

STANDING COMMITTEE ON SCRUTINY OF BILLS AND
SUBORDINATE LEGISLATION

REPORT ON THE

FOURTH COMMONWEALTH CONFERENCE
ON DELEGATED LEGISLATION

10-13 FEBRUARY 1997
HELD AT PARLIAMENT HOUSE
WELLINGTON, NEW ZEALAND

27 FEBRUARY 1997

INTRODUCTION

This is a report on the Committee's attendance at the Fourth Commonwealth Conference on Delegated Legislation. The Conference was held at Parliament House in Wellington, New Zealand from 10-13 February 1997 and was hosted by the Speaker of the House of Representatives of New Zealand. This was due to the fact that, following the general election held in October last year, no scrutiny committee had yet been formed.

The Conference was attended by representatives of most scrutiny committees in the Commonwealth, as well as some countries who are yet to establish such committees.

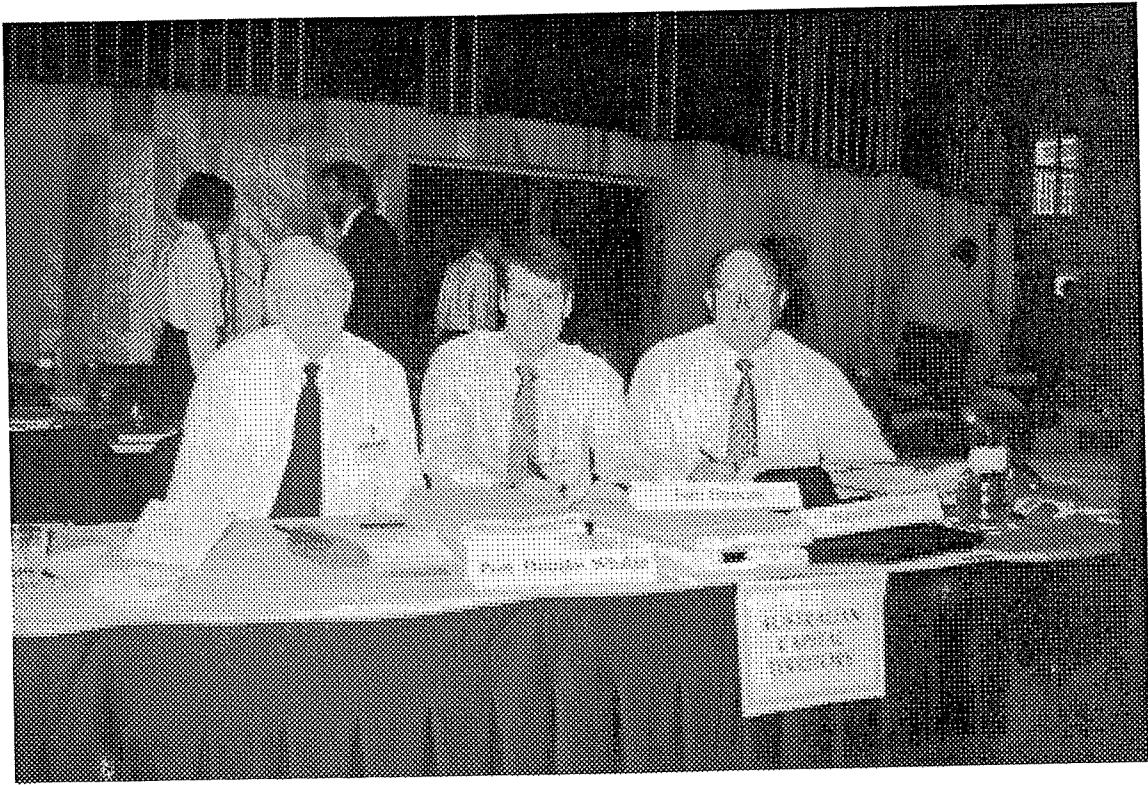
The ACT was represented by Mr Harold Hird, MLA, (Chair) and Mr Tom Duncan (Secretary). Emeritus Professor Douglas Whalan also attended in his dual capacity as Legal Adviser to our Committee and the Senate Standing Committee on Regulations and Ordinances. Attached to this report at Attachment 1 is a full list of delegates to the conference.

The conference was held over four days from Monday 10 February to Thursday 13 February in the New Zealand Parliament's Building in Wellington.

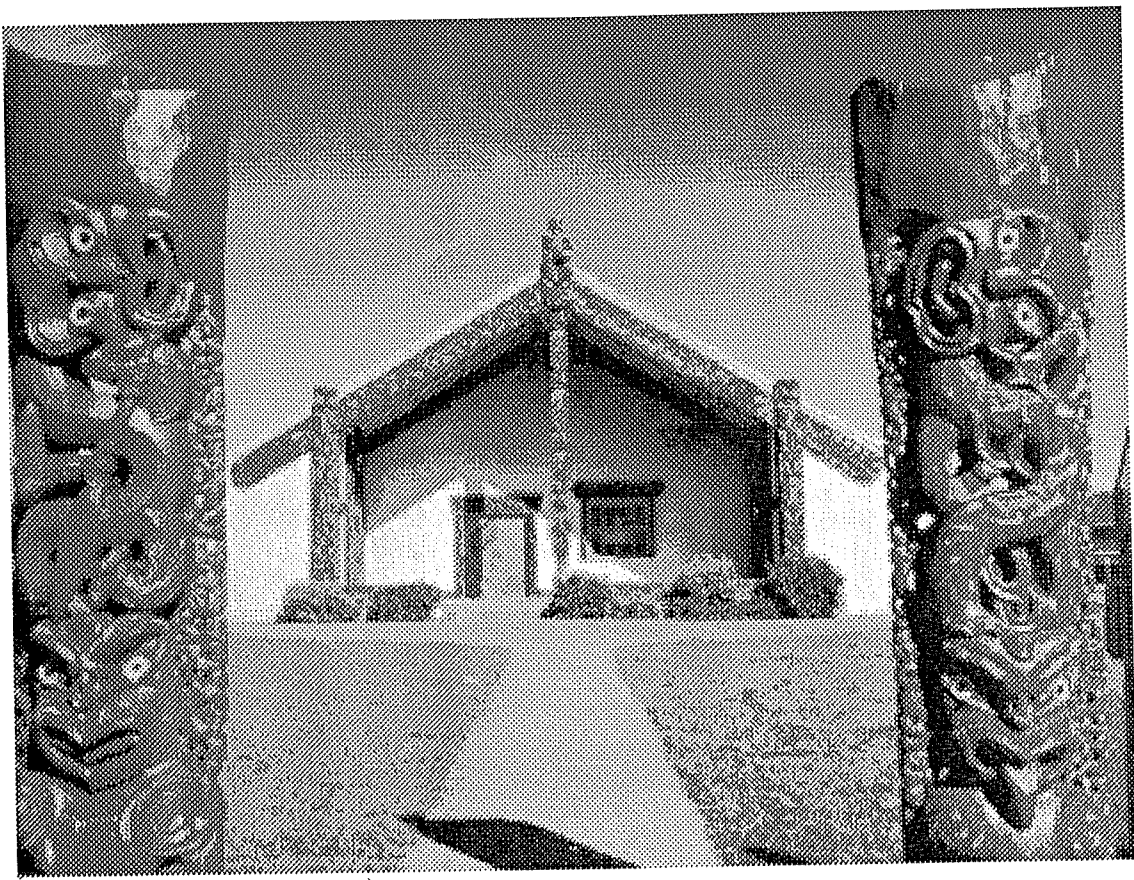
RESOLUTIONS PASSED

The Conference agreed to the following resolutions:

1. That this conference:
 - (a) expresses its deep regret at the death, on 12 April 1994, of Mr Bob Cryer MP, Chairman of our Third Commonwealth Conference on Delegated Legislation hosted by the United Kingdom in 1989, member of the Continuing Co-ordinating Committee, and Chairman of the Joint Committee on Statutory Instruments of the United Kingdom; and
 - (b) records its appreciation of his commitment to improving the parliamentary scrutiny of delegated legislation.



ACT delegation (from right to left)
Mr Harold Hird, MLA (Chair), Mr Tom Duncan, (Secretary) and
Emeritus Professor Douglas Whalan, AM, (Legal Adviser)



Place of traditional Maori welcome
Arohenui Ki Te Tangeata

2. That a permanent co-ordinating committee/secretariat be established to promote the regular holding of Commonwealth delegated conferences and to assist host countries in the organising of future conferences.
3. That the Fifth Commonwealth Conference on Delegated Legislation be held in Africa within 3 to 5 years.

THE CONFERENCE PROCEEDINGS

Detailed below is a short description of the conference proceedings. The full conference agenda is attached at Attachment 2. Copies of the conference papers may be inspected by contacting the Committee Secretary (Mr Tom Duncan - Telephone 20 50171).

Traditional Maori welcome

Delegates to the conference were taken to Waiwhetu Marne for a powhiri.

The powhiri is a traditional Maori welcoming ceremony. It sets the stage for a formal exchange of greetings between the *tangata whenua* (local people or hosts) and *Manuhiri* (visitors).

A powhiri normally occurs on a *marae*. A *marae* is a gathering place for people and usually consists of a meeting house and a dining room. It was traditionally the focal point of the community and, in most cases, still is.

Opening by the Governor-General of New Zealand

The Governor-General of New Zealand, His Excellency Sir Michael Hardie Boys, opened the conference with a welcoming speech to all the delegates.

PAPERS DELIVERED TO THE CONFERENCE

The overstocked arsenal? Some reflections on the New Zealand experience of regulatory review

The Hon. David Caygill, a former Minister in the New Zealand Government and a former Chair of the Regulation Review Committee gave a paper on his experiences as the Chair of the New Zealand delegated legislation committee. In his speech Mr Caygill highlighted the important work of the Committee, and explained that whilst Bills are not reviewed by the Committee almost all Bills introduced into the NZ Parliament are referred to Select Committees. He also commented that, although the Committee has quite significant powers to amend or disallow regulations, this power has rarely been used. He

concluded by emphasising the non partisan nature of scrutiny committees and how valuable that work can be.

History of delegated legislation in New Zealand

Associate Professor of Law Phillip Joseph, from the University of Canterbury, NZ, gave a paper documenting the history of delegated legislation in New Zealand. In his paper Professor Joseph pointed to the fact, for each Act agreed to by the NZ Parliament there was approximately 3 sets of regulations in recent years. He also highlighted several examples of Henry VIII clauses (which he defined as "Parliament's abdication of legislative power by according supremacy to subordinate legislation over Acts of Parliament").

The paper also canvassed the history of judicial review of delegated legislation in NZ, the role of the Regulation Review Committee and the Cabinet office controls.

The Interpretation and Review of Delegated Legislation by the Courts

Professor Bates, Clerk of Tynwald, Isle of Man, gave a paper concerning the interpretation and review of delegated legislation by the British Courts. The paper canvassed various instruments and their judicial review in a very detailed manner. It covered issues such as failure to exercise enabling power, statutory requirement to consult, substantive ultra vires and severance.

The paper concluded that the trend in statutory interpretation is toward greater flexibility and that where the judiciary on the grounds of constitutional nicety vacates the field, the legislature is prepared to occupy it.

Uses and abuses of delegated legislation

Mr Andrew Bennett, MP, Chairperson of the Joint Committee on Statutory Instruments, United Kingdom, gave a paper on the operation of that committee over recent years. In his paper he canvassed two issues; first, whether, and by what means, countries cede or lend their sovereignty to regional or international bodies; and secondly whether democracy plays any part in how such bodies operate. He also highlighted the rapid increase in the amount of statutory instruments. In 1996 the government produced 3,291 instruments, well over 10 per weekday, and he noted that the size of each regulation tends to get longer and longer, with sixty or seventy page regulations no longer a rarity.

Mr Bennett threw down a challenge to all delegates to find an instrument with a single sentence longer than 23 lines (see attachment 3).

Regulatory Impact statements

Ms Jill Hall, MP, Deputy Chairperson of the New South Wales Regulation Review Committee presented a paper on Regulatory Impact Statements (RIS's). Ms Hall outlined the features of the RIS system in NSW, along with the features of the staged repeal process, cost/benefit of statutory rules consultation procedures, RIS's and the assessment of social and environmental impacts and RIS's and Bills.

The paper concluded that RIS's are an idea that is here to stay and that they are a useful tool for delegated legislation committees in considering the likely impact of legislation on personal rights and liberties.

Legislative Instruments Bill 1994

Roger Mackay, Senior Legislative Counsel of the Office of Legislative Drafting, Attorney-Generals Department, Australia gave a paper concerning a Bill currently before the Federal Parliament which provides for a new system of registration, publication and parliamentary scrutiny for Commonwealth delegated legislation. In the paper Mr Mackay gave details of the key provisions of the bill, and outlined the progress to date and expected developments once the Bill became law. He also spoke on the provisions dealing with consultation procedures.

Sir Humphrey Appleby is alive and well; the Legislative Instruments Bill 1996

Senator Bill O'Chee, Chairman of the Senate Standing Committee on Regulations and Ordinances presented a paper on his committee's involvement and consideration, of the Legislative Instruments Bill 1996, which was currently before the Senate. In his paper Senator O'Chee highlighted a number of provisions in the original version of the Bill which, he contended, appeared to be inspired by Sir Humphrey Appleby of the TV series "Yes Minister" and which, in some cases, appeared to reduce the safeguards that the Parliament had over the Executive in terms of the making of legislative instrument.

Commencement of legislation by Order in Council

Mr Richard Northey, former Chairperson of the NZ Regulations Review Committee presented a paper concerning a recent report of the committee on the commencement of legislation by Order in the Council. The report discussed the problem in New Zealand whereby Bills passed by the Parliament are not commenced by Order in Council. He noted that the Committee had recommended that:

- as a general principle, legislation incorporate a fixed commencement date;
- provisions for the commencement of legislation by Order in Council be used in only rare and exceptional circumstances;
- if a fixed commencement date is not included in a bill, the bill incorporate a provision that it be brought into force automatically after a specific period of no more than one year following its enactment, unless it is earlier brought into force by Order in Council;
- if a commencement date is to be set by Order in Council, the reason for this be included in any explanatory memorandum accompanying the bill and be considered by the select committee considering the bill;
- any empowering provision providing for the commencement of legislation by Order in Council include a provision that the primary legislation and any delegated legislation associated with its implementation commence at least 28 days after notification of the commencement order in the *New Zealand Gazette*.
- a report be compiled every six months by the Chief Parliamentary Counsel listing all legislation and its item that has not been brought into force, and explaining the reasons and detailing a timetable for the commencement of the legislation;
- this report be tabled in the House; and
- these requirements relating to the commencement of legislation by Order in Council be circulated to every government department and ministry.

Later the Chief Parliamentary Counsel of New Zealand, Mr George Tanner, gave a commentary on the report.

Scrutiny of regulation-making provisions in Bills - Sri Lanka

The Honourable Kiri Bards Ratnayake, Speaker of the Parliament of Sri Lanka, presented a paper on the Scrutiny of regulation-making provisions in Bills in his country of Sri Lanka. The Speaker noted that the trend is for Parliament to delegate some of its powers and it is important to maintain some level of control. He also noted that the method of publication is an

issue in Sri Lanka, with the public not entirely happy with Gazettal of subordinate legislation and preferring some publicity through the press.

He concluded by observing that it is the duty of Members of Parliament to remain vigilant to ensure that subordinate legislation does not transgress the rights and liberties of the public.

Evolving civil rights: the role of Parliament and the Courts

Senator Barney Cooney, Chairperson of the Senate Standing Committee for the Scrutiny of Bills presented a paper concerning civil rights and the role of Parliament and the courts. The paper canvassed the following issues:

- whether Parliament should be more active in ensuring that legislation respects and enhances human rights and liberties by testing it against appropriate criteria;
- whether Parliament ought better anticipate those matters to do with such rights and liberties which might come before the courts and move to deal with them by legislation; and
- whether in any event such matters should be left to the courts or, to the contrary, the elected legislature is the appropriate body to deal with these matters.

Senator Cooney concluded his paper by posing the question of whether the principles used by Parliamentary scrutiny committees can be expanded and made more specific without fracturing the consensus needed to underpin effective parliamentary testing of legislation against human rights standards.

Regulatory efficiency; the next wave

Victor Perton, MP, Chairperson of the Victorian Law Reform Committee gave a paper focusing on new developments in regulatory reform including negotiated rule making, cost-benefit analysis and especially the concept of regulatory flexibility. The paper also canvassed the issue of the assessment of the costs and benefits of regulation, how such costs are changing over time and what effect increasing complexity has on compliance.

Later, Mr Murray Thompson, MP, Chairman, Subordinate Legislation subcommittee, Scrutiny of Acts and Regulations Committee, Parliament of Victoria gave a commentary by discussing a recent information paper on the Fisheries (Abalone) Regulations 1996.


Effective scrutiny of uniform legislation? Can Parliaments prevail where Governments in a Federal system co-operate to pass uniform legislation?

Senator Barney Cooney, the Hon. Phillip Pental, MLA, Chairman of the Western Australian Standing Committee on Uniform Legislation and Intergovernmental Agreements and Jon Sullivan, MLA, Deputy Chairman, Queensland Scrutiny of Legislation Committee jointly presented a paper on the recent developments in Australia concerning scrutiny of national schemes of legislation.

Mr Sullivan gave a synopsis of the process which resulted in all Parliaments in Australia adopting a Position Paper which was presented in each Parliament. Mr Pental provided detailed information on the various forms which national schemes of legislation may take, how they are brought into being and the role of the executive and Parliament in doing so. Senator Cooney then dealt with what the Position Paper proposed and some of the ways that were discussed for achieving appropriate scrutiny of national schemes of legislation.

Presentation by Delegation from Hong Kong

Following an invitation from the host of the Conference, the Hong Kong delegation gave an informal presentation on the recent events and proposals for the future in that colony.



Harold Hird, MLA

27 February 1997

ATTACHMENT 1

LIST OF DELEGATES

Australia

Australia (Commonwealth)

Senator Barney Cooney
Senator Winston Crane
Senator Bill O'Chee
Mr Peter Crawford
Professor Douglas Whalan
Ms Judy Middlebrook

Australian Capital Territory

Mr Harold Hird
Mr Tom Duncan

Attorney-General's Department (Canberra)

Mr Roger Mackay
Mr Jeremy Wainwright
Mr Ralph Hunt

New South Wales

Ms Jill Hall
Dr Liz Kernohan
Hon John Ryan
Hon Janelle Saffin
Mr Gregory Hogg

Queensland

Mrs Elizabeth Cunningham
Mr Paul Lucas
Mr Neil Roberts
Mr Jon Sullivan
Ms Louisa Pink
Mr Sze Chai (Simon) Yick

Tasmania

Mr R Cheek
Mrs J Jackson
Hon J A Loone
Miss Wendy Peddle

Victoria

Mr Victor Perton
Mr Carlo Carli
Mr Murray Thompson
Ms Helen Mason

Western Australia

Dr Elizabeth Constable
Mr Robert (Bob) Bloffwitch
Hon Phillip Pandal
Hon Robert (Bob) Wiese
Mr Keith Kendrick
Mr Fred Riebeling
Mr Andrew Mason
Ms Jan Paniperis

Hong Kong

Hon Ronald Arculli
Hon Albert Chan
Mrs Doris Chan
Mr Jimmy Ma
Hon James To
Hon Mrs Elizabeth Wong Chien
Chi-lien

Isle of Man

Professor St John Bates

Lesotho

Mr Malefetsane Nkhahle
Mr Thabo Ntlhakana

Malawi

Hon F.L Makuta

New Zealand

Hon Doug Kidd
Hon Doug Graham
Hon Tau Henare
Hon Jack Elder
Mr Ian Revell
Rt Hon Jonathan Hunt
Mrs Georgina te Heuheu
Ms Dianne Yates
Ms Anne Batten
Mr Grant Gillon

Ministry of Justice

Mr Mark Gobbi
Mr Hugo Hoffmann
Mr Bill Ogier

Niue

Mr Speaker, John Funaki
Mr Terry Coe

South Africa

Adv Johnny De Lange
Mr Jacko Maree
Mr Mohamed Surty
Ms Desiree Le Roux

Sri Lanka

Mr Speaker, Kiri Banda Ratnayake
Mr John Amaratunga
Mr Dhammika Dasanayaka
P.S.K. Rajapakse
Mr Peter Wickramasinghe

United Kingdom

Mr Richard Alexander
Mr Andrew Bennett
Sir James Nursaw
Mr William Ross
Lord Skelmersdale
Lord Shaughnessy
Ms Lynn Gardner

Zimbabwe

Mr Amos Chirunda
Mr Abdul Kassim
Mr Ozias Musamirapamwe



**FOURTH COMMONWEALTH CONFERENCE
ON DELEGATED LEGISLATION**

10 - 13 February 1997

AGENDA

Session 1 (Monday, 10 February; 2.00pm - 5.00pm)

- * *Chairperson's opening address* - Hon Doug Kidd, Speaker of the House of Representatives (New Zealand)
- * *The overstocked arsenal? Some reflections on the New Zealand experience of regulatory review* - Hon David Caygill (New Zealand)

Afternoon tea

- * *History of delegated legislation in New Zealand* - Philip Joseph, Associate Professor of Law, University of Canterbury (New Zealand)

Session 2 (Tuesday, 11 February; 9.30am -12.30pm)

- * *The interpretation and review of delegated legislation by the courts* - Professor Bates, Clerk of Tynwald (Isle of Man)
- * *Uses and abuses of delegated legislation* - Andrew F Bennett MP, Chairperson of the Joint Committee on Statutory Instruments (United Kingdom)

Morning tea

- * *Regulatory impact statements* - Jill Hall MP, Deputy Chairperson of the Regulation Review Committee (Australia)

Session 3 (Tuesday, 11 February; 2.00pm - 5.00pm)

- * *Legislative Instruments Bill 1994* - Roger Mackay, Attorney General's Department (Australia)

Afternoon tea

- * *Legislative Instruments Bill 1994* - Senator Bill O'Chee, Chairman of the Senate Standing Committee on Regulations and Ordinances (Australia)

Session 4 (Wednesday, 12 February; 9.30am - 12.30pm)

- * *Commencement of legislation by Order in Council* - Richard Northey, former Chairperson of the Regulations Review Committee. Commentary provided by George Tanner, Chief Parliamentary Counsel (New Zealand)
- * *Scrutiny of regulation-making provisions in bills* - Hon K B Ratnayake, Speaker, Parliament of Sri Lanka

Morning tea

- * *Evolving civil rights: the role of Parliament and the Courts* - Senator Barney Cooney, Chairperson of the Senate Standing Committee for the Scrutiny of Bills (Australia)

Session 5 (Wednesday, 12 February; 2.00pm - 5.00pm)

- * *Regulatory efficiency; the next wave* - Victor Perton MP, Chairperson of the Victorian Law Reform Committee (Australia)

Afternoon tea

- * *Effective scrutiny of uniform legislation? Can Parliaments prevail where governments in a federal system co-operate to pass uniform legislation?* - Senator Barney Cooney, Hon Phillip Pandal MLA, and Jon Sullivan MLA (Australia)

Session 6 (Thursday, 13 February; 9.30am - 12 noon)

- * *Future conferences and conference resolutions*
- * *Chairperson's closing address*

ATTACHMENT 3

T4-(1) Subject to paragraph (2), where in consequence of the provisions of the 1994 Act or the 1995 Act, transferred employees who immediately before 1st April 1996 were entitled to participate in the benefits of a superannuation fund maintained by an old administering authority become on that date entitled to participate in the benefits of a superannuation fund maintained under Part P (other than the superannuation fund maintained by the relevant new administering authority), or where in consequence of the provisions of either of those Acts transferred employees who immediately before 1st April 1996 were entitled to participate in the benefits of a superannuation fund maintained by a continuing administering authority become on that date entitled to participate in the benefits of a superannuation fund maintained under Part P (other than the superannuation fund maintained by that continuing administering authority), an apportioned part of the fund of the old or continuing administering authority, as appropriate, in respect of those transferred employees shall be transferred by the new or continuing administering authority to the body maintaining the fund in the benefits of which those transferred employees become on 1st April 1996 entitled to participate and liabilities and obligations that would otherwise vest in either the new administering authority in respect of that portion of the fund transferred to it and those transferred employees interested in it.