

mandate to scrutinize and strike down subordinate legislation as unmeritorious.

This raises the question as to whether that is something we could realistically afford. When we talk about review of the merits of subordinate legislation, we are talking about whether or not a regulation is appropriate, proper and "good". For those kinds of judgments to be made we have to start thinking about a parallel organization which has the facilities available to it to engage in a consideration of the merits of subordinate legislation from an informed, capable, policy perspective. The cost of setting up such a body may well be something that the public purse at this stage might not want to contemplate, particularly if its mandate was to review all delegated legislation. However, there may still be some profit in exploring the possibility of an external agency with authority to review the merits of selected subordinate legislation.

Admittedly, such a proposal involves removing the scrutiny of subordinate legislation from parliamentary authority or at least complementing it with an external review source. However, if we, the public, could convince parliamentarians that we do not necessarily think that they should be responsible for all delegated legislation; that we realize they cannot effectively review the merits of all such legislation, then it may well be we would be further along the road towards considering the creation of an external monitoring agency with effective power to perform that task.

Notes

¹Australia, Butterworths, 1977, p. 195.

²Ottawa, Supply and Services Canada, 1980, p. 8.

³Ibid.

A Rejoinder

Richard French, MNA

I would like to address myself to the kind of scepticism expressed, (I think not without foundation) by Professor Mullan about the capacity of Parliament to carry out its rather onerous and detailed, but important responsibilities. It is true that the drive toward adding creatures to the parliamentary zoo (auditors general, commissions for review of freedom of information decisions, commissions on human rights, etc.), has been one of the major thrusts of the last fifteen years of reform of public administration, at least in this country and I suspect that this is not untrue of some other jurisdictions.

If we are at the point where the review of merits of delegated legislation on a systematic basis, as opposed to the merits of the application of a regulation to a particular case, must be carried out by somebody other than a parliamentarian, then I think we are making a very serious comment on the viability of the legislative process and on the viability of the whole notion of legislation. I am sure that Professor Mullan knows that. Do we have to concede defeat and create a para-bureaucracy under our Parliament? Do we claim that because the nominations to this bureaucracy are carried out by a negotiated process and through the "usual channels" followed by a sort of *pro-forma* nomination of personnel in Parliament itself, it somehow conveys some intrinsic neutrality or intrinsic merit or virtue on the people thereby named? Do we claim that this form of nomination vests them with some form of transcendent wisdom that we, by the popular democratic process, have not been vested with, and that thereby they will be able to call the bureaucracy to account? If so I think we are largely ignoring the practical experience of the creatures who are already living in the parliamentary zoo, such as the Auditor General.

I would be reluctant to multiply such entities. I would rather

say, "Look, we believe in this institution called Parliament and we would like to extend it in certain ways when we see that it is patently unfit, for example, to review the accounts of the government". But to go beyond that and say, "Now, we are not even very good legislators, you know, and we are rather partisan and we fight with each other and sometimes the whips are applied and this is bad, because, you know, politics is something that each of us as individuals should practice on our own without any collective activity and we really ought to give this matter to some neutral body", would be a very grave mistake. It is not to create such bodies that I fought hard for nomination and election as the representative in my constituency. I must say I feel we must challenge our governments, whatever their political stripe, on the idea that every single thing one of the ministers or one of the parliamentary secretaries on behalf of the minister brings before the house automatically carries with it all the prestige and confidence of the people residing in their government and that, therefore, if the measure — whatever it may be and however minor it is — is defeated, in some sense this is a stain on the legitimacy of the whole government. It is not, and it is foolish of us, whether we are backbenchers on the government side or opposition members, to permit whips or the kind of search for security undertaken in ministerial offices, to allow that pathology to take root. Once that pathology has taken root, then, indeed, all we exist for is to create more and more entities to carry out functions which we should be carrying out ourselves.

If parliamentarians do not do this, the other mechanisms are rather useless. We have to decide at some point to put a brake on this process and not to allow ourselves to imagine that we need more administrative solutions to what are fundamentally political problems.