council for his approval;
> (c) if it is approved by the District Officer, be notified by the Council in the area in and for which the Council is established in any manner by which it is customary to transmit news or orders in that area; and
> (d) be binding, from the date on which it is so notified, or from such later date as is specified in the rule, on all natives residing in or being in that area.

Further power was included for the District Officer to revoke a rule by notice to a Council where he was 'satisfied that any rule made by a Council is no longer necessary'.[98]

There was a further rule-making power under the Ordinance, with a slightly different form of control. Under Section 19, a Council might, with the approval of the Director of Native Affairs, impose taxes in such manner as was prescribed. Regulation 80 of the Native Local Government Council Regulations provided that taxes should 'be imposed by rule made and promulgated in the same manner as is provided for any other rule of the Council', so that a tax rule required the prior approval of the Director of Native Affairs.

Administratively speaking, Native Local Government Council rules were regularly reviewed (primarily with an eye to *ultra vires*) by the local Department of Law, but this 'control' is hardly within the scope of this article.[99]

The Native Local Government Councils Ordinance has been replaced by the Local Government Ordinance 1963, which came into force on 1 January 1965. The latter Ordinance provides for a different form of control, in that Council Rules are subject to disallowance either by the Commissioner for Local Government (who is charged with the administration of the Ordinance) or, as with Regulations, by the legislature. Furthermore, since there is provision for the appointment of Legal Advisers to Councils, and the advisers must, where practicable, be given notice of intended rules, the purely legal standard of the Rules should be higher than in the past.

98 Native Local Government Councils Ordinance 1949-1960, s.14.

99 For the benefit of those interested, this matter was discussed in my paper 'Some Aspects of the Drafting and Revision of Native Local Government Council Rules' (1961) 1 *Journal of Local Administration Overseas* 29.

It is desired, finally, to refer to a number of miscellaneous provisions which, although not normally regarded in Papua and New Guinea as involving a delegation of legislative powers, clearly do so.

The first also relates to the Native Local Government Councils Ordinance 1949-1960. Under that Ordinance, a Council might be established by the Administrator, by proclamation, 'in and for the area described in the proclamation', and the proclamation might make (and of necessity actually made) provision for

(a) the manner in which the Council is to be constituted;
(b) the manner in which the members of the Council are to be appointed and cease to hold office;
(c) the tenure of office of the members; and
(d) the order of precedence of the members.[1]

Furthermore, a proclamation might limit the powers and authority exercisable by any given Council. No formal power of review or control over these proclamations was provided for. In the 1963 Ordinance, the equivalent provisions are either included in the Ordinance itself or made by the Administrator in Council, but again no power of review exists.

A different type of provision was formerly contained in the Native Employment Ordinance 1958-1961. Under that Ordinance, which lays down minimum rates of pay and conditions of service for most native workers in Papua and New Guinea, an approved agreement as to rates of pay and conditions of service might be entered into between a group of employees and an employer or group of employers. Such an agreement, upon publication of notice of approval by the Native Employment Board, 'shall . . . have the same force and effect . . . as if its provisions formed part of' the Ordinance, notwithstanding any conflict therewith.[2] In other words, by approving of such an industrial agreement the Administration impliedly amended the provisions of the Ordinance in respect of those employers and employees to whom the agreement related.

However, the Ordinance went further yet. It provided that

> where it appears to the Administrator to be necessary or expedient . . . the Administrator may, by notice in the *Gazette*, declare that the terms of an approved industrial agreement shall be a common rule in relation to such employers or class of employers, or to such employees or class of employees, or to employment in such area, as he thinks fit.[3]

The same consequences followed from such a declaration as from the approval of an industrial agreement.

If it be true that awards of the Commonwealth Court of Con-

[1] Native Local Government Councils Ordinance 1949-1960, ss.4 and 5.
[2] Native Employment Ordinance 1958-1960, s.131D.
[3] *Ibid.* s.131C(1).

ciliation and Arbitration are 'acts of legislation',[4] then this was even more clearly so in the case of common rules under the Native Employment Ordinance. The only element of control over this 'legislation' consisted in the fact that the approval of an industrial agreement or the declaring of a common rule was 'on the recommendation of the Native Employment Board'. That Board, which was established in 1959 as a body advisory to the Administrator, consisted of an official Chairman, two members representing employers of natives, two native members representing native employees and two further officials. It was in no way connected with the Legislative Council or responsible to it, and its reports to the Administrator were not made publicly.

The Native Employment Board Ordinance has since been repealed and replaced by the Industrial Relations Ordinance 1962. The machinery set up by the latter Ordinance for the avoidance and settlement of industrial disputes and the fixing of industrial conditions is a more sophisticated one than Papua and New Guinea has yet had, and more closely approaches the 'normal' Australian type of industrial conciliation and arbitration. Under it, various authorities may make awards, approve industrial agreements and extend common rules, Executive control being exercised administratively (through powers to refuse registration vested in the local Secretary for Labour and the Registrar of Industrial Organizations) and, in the long run, by the Administrator and the Administrator's Council. In view of the composition of that Council, the latter control may be regarded as being, in a restricted sense, parliamentary. It is noteworthy that there is no specific judicial or quasi-judicial review or appeal, as the industrial tribunals set up under the Ordinance are purely *ad hoc*.

Since the Industrial Relations Ordinance has not yet really had the time or the opportunity to prove itself in practice, from the political angle no estimate can be made of the effectiveness of the controls provided nor as to how they will operate, but the high degree of importance which non-official members of the Legislative Council always attached to employment matters may perhaps lead to the Administrator's Council taking a more than usually active interest in such things as the extension of common rules.

The final class to which I wish here to refer relates to certain 'Determinations' of wages, conditions of employment, etc. in the Public Service. For example, the Public Service Ordinance 1949-1962 (now repealed) and the Regulations thereunder detailed the conditions of service of Public Servants. The Minister, however, might declare that the provisions of that Ordinance did not apply to any officer or class of officers, and might 'from time to time determine

[4] Foenander, *Industrial Regulation in Australia* (1947) 23-4.

the rates of payment and the conditions of employment of any officer or class of officers . . . to whom or to which any such declaration applies.'[5] There were other instances of such Determinations (in some cases by the Minister and in others by the Administrator or the local Public Service Commissioner) contained in that Ordinance, sometimes it being necessary to publish them in the *Gazette* and sometimes (as in the example referred to) not.

The Public Service Ordinance was recently repealed by the Public Service (Papua and New Guinea) Ordinance 1963, passed as almost its last act by the Legislative Council. The new Ordinance is noteworthy, from the present point of view, by reason of the fact that a great number of provisions relating to salaries and conditions of service which were formerly dealt with by Regulations made by the Minister for Territories (and hence subject to the legislative controls mentioned above) will in future be covered by 'Determinations' by the Minister or the Public Service Commissioner: these, although required to be gazetted, will not be subject to the parliamentary controls formerly applicable (the initial exercise of these powers, especially insofar as they established marked differentials in salaries and other conditions between native local officers and overseas officers, has come under continuing political and industrial fire and the whole matter is currently being investigated by a Committee consisting of two members of the House of Assembly and two Departmental officers).

Similarly, under the Administration Servants Ordinance 1958-1960 (which is an 'Ordinance relating to the Employment of certain Natives by the Administration') 'the hours and conditions of work and rates of pay of Administration Servants and the allowances and leave of absence which may be granted to them shall be as prescribed or as the Public Service Commissioner determines':[6] Such a determination, however, must be published in the *Gazette*, and in this instance there is the control that the exercise of the power to make such determinations is subject to the directions of the Minister, and the further control that the Ordinance specifically provides that—The 'wages, allowances and other emoluments of an Administration Servant and his conditions of service . . . shall not be inferior to those prescribed under the Native Employment Ordinance 1958 in relation to agreement workers'.[7]

In the field of statutory corporations, of which there are a few in Papua and New Guinea, the same type of result is found. Section 15(1) of the Papua and New Guinea Electricity Commission Ordinance 1961-1963, for example, provides that 'the terms and conditions

5 Public Service Ordinance 1949-1962, s.5.
6 Administration Servants Ordinance 1958-1960, s.10.
7 *Ibid.* s.9.

of employment of officers . . . [of the Commission] . . . are such as are determined by the Minister after considering reports from the Commission and the Public Service Commissioner'.

In pointing out the nature of these Determinations I am not taking sides in the debate as to whether there should be Parliamentary or political control of the conditions of civil service employment and, if so, how much, but I am concerned to make it clear that there are fields in which there is little or no such control—at least as far as Papua and New Guinea's internal structure is concerned.

10. A Note on Judicial Control

This paper has dealt with varying degrees and kinds of control by the executive and the legislature, but has not touched on the question of judicial control, the main reason being that there is little or nothing to say with particular bearing on Papua and New Guinea. In view of the dearth of published Law Reports,[8] it is difficult to say to what extent effective judicial review has existed, a difficulty which is increased by reason of the fact that civil litigation in this country has been comparatively rare. However, in one unreported case known to me a regulation under the Native Administration Ordinance 1921 of the Territory of New Guinea was held to have been impliedly repealed by a subsequent Ordinance and there have undoubtedly been some other cases in which the validity of subordinate legislation has been called into question, but a considerable amount of research amongst unpublished material would be necessary before a proper assessment of the degree and the effectiveness of judicial review could be made.

The main point of interest in this connexion is that, apart from the incidental effect of certain adopted legislation originating mainly in Queensland, there has been no attempt by the successive legislatures in the Territories to oust the jurisdiction of the courts.

Incidentally, the Ordinances Interpretation Ordinance 1949-1965 provides that any 'instrument' (including Regulations) made under an Ordinance

> shall be read and construed subject to the Ordinance under which it was made, and so as not to exceed the power . . . [conferred] . . . to the intent that where any such instrument would, but for this section, have been construed as being in excess of the power . . . it shall nevertheless be a valid instrument to the extent to which it is not in excess of that power.[9]

In this, the Ordinance follows the Commonwealth Acts Interpretation

[8] Only one volume of the Papua and New Guinea Law Reports has as yet (January 1966) been published, covering a miscellany of 61 cases in all.

[9] *Ordinances Interpretation Ordinance* 1949-1965, s.39.

Act 1901-1964,[10] but it is noteworthy (though not relevant in the present connexion) that there is no provision similar to Section 15A of that Act, similarly regulating the relationship between Ordinances and the constituent Papua and New Guinea Act or other Commonwealth legislation.

While on the point of judicial control, however, I might refer to one type of influence on delegated legislation which, insofar as it involves an at least semi-independent professional approach, is analogous to judicial control, and which is of real practical importance in Papua and New Guinea to an extent that, at least in my experience is unequalled in Australia and is certainly not mentioned in any detail in the texts which I have consulted. I refer to the influence of professional sections of the Papua and New Guinea Department of Law.[11]

It goes almost without saying in most governmental circles, and perhaps more so in Parliamentary Drafting circles, that the Parliamentary Draftsman's views on such matters as *vires*, reasonableness and (in the legal sense) appropriateness of subordinate legislation are a significant influence on the form and content of such legislation.[12] The practical importance of this influence has, I believe, frequently been overlooked in the more formal analyses of controls on subordinate (or, really, any) legislation.

However, in Papua and New Guinea a second internal professional influence is brought to bear through the professionally autonomous Offices of the Crown Solicitor and the Public Solicitor,[13] also within the Department of Law. Even though the Drafting Office generally works in close contact with those Offices (especially that of the Crown Solicitor), there are quite frequently cases where changes in legislation are made on the recommendation of one of the latter, on the grounds referred to in the last preceding paragraph (namely, *vires*, reasonableness or appropriateness). Galling though this might sometimes be to the individual draftsman, who has usually, though not invariably, given serious attention to just these points, it does in practice mean that not infrequently subordinate legislation is amended, or more importantly, enabling Ordinances are introduced before the

10 *Acts Interpretation Act* 1901-1964 (Cth.) s.46(b).

11 The Department of Law, like the whole of the Papua and New Guinea Public Service, is separate from its Commonwealth counterpart. The Commonwealth Attorney-General's Department is ultimately responsible for advising the Commonwealth Cabinet, but the Papua and New Guinea Department of Law is responsible for the legal advice given to the Administrator. The possibility of conflict is obvious, but in practice separateness is the rule, at the present.

12 *Cf.*, for example, in relation to Local Government Rules, my paper referred to in n.2 above.

13 The Office of the Public Solicitor, while administratively within the Department of Law, is quite autonomous and provides an extremely wide, free, legal service, both in and outside Court, for 'indigenous and indigent persons'.

legislature, for the same type of reason, and with the same type of approach, that a Court might use in considering subordinate legislation before it in a particular instance.

These matters (the professional control exercised by the Parliamentary Draftsman's Office, the Office of Crown Solicitor and the Office of the Public Solicitor (or their Australian equivalent), their degree of autonomy *inter se* and their influence on subordinate legislation) might well be the subject of further examination in this particular regard. In Papua and New Guinea, I think that it is fair to say that the tendency has been to pay more attention than is perhaps given elsewhere to such internally-raised doubts as to the points in question.

Part IV—Postcript

11. The House of Assembly

The first Standing Committee of the House of Assembly on Regulations and Orders was appointed during the first meeting of the House, to consist of W. W. Watkins (Secretary for Law) and N. J. Mason (Secretary for Labour and a qualified legal practitioner) as Official Members and Messrs Dirona Abe, the late W. J. Bloomfield and John Pasquarelli as non-official members:[14] Mason resigned from the Administration in 1965 and was replaced by Dr R. F. R. Scragg, Director of Public Health.[15] During the first six meetings (*i.e.* to September 1965, the last meeting for which a printed Hansard is available), it presented three Reports.

The First Report was presented by Mr Watkins on 10 September 1964.[16] It made no special comment, but requested that Departments forward to its members explanatory memoranda concerning Regulations as the latter are made. It would appear that this request was acceded to, as an expression of appreciation for the circulated notes was the only matter of substance in the Second Report, presented on 26 February 1965, by Mr Mason.[17]

The Third Report was brought up by Mr Watkins on 2 September 1965.[18] Its only comment was, in a Committee Report, a somewhat strange one, in that it did not report, was not addressed to the House of Assembly, did not appear to fall within the Committee's terms of reference and did not relate to the functioning of the Committee. The Committee merely requested 'that special attention be given to the enforcing and policing throughout the Territory of Statutory In-

[14] H. of A. Deb., 12 June 1964, p. 72.
[15] H. of A. Deb., 18 May 1965, p. 625.
[16] H. of A. Deb., 10 September 1964, p. 315.
[17] H. of A. Deb., 26 February 1965, p. 588.
[18] H. of A. Deb., 2 September 1965, p. 966.

strument No. 3 of 1965, which relates to *Industrial Safety (Sawmilling and Woodworking) Regulations* 1965'.[19]

In view of the fact that there was no criticism of or comment on over 100 sets of Regulations and Statutory Instruments available to the Committee, experience under the House of Assembly can add little so far to the earlier commentary on the Legislative Council Committee. However, the procedural improvement involved in the obtaining of explanatory notes should be noted, and it is understood that a start was made in obtaining personal explanations from responsible Departmental Officers.

12. Envoy

One point that arises forcibly out of any study but especially a comparative study, no matter how superficial or limited, of the supervision of delegated legislation is the desirability of the preparation of a Model Code of terms of reference, procedures and practices for institutions such as the Papua and New Guinea Standing Committees on Regulations and Orders, for the making, publication and tabling of subordinate legislation and for Parliamentary procedures in relation thereto: in addition it should clarify the definition of the types of subordinate legislation and statutory instruments to which it should apply.

In most of these respects, incidentally, it would seem that Papua and New Guinea compares favourably with other jurisdictions such as those examined by Kersell,[20] at least in regard to the provision of adequate machinery. Nonetheless, it appears desirable that some institution such as a University research school or the International Commission of Jurists make a detailed comparative study and publish a Model Code or series of Model Codes. Such a study could have wider implications if, for example, Parliamentary Committees on such matters as the avoidance of racial and other discrimination and on the observance of principles of the Rule of Law were contemplated: procedures, etc. acceptable for the one should surely be readily and safely adaptable for the other. It is partly because of my belief in the desirability of such moves that I have refrained from expressing my own views as to reform of the Papua and New Guinea Committee, even where the inferences to be drawn are fairly obvious.

Addendum

Since the foregoing was written, the House of Assembly has made two Ordinances which may be of significance in this matter. They

19 Third Report of Standing Committee on Regulations and Orders.
20 Kersell, *op. cit. passim.*, especially Ch. 7.

are the Orders (Validation) Ordinance 1965 and the Ordinances Interpretation Ordinance (No. 2) 1965.[21]

The first validated 'orders' made or given under an Ordinance required by law to be, and which in fact were not—

(a) expressed in a written instrument;
(b) published;
(c) notified in the *Gazette*; or
(d) laid before the House of Assembly or the Legislative Council.[22]

The second *inter alia* omitted from Section 37 of the Ordinances Interpretation Ordinance[23] the provisions requiring gazettal and tabling of 'orders' made or given under Ordinances. In so doing the amendment brought Section 37 more closely into line with Section 48 of the Acts Interpretation Act (Cth), although (at least in theory) it still remains wider than the Australian section in that it includes, under the definition of 'regulations' in Section 6, rules and by-laws made under Ordinances, whereas the Australian provision relates only to regulations made under Acts.

The amendment, of course, removed such orders from the purview of the Standing Committee, although this is perhaps of more academic than practical importance, for three reasons: firstly, it does not appear that the Standing Committee ever considered 'orders' as such; secondly, as was pointed out in the 'Mover's Note' circulated with the Bill only 'regulations' and not 'orders' came within the disallowance provisions of Section 37; thirdly, the Mover's Note referred to stated that 'very few, if any, of these orders are of a remotely legislature nature.' Again, to quote the Note further, 'the Administration has never considered notifying these orders in the *Gazette* or tabling them in . . . [the] . . . House'.

Nonetheless, it is not uninteresting to note that the elected members of the House and of the Standing Committee apparently accepted the amendments without demur. However, the episode does add further point to my suggestion for a fuller analysis of types of subordinate legislation—not only in Papua and New Guinea.[23]

Incidentally, the Ordinances Interpretation Ordinance (No. 2) 1965 also extended the time for the tabling of regulations to fifteen sitting days of the House of Assembly after the date of their making —*i.e.* in practice, until the second meeting of the House—thus bringing Section 37 into line with the Commonwealth in this regard.

21 Both Bills were introduced and passed all stages on 29 November 1965—at the time of writing, no reports of the Debates were available.
22 *Supra* p. 334.
23 The potential area of confusion is further exemplified by the fact that the Mover's Note referred to the possibility of Court orders being subject to the gazettal and tabling requirements (and even, apparently, the disallowance provisions) of Section 37—surely stretching the 'literal interpretation' theory too far!

My attention has also been attracted to the Subordinate Legislation Committee Act 1956 (Vic.) (now repealed). The Committee is an orthodox joint Committee of the Legislative Council and the Legislative Assembly. Its functions were set out in Section 4 of the Act in the following terms:

> 4. The functions of the committee shall be to consider whether the special attention of Parliament should be drawn to any regulations on the ground that—
> (a) the regulations appear not to be within the regulation-making power conferred by, or not to be in accord with the general objects of, the Act pursuant to which they purport to be made;
> (b) the form or purport of the regulations calls for elucidation;
> (c) the regulations unduly trespass on rights previously established by law;
> (d) the regulations unduly make rights dependent upon administrative and not upon judicial decisions; or
> (e) the regulations contain matter which in the opinion of the committee should properly be dealt with by an Act of Parliament and not by regulations—
> and to make such reports and recommendations to the Council and the Assembly as it thinks desirable as a result of any such consideration.

The functions set out in paragraphs (a)-(e) are, of course, essentially similar to those of the Committees of the House of Assembly and the Senate.

It is interesting to see that, while remaining non-executive, the Committee has power to make positive recommendations to the Parliament and further that reports similar to the Commons' 'special reports' would appear to have been within the scope.

Perhaps someone else would care to elaborate on the history, functions and operations of this Committee?