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# Regulations Review Committee Digest

Dean R Knight and Edward Clark  
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NEW ZEALAND CENTRE FOR  
**PUBLIC LAW**  
TE WANANGA O NGĀ KAUPAPA TŪKE Ā IRIKI O AOTEAROA



# Regulations Review Committee Digest

7th Edition

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<b>Preface</b>	<b>v</b>
<b>Acknowledgements</b>	<b>v</b>
<b>1 Introduction</b>	<b>6</b>
<b>2 Regulations Review Committee</b>	<b>7</b>
<b>3 Regulations, Disallowable Instruments and Other Delegated Legislation</b>	<b>24</b>
<b>4 Regulation-making Powers in Bills</b>	<b>36</b>
<b>5 General Objects and Intentions of the Act SO 327(2)(a)</b>	<b>51</b>
<b>6 Undue Trespass on Personal Rights and Liberties: SO 327(2)(b)</b>	<b>65</b>
<b>7 Unusual or Unexpected Use of the Powers: SO 327(2)(c)</b>	<b>74</b>
<b>8 Review of Decisions Impacting on Rights and Liberties: SO 327(2)(d)</b>	<b>90</b>
<b>9 Excludes the Jurisdiction of the Courts Without Authority: SO 327(2)(e)</b>	<b>95</b>
<b>10 More Suited to Parliamentary Enactment: SO 327(2)(f)</b>	<b>97</b>
<b>11 Retrospective without Authority: SO 327(2)(g)</b>	<b>102</b>
<b>12 Non-Compliance With Notification and Consultation Procedures: SO 327(2)(h)</b>	<b>108</b>
<b>13 Form or Purport Calls for Elucidation: SO 327(2)(i)</b>	<b>116</b>
<b>14 Occasional Reports</b>	<b>119</b>
<b>Appendices</b>	<b>167</b>

## Detailed Table of Contents

<b>Preface</b>	<b>v</b>
<b>Acknowledgements</b>	<b>v</b>
<b>1 Introduction</b>	<b>6</b>
<b>2 Regulations Review Committee</b>	<b>7</b>
I Introduction	7
II Genesis and History	7
III Composition	8
IV Operation	8
V Role	9
VI Functions	10
VII Grounds and Jurisprudence	14
VIII Other Mechanisms for Scrutiny of Regulations	15
<b>3 Regulations, Disallowable Instruments and Other Delegated Legislation</b>	<b>24</b>
I Introduction	24
II Delegated legislation generally	24
III Key definitions: regulations, disallowable instruments and secondary legislation	27
<b>4 Regulation-making Powers in Bills</b>	<b>36</b>
I Introduction	36
II Matters of policy and substance	37
III Henry VIII Clauses	39
IV Limits of regulation-making power	42
V Omnibus Provisions	44
VI Scrutiny and control	46
VII Status of instrument made under an Act	47
VIII Constitutional Considerations	48
IX Material Incorporated by Reference	49
<b>5 General Objects and Intentions of the Act SO 327(2)(a)</b>	<b>51</b>
I Introduction	51
II Purpose of the Act	52
III Regulation-Making Powers	58
<b>6 Undue Trespass on Personal Rights and Liberties: SO 327(2)(b)</b>	<b>65</b>
I Introduction	65
II Existence of Personal Right or Liberty	65

	III	Trespass to the Right or Liberty	68
	IV	Undue Trespass	69
<b>7</b>		<b>Unusual or Unexpected Use of the Powers: SO 327(2)(c)</b>	<b>74</b>
	I	Introduction	74
	II	Purpose of the Act	75
	III	Wording	79
	IV	Fees	80
	V	Levies	83
	VI	Inappropriate Extension of Statutory Criteria by Regulation	85
	VII	Transitional Matters	85
	VIII	Addition or Reversal of a Matter of Substantive Policy	86
	IX	Henry VIII Clauses	88
<b>8</b>		<b>Review of Decisions Impacting on Rights and Liberties: SO 327(2)(d)</b>	<b>90</b>
	I	Introduction	90
	II	Right of Appeal	90
	III	Review on the Merits	93
<b>9</b>		<b>Excludes the Jurisdiction of the Courts Without Authority: SO 327(2)(e)</b>	<b>95</b>
<b>10</b>		<b>More Suited to Parliamentary Enactment: SO 327(2)(f)</b>	<b>97</b>
<b>11</b>		<b>Retrospective without Authority: SO 327(2)(g)</b>	<b>102</b>
	I	Introduction	102
	II	Retrospectivity	103
	III	Expressly Authorised by the Empowering Statute	106
<b>12</b>		<b>Non-Compliance With Notification and Consultation Procedures: SO 327(2)(h)</b>	<b>108</b>
	I	Introduction	108
	II	When Consultation is Required	109
	III	What Constitutes Consultation	111
<b>13</b>		<b>Form or Purport Calls for Elucidation: SO 327(2)(i)</b>	<b>116</b>
<b>14</b>		<b>Occasional Reports</b>	<b>119</b>
	I	Occasional Reports	119
	II	Fees	119
	III	Deemed Regulations and Disallowable Instruments that are not Legislative Instruments	121
	IV	Henry VIII Clauses	130
	V	National Emergency Powers	133
	VI	Affirmative Resolution Procedures	137

VII	Regulations-Making Powers That Authorise Treaties to Override New Zealand Enactments	140
VIII	Commencement of Legislation by Order in Council	142
IX	Material Incorporated by Reference	147
X	Currency of Existing Regulations	153
XI	Regulatory Impact Statements	156
XII	Instruments of Exemption in Primary Legislation	159
XIII	Transitional regulations that override primary legislation	163
<b>Appendices</b>		<b>167</b>
A	Inquiries into Regulations (up to 31 December 2019)	167
B	Occasional Reports (up to 31 December 2019)	184
C	Annual Reports (up to 31 December 2019)	188
D	Changes to Standing Orders and <i>Cabinet Manual</i>	189
E	Changes to governing legislation	190

## **Preface**

The Regulations Review Committee Digest, first published in 2004, provides a general overview of the role and functioning of the Regulations Review Committee and synthesises its work into a single, readily accessible source. The primary aim of the Digest is to summarise the Committee's jurisprudence concerning the nine Standing Order grounds under which it may draw regulations to the attention of the House. In addition, it summarises the Committee's jurisprudence concerning general matters regarding regulations developed in its occasional reports.

In this (seventh) edition, the Digest has been updated to include material from reports of the Committee issued up to the end of 2019, most of the way through 52nd New Zealand Parliament and, where appropriate, any government responses to those reports. The commentary generally reflects developments up to the end of 2019. This edition also includes substantial revision of the various chapters, including a streamlined explanation of the Committee and the nature of secondary legislation. References to Standing Orders have been updated to reflect the updated version adopted in 2020.

## **Acknowledgements**

The New Zealand Centre for Public Law, along with the authors, would like to acknowledge the Office of the Clerk of the House of Representatives and the Parliamentary Counsel Office for their financial support for this publication. We would also like to recognise the contribution of various people to the original Digest. First, thanks to George Tanner QC and Hon Doug Kidd for sparking the idea of the Digest. Secondly, thanks to the various authors whose work has formed the foundation of the Digest. The contribution of Dr Ryan Malone, Original Author of the Digest, is particularly acknowledged, along with the work of the subsequent Updating Authors, Tim Miller, Luke Archer and Anna Prestige. Thirdly, thanks to those who have been otherwise involved in the production of this current and earlier editions of the Digest: Dr Matthew Palmer, Caroline Morris, Debbie Angus, Tim Workman, Suzanne Giacommetti, Fiona McLean, Ross Carter and Kelly Harris.



# 1

## Introduction

This Digest provides an overview of the history, role and work of the Regulations Review Committee.

The Digest is divided into 14 chapters:

- Chapter 2 explained the Regulations Review Committee and its work, in the context of different forms of scrutiny of secondary legislation.
- Chapter 3 discusses the nature of regulations, disallowable instruments and delegated legislation in general.
- Chapter 4 discusses the Committee's recommendations in relation to regulation-making powers in bills.
- Chapters 5 to 13 discuss the Committee's jurisprudence concerning the nine Standing Order grounds upon which it may draw regulations to the attention of the House (by reference to the Committee's complaint reports).
- Chapter 14 summarises the Committee's findings in its various occasional reports.

## 2

# Regulations Review Committee

## I Introduction

The Regulations Review committee is the central vehicle for scrutiny of regulations, disallowable instruments and other delegated legislation. This chapter briefly explains the history the committee, along with its current composition, role and functions. In the chapter that follows, the instruments subject to the Committee's jurisdiction – regulations, disallowable instruments and other delegated instruments – are defined and explained.

## II Genesis and History

The Committee was first established in 1985 and has operated continually since then.<sup>1</sup> It was established as part of a wider process of constitutional reform aimed at reining in the power of the executive in New Zealand.<sup>2</sup> The main concern was that delegated legislation was being used by the executive to push through government policy initiatives.<sup>3</sup> This was appealing to the executive because of the relative ease of passing laws in this way and the general avoidance of parliamentary scrutiny,<sup>4</sup> which included debate in the House, three readings, and, in most cases, referral to the relevant subject select committee.<sup>5</sup> However, this practice undermined the constitutional principle that “democratically elected and accountable members of Parliament [should] retain control over the content of the law.”<sup>6</sup> Delegated legislation, on the other hand, is meant only to provide the detail necessary for the implementation of the law.

Hence, the Regulations Review Committee was established as a specialist standing Committee of the House in order to provide a consistent level of parliamentary scrutiny over

<sup>1</sup> Standing Orders of the House of Representatives 1985, SOs 388-390.

<sup>2</sup> See generally Geoffrey Palmer and Matthew Palmer *Bridled Power* (4th ed, Oxford University Press, Auckland, 2004).

<sup>3</sup> Caroline Morris and Ryan Malone “Regulations Review in the New Zealand Parliament” (2004) 4 *Macquarie Law Journal* 7 at 8.

<sup>4</sup> Morris and Malone, above n 3, at 10.

<sup>5</sup> Morris and Malone, above n 3, at 10.

<sup>6</sup> Geoffrey Palmer “Deficiencies in New Zealand Delegated Legislation” (1999) 30 *VUWLR* 1 at 2.

the use of delegated legislation.<sup>7</sup> Standing Orders continue to mandate that a Regulations Review Committee be established at the commencement of each Parliament.<sup>8</sup>

### III Composition

In the most recent term of Parliament, the Committee consisted of 6 members, is chaired by an Opposition MP and equal representation of government and opposition MPs. There are no Standing Orders addressing the composition of the Committee.<sup>9</sup> Thus, the size of the Committee has varied over time (from as many as 9 to 5 committee members). By convention, the Committee is chaired by a non-government member of Parliament. During most of its existence, the convention was understood to be that the majority of the Committee's members do not belong to the party currently in government; however, this convention has not been followed since the 50th Parliament.

### IV Operation

The Committee generally works on a less partisan basis than many other parliamentary committees. It tries to avoid situations where government members refuse to find fault with government regulations or non-government members continually oppose them purely on the basis of party allegiance. This approach is consistent with the principle that the Committee does not concern itself with matters of policy but instead limits itself to technical scrutiny of regulations. This is not to say, however, that party politics are completely absent from committee decision making. And, on occasion, the Committee will make a majority finding while in the same report noting the differing views of the minority.<sup>10</sup>

<sup>7</sup> Standing Orders of the House of Representatives 2020, SO 185(1)(b).

<sup>8</sup> Standing Orders of the House of Representatives 2020, SO 185(1)(b).

<sup>9</sup> Ross Carter, Jason McHerron and Ryan Malone *Subordinate Legislation in New Zealand* (LexisNexis, 2013) at 161.

<sup>10</sup> See for instance Regulations Review Committee "Investigation into the Disputes Tribunals Amendment Rules 1997 and the Disputes Tribunals Amendment Rules 1998" [1998] AJHR I16L and Regulations Review Committee "Complaint Regarding the New Zealand Teachers' Council (Conduct) Rules 2004" (12 August 2013).

## V Role

The Regulations Review Committee lies at the heart of parliamentary scrutiny of regulations and other subordinate legislation.<sup>11</sup> Doug Kidd, twice chairman of the Regulations Review Committee and former Speaker of the House, said:<sup>12</sup>

[The Committee's work] shows the ongoing tendency of all governments to stray from the paths of constitutional righteousness seduced by the sirens of power, efficiency and convenience. We are here to educate, guide, persuade, correct, chastise and reform Government – a congenital sinner. Above all we are here to protect and promote the rule of law.

Much of the Committee's work is reactive; it examines all regulations after they are made and ensures that they do not offend against the principles laid down in Standing Order 327(2). However, the Committee is also proactive insofar as it examines draft regulations and regulation-making powers in bills to discourage the making of regulations, which, once promulgated, are likely to breach good law-making practices. The Committee also issues occasional reports in an effort to educate and to clarify matters relating to the delegation of law-making powers.

The Committee also provides a useful mechanism for those adversely affected by regulations. The courts are limited to a finding of ultra vires when dealing with regulations; in contrast, the Committee can examine a regulation according to wider suite of grounds. Although the Committee has a power of recommendation only, its ability to effect changes to regulations is significant. And the Committee's scrutiny may also trigger the automatic disallowance provisions in the Legislation Act 2012.

Importantly, the Committee does not purport to examine (or offer opinions on) matters of policy. This is because policy matters are "seen to belong to primary legislation which is more appropriately dealt with in the House or by other subject committees".<sup>13</sup> Instead, the Committee provides technical scrutiny of regulations. For example, the Kiwifruit Marketing Regulations 1977, Amendment No 4 established the Kiwifruit Marketing Board.<sup>14</sup> The regulations also gave the Board monopoly export rights, meaning it could compulsorily acquire export kiwifruit from growers. In examining the regulations, the Committee passed

<sup>11</sup> For other mechanisms for scrutiny, see Part VIII below.

<sup>12</sup> Kidd, above n 88, at 1-2.

<sup>13</sup> Jonathan Hunt "The Regulations Review Committee" [1999] NZLJ 402-408 at 402.

<sup>14</sup> Regulations Review Committee "Report on the Inquiry into the Appropriateness of Establishing the Kiwifruit Marketing Board Through Regulations" [1988] AJHR I16.

over the policy decision to establish the Board in the first place:<sup>15</sup>

The committee does not concern itself here with ... the policy issues arising from the establishment of the Board through regulations. Its concerns focus on the appropriateness of the use of regulations to legislate in this way.

What did concern the Committee was the way in which regulations had been used to implement an important government policy. The Committee was of the opinion that the establishment of the Board was more appropriate for parliamentary enactment, especially given that it would have powers of compulsory acquisition (estimated to be worth \$600 million per year). Thus, there is a distinction between the policy within regulations on the one hand, and the proper use of regulations to implement policy decisions on the other hand. The Committee concerns itself only with the latter.

## **VI Functions**

The Committee's functions are mandated by key Standing Orders and include:<sup>16</sup>

- examining regulations (SO 326(1));
- examining draft regulations (SO 326(2));
- examining regulation-making powers in bills (SO 326(3));
- considering any matter relating to regulations (SO 326(4)); and
- hearing complaints regarding regulations (SOs 326(5) and 328).

### ***A Examination of Regulations***

The Committee automatically examines all regulations and other disallowable instruments after they are presented to the House and scrutinises them in accordance with the 9 grounds contained in Standing Order 327(2).<sup>17</sup> For instance, from 1 January to 22 August 2017 it scrutinized 267 regulations.<sup>18</sup> The Committee's examination of regulations against these grounds are discussed in detail in chapters 5 to 13.

<sup>15</sup> Regulations Review Committee "Report on the Inquiry into the Appropriateness of Establishing the Kiwifruit Marketing Board Through Regulations" [1988] AJHR I16 at 5.

<sup>16</sup> Standing Orders of the House of Representatives 2020.

<sup>17</sup> Standing Orders of the House of Representatives 2020, SO 326(1) and see grounds explained below.

<sup>18</sup> Regulations Review Committee "Activities of the Regulations Review Committee in 2017" [2017] AJHR I16D at 10.

As a matter of practice, the Committee's legal advisors generally examine all new regulations and bring only those of particular concern to the Committee's attention.<sup>19</sup> Most regulations raise no more than cursory issues. Those that raise more significant issues, however, will often lead to the Committee directly requesting information from the relevant Minister, for example information regarding the likely effect of the regulations. If the information provided is not sufficient, the Committee may then engage in an investigation into the regulation in question.<sup>20</sup>

As a result of such an investigation into a regulation, the Committee may report to the House and recommend that the regulation in question be amended or revoked. The government may follow the Committee's recommendations, but is under no obligation to do so. Regardless of whether it implements the recommendations, the government must table a response to that report in the House within 60 working days.<sup>21</sup> On several occasions, the Committee has submitted a further report to the House on the basis that the government misunderstood or failed to adequately address its concerns.<sup>22</sup> On several occasions the Committee has expressed concern with the current examination process. In particular, the Committee has also acknowledged that difficulty in identifying and accessing secondary legislation that is not drafted by the Parliamentary Counsel Office has delayed their examination.<sup>23</sup>

<sup>19</sup> Carter, McHerron and Malone, above n 9, at 163.

<sup>20</sup> Carter, McHerron and Malone, above n 9, 164.

<sup>21</sup> Standing Orders of the House of Representatives 2020, SO 256.

<sup>22</sup> See for example, Regulations Review Committee "Report on the Government's Response to the Committee's Inquiry into the Geothermal Energy Regulations 1961" [1987] AJHR I16; Regulations Review Committee "Report on the Government's Response to the Committee's Inquiry into the Reserve Bank of New Zealand Order 1988" [1989] AJHR I16; Regulations Review Committee "Report on the Government's Response to the Inquiry into the Resource Management (Transitional) Regulations 1994 and the Principles that Should Apply to the Use of Empowering Provisions Allowing Regulations to Override Primary Legislation During a Transitional Period" [1996] AJHR I16; and Regulations Review Committee "Report on the Government's Response to the Report on the Complaint Relating to Staffing Orders, Promulgated under Section 91H of the Education Act 1989, Affecting Area, Primary, Intermediate, and Secondary Schools" [1996] AJHR I16L.

<sup>23</sup> Regulations Review Committee "Activities of the Regulations Review Committee in 2017" [2017] AJHR I16D at 1.

## ***B Examination of Draft Regulations***

The Committee may also examine draft regulations, when they are referred to it by a minister. This jurisdiction is rarely used, even though the Committee has stated that the optimal time to scrutinise regulations is before the regulations have come into force.<sup>24</sup>

The Committee is not systemically apprised of regulations in draft form. However, occasionally it may become aware proposed regulations, for example, through complaints made to the Committee.<sup>25</sup> In such cases, the Committee may invite the relevant minister to forward draft regulations for consideration. Alternatively, a minister may forward draft regulations on his or her own initiative. The Committee will not usually proceed with its examination if it considers that the minister's time-frame is too short to allow meaningful scrutiny. Instead it will scrutinise the regulations after they are made.

Occasionally referral of draft regulations to the committee is a statutory requirement, especially in some recent emergency legislation.<sup>26</sup>

## ***C Examination of Regulation-Making Powers in Bills***

The Committee may examine regulation-making powers contained in a bill before another select committee.<sup>27</sup> Scrutinizing the regulation-making powers in bills is central to the Committees' work. For example, in 2016 the Committee made 26 reports to other committees about regulation-making powers in bills.<sup>28</sup> A regulation-making power in a bill may be drafted in such a way that the resulting regulations are likely to breach one or more of the grounds listed in Standing Order 327(2). The Committee also examines whether the regulation-making powers are consistent with good legislative design, including the established principles set out in the Legislation Design and Advisory Committee's

<sup>24</sup> Regulations Review Committee "Activities of the Regulations Review Committee During 1999" [1999] AJHR I16X.

<sup>25</sup> Regulations Review Committee "Activities of the Committee in 1988 and 1989" [1990] I16A at 4.

<sup>26</sup> See eg Hurunui/Kaikōura Earthquakes Recovery Act 2016, s 8(1)(c); and Christ Church Cathedral Reinstatement Act 2017, s 9(1)(b).

<sup>27</sup> Standing Orders of the House of Representatives 2020, SO 326(3).

<sup>28</sup> Regulations Review Committee "Activities of the Regulations Review Committee in 2016" [2017] at I.16C at 4.

Legislation Guidelines.<sup>29</sup> It is of considerable benefit, therefore, if the Committee is able to effect a change to such a regulation-making power before it is enacted into law.<sup>30</sup>

Whether or not the Committee examines a regulation-making power in a bill and reports to the relevant subject committee is a matter for its own discretion but generally looks at all bills with regulation-making powers.<sup>31</sup> Alternatively, some committees proactively write to the Committee for advice.<sup>32</sup> Where the Committee does consider a regulation-making power in a bill, if it has concerns it will provide the relevant select committee with a report outlining its concerns.<sup>33</sup> The select committee considering the bill is under no obligation to adopt these recommendations. In practice, however, select committees will often recommend to the House that a regulation-making power be amended in accordance with the advice of the Regulations Review Committee.

The Committee's examination of regulation-making powers in bills is discussed in more detail in the Chapter 4.

## ***D Considering Matters Relating to Regulations***

The Committee has the general power to report to the House on matters related to regulations.<sup>34</sup> This power is used when the Committee makes an occasional report to the House, often dealing with principles or general issues relating to delegated legislation.<sup>35</sup> Such reports have included the principles relating to the incorporation of material by reference, the use of instruments of exemption, and the use of the affirmative resolution

<sup>29</sup> Regulations Review Committee "Activities of the Regulations Review Committee in 2016" [2017] AJHR I.16C at 4 and Regulations Review Committee "Activities of the Regulations Review Committee in 2017" [2017] AJHR I16D at 4. See the Legislation Design and Advisory Committee *Legislation Guidelines* at <www.ldac.org.nz>.

<sup>30</sup> Doug Kidd has stated that "the task of considering regulation-making powers in bills is the [Committee's] most important function in that it is a top of the cliff function and of enduring value": Kidd, above n 88, at 4.

<sup>31</sup> When the Committee was first established, it could report on a regulation-making power only at the request of the select committee considering the bill. See Regulations Review Committee "Regulation Making Powers in Legislation" [1987] AJHR I16A.

<sup>32</sup> Regulations Review Committee "Activities of the Regulations Review Committee in 2016" [2017] AJHR I.16C at 4.

<sup>33</sup> Much of the Committee's work in this area can be found in its annual activities reports. See also Richard Worth and Debbie Angus "A New Zealand Perspective of the Scrutiny of Delegated Legislation" in Regulations Review Committee "First International Conference on Regulation Reform Management and Scrutiny of Legislation" [2001] AJHR I16F at 13-27.

<sup>34</sup> Standing Orders of the House of Representatives 2020, SO 326(4).

<sup>35</sup> For a complete list of occasional reports tabled in Parliament see Appendix B.



procedure. Inadequate government response to these reports may lead to further reports on the same issue.<sup>36</sup> This function is discussed in more detail in Chapter 14.

### ***E Hearing Complaints regarding Regulations***

Any person aggrieved at the operation of a regulation may complain to the Committee.<sup>37</sup> The practice of the Committee is to initially consider whether to investigate the complaint or to resolve no further with the complaint. The complainant is given an opportunity to address the Committee regarding the regulation if an investigation is undertaken (and occasionally when the Committee is considering whether to investigate). The Committee will investigate the regulations based on the nine grounds listed in Standing Order 327(2) and is not limited in its consideration by the substance of the complaint.<sup>38</sup> While the Committee's jurisdiction to investigate complaints is broad, the only available remedy is for the Committee to make recommendations in a report to the House or the Government (or to trigger House disallowance processes).<sup>39</sup>

In its complaints jurisdiction, the Committee is limited to scrutinising "regulations". This is a broad scope, but the Committee has at times noted the limits of its jurisdiction. For example, in rejecting a potential complaint regarding the approval of Variation A1073 to Food Standard 1.5.2 in 2013, the Committee noted that the standard in question, despite being a part of New Zealand law, was an instrument made by Food Standards Australia New Zealand under Australian Commonwealth legislation. This instrument was not made under an "Act of the Parliament of New Zealand", within the meaning of section 29 of the Interpretation Act 1999 (the then relevant definition), and was thus not an instrument able to be scrutinised by the Committee.<sup>40</sup>

## **VII Grounds and Jurisprudence**

As noted earlier, the Committee examines regulations based on the nine grounds listed in Standing Order 327(2), namely:

<sup>36</sup> Carter, McHerron and Malone, above n 9, at 167.

<sup>37</sup> Standing Orders of the House of Representatives 2020, SO 328(1).

<sup>38</sup> Regulations Review Committee "Complaint regarding the Legal Services Regulations 2011" (19 September 2013) at 6.

<sup>39</sup> Regulations Review Committee "Activities of the Regulations Review Committee in 2017" [2017] AJHR I.16D at 15.

<sup>40</sup> Regulations Review Committee Activities of the Regulations Review Committee in 2013 (27 June 2014) at 34

- discord with the general objects and intentions of the Act;
- undue trespass on personal rights and liberties;
- unusual or unexpected use of the powers conferred by the Act;
- unduly makes the rights and liberties of persons dependent upon administrative decisions not subject to judicial review on their merits;
- excludes the jurisdiction of the courts without authority;
- more suited to parliamentary enactment;
- retrospective without authority;
- non-compliance with notification and consultation procedures; or
- form or purport calls for elucidation.

Chapters 5 through 13 summarise the principles that have developed under each of these grounds. Before considering the Committee's treatment of each ground, several preliminary points should be made.

First, a regulation may breach more than one ground. For example, a regulation may trespass unduly on rights and liberties but it may also have been made contrary to consultation requirements prescribed by statute. Secondly, the Committee does not explicitly operate on a historical *stare decisis* basis. In other words, the current Regulations Review Committee is not in any way bound by the findings or statements of previous Regulations Review Committees. Nevertheless, successive Committees have shown a high degree of consistency in their interpretation and application of each ground. One Committee will often cite the work of an earlier Committee in order to help explain its position on a particular aspect of a regulation. Finally, the following discussion of each Standing Order ground is not intended to be a complete notation of every instance where the Committee has discussed a particular ground. Rather, it provides a general overview of the work of the Committee. Those Committee reports that are cited have been used because they help illustrate the way in which the Committee has applied and interpreted the different elements of each of the nine grounds.

## **VIII Other Mechanisms for Scrutiny of Regulations**

This Digest addresses the Regulations Review Committee's functions and jurisprudence. The Committee is not, however, the only mechanism providing for the scrutiny of regulations.<sup>41</sup>

<sup>41</sup> For a history of the different mechanisms and general scrutiny of regulations, see earlier editions of this Digest and Carter, McHerron and Malone, above n 9,

Regulation-making is also supervised by the executive and judicial branches of government including:

- executive scrutiny and vetting;
- judicial scrutiny;
- other parliamentary scrutiny.

### **A    *Executive Scrutiny and Vetting***

In terms of executive scrutiny, the *Cabinet Manual* puts in place rules dealing with the making and publication of new regulations.<sup>42</sup> The Manual notes that regulations should only deal with matters of a technical or detailed nature and warns that regulations must not be ultra vires the empowering statute. It also sets out a nine-step guideline process for the promulgation of regulations made by Order in Council (but not other secondary legislation). Most notably:

- the need for the regulations must generally be identified and approved by Cabinet;
- appropriate consultation must be undertaken;
- draft regulations are to be prepared by Parliamentary Counsel Office (PCO) and generally submitted to cabinet; and
- regulations are to be approved by Cabinet and the Executive Council.

The Cabinet Manual places an obligation on PCO to notify the Attorney-General and the relevant minister of draft regulations that are “not within the regulation-making powers granted in the Act, restrict individual freedom unreasonably, or are otherwise undesirable from a legal perspective”.<sup>43</sup> No specific obligations are placed on the Attorney-General or the minister in return. The *CabGuide* sets out the processes approved by Cabinet for Cabinet and its various Committees.<sup>44</sup> The *CabGuide* states that PCO must certify draft regulations as fit for submission to Cabinet. This includes advice as to whether or not the regulations are authorised by the empowering provision.<sup>45</sup> The *CabGuide* also states that the minister responsible for a set of regulations must be present at the Executive Council (when

<sup>42</sup> Cabinet Office, *Cabinet Manual 2008*, at [7.84-7.86].

<sup>43</sup> Cabinet Office, *Cabinet Manual 2017* at [7.82].

<sup>44</sup> Cabinet Office *CabGuide* <[www.cabinetoffice.govt.nz](http://www.cabinetoffice.govt.nz)>.

<sup>45</sup> Regulations Review Committee “Inquiry into the Resource Management (Transitional) Regulations 1994 and the Principles that Should Apply to the Use of Empowering Provisions Allowing Regulations to Override Primary Legislation During a Transitional Period”, above n 84, at 20.

regulations are formally promulgated) to answer any queries from the Governor-General. Alternatively, he or she or must have briefed another minister who will be present.<sup>46</sup>

The principles and requirements set out in the *Cabinet Manual* and *CabGuide* can be seen as an attempt to streamline the regulation-making process and to encourage the constitutionally proper use of regulation-making powers.

## **B Judicial Scrutiny**

After regulations are made, the courts have the jurisdiction to strike them down on the basis that they are ultra vires the empowering legislation.<sup>47</sup> When a regulation-making power is exercised, the individual or body to whom the power is delegated must legislate within those set limits. If it does not, then it is purporting to legislate on an authority that does not exist and the regulation is liable to being ruled unlawful. Palmer found that between 1986 and 1999 only fifteen cases in New Zealand addressed whether particular regulations were ultra vires. An online search of New Zealand cases from 2000 to 2013 reveals a similar trend, with 16 cases addressing whether particular regulations were ultra vires.<sup>48</sup> Despite these relatively low figures, the fact that the courts are able to invalidate a regulation acts as an important check on those exercising delegated regulation-making powers.<sup>49</sup>

## **C Other Parliamentary Scrutiny**

Parliament itself has a significant role in supervising the making of regulations and other subordinate legislation. As the Algie Committee said:<sup>50</sup>

If Parliament is accepted as the sole legislative authority, and if by force of circumstances it must delegate some of its authority to others, then it stands to reason that the public will expect Parliament to exercise something more than a merely nominal supervision over the work of those to whom law-making powers have been delegated.

In practice, supervision of regulations by Parliament, other than through the examination by the Regulations Review Committee, takes 4 key forms:

- the presentation of all regulations to the House of Representatives;

<sup>46</sup> Cabinet Office *CabGuide* <[www.cabinetoffice.govt.nz](http://www.cabinetoffice.govt.nz)>.

<sup>47</sup> See generally Phillip A Joseph *Constitutional and Administrative Law in New Zealand* (3rd ed, Brookers, Wellington, 2007) at 1007-1055 and Carter, McHerron and Malone, above n 9.

<sup>48</sup> This figure was obtained from a search of the LexisNexisNZ online database, and should be regarded as indicative only (search conducted 24 May 2013).

<sup>49</sup> Palmer, above n 6, at 12.

<sup>50</sup> *Algie Committee*, above n 80, at 6.

- confirmation of regulations by an Act of Parliament;
- approval of regulations by resolution of the House;
- disallowance or amendment of regulations or other disallowable instruments by the House under the Legislation Act 2012.

Usually, the Regulations Review Committee usually plays a preliminary role in the disallowance of secondary legislation.

### *Presentation of regulations*

Section 41 of the Legislation Act 2012 (before 2013, section 4 of the Regulations (Disallowance) Act 1989) requires most disallowable instruments to be laid before the House no later than 16 sitting days after they are made. This also applies to the class of instruments once known as deemed regulations discussed in Chapter 3, but does not apply to instruments which are disallowable by virtue only of their “substantial legislative effect”. A mandatory presentation requirement ensures that the House is aware that regulations have been made, allows for parliamentary scrutiny of them, and ensures that ministers are accountable for regulations and disallowable instruments made by them or others within their portfolio responsibilities.<sup>51</sup> In recent years, the Committee has expressed concern that some disallowable instruments that are not legislative instruments are not being presented.<sup>52</sup> In 2016, the Committee found that 21 regulations it reviewed were not presented to the House.<sup>53</sup>

### *Confirmation of regulations by statute*

Occasionally, an Act may provide that regulations made pursuant to it must be confirmed by statute, often to prevent the regulations concerned from lapsing. If confirmation is not provided within the specified period, the regulations are automatically revoked. This mechanism provides Parliament with the opportunity to consider the policy issues raised by the regulations and to give, or withhold, its approval.<sup>54</sup> Confirmation is typically achieved

<sup>51</sup> See *Algie Committee*, above n 80, at 9.

<sup>52</sup> Regulations Review Committee “Activities of the Regulations Review Committee in 2016” [2017] at I.16C at 14 and Regulations Review Committee “Activities of the Regulations Review Committee in 2017” [2017] AJHR I.16D at 13.

<sup>53</sup> Regulations Review Committee “Activities of the Regulations Review Committee in 2016” [2017] AJHR I.16C at 14.

<sup>54</sup> This is specifically contemplated by section 37 of the Legislation Act 2012, which defines “confirmation provisions” as follows: “confirmation provision, in relation to an instrument made under an enactment, means an enactment that provides that the instrument lapses,

through the enactment of an annual Subordinate Legislation Confirmation and Validation Bill. Standing Order 333 sets out a streamlined House process for confirmation bills: there is no debate in the first reading and these bills are referred to the Regulations Review Committee. The Committee considers these bills with regard to written submissions from government departments responsible for administering the subordinate legislation in the Bill and advice from PCO. After the second reading, these proceed straight to the third reading, unless the House resolves into committee to consider an amendment. Where confirmable instruments are not confirmed, they are automatically revoked before the deadline.

The Regulations Review Committee has, however, questioned whether more effective parliamentary scrutiny of regulations and more efficient use of House time might be achieved by changing the process under which these confirmation and validation bills are passed.<sup>55</sup> Of particular concern to the Committee in its report on the Subordinate Legislation (Confirmation and Validation) Bill 2012 was the limited time given to the Committee to scrutinise Bills of this type and to refer specific policy issues to the relevant subject select committee.<sup>56</sup> The Committee suggested that the House extend the process contained in the Legislation Bill (now contained in Part 2, Subpart 3 of the Legislation Act 2012) for enacting “revisions Bills,” to also apply to confirmation and validation bills.<sup>57</sup> The Committee said that this process would both “streamline” such bills’ progress through the House as well as ensure the Committee is given sufficient time to scrutinise and receive advice from Government departments and other Select Committees on bills of this type. This suggestion was taken up by the House following the 2014 review of the Standing Orders, and Standing Order 325 was introduced as a result. The new procedure largely adopts the Committee’s recommendations, but excludes the validation of illegal regulations from the streamlined procedure.<sup>58</sup>

expires, or is revoked at a stated time unless the instrument is confirmed, confirmed and validated, or validated by an Act passed or enacted before that time”. See also Regulations Review Committee “Regulation Making Powers in Legislation” [1987] AJHR I16A.

<sup>55</sup> Subordinate Legislation (Confirmation and Validation) Bill 2011 (No 3) (311–1) (select committee report); Subordinate Legislation (Confirmation and Validation) Bill 2013 (No 2) (142–1) (select committee report).

<sup>56</sup> Subordinate Legislation (Confirmation and Validation) Bill 2012 (51–1) (select committee report).

<sup>57</sup> Subordinate Legislation (Confirmation and Validation) Bill 2012 (51–1) (select committee report) at 5.

<sup>58</sup> Standing Orders Committee “Review of Standing Orders 2014” (21 July 2014), at 23. In brief, the procedure is as follows: (a) set the bill down for its first reading without debate; (b) when the bill is read a first time, it automatically stands referred to the Regulations Review Committee; (c) debate the bill’s second reading in the usual way; (d) set the bill down for

In its report on the Subordinate Legislation Confirmation Bill (No 2) 2016, the Committee again expressed concern with the limited time given to scrutinise confirmation bills. It recommended that confirmation bills be introduced and referred for scrutiny earlier. Some Committee members sought an amendment to Standing Order 326(2) to allow draft regulations to be scrutinized prior to instruments being finalised. However, this view is not unanimously held. Other Committee members regarded the process as well established and effective. They expressed concern that requiring the Committee to consider instruments prior to finalising could cause unnecessary and duplicated work.<sup>59</sup>

### *Approval of regulations by resolution*

Approval of regulations by a resolution of the House provides a further method of scrutiny. Rather than passing an Act to confirm regulations, approval is provided by a resolution of the House. This ‘affirmative resolution’ procedure was first used in the Misuse of Drugs Act 1975. Under section 4A of the Act, a regulation that amends the schedules to the Act (for example designating a new substance as a class A, B, or C drug) must be approved by a resolution of the House. If the resolution is passed, a commencement order can then be made which brings the regulation into effect.

The Regulations Review Committee has previously expressed concern at the growing use of affirmative resolution procedures (see discussion below).<sup>60</sup>

### *Disallowance and amendment*

Parliament is able to exercise significant post-promulgation powers to disallow and amend regulations under the Legislation Act 2012.<sup>61</sup> In particular:

- The House may, by resolution, disallow any regulations or provisions of regulations (s 42 of the Legislation Act 2012; formerly s 5 of the Regulations (Disallowance) Act 1989).

consideration in a committee of the whole House only if the Minister in charge requires an amendment to be considered, or if a member lodges an amendment with at least 24 hours’ notice before the time that the House meets on the day on which the bill is read a second time; (e) the bill is taken for its third reading without debate.

<sup>59</sup> Subordinate Legislation Confirmation Bill (No 2) (select committee report) at 3–4.

<sup>60</sup> See Chapter 14(IV).

<sup>61</sup> These powers were originally set out in the Regulations (Disallowance) Act 1989. The Legislation Act 2012 only made minor changes to the wording of these powers and thus the effect of the provisions is the same. Appendix E of this publication provides a table of relevant changes in section numbering between the 1989 and 2012 Acts.

- Any member of the Regulations Review Committee may give a notice of motion to disallow any regulation and, unless Parliament disposes of the motion within 21 sitting days of it being given, the regulation is deemed to have been disallowed (s 43 of the Legislation Act 2012; formerly s 6 of the Regulations (Disallowance) Act 1989).
- The House may, by resolution, amend any regulations or revoke any regulations and substitute other regulations (s 46 of the Legislation Act 2012; formerly s 9(1) of the Regulations (Disallowance) Act 1989).

First, any Member of Parliament is able to put forward a notice of motion to amend or disallow regulations under s 42 of the Legislation Act 2012. This type of notice of motion faces considerable hurdles within the parliamentary process. Most notably, it is a negative resolution procedure, which means if the motion to disallow is not disposed of within the allocated time, it will typically have no effect and the regulations concerned will stand.<sup>62</sup>

Secondly, the automatic 21-day disallowance mechanism under section 43 of the Legislation Act 2012 puts an obligation on the government of the day to allow the House to debate and vote on a motion put forward by a member of the Regulations Review Committee. If the government does not facilitate this debate, the regulations will be disallowed automatically. Until recently, the 21-day disallowance procedure had been, on its face, relatively ineffectual. Before 2013, the disallowance procedure had been invoked on six occasions in the House, none of which resulted in a regulation being disallowed.<sup>63</sup> It has been argued in previous editions of this publication that the value of the automatic disallowance procedure lay primarily in the mere existence of the power. In the same way that a court's ability to declare a regulation *ultra vires* acts as a deterrent to the making of unlawful regulations, the "existence of a power of disallowance provides the sanction that ensures that

<sup>62</sup> Standing Orders of the House of Representatives 2020, SO 331.

<sup>63</sup> The six occasions referred to are: (1) Civil Aviation Charges Regulations 1990 (notice of motion given on 4 September 1990); (2) Disputes Tribunal Amendment Rules 1998 (notice of motion given on 9 September 1998); (3) New Zealand Food Standard 1996, Amendment No 11 (notice of motion given on 13 July 1999); (4) Court of Appeal/High Court/District Court Fees Regulations 2001 (notices of motion given on 8 and 13 November 2001); (5) New Zealand (Mandatory Fortification of Bread with Folic Acid) Amendment Food Standard 2009 (notice of motion given on 5 August 2010); (6) Plumbers, Gasfitters and Drainlayers Board (Plumbing Registration and Licensing) Notice 2010, Plumbers, Gasfitters and Drainlayers Board (Gasfitting Registration and Licensing) Notice 2010, Plumbers, Gasfitters and Drainlayers Board (Drainlayers Registration and Licensing) Notice 2010, and Plumbers, Gasfitters and Drainlayers Board (Fees) Notice 2010 (notices of motion given on 15 February 2011 and 15 March 2011). Of these six motions, four were debated and voted on, with the other two lapsing on the dissolution of Parliament.



a Committee's views are taken seriously".<sup>64</sup> In short, the mere prospect of a disallowance motion being moved may encourage the executive to amend regulations to address the Committee's concerns.

The 21-day disallowance mechanism was fully applied for the first time in 2013, resulting in the disallowance of three regulations in the Road User Charges (Transitional Matters) Regulations 2012. In its report on those regulations,<sup>65</sup> the Committee recommended the disallowance of the three individual regulations on the grounds that they breached Standing Orders 327(2)(c) and (f).<sup>66</sup> Following the report, on 13 November 2012, then Chairperson of the Committee, Charles Chauvel MP, gave a notice of motion in the House to disallow these regulations. This notice of motion was not withdrawn, voted or debated on (or otherwise disposed of) within 21 sitting days, and therefore under s 6(1) of the Regulations (Disallowance) Act 1989 (which was in force at the time) the regulations were automatically disallowed at the end of 27 February 2013. This disallowance was published in the Statutory Regulations series, as a regulation with force of law in itself, on 28 February 2013.<sup>67</sup> One of the three disallowed regulations was then reinstated in the Road User Charges (Transitional Exceptions for Certain Farmers' Vehicles) Regulations 2013.<sup>68</sup> At the time, it was not explained why the House had not debated or otherwise disposed of the motion. A subsequent Committee report indicated that advice had been given to the relevant minister regarding the motion, but no House time had been devoted to debating the motion.<sup>69</sup> The minister told the Committee that had the motion been debated, it would have been defeated, and the government would have been forced to use House time to effectively reconfirm the regulations.<sup>70</sup> The minister believed that given the infrequent use of the 21-day disallowance procedure, the government voting down such a motion would not have set a good precedent

<sup>64</sup> Regulations Review Committee "Proposals for a Regulations Bill" [1987] AJHR I16B, 36.

<sup>65</sup> Regulations Review Committee "Investigation into the Road User Charges (Transitional Matters) Regulations 2012" (13 November 2012) at 12.

<sup>66</sup> Discussed in Chapters 7 and 10 respectively.

<sup>67</sup> Notice in relation to Notice of Motion to Disallow Regulations 5(3), 5(4) and 8 of the Road User Charges (Transitional Matters) Regulations 2012.

<sup>68</sup> Regulation 8 of the disallowed regulations was reinstated in the Road User Charges (Transitional Exemption for Certain Farmers' Vehicles) Regulations 2013. The Order-in-Council promulgating these regulations was made on 25 February 2013, *before* the regulations concerned were disallowed.

<sup>69</sup> Regulations Review Committee "Investigation into the Road User Charges (Transitional Exemption for Certain Farmers' Vehicles) Regulations 2013" (12 August 2013) at 9-11.

<sup>70</sup> Regulations Review Committee "Investigation into the Road User Charges (Transitional Exemption for Certain Farmers' Vehicles) Regulations 2013" (12 August 2013) at 9-11.

for future use of the procedure.<sup>71</sup> Instead, the government did not interfere with the motion, implicitly allowing the disallowance of the three regulations concerned while explicitly reinstating one of the disallowed regulations. Mr Chauvel, in his valedictory speech to the House on 27 February 2013, took the view that the disallowance occurring was an example of the proper use of the section 6 procedure and that the minister concerned had allowed the procedure to work in the way it was intended.<sup>72</sup> The Committee, however, expressed regret that the regulations concerned were immediately reinstated.<sup>73</sup> It encouraged the relevant minister to, in future, engage in dialogue with the member who lodged the motion regarding the issues underlying the motion and the viability of the regulations concerned.

The significance of this use of the disallowance procedure, therefore, remains to be seen. The successful disallowance of the regulations referred to above may lead to disallowance motions being submitted to the House more regularly, particularly in order to press the executive to address the Committee's concerns. The automatic disallowance procedure may, on the other hand, remain an infrequently used parliamentary check on the executive's regulatory powers, particularly since the government retains the power to expressly reinstate any disallowed regulations.

Thirdly, the power to amend or revoke regulations under s 46 of the Legislation Act 2012 serves as a reminder to those that exercise regulation-making powers that Parliament ultimately retains control over delegated legislation. The Regulations Review Committee has observed that "this clause confirms the position of those who delegate in that a delegated power does not prevent the exercise of the same power by the person who delegates".<sup>74</sup> Such a motion was moved in the House of Representatives for the first time on 26 September 2008.<sup>75</sup> The motion, which the House agreed to, revoked clause 4 of the Notice of Scopes of Practice and Related Qualifications Prescribed by the Nursing Council of New Zealand.

<sup>71</sup> Regulations Review Committee "Investigation into the Road User Charges (Transitional Exemption for Certain Farmers' Vehicles) Regulations 2013" (12 August 2013) at 9-11.

<sup>72</sup> (27 February 2013) 687 NZPD 8284.

<sup>73</sup> Regulations Review Committee "Investigation into the Road User Charges (Transitional Exemption for Certain Farmers' Vehicles) Regulations 2013" (12 August 2013) at 10-11.

<sup>74</sup> Regulations Review Committee "Report on the Statutory Publications Bill" [1990] AJHR I16 at 33.

<sup>75</sup> "Notice of Scopes Practice and Related Qualifications Prescribed by the Nursing Council of New Zealand Amendment Notice" Hon Dr Michael Cullen (23 September 2008) 650 NZPD 19223.

### 3

## Regulations, Disallowable Instruments and Other Delegated Legislation

### I Introduction

Much of the jurisdiction of the Regulations Review Committee relates to examination of “regulations”, namely any delegated legislation, including secondary legislation within the meaning of the Legislation Act 2019.<sup>76</sup> Similarly, key consequences that may flow from the Committee’s examination, such as disallowance, can only be applied in relation to particular instruments.

The definitions of “regulations”, “delegated legislation”, “legislative instruments” and “disallowance instruments” are therefore relevant to the work of the committee. This chapter explains these terms, some of which are in states of transition and subject to reform.

### II Delegated legislation generally

There is a hierarchy of legislative instruments. When Parliament passes a bill it becomes an Act of Parliament, also known as a *statute or primary legislation*. Parliament is, however, not the only institution that produces legislation; Parliament may delegate the power to make laws to another body or individual. Laws made pursuant to such a power are known as *delegated or secondary legislation*.<sup>77</sup> Instruments by the Executive, commonly called regulations, are one form of delegated legislation. Regulations are sometimes also called *secondary or subordinate legislation*.

It is a well-established principle that statutes should set out the substantive policy of a law, while regulations may provide the detail necessary for the implementation of that law, without, for example, purporting to levy taxes, amend Acts of Parliament or have retrospective effect.<sup>78</sup> These are matters of such importance that they are properly the

<sup>76</sup> Standing Orders of the House of Representatives 2020, SO 2.

<sup>77</sup> Delegated legislation is also known as “subordinate legislation” or “statutory instruments”. For further discussion regarding delegated legislation in New Zealand, see Morris and Malone, above n 3, at 7-31; Palmer and Palmer, above n 2, at 202-209; David McGee *Parliamentary Practice in New Zealand* (3rd ed, Dunmore Publishing Ltd, Wellington, 2005) at 396-423 and Ross Carter, Jason McHerron and Ryan Malone *Subordinate Legislation in New Zealand* (LexisNexis, Wellington, 2013).

<sup>78</sup> Cabinet Office, *Cabinet Manual 2017* at [7.82].

domain of an Act of Parliament. Regulations may, however, contain key factors that guide the implementation of policy enacted by Parliament, give effect to New Zealand's international obligations or ensure prompt response to emergencies. Regulations are also commonly used where the area of law concerned needs to be updated or replaced regularly.<sup>79</sup>

Regulations therefore deal with a vast array of subject matter, often in a detailed or technical manner. For instance, regulations may, amongst other things, provide for the issuing of licences or permits, govern the use of harbours and reserves, set levels of fees for government services, and establish laws relating to aviation and transport.

Delegation of law-making is usually justified for the following reasons:<sup>80</sup>

- the pressure of parliamentary time;
- the technicality of the subject matter;
- any unforeseen contingencies that may arise during the introduction of large and complex schemes of reform;
- the need for flexibility;
- an opportunity for experiment; and
- emergency conditions requiring speedy or instant action.

The New Zealand Parliament generally has insufficient time to legislate on all matters that are potentially relevant to the implementation of a new law. The House devotes considerable time debating the substantive policies of bills during reading debates, within select committees, and at the committee of the whole House stage.<sup>81</sup> To ask it to go through a similar process in order to legislate on all technical matters relating to the implementation of the law would be impractical.<sup>82</sup>

Delegated legislation can overcome Parliament's 'limitation of aptitude' to deal with technical matters. This included "detailed technical knowledge, for example, of trademarks, designs, diseases, poisons, legal procedure and so on, upon which the Minister can and does consult experts".<sup>83</sup> Using regulations to pass laws on such matters has two advantages. First,

<sup>79</sup> For further discussion of the constitutional divide between primary and secondary legislation, see Ross Carter, Jason McHerron and Ryan Malone *Subordinate Legislation in New Zealand* (LexisNexis, 2013) at 23–42.

<sup>80</sup> Report of the Committee on Ministers' Powers 1932, Cmnd 4060 [*The Donoughmore Report*]; adopted in Report of the Delegated Legislation Committee [1962] AJHR I18 [*Algie Committee*].

<sup>81</sup> For an outline of the parliamentary legislative process, see McGee, above n 77, at 341–390.

<sup>82</sup> For example, at the time of writing there were 28 different sets of regulations in force made pursuant to the Resource Management Act 1991.

<sup>83</sup> *Algie Committee*, above n 80, at 6.

regulations can be amended relatively quickly when compared to an Act of Parliament. This allows rapid movements in technical development and knowledge to be provided for in the law. Secondly, it overcomes the problem of having Acts overburdened with provisions dealing with matters of great complexity and detail.

In addition, Acts that introduce large-scale reform of an area of law may bring about certain difficulties and, in the words of the Regulations Review Committee, “it is inevitable that in the case of lengthy and complex reform that anomalies, discrepancies and mistakes will become apparent from time to time and that these will need to be rectified promptly”.<sup>84</sup> Although generally discouraged, one way of dealing with unforeseen difficulties is through the making of regulations that amend the principal Act in order to correct any anomalies that become apparent.<sup>85</sup> Regulations can usually be made considerably faster than can an Act of Parliament. By contrast, a bill that seeks to amend the provisions of an Act must compete with other bills on Parliament’s agenda, and then must pass through the various stages of the parliamentary process before it becomes law.<sup>86</sup>

As noted earlier, policy is a matter for Parliament. By delegating its law-making powers, however, there is a risk that the executive will use those powers to legislate on matters of substantive policy. The key issue is to what extent Parliament should delegate its regulation-making power to another body. If precise limits are set down in the principal Act specifying the exact matters that may be contained in a regulation, the body to whom the power is granted must legislate within those confined limits. If it does not, the regulation is liable to be struck down by the courts as being *ultra vires* (“outside the powers”). In this way, Parliament can retain control over those matters that should properly be dealt with by statute. In contrast, if a regulation-making power contained in an Act is broad and allows legislation to be made for very general and non-specific purposes, the likelihood of delegated legislation dealing with matters more appropriate for parliamentary enactment increases. In short, the broader the regulation-making power, the greater the possibility that it is an inappropriate delegation of law making power to the executive.

<sup>84</sup> Regulations Review Committee “Inquiry into the Resource Management (Transitional) Regulations 1994 and the Principles that Should Apply to the Use of Empowering Provisions Allowing Regulations to Override Primary Legislation During a Transitional Period” [1995] AJHR I16C at 15.

<sup>85</sup> This kind of regulation-making power is known as a “Henry VIII clause”. These are further discussed in Chapter 14(IV).

<sup>86</sup> It should be noted, however, that Parliament can pass laws under urgency which can facilitate the rapid enactment of a bill. See generally McGee, above n 77, at 153-157.

One of the clearest examples of a broad regulation-making power was contained in the Economic Stabilisation Act 1948. The purpose of the Act was to “promote the economic stability of New Zealand”. Section 11 of the Act allowed the Governor-General to make regulations “as appear to him to be necessary or expedient for the general purposes of this Act”. Given that this regulation-making power lacked any specificity, the executive was able to use it to put through controversial measures such as wage, price and rent freezes. Indeed, then-Prime Minister Robert Muldoon was recorded as saying that the government could “do anything provided you can hang your hat on economic stabilisation”.<sup>87</sup> Given the impact of the regulations on individuals and businesses, many commentators argued that the freezes were of such importance that only Parliament should have had the power to bring them into force.<sup>88</sup>

### **III Key definitions: regulations, disallowable instruments and secondary legislation**

Over time, the different categories of delegated legislation have been defined by several instruments, statutory and otherwise. For present purposes, there are five important definitions:

- First, the definition of the term “regulations” in the Standing Orders of the House of Representatives.
- Secondly, the definition of “disallowable instrument” in section 38 of the Legislation Act 2012.
- Thirdly, the definition of “regulations” in section 29 of the Interpretation Act 1999.
- Fourthly, the definition of “regulations” in section 2 of the Regulations (Disallowance) Act 1989 (this definition ceased to have legal force on 5 August 2013 but is still useful for comparative purposes).
- Fifthly, the definition of “secondary legislation” under the (soon to be in force) Legislation Act 2019.

Before the coming into force of the Legislation Act 2012, the primary definition of these instruments, then officially known as “regulations”, was contained in the Regulations (Disallowance) Act 1989. This form of delegated legislation is now known as “disallowable instruments”, the definition of which is provided by the Legislation Act 2012. However, the

<sup>87</sup> Palmer, above n 6, at 12.

<sup>88</sup> Doug Kidd *Legislature v Executive: The Struggle Continues* (New Zealand Centre for Public Law, Victoria University of Wellington, Occasional Paper No 3, 2001) at 2-3.

term “regulations” remains commonly used to refer to these instruments, and at the time of writing, the term remains defined in the Interpretation Act. Once the Interpretation Act 2019 comes into force (see below), a new term – “secondary legislation” – and definition will be adopted.

### ***A “Regulations” under the Standing Orders***

Standing orders define regulation as “any delegated legislation, including secondary legislation within the meaning of the Legislation Act 2019”.<sup>89</sup> The definition of regulations has been updated in response to the Legislation Act 2012 and Legislation Act 2019. The changes ensure that the Regulations Review Committee’s jurisdiction is consistent with the statutory language used in the Legislation Act 2012 and Legislation Act 2019, while also continuing to use the term “regulations” to describe the instruments the Committee may scrutinise. For this reason, the Digest continues to use the term “regulations” to refer to all instruments subject to scrutiny by the Regulations Review Committee, except where the context otherwise requires.

### ***B “Disallowable Instruments” under the Legislation Act 2012***

The legislative regime managing the classification, management and disallowance of delegated legislation was significantly changed on 5 August 2013, with the coming into force of relevant parts of the Legislation Act 2012.

The Act does not define the term “regulations”, nor does it use this term to refer to specific types of delegated legislation. Instead, the Act defines two new terms, “disallowable instruments” and “legislative instruments”. “Disallowable instrument” is defined in section 38:

#### **38 Disallowable instruments**

- (1) An instrument made under an enactment is a disallowable instrument for the purposes of this Act if 1 or more of the following applies:
  - (a) the instrument is a legislative instrument;
  - (b) that enactment or another enactment contains a provision (however expressed) that has the effect of making the instrument disallowable for the purposes of this Act;
  - (c) the instrument has a significant legislative effect.
- (2) However, an instrument is not a disallowable instrument for the purposes of this Act if the instrument—

<sup>89</sup> Standing Orders of the House of Representatives 2020, SO 3.

- (a) is made or approved by a resolution of the House of Representatives; or
- (b) is one that the House of Representatives could, by resolution, prevent from coming into force or taking effect; or
- (c) is one made by a court, Judge, or person acting judicially.
- (3) A bylaw that is subject to the Bylaws Act 1910 is not a disallowable instrument for the purposes of this Act.
- (4) This section is subject to other enactments that limit or affect when, or the extent to which, a kind of instrument is a disallowable instrument for the purposes of this Act.

The Regulations Review Committee has noted that this definition may be slightly broader than the definition of “regulations” contained in the 1989 Act.<sup>90</sup> Subsection (1) of the definition sets out three key categories of instruments which are treated as disallowable instruments (unless one of the exceptions applies).

First, “legislative instruments” are disallowable instruments. The instruments are defined in section 4:

“legislative instrument” means—

- (a) an Order in Council other than—
  - (i) an Order in Council that the empowering Act requires to be published in the Gazette;
  - (ii) an Order in Council that relates exclusively to an individual;
- (b) an instrument made by a Minister of the Crown that amends an Act or defines the meaning of a term used in an Act;
- (c) an instrument that an Act requires to be published under this Act;
- (d) resolutions of the House of Representatives that—
  - (i) revoke a disallowable instrument in whole or in part; or
  - (ii) amend a disallowable instrument; or
  - (iii) revoke and substitute a disallowable instrument.,

This category of instruments includes most Orders in Council, instruments made by Ministers which amend an Act or defines a term in an Act, instruments required by their parent Act to be published, and some resolutions of the House relating to disallowable instruments.<sup>91</sup>

<sup>90</sup> Legislation Bill 2012 (162–2) (select committee report) at 7.

<sup>91</sup> A few Orders in Council are not legislative instruments: see for example the Tariff (ANZTEC) Amendment Order 2013 and the Minerals Programme for Minerals (Excluding Petroleum) 2013 Order 2013. An example of a provision which declares instruments to be legislative instruments is section 571(2) of the Financial Markets Conduct Act 2013.



Secondly, disallowable instruments include instruments made under empowering provisions that, implicitly or explicitly, have the effect of making them disallowable. The Regulations Review Committee has begun to refer to this category of instruments as “disallowable instruments that are not legislative instruments” or “DINLIs” (although the use of this term has created some confusion, and its continued use is uncertain).<sup>92</sup> DINLIs also include “instruments with significant legislative effect”, discussed further below. The Committee completed a report into the identification and oversight of these instruments in 2014, discussed further in Chapter 14.<sup>93</sup>

This category of instruments is not identical to, but broadly overlaps with, the class of instrument that had, under the Regulations (Disallowance) Act 1989, come to be known as “deemed regulations” (although the term was never explicitly defined in legislation).<sup>94</sup> Historically, deemed regulations were instruments made pursuant to delegated authority that did not fall within the definition of “regulations” but were “deemed” to be regulations nonetheless. Generally, although not always, these instruments were designated as such by the text of their empowering Acts.<sup>95</sup> In other words, deemed regulations sat alongside “traditional” regulations as a form of secondary legislation.<sup>96</sup> As a consequence, the instrument in question was scrutinised by the Regulations Review Committee as well as being covered by the disallowance provisions of the 1989 Act. Nowadays, under s 38(1)(b) of the Legislation Act 2012, instruments that were once classed as “deemed regulations” may now be designated as disallowable instruments by their empowering Act, even if they are not legislative instruments.

<sup>92</sup> The Parliamentary Counsel Office currently refers to these instruments as “other instruments”. The Office maintains a list of other instruments ([www.pco.parliament.govt.nz/other-instruments](http://www.pco.parliament.govt.nz/other-instruments)) and the instruments can also be found through the New Zealand Legislation website at [www.legislation.govt.nz](http://www.legislation.govt.nz).

<sup>93</sup> Regulations Review Committee “Inquiry into the oversight of disallowable instruments that are not legislative instruments” (11 July 2014), see also Chapter 14.

<sup>94</sup> For further discussion of deemed regulations, see Chapter 14(III).

<sup>95</sup> This was generally achieved by expressly designating that instruments made under the empowering Act were to be treated as regulations for the purpose of the Regulations (Disallowance) Act 1989 but not for the purposes of the Acts and Regulations Publications Act 1989.

<sup>96</sup> There also exists a further category of legislation known as tertiary legislation. Tertiary legislation is delegated legislation that does not take the form of traditional regulations, deemed regulations, or any other form of secondary legislation. It includes such things as manuals, instructions, and some codes.

Finally, “instruments with significant legislative effect” qualify as disallowable instruments. The meaning of this category of instruments is set out in section 39:<sup>97</sup>

**39 Instruments that have significant legislative effect**

- (1) An instrument has a significant legislative effect if the effect of the instrument is to do both of the following:
  - (a) create, alter, or remove rights or obligations; and
  - (b) determine or alter the content of the law applying to the public or a class of the public.
- (2) For the purposes of subsection (1),—
  - (a) an instrument that determines or alters the temporal application of rights or obligations must be treated as having the effect described in paragraph (a) of that subsection; and
  - (b) an instrument that determines or alters the temporal application of the law applying to the public or a class of the public must be treated as having the effect described in paragraph (b) of that subsection.
- (3) In applying subsection (1), the following must be disregarded:
  - (a) the description, form, and maker of the instrument;
  - (b) whether a confirmation provision applies to 1 or more of its provisions;
  - (c) whether it also contains provisions that are administrative.
- (4) An instrument does not have a significant legislative effect if it explains or interprets rights or obligations in a non-binding way, as long as the instrument does not do anything else that would bring it within subsection (1).
- (5) An instrument that is made in the exercise of a statutory power and imposes obligations in an individual case does not determine or alter the content of the law just because the statutory power applies generally or to a class of persons.

In its report on the Legislation Bill, the Regulations Review Committee commended the classification of instruments as disallowable based on their substance rather than their form or description, as was the approach in the 1989 Act.<sup>98</sup> Delegated legislation could no longer be excluded from the disallowance regime simply on the basis of how it was described.<sup>99</sup>

<sup>97</sup> Empowering provisions for this category of instruments were not covered by the definition of “regulations” in the Regulations (Disallowance) Act 1989, but SO314(3)(b) of the 2011 Standing Orders stated that the Regulations Review Committee could scrutinise “any provision that contains a delegated power to make instruments of a legislative character.” This Standing Order was deleted in the 2014 revisions, because the inclusion of this type of instrument in the definition of “disallowable instrument” renders it unnecessary.

<sup>98</sup> Legislation Bill 2012 (162–2) (select committee report) at 7.

<sup>99</sup> Legislation Bill 2012 (162–2) (select committee report) at 7.

Parliament, however, remains able to clearly indicate in the empowering Act that an instrument is *not* disallowable for the purposes of the Legislation Act.<sup>100</sup>

While adopting a different style of definition and some different terms, the definition of “disallowable instrument” is generally similar in scope to the definition of “regulations” under the 1989 Act, other than some possible differences around the margins. The Committee’s jurisdiction therefore does not appear to have been significantly affected by the change in terminology, though if anything it has been slightly broadened. Most disallowable instruments must be presented to the House not later than the 16th sitting day after the day on which they are made and are subject to the Regulations Review Committee’s supervisory ambit and the parliamentary disallowance mechanisms discussed below.<sup>101</sup>

The Cabinet Manual provides that legislative instruments must not come into force until at least 28-days after notification in the *Gazette*. While this rule does not apply to disallowable instruments, the policy behind the rule, namely to ensure the law is publicly available and capable of being ascertained prior to coming into force, is arguably just as relevant to disallowable instruments. In 2016, the Committee wrote to three entities bring this issue to their attention and enquiring as to their opinion on whether the rule would have been good practice for their regulations.<sup>102</sup> The Committee expressed particular concern with the amendments to the New Zealand Greyhound Racing Association Incorporated Rules. These amendments were notified in the Gazette on 1 December 2016, however, no detail was given as to the nature and substance of amendments. Further, while it appears that the amendments were incorporated in the rules on the Association’s website, information regarding the amendments was not readily available nor were previous versions of the rules available for comparison. The amendments rules were also presented to the House in this manner. The Committee recommended that an explanation of the amendments is included

<sup>100</sup> Legislation Act 2012, s 38(4). This power to expressly exclude instruments from the disallowance scheme can be seen in, for example: Section 12B(9) of the Remuneration Authority Act 1977 excluding determinations of judicial salaries from disallowance; Section 17(3) of the Members of Parliament (Remuneration and Services) Act 2013 excluding orders setting the privileges available to Members of Parliament from the scheme; and Section 32(6) of the Telecommunications (Interception Capability and Security) Act 2013 excluding exemptions given to telecommunications networks from the interception capability requirements of that Act, from disallowance.

<sup>101</sup> See Chapters 3.

<sup>102</sup> Regulations Review Committee “Activities of the Regulations Review Committee in 2016” [2017] AJHR I.16C at 14.

in the Gazette notification.<sup>103</sup>

### ***C “Regulations” under the Interpretation Act 1999***

Section 29 of the Interpretation Act 1999 also defines “regulations”:

“Regulations” means—

- (a) Regulations, rules, or bylaws made under an Act by the Governor-General in Council or by a Minister of the Crown;
- (b) An Order in Council, Proclamation, notice, Warrant, or instrument, made under an enactment that varies or extends the scope or provisions of an enactment;
- (c) An Order in Council that brings into force, repeals, or suspends an enactment;
- (d) Regulations, rules, or an instrument made under an Imperial Act or the Royal prerogative and having the force of law in New Zealand;
- (e) An instrument that is a legislative instrument or a disallowable instrument for the purposes of the Legislation Act 2012;
- (f) An instrument that revokes regulations, rules, bylaws, an Order in Council, a Proclamation, a notice, a Warrant, or an instrument, referred to in paragraphs (a) to (e).

This definition is the same as that contained in section 2 of the Regulations (Disallowance) Act 1989, which was in force at the time at which the Interpretation Act was passed, except paragraph (e) of the definition has since been amended to include reference to the Legislation Act 2012. The effect of this amendment is that the concept of “regulations” under the Interpretation Act 1999 encapsulates *all* instruments falling within the relevant definitions contained in *both* the 1989 and 2012 Acts. The continued use of the term “regulations” in the Standing Orders to describe the instruments the Committee scrutinises therefore fits cleanly within the legislative scheme contained within both Acts.

It is notable that Parliament has retained reference to “regulations” in this Act while not yet including such reference in the Legislation Act 2012. The Regulations Review Committee has indicated that it will continue to use the term “regulations” to refer to delegated legislation generally, as it did prior to 2013.<sup>104</sup> As noted above, the term “regulations” also continues to be used in the Standings Orders.

<sup>103</sup> Regulations Review Committee “Activities of the Regulations Review Committee in 2017” [2017] AJHR I.16D at 13 – 14.

<sup>104</sup> Regulations Review Committee “Activities of the Regulations Review Committee in 2013” (27 June 2014) at 6.

## ***D “Regulations” under the Regulations (Disallowance) Act 1989***

In previous editions of this publication, regulations were primarily defined by section 2 of the Regulations (Disallowance) Act 1989 as follows:

“Regulations” means—

- (a) Regulations, rules, or bylaws made under an Act by the Governor-General in Council or by a Minister of the Crown:
- (b) An Order in Council, Proclamation, notice, Warrant, or instrument, made under an enactment that varies or extends the scope or provisions of an enactment:
- (c) An Order in Council that brings into force, repeals, or suspends an enactment:
- (d) Regulations, rules, or an instrument made under an Imperial Act or the Royal prerogative and having the force of law in New Zealand:
- (e) An instrument that is a regulation or that is required to be treated as a regulation for the purposes of the Regulations Act 1936 or Acts and Regulations Publication Act 1989 or this Act:
- (f) An instrument that revokes regulations, rules, bylaws, an Order in Council, a Proclamation, a notice, a Warrant, or an instrument, referred to in paragraphs (a) to (e).

This definition ceased to have force of law since 2013, but it is still relevant for historical reasons. This definition is illustrative of the types of instruments still commonly called “regulations”. Importantly, many of the older Committee reports and other publications cited in this Digest rely on this older definition, the substance of which is captured within the definition of “regulations” that remains in the Interpretation Act 1999.

## ***E “Secondary legislation” under the (soon to be in force) Legislation Act 2019***

The definition of secondary legislation that must be published and presented to the House of Representatives or that is subject to disallowance through parliamentary procedures has been vexing and confusing, as the myriad of definitions discussed earlier testifies. The Legislation Act 2019 (enacted but not yet fully in force) and the Secondary Legislation Bill 2019 (soon to be passed companion bill) seek to address this.<sup>105</sup> The Legislation Act 2019 rewrites and updates both the Legislation Act 2012 and Interpretation Act 1999, re-enacting the two into one Act. Notably, the Legislation Act 2019 tackles the definition of secondary

<sup>105</sup> For background, see Dean R Knight “Specifying the corpus of secondary legislation subject to publication, presentation and disallowance” [2020] Public Law 585 and Attorney-General, *Access to secondary legislation: policy approvals for the Secondary Legislation (Access) Bill* (Paper for Cabinet Legislation Committee, March 2019).

legislation. Rather than relying on woolly and complicated definitions, the new regime relies on specification of secondary legislation as such in all legislation empowering secondary legislation – thereby requiring a massive project to amend almost every Act on the statute book.

The Legislation Act 2019, when it comes into force after its companion bill is passed, establishes a single category of ‘secondary legislation’, namely:

“secondary legislation” means an instrument (whatever it is called) that—

- (a) is made under an Act if the Act (or any other legislation) states that the instrument is secondary legislation; or
- (b) is made under the Royal prerogative and has legislative effect.

Thus, once in force, the definition of secondary legislation for the purpose of presentation to the House and disallowance is clear and certain. The definition also clarifies the extent of the obligation to publish secondary legislation.<sup>106</sup> Significantly, the Legislation (Repeals and Amendments) Act 2019 will, at some time in the future, amend the Legislation Act 2019 to provide that, subject to a few exceptions, secondary legislation does not commence until published electronically on a central legislation website.<sup>107</sup>

The new specification approach has necessitated a massive revision project for the Parliamentary Counsel Office, who have examined all the empowering provisions in each and every statute to determine whether or not instruments made under those provisions should be specified as secondary legislation. When making that assessment, a test of whether instruments are likely to have legislative effect has been applied; in other words, in general terms, whether the instruments “make legal rules that apply generally”, “apply to the public or class of the public” or “create a framework to be applied again and again.

<sup>106</sup> Legislation Act 2019, Part 3.

<sup>107</sup> Legislation (Repeals and Amendments) Act 2019, sch 2, which will amend Legislation Act 2019, s 73.

## 4

# Regulation-making Powers in Bills

## I Introduction

The Regulations Review Committee plays an important role in shaping the empowering provisions under which such regulations are made, in addition to its role reviewing regulations once they have come into force. Under Standing Order 326(3) the Committee may, in relation to a bill before another committee, examine, among other things, any regulation-making power.<sup>108</sup> In some cases, a select committee considering a bill containing a regulation-making power or powers will refer that particular aspect of the bill to the Committee. In any event, the Committee undertakes routine scrutiny of regulation-making powers in all bills that are referred to a select committee.

After considering any regulation-making powers in a bill, the Committee will then set out its findings in a letter to the committee considering the bill. It is up to the committee considering the bill to decide whether or not to include any of the Committee's recommendations in its report to the House.<sup>109</sup> It is notable, however, that although not formally obliged to, committees mostly "recommend to the House that a regulation-making power be amended in accordance with the advice of the Regulations Review Committee."<sup>110</sup> Former Committee Chairperson, Sir Doug Kidd, has described this regulation-making power review function as the "most important... in that it is a top of the cliff function and of enduring value".<sup>111</sup> In other words, by aiming to ensure that regulation-making powers in primary legislation are appropriately drafted, the Committee provides an initial safeguard against poor quality or inappropriate regulation-making.

<sup>108</sup> Standing Orders of the House of Representatives 2020, SO 326(3)(a). However, there is no formal requirement in the Standing Orders that all regulation-making powers in bills be referred to the Committee.

<sup>109</sup> Some committee reports will record under the heading of "Committee Process" that the Regulations Review Committee made a report to them, while others may not. Even where committees do refer to a Regulations Review Committee report, such committees do not always explain why its recommendations were or were not followed, there being no obligation in Standing Orders to do so.

<sup>110</sup> Hunt, above n 13, at 403. See also Regulations Review Committee "Activities in 2008" (30 September 2008), at 12.

<sup>111</sup> Kidd, above n 88, at 4.

In examining regulation-making powers in bills, the Committee is not confined to the scrutiny grounds set out in the Standing Orders. It does, however, consider it useful to test of a regulation-making power to ask whether “regulations made under the empowering provisions [may] potentially transgress any such grounds.”<sup>112</sup> Additionally, it will consider whether the “regulation-making provisions infringe well established principles.”<sup>113</sup> For example, that regulation-making provisions should not permit the making of regulations that deal with matters of policy, amend primary legislation, or have inadequate provision for “scrutiny and control.”<sup>114</sup>

This Chapter sets out examples of common issues that the Committee has identified when examining regulation-making powers in bills before other committees and its recommendations to those committees. Where possible, it also sets out:

- whether those recommendations were adopted and/or referred to by the relevant committee in its report to the House; and
- if the recommendations were adopted, whether this resulted in any amendment to regulation-making power in the relevant Act as ultimately passed.

## **II Matters of policy and substance**

It is a well-established principle that statutes should set out the policy of a law, while regulations may provide the detail necessary for the implementation of that law.

There are a number of examples of the Committee considering regulation-making powers that allowed for the making of regulations dealing with matters of policy, and the Committee ultimately recommending that these powers either be amended or omitted altogether, particularly under Standing Order 327(2)(f).<sup>115</sup>

First, clause 22 of the Aviation Security Legislation Bill proposed to amend section 100 of the Civil Aviation Act (a regulation-making provision). The Committee took the view that an amendment proposed by clause 22(1), which allowed regulations to be made under a broad empowering provision for “assisting or enhancing aviation security”, dealt with matters of policy.<sup>116</sup> It noted in particular that this seemed to be at odds with the technical focus of the other regulation-making powers in section 100. The Committee recommended

<sup>112</sup> Regulations Review Committee “Activities in 2008”, above n 110, at 12.

<sup>113</sup> Regulations Review Committee “Activities in 2008”, above n 110, at 12.

<sup>114</sup> Regulations Review Committee “Activities in 2008”, above n 110, at 12.

<sup>115</sup> See Chapter 10 for further discussion of this Standing Order.

<sup>116</sup> Letter from the Regulations Review Committee to the Transport and Industrial Relations Committee regarding the Aviation Security Legislation Bill 2007 (110-2) (24 May 2007).



that the Transport and Industrial Relations Committee seek further information on, among other things, why the regulation-making power was drafted so widely, and ways to limit its scope. The Transport and Industrial Relations Committee agreed with the Committee and recommended in its report to the House that the power be amended to include a list indicating the matters to be covered by the regulations.<sup>117</sup> This recommended amendment was included in section 100(ee) of the Civil Aviation Act 1990, as inserted by Civil Aviation Amendment Act 2007.

Secondly, the Public Lending Right for New Zealand Authors Bill, which dealt with payments to New Zealand authors for books lent in local libraries, proposed that the definitions of author, New Zealand author, and book be contained in regulations made under a regulation-making power in clause 10(2). The Committee pointed out that this would mean that regulations would determine whom the Bill applied to.<sup>118</sup> It identified similar concerns with clause 10(3) of the Bill, which allowed regulations to be made specifying the eligibility criteria for both New Zealand authors and books that entitled New Zealand authors to payments under the Act. The Committee took the view that these were all matters of policy deserving full parliamentary scrutiny and not something that should be dealt with in regulations. The Committee's concerns were ultimately addressed by Supplementary Order Paper, moved by the minister, which inserted appropriate definitions in the Bill.<sup>119</sup>

Thirdly, the Energy Safety Bill proposed a new section 169A of the Electricity Act 1992 allowing regulations to prescribe, among other things, how owners of electricity supply systems were to implement and maintain a safety management system that ensures that the electricity supply system does not present a significant risk of serious harm to any member of the public, or of significant property damage. The meaning both of "serious harm" and of "property damage" was also to be set out in detail in regulations. Further, the definition of "electricity supply system" contained in the Bill was wide enough to include New Zealand households, unless otherwise limited by regulation. The Committee took the view that these factors were all matters of policy and, accordingly, were best dealt with in an Act rather than

<sup>117</sup> Aviation Security Legislation Bill 2007 (110-2) (select committee report).

<sup>118</sup> Letter from the Regulations Review Committee to the Government and Administration Committee regarding the Public Lending Right for New Zealand Authors Bill 2008 (227-1) (6 August 2008).

<sup>119</sup> Supplementary Order Paper 2008 (246) Public Lending Right for New Zealand Authors Bill (104-1). The Bill was discharged due to the expiry of the reporting deadline; thus, the Government Administration Committee did not respond to the Regulations Review Committee's concerns because no report was issued.

delegated legislation.<sup>120</sup> As a result of this finding, the Committee recommended that the amendments to the empowering Act (the Electricity Act 1992) should more clearly identify the requirements for a safety management system, what works or electrical installations are part of an electricity supply system, and what constitutes serious harm or significant property damage. The Commerce Committee agreed with these recommendations, including them in its report to the House.<sup>121</sup> Its recommendations were ultimately included in the Electricity Amendment Act 2006.

### III Henry VIII Clauses

A Henry VIII clause is a provision in an Act that allows primary legislation to be amended, suspended or overridden by delegated legislation. As discussed in Chapter 14, the Committee has generally taken a dim view of these clauses on the basis that only Parliament should be able to amend its own laws. The Committee has taken a broad view of what constitutes a Henry VIII clause, including regulation-making powers that alter the scope or effect of legislation, even if the text of the legislation is not changed.<sup>122</sup>

The Committee used to take the view that these clause should be only used in exceptional circumstances (and never routinely in reforming legislation) and be drafted in “the most specific and limited terms possible.”<sup>123</sup> The Committee has said:<sup>124</sup>

As a matter of principle, [Henry VIII clauses] are undesirable because they give the government of the day the power to override the will of Parliament, and thus have serious implications for Parliament’s ability in practice to control and oversee the delegation of its law-making powers. Henry VIII powers should therefore be granted by Parliament, and used by the government of the day, only in exceptional circumstances and subject to appropriate controls and safeguards.

The Committee would often recommend the deletion of Henry VIII clauses.

<sup>120</sup> Letter from the Regulations Review Committee to the Commerce Committee regarding the Energy Safety Review Bill 2006 (269-2) (1 March 2006).

<sup>121</sup> Energy Safety Review Bill 2006 (269-2) (select committee report).

<sup>122</sup> Regulations Review Committee “Activities of the Regulations Review Committee in 2012” (19 March 2014) at 18.

<sup>123</sup> Regulations Review Committee “Inquiry into the Resource Management (Transitional) Regulations 1994 and the Principles that Should Apply to the Use of Empowering Provisions Allowing Regulations to Override Primary Legislation During a Transitional Period”, above n 84 at 16.

<sup>124</sup> Regulations Review Committee “Investigation into the Road User Charges (Transitional Matters) Regulations 2012 (13 November 2012)” at 3.

Since 2018, however, the Committee has scrutinised these clause “in a more practical manner”, focusing on whether the regulation-making power is “necessary” and has “appropriate constraints on the use of the power”.<sup>125</sup>

A number of examples illustrate the Committee concerns about the use of Henry VIII clauses.

First, clause 27 of the Policing Bill authorised amendments to a schedule by Order in Council. The Committee took the view that amendments to the schedule, which specified policing roles performed by police employees and the powers conferred on those employees when carrying out the specified role, would involve a significant amount of policy content and not just matters of technical detail.<sup>126</sup> It expressed particular concern about the lack of any limits in clause 27 on the nature of the powers that could be conferred on police employees through amendments to the schedule. The Committee was not convinced that its scrutiny of any regulations made under clause 27 for technical correctness would provide a sufficient level of parliamentary oversight of amendments to the powers of police employees. It suggested the clause be omitted and amendments to the schedule be made by an amending statute, as this would ensure changes in the powers conferred on police employees were subject to full the scrutiny of the House and its committees. The Committee noted that an acceptable alternative would be annual confirmation of changes by statute (as recommended by the Legislation Advisory Committee). In its report on the Bill, the Law and Order Committee did not recommend clause 27 be omitted, but recommended that clause 27 be amended to require the confirmation of an Order in Council by an Act of Parliament.<sup>127</sup> The recommendations were ultimately included in sections 27(3) and (4) of the Policing Act 2008.

Secondly, clause 36(a) of the Affordable Housing: Enabling Territorial Authorities Bill authorised regulations to prescribe results additional to those set out in clause 8(3) that must flow from a method of assessing the need for affordable housing. Clause 36(b) authorised regulations “prescribing criteria additional to those in section 13(2) for the allocation of

<sup>125</sup> Regulations Review Committee “Activities of the Regulations Review Committee in 2018” (20 March 2019) at 4.

<sup>126</sup> Letter from the Regulations Review Committee to the Law and Order Committee regarding the Policing Bill 2008 (195-2) ((14 May 2008). Other examples of Henry VIII clauses in bills that the Committee has considered include the Reserve Bank of New Zealand Amendment Bill (No 3) 2007 (174-1), new ss 157G(1) and 157(2), Climate Change (Emissions Trading and Renewable Preference) Bill 2007 (187-1), new s 62N(1)(a), and Waitakere Heritage Area Bill 2006 (15-1), cl 7.

<sup>127</sup> Policing Bill 2008 (195-2) (select committee report).

affordable housing that must be stated in an affordable housing policy.” The Committee took the view that clauses 36(a) and 36(b) both raised matters of policy, because they affected the decision-making processes of territorial authorities.<sup>128</sup> It was not convinced there were any circumstances justifying dealing with such policy matters through delegated legislation. It noted in particular that there was no obvious need for urgency. It also expressed concern about the lack of any additional procedural safeguards or level of scrutiny. Accordingly, the Committee recommended that clauses 36(a) and 36(b) be omitted altogether.<sup>129</sup> The Local Government and Environment Committee adopted the Committee’s recommendations in its report to House.<sup>130</sup> These recommended amendments were included in the Affordable Housing: Enabling Territorial Authorities Act 2008.

Thirdly, the Dog Control Amendment Bill (No 2) proposed a new section 78A allowing breeds of dog to be added to a schedule by regulation following consultation by the responsible minister. The consequences of adding a breed of dog to the schedule were that it may be prohibited from importation into New Zealand, and that it may be classified as being potentially dangerous and thus require muzzling in public. The Committee expressed a number of concerns about adding breeds of dog a schedule through regulation, as this was a matter of policy that should be dealt with by an Act of Parliament.<sup>131</sup> The existing legislation already provided a mechanism for dealing quickly with dangerous dogs, eliminating any need for an expeditious amendments to the Act. It was also concerned that the consultation requirements for additions to the schedule were an inadequate substitute for the scrutiny of the House and its committees. As a result of these concerns, the Committee recommended the new section 78A be removed from the Bill altogether. In this instance, the Local Government and Environment Committee did not include or refer to the Committee’s recommendation in its report to the House.<sup>132</sup>

<sup>128</sup> Letter from the Regulations Review Committee to the Local Government and Environment Committee regarding the Affordable Housing: Enabling Territorial Authorities Bill 2008 (189-2) (22 May 2008).

<sup>129</sup> The Committee made a further recommendation applicable to either clause if it was retained. It noted that neither clause 8(3) nor clause 13(2) stated that additional criteria could be added by regulation, leaving the reader unaware additional requirements may need to be taken into account. The Committee recommended remedying this by making it clear in the clauses that other criteria could be prescribed by regulation.

<sup>130</sup> Affordable Housing: Enabling Territorial Authorities Bill 2008 (189-2) (select committee report).

<sup>131</sup> Letter from the Regulations Review Committee to the Local Government and Environment Committee regarding the Dog Control Amendment Bill (No 2) 2008 (176-2) (6 March 2008).

<sup>132</sup> Dog Control Amendment Bill (No 2) 2008 (176-2) (select committee report).

Similarly, the Child Protection (Child Sex Offender Register) Bill provided a schedule of a list of offences that could mean an offender might be registered. This schedule could be amended by Order in Council. The Committee believed this power appeared unjustifiable: there were no reasons or exceptional circumstances given as to why this power was required and there was no criteria given for this power to be used. Following the Committee's advice, the Social Services Committee considered that this power could not be justified and recommended to the House that clause 50 be deleted.<sup>133</sup>

Clauses which allow regulation to amend the definition of the primary Act in an attempt to 'future proof' the legislation also risk the dangers posed by Henry VIII clauses. For example, the Taxation (Land Information and Offshore Persons Information) Bill 2015 allowed amendment of the central definition of "specified estate in land". In the specific context of estates in land, the Committee considered the policy decisions inherent in such an amendment would be more appropriate for parliamentary enactment. Similarly, the Customs and Excise Bill provided that the definition of "specified enactment" was to be defined by Order in Council. What enactments were appropriate to trigger a detention power would therefore be left to the discretion of the Executive. The Bill further provided that the definition of "serious default" could be amended by Orders in Council. In response to the Committee's concerns, the Foreign Affairs, Defence and Trade Committee recommended deleting the reference to "specified enactments" and instead addressing extensions to the power in clause 187 when new statutes are drafted. The Foreign Affairs, Defence and Trade Committee also recommended including a monetary threshold to "serious default", limiting the scope of the Henry VIII power.<sup>134</sup>

#### **IV Limits of regulation-making power**

The Legislative Advisory Committee has said that "empowering provisions... should be drafted so that the limits of the delegated legislative power are specified as clearly and precisely as possible."<sup>135</sup> Drawing on this general rule, the Committee has, at times, taken

<sup>133</sup> Regulations Review Committee "Activities of the Regulations Review Committee in 2016) at I.16C at 6.

<sup>134</sup> Regulations Review Committee "Activities of the Regulations Review Committee in 2017" [2017] AJHR I.16D at 5.

<sup>135</sup> Legislation Advisory Committee *Guidelines on the Process and Content of Legislation* (2001 edition with amendments, Wellington, 2007) at [10.1.7] Legislation Advisory Committee *Guidelines on the Process and Content of Legislation* (Wellington, 2014), chapter 13.5 and Legislation Advisory and Design Committee *Legislation Guidelines* (Wellington, 2017), chapter 13.

the view that the limits on a particular regulation-making power are unclear or are too broadly drawn.

A number of examples illustrate this principle. First, clause 75(1)(e) of the Public Health Bill empowered the Governor-General to make regulations:

Providing for the establishment, appointment, procedures, and powers of any person or group of persons or body or organisation established to perform specific functions or to make specific decisions that relate to the NCSP or to matters referred to in paragraphs (b) and (d).

The Committee suggested that, among other things, both the purpose and the extent of this clause were unclear, and that it potentially allowed any regulations to be made as long as they related to the NCSP in some way.<sup>136</sup> It recommended that clause 75 be amended to, among other things, clarify and prescribe the intent and extent of the power being delegated. The Health Committee did not accept or refer to this recommendation in its report to the House.<sup>137</sup>

Secondly, clause 11 of the Reserve Bank of New Zealand Amendment Bill (No 3) proposed a new section 157L of the Reserve Bank of New Zealand Act, which contained a broadly drafted power to make regulations “for the purpose of imposing requirements in relation to the governance of deposit takers.” Paragraphs (a) to (d) of the section then went on to list four non-exhaustive matters illustrative of the regulations which could be made. The Committee recommended that, unless there was good reason for keeping the regulation-making power so broad, it should be restricted to the matters set out in paragraphs (a) to (d).<sup>138</sup> The Finance and Expenditure Committee recommended that the regulation-making power in new section 157L be omitted altogether and that the Bill be amended to specify, in the primary legislation, the requirements relating to governance.<sup>139</sup> These recommended amendments were ultimately included in the Reserve Bank of New Zealand Amendment Act 2008.

Thirdly, the Anti-Money Laundering and Countering Financing of Terrorism Amendment Bill added two new sections relating to disclosure of information. The provision, as introduced, appears to suggest that the regulation could extend the purpose for which information may be disclosed. In particular, the regulation-making power did not require

<sup>136</sup> Letter from the Regulations Review Committee to the Health Committee regarding the Public Health Bill 2008 (177-2) (14 May 2008).

<sup>137</sup> Public Health Bill 2008 (177-2) (select committee report).

<sup>138</sup> Letter from the Regulations Review Committee to the Finance and Expenditure Committee regarding the Reserve Bank of New Zealand Amendment Bill (No 3) 2008 (174-2) (3 April 2008).

<sup>139</sup> Reserve Bank of New Zealand Amendment Bill (No 3) 2008 (174-2) (select committee report).

recipients of information under a specific section to have a “proper interest” in receiving the information, seemingly inconsistent with requirements elsewhere in the bill. The Committee recommended greater limits on the regulation-making power relating to information sharing and the Law and Order Committee similarly acknowledged that “the framework provided for information sharing under clauses 38, 40 and 48 is unduly broad”. Consequently, amendments were made and a new section was created, allowing for regulations relating to information sharing to be made by Order in Council. This sections however imposes additional safeguards, such as required Minister consultation with the Privacy Commissioner.<sup>140</sup>

## V Omnibus Provisions

An omnibus provision is the most general form of empowering provision and offends the principle that requires the limits of delegated legislative power to be specified as clearly and precisely as possible.<sup>141</sup> For example, clause 37 of the Rail Network Bill provided for the making of regulations “providing for any other matters contemplated by this Act or necessary for its administration or necessary for giving it full effect”. In its recommendations on clause 37 to the Government Administration Committee, the Committee said “the significance of this type of provision is whether it confers any substantive authority as opposed to authorising only procedural provisions.”<sup>142</sup> The Committee said case law supports the view that a provision such as clause 37 will only “cover matters that are incidental or ancillary to what is enacted in the statute itself, and will not support attempts to widen, vary or depart from the general intent or purposes of the empowering legislation.”<sup>143</sup> The Committee recommended that if specific regulation-making powers were intended, they should be clearly identified. In its report to the House, the Government Administration Committee recommended that clause 37 be amended to make specific provision for a process for preparing rail network development plans.

The form of omnibus provisions has changed over time. Before 1962, regulation-making powers were generally framed by first authorising the making of “any regulations deemed

<sup>140</sup> Regulations Review Committee “Activities of the Regulations Review Committee in 2017” [2017] AJHR I.16D at 6.

<sup>141</sup> See Part D above.

<sup>142</sup> Letter from the Regulations Review Committee to the Government Administration Committee regarding the Rail Network Bill 2005 (28 July 2005).

<sup>143</sup> Letter from the Regulations Review Committee to the Government Administration Committee regarding the Rail Network Bill 2005 (28 July 2005), citing *Shannahan v Scott* (1956) 96 CLR 245.

necessary for giving full effect to the Act” (similar to clause 37 above); and second by authorising the making of regulations for a number of specified purposes without limiting the general power. Since 1962, the general or omnibus provision has instead been placed as a catch-all after any specific regulation-making provisions, reversing the previous order. The Committee in 1986 stated that doing so more clearly sets out the exact limits of the regulation-making powers contemplated by Parliament.<sup>144</sup> In 2014, the Committee reiterated that placing the omnibus provision *after* specific regulation-making powers allows the general power to be “read down” and limited by the content and context of the specific powers.<sup>145</sup>

In considering the Harmful Digital Communications Bill 2014, the Committee noted that clause 21 of the proposed bill used the pre-1962 structure. The Committee wrote to the Justice and Electoral Select Committee recommending that the omnibus provision be amended to the post-1962 form, for two reasons.<sup>146</sup> First, if the clause were not amended, Parliament would have little control over the exact purposes for which regulations could properly be made under it. Second, without amendment, the courts would have a reduced and unclear jurisdiction in determining the validity of regulations made under clause 21 vis-à-vis the ultra vires principle. The Justice and Electoral Select Committee recommended such an amendment, and the bill was enacted consistent with the post-1962 style of omnibus provisions.<sup>147</sup>

Omnibus provisions continue to arise from time to time. For example, in 2015 the Radiation Safety Bill permitted regulation via codes of practice for a list of purposes, the last being “any provision of the Act”.<sup>148</sup> The Committee continues to recommend that such provisions are used sparingly and with appropriate safeguards, such as consultation or ministerial approval. Similarly, in 2017, the Committee recommended the regulation-making power in the Customs and Excise Bill 2016 be re-drafted “to reflect a more common drafting style that is consistent with its purpose of empowering regulations that are ancillary

<sup>144</sup> Regulations Review Committee “Regulation-making powers in legislation” [1986] I.16A, at [5.16].

<sup>145</sup> Regulations Review Committee “Activities of the Regulations Review Committee in 2014” (8 August 2014) at 17–18.

<sup>146</sup> Regulations Review Committee “Activities of the Regulations Review Committee in 2014” (8 August 2014) at 17–18.

<sup>147</sup> Harmful Digital Communications Act 2015, s 26.

<sup>148</sup> Regulations Review Committee “Activities of the Regulations Review Committee in 2015” [2015] AJHR I16A at 12.



or incidental to the specific regulation-making powers in the bill”; this recommendation was adopted.<sup>149</sup>

## VI Scrutiny and control

Another issue the Committee often confronts is whether law-making powers have been delegated without adequate provision for scrutiny and control of the instrument. One of the major concerns here is that delegated legislation is not subject to the same level of scrutiny as primary legislation. Accordingly, the Committee may recommend that provision be made for some other form of scrutiny or control of the content of delegated legislation.

An important means of ensuring a level of scrutiny over the content of delegated legislation is the requirement of consultation before delegated legislation is made. To this end, the Committee has recommended on a number of occasions that consultation requirements be included or strengthened in the bills it is considering.

First, the Committee was concerned about the adequacy of the proposed consultation requirements for regulations amending the schedule of dangerous dogs in the Dog Control Act. The Committee recommended that if the Henry VIII regulation-making power was enacted (which it recommended against), the consultation requirements set out in the new section 78A should be strengthened. This was because amendments to the schedule had the potential to affect a wide spectrum of the public, but consultation was limited to those special interest groups that the minister thought appropriate. Accordingly, the Committee recommended a requirement of public notification that a consultation process was underway. It took the view that this requirement would go some way to offsetting the lack of select committee scrutiny ordinarily available in the case of amendments to primary legislation. The Local Government and Environment Committee did not accept or refer to these recommendations.<sup>150</sup>

Secondly, the Committee recommended to the Commerce Committee that consultation requirements be strengthened in the Energy Safety Review Bill in relation to, among other

<sup>149</sup> Letter from Regulations Review Committee to Foreign Affairs, Defence and Trade Committee regarding Customs and Excise Bill (9 February 2017); Customs and Excise Bill 2016 (209-2) (select committee report).

<sup>150</sup> Dog Control Amendment Bill (No 2) 2008 (176-2) (select committee report).

things, licensing matters.<sup>151</sup> The Committee expressed concern that clause 82 of the Bill required the Plumbers, Gasfitters and Drainlayers Board to consult before issuing notices designating classes of licence, but not before issuing notices dealing with matters such as minimum standards, terms and conditions and licences, requirements for competent and safe work practices, and recognition of overseas qualifications. Accordingly, the Committee recommended that clause 82 be amended to require that before a notice is issued in relation to any of these other matters, “the Board consult with licensed plumbers, gas fitters and drainlayers or any person, representative of persons or classes of persons affected by the notice.”

The Commerce Committee accepted this recommendation, recommending in its report to the House that the broader consultation obligation be inserted.<sup>152</sup> This recommended amendment was ultimately included in the Electricity Amendment Act 2006. It is noteworthy, however, that the Commerce Committee did not accept or refer to two other recommendations the Committee made in relation to consultation. The first recommendation was that the new section 169A, discussed above, be amended to include a general requirement to consult with affected parties. The second recommendation was for a general requirement “to consult with representative organisations for persons affected by proposed regulations to be made under the various Acts amended by the Bill.”

## **VII Status of instrument made under an Act**

At times it will not be clear if an instrument made under a proposed regulation-making power falls within the definition of a disallowable instrument in section 38 of the Legislation Act 2012. Clarity on this question is important because an instrument’s status will determine, among other things, whether or not it will be susceptible to the scrutiny of the Committee and the disallowance procedure set out in the Legislation Act 2012. Accordingly, where it is unclear whether an instrument made under a proposed regulation-making power is a disallowable instrument for the purposes of the Legislation Act 2012, the Committee will usually recommend that this be clarified in the instrument’s empowering legislation.

An example of this (under the Regulations (Disallowance) Act 1989 framework) arose in the Committee’s recommendations to the Finance and Expenditure Committee on the

<sup>151</sup> Letter from the Regulations Review Committee to the Commerce Committee regarding the Energy Safety Review Bill (269-2) (1 March 2006).

<sup>152</sup> Energy Safety Review Bill 2006 (269-2) (select committee report) at 29.

Climate Change (Emissions Trading and Renewable Preference) Bill.<sup>153</sup> The Bill proposed a new section 62F of the Electricity Act 1992 that would permit the Minister of Energy to grant or vary an exemption by notice in the *Gazette*. In the Committee's view, such an exemption notice might fall under paragraph (b) of the definition of regulation in section 2 of the Regulations (Disallowance) Act.<sup>154</sup> It recommended the new section 62F state whether or not the notices would be regulations under the Regulations (Disallowance) Act. The Finance and Expenditure Committee accepted this recommendation and recommended that the new section 62F be amended to clarify that exemption notices were not regulations for the purposes of the Regulations (Disallowance) Act 1989 or the Acts and Regulations Publication Act 1989.<sup>155</sup> This recommended amendment was included in the Electricity (Renewable Preference) Amendment Act 2008.

## VIII Constitutional Considerations

Wider constitutional considerations may inform the Committee's recommendations about regulation-making powers. For instance, concerns about executive interference with the independence of a judicial body informed the Committee's recommendations to the Justice and Electoral Committee on the Real Estate Agents Bill.<sup>156</sup> Clause 155(m) of the Bill allowed regulations to be made prescribing the maximum amount of compensation to be awarded under clause 107(2)(g) by a newly established disciplinary tribunal. The Committee expressed concern about the ability of the executive to limit the tribunal's jurisdiction in this way. It noted in particular that the executive should not be allowed to reduce the amounts the tribunal can award, should the tribunal not perform as it expected it to. The Committee suggested that, instead, this kind of decision was a matter properly deserving the full scrutiny of the House. It recommended that clause 155(m) be omitted and that clause 107(2)(g) be amended to specify any monetary limit the tribunal may order. The Justice and Electoral Committee agreed with the Committee's recommendations and included them in

<sup>153</sup> Letter from Regulations Review Committee to Government Administration Committee about Civil Defence Emergency Management Amendment Bill (17 March 2016) (recommending status of various instruments be clarified).

<sup>154</sup> A regulation under paragraph (b) of the definition in that Act was: "an Order in Council, Proclamation, notice, Warrant, or instrument, made under an enactment that varies or extends the scope or provisions of an enactment."

<sup>155</sup> Climate Change (Emissions Trading and Renewable Preference) Bill 2007 (187-2) (select committee report).

<sup>156</sup> Letter from the Regulations Review Committee to the Justice and Electoral Committee regarding the Real Estate Agents Bill 2008 (185-2) (14 May 2008).

its report to the House.<sup>157</sup> The recommended amendment was ultimately included in the Real Estate Agents Act 2008.

## **IX Material Incorporated by Reference**

At times, legislation (particularly delegated legislation) will give legal effect to material from an extrinsic source without repeating the contents of that material in the incorporating legislation. A common example of this practice is the incorporation by reference of technical standards. The Committee has released two occasional reports on the incorporation of material by reference,<sup>158</sup> both of which are discussed in detail, along with associated government responses and the changes made by Part 3, Subpart 2 of the Legislation Act 2012, in Chapter 14.

One example of the Committee making specific recommendations concerning the use of material incorporated by reference occurred in its recommendations to the Health Committee on the Health (Drinking Water) Amendment Bill. Clause 7 of the Bill allowed the Minister of Health to issue or adopt drinking water standards. Clause 9 of the Bill inserted sections that regulated the use of material incorporated by reference (in a way that the Committee concluded was appropriate in the circumstances). The Committee expressed concern that the relationship between standards “adopted” by the minister and material incorporated by reference was unclear. This was because the Bill allowed material to be incorporated by reference into standards “made” or “issued” under the Act, but the minister was empowered to “issue” or “adopt” standards. This left unclear whether material could be incorporated by reference into standards that were adopted. The Committee pointed out that it was possible that “the adoption of a standard is, in itself, an incorporation by reference, rather than the republication of the adopted standard.”<sup>159</sup> It suggested that if this were the case, it might be preferable if the provisions regulating the use of material incorporated by reference also applied to standards that are adopted. The Committee went on to say that it would not be good legislative practice if such adopted standards incorporated further material by reference. This was because giving such further incorporated material the status of law could have “unintended consequences,” including problems with accessing such

<sup>157</sup> Real Estate Agents Bill 2008 (185-2) (select committee report).

<sup>158</sup> Regulations Review Committee “Inquiry into Material Incorporated by Reference” [2004] AJHR I16G, and Regulations Review Committee “Further Inquiry into Material Incorporated by Reference” [2008] AJHR I16O.

<sup>159</sup> Letter from the Regulations Review Committee to the Transport and Industrial Relations Committee regarding the Health (Drinking Water) Amendment Bill 2007 (55-2) (7 September 2006).

material and with assessing its currency. The Committee recommended clarification about what was meant by adoption of a standard and whether the provisions regulating the incorporation of material by reference also applied to adopted standards. Although the Health Committee referred to and discussed the Committee's recommendations in its report to the House,<sup>160</sup> it did not ultimately accept them.

Another example is the Maritime Transport Amendment Bill, where the Committee raised concerns about the accessibility of material incorporated into maritime and marine protection rules.<sup>161</sup> The proposed clauses only required that documents incorporated be made available for inspection at the head office of Maritime New Zealand. However, Committee recommended that the incorporated material also be made available on Maritime New Zealand's website, except where publication would infringe copyright. Transport and Industrial Relations Committee did not adopt this recommendation, instead recommending that the incorporated material be made available for inspection at all Maritime New Zealand's offices.<sup>162</sup>

<sup>160</sup> Health (Drinking Water) Amendment Bill 2007 (55-2) (select committee report) at 7-8.

<sup>161</sup> Letter from the Regulations Review Committee to the Transport and Industrial Relations Committee about the Maritime Transport Amendment Bill 2016 (200-2) (1 December 2016).

<sup>162</sup> Maritime Transport Amendment Bill 2016 (200-2) (select committee report) (16 May 2017).

## 5

### General Objects and Intentions of the Act

#### SO 327(2)(a)

##### **327 Drawing attention to a regulation**

- (1) In examining a regulation, the committee considers whether it ought to be drawn to the special attention of the House on one or more of the grounds set out in paragraph (2).
- (2) The grounds are, that the regulation—
  - (a) is not in accordance with the general objects and intentions of the statute under which it is made:

*Hist:* SO 319(2)(a) (September 2014 to October 2020)  
 SO 315(2)(a) (October 2011 to August 2014)  
 SO 310(2)(a) (September 2008 to October 2011)  
 SO 315(2)(a) (August 2005 to September 2008)

## **I Introduction**

The Committee has approached this ground in two ways. First, it may ask itself whether the regulation is consistent with the intentions of the statute as a whole. Secondly, it may consider whether the regulation-making power in the Act authorises the making of such a regulation. In a sense, this second enquiry is simply one component of the first enquiry. If a regulation is outside the terms of the regulation-making power, then arguably it will not be consistent with the intentions of the Act. For the purposes of this analysis, however, it is helpful if the two approaches of the Committee are separated out in this way.

This Standing Order ground is one of the three most often discussed in the reports of the Regulations Review Committee.<sup>163</sup> The Statutes Revision Committee made two important points regarding it. First, its inclusion as a ground of review “is not intended to open the Regulations Review Committee to discussion on matters of policy. It is intended that the Committee deal only with the policy as written in general terms”.<sup>164</sup> The distinction is an

<sup>163</sup> The other two grounds most often discussed are SO 327(2)(b) (undue trespasses on personal rights and liberties) and 327(2)(c) (unusual or unexpected use of a regulation-making power).

<sup>164</sup> Statutes Revision Committee “First Report on Delegated Legislation” [1985] AJHR I5A at 8.

important one. This ground requires the Committee to consider the objects and intentions of the Act under which the regulation was made. As a consequence, the Committee will consider the policy implicit in the Act to ascertain whether the regulations are consistent with that policy. Yet, in doing so, the Committee will not examine the merit of the policy itself, since this is outside the Committee's jurisdiction.

The second point made by the Statutes Revision Committee is that this ground does not allow the Regulations Review Committee to invalidate a regulation on the basis that it is ultra vires the empowering Act. Rather, this is a matter for the courts. The Regulations Review Committee concurs with this view. It has stated that a finding of ultra vires and a breach of Standing Order 327(2)(a) are separate and distinct grounds of review.<sup>165</sup> The Committee did acknowledge, however, that of all the grounds listed in Standing Orders 327(2), this ground is "closest to raising the question of ultra vires".<sup>166</sup> This is because a finding that the regulation was made outside the terms of the regulation-making power is tantamount to a finding that the regulation was made without proper authority. Yet, from a jurisdictional point of view, the distinction is important, since only a court can invalidate delegated legislation.

## **II Purpose of the Act**

The Committee has taken a broad approach to deciding on the objects and intentions of any given Act. It is not uncommon for a complainant to argue that because a regulation is inconsistent with one part of the empowering Act, the regulation is not in accordance with the objects and intentions of the Act as a whole. The Committee has tended not to be drawn into such a narrow approach, preferring instead to look for the wider purpose of an Act.

For example, in its investigation into the Legal Services Board (Civil and Criminal Legal Aid Remuneration) Instructions 1998, the complainants argued that new guideline fees issued by the Legal Services Board for remuneration of practitioners providing legal aid were too low.<sup>167</sup> The complainants cited the long title of the Act: "An Act to make legal assistance more readily available to persons of insufficient means". The complainants argued that

<sup>165</sup> Regulations Review Committee "Sixth Australasian and Pacific Conference on Delegated Legislation and Third Australasian and Pacific Conference on the Scrutiny of Bills" [1997] AJHR I16D at 11.

<sup>166</sup> Regulations Review Committee "Sixth Australasian and Pacific Conference on Delegated Legislation and Third Australasian and Pacific Conference on the Scrutiny of Bills" [1997] AJHR I16D at 11 at 10.

<sup>167</sup> Regulations Review Committee "Complaint Relating to Legal Services Board (Civil and Criminal Legal Aid Remuneration) Instructions 1998" [1998] AJHR I16M.

practitioners would be unwilling to take on domestic violence work at such a low rate, and that this would have implications for the safety of victims of domestic violence. Yet the long title did not provide a complete picture of the objects and intentions of the Act. Section 95(1)(c) obliged the Board to ensure that the civil and legal aid schemes were as “inexpensive, expeditious, and efficient as is consistent with the spirit of the Act”. Thus, the Board was required to balance competing objectives and for this reason the regulations were not considered to be in breach of Standing Order 327(2)(a).

A similar approach was taken by the Committee in its investigation into the Accident Rehabilitation and Compensation Insurance (Employment Premiums) Regulations 1995 and 1996.<sup>168</sup> Section 167 of the Accident Rehabilitation and Compensation Insurance Act 1992 provided for regulations prescribing rates of premiums and risk-based classifications. The complainant company supported risk-based premiums, but argued that the phased introduction of the scheme was unreasonable because it prolonged cross-subsidisation of high-risk employers by low-risk employers. The complainant pointed to the long title of the Act that stated that the scheme was to be “insurance-based” and argued that to set premiums that were disproportionate to the actual risk an employer presented was inconsistent with the objects of the Act. The Committee responded by stating that the long title of an Act is only a précis of the purpose of the Act and should be read along with various provisions of the statute. The Committee found that the Act gave the Accident Compensation Corporation a broad discretion as to how it set premium rates. The regulations were not, therefore, considered to be in breach of this ground.<sup>169</sup>

In 2005, the Committee reviewed a notice that prescribed the rental payments and costs that societies paid to gaming machine operators who ‘hosted’ their gaming machines.<sup>170</sup> The complainant (the Charity Gaming Association) argued that the level of payments had been set too low, and that this would discourage gaming machine operators from hosting machines. This would mean less money spent on gaming machines generally, which in turn would mean less money distributed to the community. In advancing its case, the complainant argued that this outcome would be contrary to the Gambling Act 2003 (the

<sup>168</sup> Regulations Review Committee “Complaint Relating to the Accident Rehabilitation and Compensation Insurance (Employment Premiums) Regulations 1995 and 1996” [1997] AJHR I16C.

<sup>169</sup> See Regulations Review Committee “Complaints Relating to the Accident Insurance (Insurer’s Liability to Pay Costs of Treatment) Regulations 1999” [1999] AJHR I16V, which also dealt with the objects and intention of the Accident Insurance Act 1998.

<sup>170</sup> Regulations Review Committee “Complaint Regarding the Limits and Exclusions on Class 4 Venue Costs Notice 2004” [2005] AJHR I16M.



empowering Act). Section 3(g) provided that one of the purposes of the Act was to “ensure that money from gambling benefits the community”. The Committee was not persuaded. It stated that the requirement that gambling benefit the community did not in itself require that a certain level of gambling be maintained. It pointed out that section 3 identified a number of other purposes that also had to be taken into account. It further noted that any reduction in gambling that flowed from the notice was not inconsistent with an Act that sought to control the growth of gambling.

The Committee did find fault with the Accident Insurance (Review Costs and Appeals) Regulations 1999.<sup>171</sup> The regulations were made pursuant to the Accident Insurance Act 1998 that introduced the market-model for the provision of accident compensation insurance. Section 405(d) of the Act provided for regulations to remunerate claimants for the costs of appealing a decision on an insurance claim. The Department of Labour openly acknowledged that remuneration levels were set at relatively low levels to discourage claimants from having legal representation in the review process. This, the Department argued, was because the review was intended to be an informal and non-litigious process. The Committee, however, concluded that the regulations breached Standing Order 327(2)(a). In the opinion of the Committee, a general object of the Act was to ensure equitable compensation for certain classes of personal injury. In addition, the Act reflected a clear legislative intention that all parties should have access to a fair and effective dispute resolution procedure. It was concluded that the regulations unjustifiably impeded the ability of an applicant to choose to be legally represented in this process by setting an inadequate rate of remuneration. If a claimant could not be legally represented in the review process, then the objects and intentions of the Act were being defeated.<sup>172</sup>

If an Act sets a process for the vetting of regulations, such as a review panel, then it could be contrary to the purposes of the Act if that process is not followed in all material respects. Section 72 of the Canterbury Earthquake Recovery Act 2011 required the Review Panel convened under that Act to have, inter alia, a member with legal expertise present to consider the regulations remitted to it. Due to a conflict of interest, the legal member recused themselves while considering the Canterbury Earthquake District Plan Order 2014.<sup>173</sup> A

<sup>171</sup> Regulations Review Committee “Complaints Relating to the Accident Insurance (Reviews Costs and Appeals) Regulations 1999” [1999] AJHR I16W.

<sup>172</sup> A minority of the Committee believed that the non-litigious nature of the review process was beneficial and, therefore, that the level of remuneration was consistent with the empowering Act.

<sup>173</sup> Regulations Review Committee “Investigation into the Canterbury Earthquake District Plan Order 2014” [2015] AJHR I16A.

number of Committee members considered this to mean that the Act's purpose in having legal oversight had not been complied with, while other members did not believe the Act strictly set a quorum of legal expertise. As the Committee could not come to a decision in its investigation and the order was subsequently validated by Parliament, the issue is somewhat unresolved.

When regulations are used to set fees for a service, any significant increase in those fees may mean that the regulation is deemed to be inconsistent with the objects and intentions of the Act.<sup>174</sup> In 1998, the Committee undertook an investigation into the Disputes Tribunal Amendment Rules 1997 and 1998.<sup>175</sup> The Rules were made pursuant to the Disputes Tribunal Act 1988 which consolidated and amended the Small Claims Tribunal Act 1976. The long title of the Small Claims Tribunal Act 1976 provided that the Act was to make provision for the establishment of tribunals to hear and determine small claims. Fees for lodging a claim with the tribunal were doubled under the 1997 Rules and then further increased under the 1998 Rules. A majority of the Committee found that the Rules breached Standing Order 327(2)(a) on the basis that the fees were set at such a level that they created potential barriers to justice for low income earners. In addition, in some cases the fees represented too high a proportion of the total amount being claimed. The purpose of the Act was to provide relatively low cost access to a small claims court. In the opinion of the Committee, the fees had been set at such a level that this object was being unjustifiably frustrated.

Similar issues were dealt with by the Regulations Review Committee in its investigation into fee increases for civil proceedings in the Disputes Tribunal, District Court, High Court, and Court of Appeal.<sup>176</sup> The fees were increased significantly in 2002, and then increased further in 2004. The complainants argued that the fee increases defeated the purposes of the empowering legislation (the Judicature Act 1908 and the District Courts Act 1947) by creating barriers to accessing the courts. In response, the Department for Courts suggested that the emphasis in both Acts was on administrative matters relating to how courts operated. In other words, *how* court services are to be provided rather than *why* they exist at all. Both Committees concluded that the empowering Acts went beyond merely providing for the administration of courts, and further, that access to justice was among the general

<sup>174</sup> The Committee has produced a report on the setting of fees by regulations. For a summary of the report see Chapter 14(II).

<sup>175</sup> Regulations Review Committee "Investigation into the Disputes Tribunals Amendment Rules 1997 and the Disputes Tribunals Amendment Rules 1998", above n 10.

<sup>176</sup> Regulations Review Committee "Investigation and Complaints Relating to Civil Court Fees Regulations" [2002] AJHR I16M and Regulations Review Committee "Investigation and Complaints Relating to Civil Court Fees Regulations 2004" [2005] AJHR I16H.

objects of each Act. In the 2002 report, the Committee felt unable to draw conclusions as to whether Standing Order 327(2)(a) had been breached given that the impact of the fee increases could not be established conclusively. However, in the 2005 report, the Committee identified certain types of fees that it considered excessive and which it declared not to be in accordance with the objects and intentions of the empowering legislation.

More recently, the Committee, in its investigation into the Resource Management (Forms, Fees, and Procedure) Amendment Regulations 2009, expressed concern that an increase in the filing fee for commencing proceedings in the Environment Court from \$55 to \$500 could unduly affect access to the Court in breach of SO 327(2)(a).<sup>177</sup> On the evidence available, however, it was unable to establish whether the increase was having such an effect. Accordingly, it issued an interim report giving the complainants an opportunity to re-open the complaint within a year's time should new evidence about the increased fee's operation arise. It recommended that the government take note of the interim report and monitor the effect of the fee increase on deterring persons from commencing proceedings in the Court; and the way in which the Registrar exercises his or her power to waive the fee. The government response accepted the Committee's recommendations and set out how the government proposed to monitor the operation of the fee increase and the exercise of the Registrar's waiver power.<sup>178</sup> In its final report on the complaint - issued approximately two years after the initial report - the Committee noted that, on the available evidence, it was not able to determine whether or not the new filing fee was having a deterrent effect on access to the Environment Court.<sup>179</sup> It encouraged the government to continue monitoring the effect of filing fee, and invited the complainants to re-submit their complaint, should new evidence of a deterrent effect arise.

In contrast, the Committee was not convinced that the extent of an increase in the annual practising fees for midwives from \$50 in 2003 to \$600 in 2006 was in itself objectionable in terms of Standing Order 327(2)(a).<sup>180</sup> However, it did find the Standing Order ground was made out in relation to the charging of fees in excess of cost in order to maintain a financial

<sup>177</sup> Regulations Review Committee "Complaint regarding the Resource Management (Forms, Fees, and Procedure) Amendment Regulations 2009" [2009] AJHR I16C.

<sup>178</sup> "Government Response to Interim Report of the Regulations Review Committee: complaints regarding SR 2009/73 Resource Management (Forms, Fees, and Procedure) Amendment Regulations 2009" [2010] AJHR J1 at 5.

<sup>179</sup> Regulations Review Committee "Complaint Regarding the Resource Management (Forms, Fees, and Procedure) Amendment Regulations 2009 (SR 2009/73)" [2011] AJHR I16M.

<sup>180</sup> Regulations Review Committee "Complaint Regarding Midwifery (Fees) Notice 2005" [2007] AJHR I16H at 9.

reserve. The Committee took the view that the empowering Act gave the Midwifery Council a broad power to levy the fees necessary to carry out its functions; and it accepted that the fees set were comparable to those set by other health regulatory agencies and reflected the cost of setting up the body. It noted, though, that there are general principles to be followed when public sector agencies set fees by regulation, which are contained in the Office of the Auditor General's *Guidelines on Costing and Charging for Public Sector Goods and Services* and the Treasury's *Guidelines Setting Charges in the Public Sector*.<sup>181</sup> A breach of these principles might amount to a breach of one or more of the Standing Order grounds. One of the principles in the guidelines is that charging more than the expected costs in order to maintain a financial reserve is not permitted (except where permitted by the empowering legislation). The rationale being that public sector agencies should not overcharge for services, and not gather revenue amounting to a tax. The Committee found that in this instance the empowering legislation did not allow the charging of fees in excess of costs and, therefore, the 2005 notice was outside the objects and intentions of the statute under which it was made.<sup>182</sup>

The Committee took a similar approach to the purpose of the empowering Act with regard to a sharp tightening of a time limit in its report on the Legal Services Regulations 2012.<sup>183</sup> The regulations, authorised by the empowering Act, set the timeframe for legal aid service providers to claim payment from the Ministry of Justice at three months (whereas previously there had been no time limit). The Committee assessed the time limit against the purpose of the empowering Act, which was found to be the delivery of services in an effective and efficient manner. It found that, while the existence of a time limit was not inconsistent with the purposes of the Act, such time limits needed to be set reasonably having regard to the statutory purpose identified. Applying this approach, the Committee took the view that the administrative burden on service providers and both the high level of delay and a significant backlog on the part of the Ministry meant that the current time limit did not provide for effective or efficient service delivery and that, accordingly, an SO 327(2)(a) complaint was made out. The Committee did not recommend disallowance on this ground because, since the complaint was laid, the regulation had been amended to provide a six month limit, which the Committee considered would be consistent with the purpose of the empowering Act.

<sup>181</sup> Office of the Auditor-General "Guidelines on Costing and Charging for Public Sector Goods and Services" (18 June 2008) <[www.oag.govt.nz](http://www.oag.govt.nz)> and Treasury, "Guidelines for Setting Charges in the Public Sector" (27 June 2008) <[www.treasury.govt.nz](http://www.treasury.govt.nz)>.

<sup>182</sup> It also found that this breached Standing Order ground 327(2)(f), see Chapter 10.

<sup>183</sup> Regulations Review Committee "Complaint regarding the Legal Services Regulations 2011" (19 September 2013).

The Committee also raised concerns, in response to a complaint, about whether the Social Security (Income and Cash Assets Exemptions) Regulations 2011 were not in accordance with the general objects and intentions of their empowering legislation.<sup>184</sup> The Regulations made compensation and ex gratia payments from the Crown exempt from certain social security calculations – but not compensation and payments from non-Crown bodies – and imposed a 12-month time limit on any exemption. The Committee recommended the Minister of Social Development consider the concerns raised. As a result, subsequent regulations extended the exemptions to non-Crown compensation and payments, as well as removing the 12-month time limit.

### **III Regulation-Making Powers**

The crucial aspect of any delegated law-making power, as noted earlier, is the extent to which restrictions are placed on the use of that power. This is done by specifying the purposes for which regulations may be made. In deciding whether a regulation is in accordance with the objects and intentions of an Act, the Committee may undertake an examination as to whether the content of the regulation fits with one of the purposes specified.

#### **A *A Matter of Interpretation***

In 1991, the Committee received a complaint regarding the Lake Taupo Regulations 1976. Section 232(11) of the Harbours Act 1950 allowed regulations to be made to regulate the use of wharves or docks, quays, landing stages and other landing places. Regulation 27(1) provided that no person shall use a launching ramp on Lake Taupo, but that it shall be a defence to a charge of doing so if a valid permit is held. Permit holders were required to pay a fee to obtain the permit. The Committee was of the opinion that the Department of Internal Affairs had no authority to charge a fee for use of the ramps under section 232(11). The Committee rejected the argument that implicit in the power to “regulate” the facilities was a power to charge fees to recover costs. It concluded that unless there was clear authority to impose a charge for a service, a body exercising delegated authority had no right to do so. Accordingly, the regulations were deemed to be in breach of this Standing Order ground.

#### **B *The ‘General’ Purpose***

A list of specific purposes for which regulations may be made is often accompanied by a ‘general’ purpose. This typically authorises regulations to be made for such matters as are

<sup>184</sup> Regulations Review Committee “Complaint about the Social Security (Income and Cash Assets Exemptions) Regulations 2011” (September 2019).

contemplated or are necessary for giving full effect to the provisions of the Act under which the regulations are made. The common law has constructed this type of provision to cover matters that are ancillary or incidental to what is enacted in the statute, but does not support a widening of, or departure from, the underlying intent and purpose of the Act.<sup>185</sup> Likewise, in 1962 the Delegated Legislation Committee stated that the general purpose authorised the making of regulations for subsidiary or incidental matters only, a view shared by the Regulations Review Committee.<sup>186</sup> Recently, the Committee has noted that any regulations adding extra regulatory steps to existing processes that are neither contemplated by the empowering Act nor necessary to fulfil the purpose of that Act, will likely breach this Standing Order ground.<sup>187</sup>

Section 165(x) of the Biosecurity Act 1993 allowed regulations to be made “providing for such matters as may be contemplated by or are necessary for giving full effect to this Act and for its administration”.<sup>188</sup> The Biosecurity (Rabbit Calicivirus) Regulations 1997 were made pursuant to section 165(x). The effect of the regulations was that it was no longer an offence under section 21 of the Animals Act 1967 to introduce or possess the rabbit-killing ‘calicivirus’ in New Zealand. The Ministry of Agriculture claimed section 165(x) properly authorised the making of the regulations. The Committee disagreed. It stated that “this type of provision authorises subsidiary and incidental matters but cannot be used to broaden the scope of regulations and include matters that would be more appropriately dealt with by parliamentary enactment”.<sup>189</sup> It was felt that as the regulations were highly contentious, and because they amended the application of the Animals Act 1967, the regulations contained matters more appropriate for parliamentary enactment. In the Committee’s opinion, the regulations could not be described as merely incidental or subsidiary and were not authorised by the section 165(x) ‘general’ power.

### ***C Conditions that Attach to the Regulation-Making Power***

A regulation-making power may be limited not only by the purposes specified in the regulation-making power but also by other conditions placed on the use of that power. For

<sup>185</sup> *Shanahan v Scott* (1957) 96 CLR 245.

<sup>186</sup> Regulations Review Committee “Inquiry into the Drafting of Empowering Provisions in Bills” [1990] AJHR I16.

<sup>187</sup> Regulations Review Committee “Investigation into the Marine and Coastal Area (Takutai Moana) Reclamation Fees Regulations 2012” (30 September 2013).

<sup>188</sup> Regulations Review Committee “Investigation into the Biosecurity (Rabbit Calicivirus) Regulations 1997” [1998] AJHR I16E.

<sup>189</sup> Regulations Review Committee “Investigation into the Biosecurity (Rabbit Calicivirus) Regulations 1997” [1998] AJHR I16E at 8.

example, section 28(1) of the Citizenship Act 1977 allowed regulations to be made prescribing fees payable for an application for citizenship. Section 28(2) provided that every fee must be “reasonable” having regard to the costs and expenses incurred by the department in processing the application. The Citizenship Regulations 1978, Amendment No 6 increased the costs of applications, while requiring child applicants to pay the same amount as an adult.<sup>190</sup> Having considered the work required to process a child’s application, the Committee concluded that the fee was being used to cross-subsidise the costs of adults’ applications, and that this was unreasonable.<sup>191</sup> Given that section 28(2) required any fees to be reasonable, the regulations were deemed to be not in accordance with the objects of the empowering Act.<sup>192</sup>

Before a regulation is made, a regulation-making power may require the individual or organisation exercising the power to undertake certain tasks or to consider certain matters relevant to the making of that regulation. On several occasions the Committee has had to consider whether a minister (or other body) failed to discharge certain obligations prior to the making of deemed regulations. In one instance, section 9(2) of the Land Transport Act 1993 required the Minister of Transport to take into account a number of factors prior to issuing a Land Transport Rule under section 5(e) of the Act (for instance, the cost of implementing land transport safety measures).<sup>193</sup> In reviewing *Land Transport Rule 32012*, the Committee examined whether the minister had considered all the matters specified in section 9(2). Having been satisfied that they had in fact been considered, the Committee found no breach of Standing Order 315(2)(a).

On another occasion, however, the Committee was not satisfied that all obligations had

<sup>190</sup> Previously applications from children that accompanied an adult’s application were processed free of charge.

<sup>191</sup> Regulations Review Committee “Investigation into the Citizenship Regulations 1978, Amendment No 6, Promulgated under the Citizenship Act 1977 and their Impact on Children of Families Granted to New Zealand on Humanitarian, Re-unification, or Refugee Grounds” [1996] AJHR I16H.

<sup>192</sup> See also Regulations Review Committee “Inquiry into the Accident Compensation (Accident Experience) Regulations 1992” [1992] AJHR I16G. In this instance, section 120 of the Accident Compensation Act 1992 contained the regulation-making power. An entirely separate section of the Act, s 40(2), placed conditions on the use of that regulation-making power. These conditions were not complied with when the regulations were made and the Committee recommended that the government review the regulations to correct the unfairness that had resulted.

<sup>193</sup> Regulations Review Committee “Complaint Relating to Land Transport Rule 32012 - Vehicle Standards (Glazing)” [1998] AJHR I16K.

been met.<sup>194</sup> Prior to the issuing of a Food Standard under section 11C of the Food Act 1981, the Minister of Health was required to consider several matters, one of which was the need to protect the public. The New Zealand Food Standard 1996, Amendment No 11 imposed mandatory warning labels on all products containing royal jelly, bee pollen, or propolis. The complainants alleged that there was insufficient scientific and technical evidence to support the safety concerns that the standard purported to address. The Committee agreed and found that Ministry of Health had acted on inadequate information and had failed to produce a substantive and comparative risk-assessment for all three products. As a result, the Committee felt that it was not possible that the minister could have satisfied the requirement to consider the need to protect the public given that the information relied upon was inadequate for this purpose. The Committee stated that “while the Minister has a discretion in deciding the weight to be given to different considerations there must be evidence available to support the decision”.<sup>195</sup>

More recently, the Committee considered a complaint from the Animal Rights Legal Advocacy Network in relation to a code of animal welfare.<sup>196</sup> Section 10 of the Animal Welfare Act 1999 requires owners of an animal to ensure that the physical, health, and behavioural needs of the animal are met in a manner that is consistent with good practice and scientific knowledge. Under the Act, codes can be issued establishing minimum standards for the care of animals and recommending best practices. The Animal Welfare (Layer Hens) Code of Welfare 2005 was issued pursuant to the Act, and amongst other things, provided for the minimum sizes of cages for layer hens to be up to 550sq cm per bird. The National Animal Welfare Advisory Committee (NAWAC) was the body charged with reviewing whether a proposed code included minimum standards necessary to ensure that the purposes of the Act would be met. NAWAC had recommended to the Minister of Agriculture that the code be issued. Yet, in its evidence to the committee, NAWAC openly acknowledged that the 550sq cm limit did not allow layer hens to display normal patterns of behaviour, and therefore that the code did not comply with section 10 of the Act. However, under section 73(3) NAWAC could recommend a code that did not meet the requirements of section 10 in “exceptional circumstances”. Under section 73(4), NAWAC had to take into account several factors in deciding whether exceptional circumstances existed.

<sup>194</sup> Regulations Review Committee “Complaint Relating to the New Zealand Food Standard 1996, Amendment No 11” [1999] AJHR I16Q.

<sup>195</sup> Regulations Review Committee “Complaint Relating to the New Zealand Food Standard 1996, Amendment No 11” [1999] AJHR I16Q at 11.

<sup>196</sup> Regulations Review Committee “Final Report on the Complaint About Animal Welfare (Layer Hens) Code of Welfare 2005” [2006] AJHR I16A.



In recommending that the code be issued, NAWAC had stated that uncertainty as to whether alternative layer systems (such as barn and free-range systems) would provide consistently better welfare outcomes for layer hens meant that exceptional circumstances did exist. While individual members of the Committee questioned the validity of this stance, in its report the Committee stated that “it is not our role to determine what is a good practice or what is the scientific basis of the welfare of layer hens under a code”.<sup>197</sup> The Committee nevertheless found the code to be in breach of Standing Order 327(2)(a). This was because NAWAC had stated that it would not review the use of the current cage systems until 2009. The Committee was of the view that it was stretching the meaning of “exceptional circumstances” to allow for a code that was in breach of section of the Act for such a long period. Accordingly, the Committee recommended that NAWAC review the code with a view to inserting a fixed date into the code specifying when a review would take place and providing for the transition to an alternative cage system.

The Committee reiterated their unwillingness to question expert evidence in a complaint about the Animal Welfare (Layer Hens) Code of Welfare 2012.<sup>198</sup> NAWAC had adopted a legal interpretation of s 10 of the Animal Welfare Act that may have amounted to an unusual use of regulatory authority, by distinguishing between welfare-essential and non-welfare-essential normal behaviours. The regulation could either be justified as reflecting NAWAC's expert judgment about hen behaviour or interpreted as rules adopted for improper reasons. The Committee could not be sure, even if the latter was the case, that a correct application of the Act would have resulted in a different code and was reluctant to find a breach accordingly.

A similar approach was taken when considering a complaint regarding the Shipping (Charges) Amendment Regulations 2013 and Marine Safety Charges Amendment Regulations 2013.<sup>199</sup> During consideration of the complaint, the Committee sought advice from the Office of the Auditor-General that indicated the fees and levies which were subject of the complaint were set using a reasonable, albeit opaque, process that was unlikely to exceed cost recovery. Therefore, the Committee considered the charges levied would not be so high as to frustrate the intention of Parliament (or be an improper use of regulatory

<sup>197</sup> Regulations Review Committee “Final Report on the Complaint About Animal Welfare (Layer Hens) Code of Welfare 2005” [2006] AJHR I16A at 16.

<sup>198</sup> Regulations Review Committee “Complaint about Animal Welfare (Layer Hens) Code of Welfare 2012” (14 October 2016).

<sup>199</sup> Regulations Review Committee “Complaint regarding Shipping (Charges) Amendment Regulations 2013 and Marine Safety Charges Amendment Regulations 2013” (12 December 2016).

power, or a matter more suited for parliamentary enactment).

### ***D Legitimate use of Power Not Determinative***

Even though a regulation has been made legitimately pursuant to a regulation-making power, the Committee might still conclude that the regulation is not in accordance with the objects and intentions of the empowering Act. For example, one of the objects and intentions of the Dairy Industry Restructuring Act 2001 was the promotion of efficient dairy markets by regulating Fonterra's activities in order to provide a level playing field for competition.<sup>200</sup> Section 115 of the Act permitted regulations requiring Fonterra to supply raw milk to independent processors at an agreed price or a price based on a methodology for determining that price. Regulation 8(6) of the Dairy Industry Restructuring (Raw Milk) Regulations 2001 established a formula for setting the default milk price of raw milk supplied to independent processors. The Committee accepted that the regulations were made legitimately, in that they were intended to promote the object of promoting a level playing field. However, it took the view that, in practice, the formula used and associated definitions for calculating the default price for raw milk supplied to independent processors were open to manipulation to such an extent that it undermined the objects and intentions of the Act. The Committee recommended amendments to regulation 8(6) to prevent such manipulation occurring. The government response directed the Ministry of Agriculture to incorporate the Committee's findings into a general review of the regulations.<sup>201</sup>

A further example related to regulations made pursuant to section 10 of the Reserve Bank Act 1964. Section 10 provided that unless authorised by regulation, it shall not be lawful for the Reserve Bank to engage in trade or have a financial interest in any commercial undertaking.<sup>202</sup> Clause 3 of the Reserve Bank of New Zealand Order 1988 provided that the Bank was authorised to trade to the extent of acting as the agent of "any person" in regards to securities. This was done to allow the Bank to act for State Owned Enterprises. While finding that section 10 of the Act did allow for the regulation to be made, the Committee was of the opinion that the section 10 exemption was not intended to allow the Bank to become involved in trading activities beyond the public sector. By using the term "any person" in the Order, the Committee considered that it would be quite possible for the bank to act for

<sup>200</sup> Regulations Review Committee "Complaint Regarding the Dairy Industry Restructuring (Raw Milk) Regulations 2001" [2007] AJHR I16K.

<sup>201</sup> "Government Response to Report of the Regulations Review Committee: Complaint Regarding the Dairy Industry Restructuring (Raw Milk) Regulations 2001" [2007] AJHR J1.

<sup>202</sup> Regulations Review Committee "Report on the Inquiry into the Reserve Bank of New Zealand Order 1988" [1988] AJHR I16.

private interests and thus contrary to the objects and intentions of the Act. The Committee recommended an amendment to the Order to make it clear that the Bank could only act for the public sector.

## 6

# Undue Trespass on Personal Rights and Liberties: SO 327(2)(b)

### **327 Drawing attention to a regulation**

- (1) In examining a regulation, the committee considers whether it ought to be drawn to the special attention of the House on one or more of the grounds set out in paragraph (2).
- (2) The grounds are, that the regulation—
  - ...
  - (b) trespasses unduly on personal rights and liberties:

*Hist:* SO 319(2)(b) (September 2014 to October 2020)  
 SO 315(2)(b) (October 2011 to August 2014)  
 SO 310(2)(b) (September 2008 to October 2011)  
 SO 315(2)(b) (August 2005 to September 2008)

## **I Introduction**

This ground seeks to enforce a balance between the interests of an individual or group affected by a regulation and the public benefit that that regulation seeks to achieve. Where the Committee considers that a regulation unreasonably impinges on a private right, the regulation may be found to be in breach of Standing Order 327(2)(b).

The Committee has established a three-step test for determining whether a regulation breaches Standing Order 327(2)(b). First, is there a right or liberty to be trespassed against? Secondly, has the regulation trespassed against that right or liberty? Thirdly, if so, is that trespass undue or unreasonable in the circumstances, balanced against the public interest in the making of the regulation? The following analysis of this ground is based on the three limbs of this test.

## **II Existence of Personal Right or Liberty**

The Committee has not laid down a definitive test to determine whether a right or liberty exists for the purposes of this ground. Instead, it has “taken a reasonably liberal approach to

what constitutes a right”.<sup>203</sup> It has not limited its definition of rights to those protected by statutes such as the New Zealand Bill of Rights Act 1990, or those recognised by the common law.<sup>204</sup> Where a right recognised by the law has been engaged, the Committee has not been prepared to extend the right’s scope beyond recognised bounds. For example, the Overseas Investment Amendment Regulations 2008 were the subject of a complaint relating to, amongst other things, the effect of the regulations on the price of shares in Auckland International Airport Limited. The Committee accepted that attempts by the government to prevent the purchase of a 40 percent share in the Airport by the Canadian Pension Plan Investment Board through the use of regulations had a negative impact on the price of shares in the Airport. However, the Committee took the view that a drop in share price resulting from legitimate regulatory intervention was something shareholders simply had to accept. It stated that while the rights of shareholders included the right to “enjoy the benefits of those shares and to sell the shares at their discretion”,<sup>205</sup> it was not prepared to accept there was a right to a stable share price.

On some occasions, however, the Committee has been content to declare that a right exists without recourse to the law. For instance, staffing orders promulgated under the Education Act 1989 had the potential to make teachers redundant and/or lead to a loss of income.<sup>206</sup> The Committee concluded that the orders “may well result in personal rights and liberties being unduly trespassed upon”.<sup>207</sup> Thus, personal interests such as employment and income can potentially be considered rights or liberties capable of being trespassed on. Similarly, in its examination of the Biosecurity (Ruminant Protein) Regulations 1999, the Committee stated that people have a legitimate right to conduct a business, as well as a right not to have that business unduly restricted.<sup>208</sup> Such rights or interests may not necessarily

<sup>203</sup> Regulations Review Committee “Complaint Regarding the Overseas Investment Amendment Regulations 2008” [2008] AJHR I16P.

<sup>204</sup> Regulations Review Committee “Complaint Regarding the New Zealand Teachers’ Council (Conduct) Rules 2004 (12 August 2013)” at 9.

<sup>205</sup> Regulations Review Committee “Complaint Regarding the Overseas Investment Amendment Regulations 2008” [2008] AJHR I16P.

<sup>206</sup> Regulations Review Committee “Complaint Relating to Staffing Orders, Promulgated under Section 91H of the Education Act 1989, Affecting Area, Primary, Intermediate, and Secondary Schools” [1996] AJHR I16F.

<sup>207</sup> Regulations Review Committee “Complaint Relating to Staffing Orders, Promulgated under Section 91H of the Education Act 1989, Affecting Area, Primary, Intermediate, and Secondary Schools” [1996] AJHR I16F at 9.

<sup>208</sup> Regulations Review Committee “Investigation into the Biosecurity (Ruminant Protein) Regulations 1999” [2000] AJHR I16A at 10.

be enshrined in law, but are deemed to exist nonetheless.

On other occasions, the Committee has required a complainant who claims a right to establish that the right exists in law. One way of doing this is by establishing that the right is contained in an Act of Parliament. In 2014, the Committee rejected a potential complaint under this ground relating to the Arms (Military Style Semi-automatic Firearms–Pistol Grips) Order 2013 as the complainant was unable to prove that there was a statutory right to possess or own a firearm.<sup>209</sup> Similarly, the Committee did not uphold a complaint regarding the Civil Aviation Charges Regulations (No 2) 1991 Amendment Regulations 2012, as it considered that participation in the aviation system under the Civil Aviation Act 1990 was a privilege, not a right.<sup>210</sup> On the other hand, in 1999 the Committee examined the Accident Insurance (Review Costs and Appeals) Regulations 1999.<sup>211</sup> The Committee found that those making a claim for an injury had a right to seek an effective remedy for a poor decision by an insurer, as this right was specified in section 134(4) of the Accident Insurance Act 1998. This right was reinforced by the statutory bar that prevents an injured person from suing for personal injury.

The Committee’s examination of the Accident Insurance (Insurer’s Liability to Pay Costs of Treatment) Regulations 1999 involved similar issues, but resulted in a different finding.<sup>212</sup> The regulations prescribed the amounts that an insurer had to pay for the costs of treatment for an injured worker. This meant that an injured worker would be required to pay the balance of the treatment costs where those costs exceeded the amounts payable by the insurance company. The complainants argued that workers had a right to receive the full cost of medical treatment resulting from an accident. It was argued that this right was sourced in the International Labour Organisation (ILO) Convention 17, which provided that injured workers should have the costs of treatment resulting from accidents paid for either by the employer or through accident insurance. Yet despite the ILO convention, the Committee concluded that as a matter of New Zealand law it could not be said that there existed a right to free medical care for injured workers. Ultimately, this was because the ILO convention was in conflict with New Zealand domestic law. The Accident Insurance Act 1998

<sup>209</sup> Regulations Review Committee “Activities of the Regulations Review Committee in 2014 (8 August 2014)” at 25–26.

<sup>210</sup> Regulations Review Committee “Complaint regarding the Civil Aviation Charges Regulations (No 2) 1991” Amendment Regulations 2012 (26 February 2014) at 12,

<sup>211</sup> Regulations Review Committee “Complaints Relating to Accident Insurance (Reviews Costs and Appeals) Regulations 1999”, above n 171.

<sup>212</sup> Regulations Review Committee “Complaints Relating to the Accident Insurance (Insurer’s Liability to Pay Costs of Treatment) Regulations 1999”, above n 169.

specifically allowed regulations to be made which had the effect of requiring workers to contribute towards the costs of their treatment in certain cases.

The question of whether a treaty that is consistent with New Zealand domestic law can provide a source of rights capable of being trespassed upon has not been explicitly addressed by the Committee. However, in its report on the Citizenship Regulations 1978, the Committee cited two international Conventions relating to the rights of the child as part of its discussion on a child's right to citizenship.<sup>213</sup>

A further discussion of rights capable of being trespassed on was provided in the Committee's report into a notice issued pursuant to the Fisheries Act 1996.<sup>214</sup> The notice added a number of new fish stocks to the Quota Management System (a statutory fisheries management system). One of the new stocks added was kina. Prior to the notice coming into effect, the complainant had a fishing permit that allowed him to catch 900 kilograms of kina per day. Under the QMS regime, this would drop to 343 kilograms per year. This was primarily because the complainant's actual catch of kina during the qualifying years was limited – an outcome the complainant alleged was the result of misinformation from the Ministry of Fisheries. He argued that the effect of the drop in his allowable kina catch constituted an undue trespass on his rights and liberties. In response, the Ministry of Fisheries argued that the 900 kilogram daily catch limit did not constitute a "right". Rather, it was a limit prescribed in the existing regulations that was subject to change depending on sustainability issues. The Ministry contrasted the permit limit with quota issued under the QMS, which it noted amounted to a transferable property right, issued in perpetuity. The Committee sided firmly with the Ministry, concluding that the complainant never had a right to catch 900 kilogram of kina per day. It expressed the view that the complainant's opposition appeared to stem from government policy regarding the QMS, rather than with the constitutional propriety of the notice itself.

### **III Trespass to the Right or Liberty**

The Committee's investigation into the Citizenship Regulations 1978, Amendment No 6 established two requirements for establishing that a right or liberty has actually been trespassed on. As noted previously, the regulations required all applicants – including

<sup>213</sup> Regulations Review Committee "Investigation into the Citizenship Regulations 1978, Amendment No 6, Promulgated under the Citizenship Act 1977 and their Impact on Children of Families Granted to New Zealand on Humanitarian, Re-unification, or Refugee Grounds", above n 191. The Committee used the terms 'injury' and 'trespass' interchangeably.

<sup>214</sup> Regulations Review Committee "Complaint Regarding Fisheries (Declaration of New Stocks Subject to Quota Management System) Notice (No 2) 2002" [2003] AJHR I16C.

children – to pay the same set fee. Given that previously no such fee was charged for children’s applications, the regulations had increased the costs to families of applying for citizenship. The Committee noted that “this fact alone is insufficient to establish that the regulations give rise to an injury to children”.<sup>215</sup> Rather, the regulations must impact adversely on the right that has allegedly been trespassed on.

The second requirement was implicit in the Committee’s statement that the “level of the impact will determine whether the regulations constitute an injury”.<sup>216</sup> Thus, if a regulation adversely affects a right or liberty only in a minimal or nominal way, then there may have been no trespass at all (let alone an undue trespass). Whether this is so will depend on the nature of the regulation in question and its impact on the right that is claimed. In this instance, the Committee had evidence before it that the increased fees had meant that some families had significantly delayed their citizenship application process. The Committee concluded that the delay had had such a significant impact on a child’s right to citizenship that it did constitute a trespass to that right.

#### **IV Undue Trespass**

The third test is whether the trespass to the right or liberty is undue.

##### **A *Severity of Trespass***

This may involve a straight-forward assessment of the severity of the trespass. In its investigation into the Citizenship Regulations 1978, Amendment No 6, the Committee noted that access to health or education facilities was not denied to children on the basis that they did not have citizenship.<sup>217</sup> Yet by not having citizenship, children could suffer mental distress by being denied the feeling of belonging, safety, and security that citizenship provided. As a result, the trespass to a child’s right to citizenship was considered undue.

<sup>215</sup> Regulations Review Committee “Investigation into the Citizenship Regulations 1978, Amendment No 6, Promulgated under the Citizenship Act 1977 and their Impact on Children of Families Granted to New Zealand on Humanitarian, Re-unification, or Refugee Grounds”, above n 191, at 5.

<sup>216</sup> Regulations Review Committee “Investigation into the Citizenship Regulations 1978, Amendment No 6, Promulgated under the Citizenship Act 1977 and their Impact on Children of Families Granted to New Zealand on Humanitarian, Re-unification, or Refugee Grounds”, above n 191, at 5.

<sup>217</sup> Regulations Review Committee “Investigation into the Citizenship Regulations 1978, Amendment No 6, Promulgated under the Citizenship Act 1977 and their Impact on Children of Families Granted to New Zealand on Humanitarian, Re-unification, or Refugee Grounds”, above n 191, at 8.



When a trespass to a right protected by the New Zealand Bill of Rights Act 1990 is at issue, the Committee will not necessarily take the view that any statutory limitation of that right is an undue trespass. In its report on a complaint made regarding the New Zealand Teachers' Council (Conduct) Rules 2004, the Committee was not prepared to find that the Regulations in question constituted an undue trespass to the right to freedom of expression contained in section 14 of the Bill of Rights Act.<sup>218</sup> The Regulations concerned created a presumption of privacy regarding Disciplinary Tribunal hearings, which undoubtedly trespassed on the media's right to report on those hearings. The Committee found, however, that the restriction on that right was not inconsistent with other judicial bodies' statutory abilities to restrict such reporting, for example through the imposition of name suppression. While the Committee recommended that there be a presumption towards open hearings, and that the current regulations were a *prima facie* breach of section 14 of the Bill of Rights Act, a mere breach of that right did not, in context, amount to an undue trespass under this Standing Order.

### ***B Balancing rights: Cost-benefit Analysis***

More often the Committee will undertake a balancing exercise to determine whether the trespass is undue. On the one hand is the public interest that is served by the regulations. On the other hand is the right or liberty of the individual or group that has been trespassed on. If the latter outweighs the former, the regulation is likely to be considered in breach of this Standing Order ground.

The Committee undertook a balancing exercise in its consideration of the Canterbury Earthquake (Building Act) Order 2011.<sup>219</sup> The Order allowed three Canterbury area councils to issue "extended section 124 notices" (commonly known as "red cards") in the wake of the Canterbury Earthquakes, which allowed those councils to restrict citizens' access to their own homes for safety reasons. The complainants alleged, and the Committee accepted, that such orders were a restriction on the right to occupy one's own home. The Committee was not convinced, however, that the power to issue "red cards" unduly trespassed on that right. The Committee noted that the right was limited by subpart 6 of the Building Act 2004 for reasons relating to safety. The Committee stated that the Order was made in full knowledge that doing so would shift the balance between the right to occupy one's own home and the

<sup>218</sup> Regulations Review Committee "Complaint Regarding the New Zealand Teachers' Council (Conduct) Rules 2004" (12 August 2013).

<sup>219</sup> Regulations Review Committee "Complaint regarding the Canterbury Earthquake (Building Act) Order 2011" (24 April 2014) at 10–11.

public interest in preventing injury or death, towards the latter. The Committee was satisfied that the public interest in preventing injury or death was of sufficient importance to justify restricting the right to occupy one's home, and so any trespass on that right was not undue.

This balancing exercise may take the form of a cost-benefit analysis. For example, in the Committee's inquiry into fees charged under the Weights and Measures Regulations 1987, a chemist placed a scale outside his shop allowing members of the public to weigh themselves for a small fee.<sup>220</sup> The Weights and Measures Regulations 1987 required the machine to be tested for accuracy at a cost of \$2000. The Committee found the cost of testing the machine to be disproportionate to the benefits people gained from using the scales. Accordingly, the Committee recommended that the regulations be amended to either exclude scales of this nature, or to recognise overseas certificates of accuracy.

The Committee also undertook a cost-benefit analysis during its consideration of the Land Transport Rule 32012 – Vehicle Standards (Glazing).<sup>221</sup> The regulations significantly lowered the allowable limit of window tinting in most vehicles. In assessing the rule, the Committee had evidence before it that the regulation had led to a significant downturn in demand for window tinting, leading to some business closures and job losses. Also relevant were the interests of those vehicle owners who used window tinting. These factors were balanced against the need to reduce the risk of accidents involving vehicles with window tinting. This had particular relevance for vehicle occupants, cyclists, and pedestrians. Having considered the costs imposed by the Glazing Rule, the Committee concluded that the trespass was not undue given the potential improvements in safety that it would bring.

### ***C Statutory Context***

The overall aims and objectives of the empowering Act may also be an important factor in determining whether rights or liberties have been unduly trespassed on. The Gambling (Harm Prevention and Minimisation) Regulations 2004 were made pursuant to the Gambling Act 2004.<sup>222</sup> Amongst other things, the regulations required all gaming machines to include a feature that interrupts play at regular intervals informing users of the time spent playing the machine as well as the user's total expenditure. The Australasian Machine Manufacturers Association and Skycity Entertainment Group contended that the regulations

<sup>220</sup> Regulations Review Committee "Inquiry into Fees Charged under the Weights and Measures Regulations 1987" [1988] AJHR I16.

<sup>221</sup> Regulations Review Committee "Complaint Relating to Land Transport Rule 32012 - Vehicle Standards (Glazing)", above n 193.

<sup>222</sup> Regulations Review Committee "Complaint Regarding Regulation 8 of the Gambling (Harm Prevention and Minimisation) Regulations 2004" [2005] AJHR I16L.

were in breach of Standing Order 327(2)(b). They argued that pop-ups infringed on their rights to conduct their businesses in an unduly restricted manner, that the cost of compliance would be excessive, and that the ‘gambling experience’ for users would be overly infringed. The Committee found no breach of this ground. It pointed to the Gambling Act 2004 and noted that it tightly regulated gambling activities, while emphasising the need to minimise harm from gambling. Any costs that the industry incurred had to be seen in light of these aims. It concluded that the regulations did not constitute an undue trespass.

### ***D Public Benefit Unclear***

When undertaking a cost-benefit analysis, the Committee will be less tolerant of a trespass to personal rights or liberties if the public benefit which the regulation seeks to achieve is unclear. Such a situation arose in the Committee’s investigation into the Accident Insurance (Insurer Returns) Regulations 1999.<sup>223</sup> Among other things, the regulations required insurers to ascertain the ethnicity of people making claims and to supply that information to a regulator. Consequently, forms used by those making an insurance claim required the claimant to specify his or her ethnic background. The complainants argued that ethnicity is deeply personal and sensitive information and should only be disclosed by a claimant on a voluntary basis. It was further argued that the ethnicity information could be used for discriminatory purposes. The Department of Labour responded by stating that there were strong policy reasons for requiring information on ethnicity to be collected. In the Committee’s opinion this was not sufficient reason to justify collecting ethnicity information. The Committee stated that adequate consideration had not been given to the need for collecting ethnicity information, and that the exact purposes for which it is collected had not been adequately defined. In light of this failure, the Committee concluded that society’s interest in the protection of individual privacy outweighed the grounds put forward by the Department justifying the collection of the information. Accordingly, it concluded that the trespass was undue and recommended that the part of the regulations requiring the collection of ethnicity information be revoked.

### ***E Unreasonable Obligation***

If a regulation imposes an unreasonable obligation on an individual or group, it is more likely that the Committee will find a trespass on a right or liberty to be undue. For example, the

<sup>223</sup> Regulations Review Committee “Complaint Relating to Accident Insurance (Insurer Returns) Regulations 1999” [1999] AJHR I16S.

Biosecurity (Ruminant Protein) Regulations 1999 were promulgated with the aim of preventing the introduction of certain animal diseases, one of which was bovine spongiform encephalopathy (commonly known as ‘mad-cow disease’).<sup>224</sup> Under regulation 7, all operators were required to prepare a ruminant protein control programme and the Director-General of the Ministry of Agriculture and Fisheries had the authority to suspend or cancel an operator’s business for an indefinite period until satisfied that a satisfactory programme was in place. The Committee was of the view that regulation 7 failed to specify with enough detail the exact requirements of a programme. Because of this failure, the Committee found that public interest in feeling secure about New Zealand’s ability to manage the risk of mad cow disease did not outweigh the rights of operators not to have their lawful business unduly restricted. The potential for an undue trespass was exacerbated because the regulations did not specify clearly what operators must do to comply with their obligations.

## ***F Lack of Criteria***

Similar issues were raised when the Committee investigated a complaint regarding the Accident Compensation (Referred Treatments Costs) Regulations 1990.<sup>225</sup> Under the regulations, payment by the Accident Compensation Corporation to the providers of acupuncture treatment was limited to members of the New Zealand Register of Acupuncturists (NZRA). This had the effect of excluding payments to members of the Chinese Acupuncture Association (NZCAA). The Corporation justified the regulations on the basis that it did not have confidence in the NZCAA. While stating that it was not the Committee’s role to decide which groups should receive treatment costs (since this is a matter of policy), the Committee did state that the process for determining who qualified for treatment costs should be fair. The problem in this case was that the Corporation had not provided standards of treatment by which applicants for treatment costs could be considered. The Committee considered it an undue trespass on the rights of NZCAA members that the corporation decided the NZCAA did not meet appropriate standards when the corporation had never specified a standard of competence in the first place.

<sup>224</sup> Regulations Review Committee “Investigation into the Biosecurity (Ruminant Protein) Regulations 1999”, above n 208.

<sup>225</sup> Regulations Review Committee “Complaint Relating to the Accident Compensation (Referred Treatments Costs) Regulations 1990” [1998] AJHR I16J.

## 7

## Unusual or Unexpected Use of the Powers: SO 327(2)(c)

### 327 Drawing attention to a regulation

- (1) In examining a regulation, the committee considers whether it ought to be drawn to the special attention of the House on one or more of the grounds set out in paragraph (2).
- (2) The grounds are, that the regulation—
  - ...
  - (c) appears to make some unusual or unexpected use of the powers conferred by the statute under which it is made:

*Hist:* SO 319(2)(c) (September 2014 to October 2020)  
 SO 315(2)(c) (October 2011 to August 2014)  
 SO 310(2)(c) (September 2008 to October 2011)  
 SO 315(2)(c) (August 2005 to September 2008)

## I Introduction

This Standing Order ground is intended to cover those regulations which, although authorised by a regulation-making power, do not represent a proper use of that power. In reality, this ground is very similar to Standing Order 327(2)(a). Central to both grounds is the policy or intention behind the empowering Act. Under Standing Order 327(2)(a), the issue is whether the regulation is broadly consistent with the objects and intentions of the empowering Act. Under Standing Order 327(2)(c), the issue is whether there has been an unusual or unexpected use of a regulation-making power given the intentions of the empowering Act. The Committee has also stressed that Standing Order 327(2)(c) does not give it a broad power to declare a use of a regulation making power ultra vires the empowering legislation.<sup>226</sup> Both Standing Orders, however, effectively require the Committee to undertake the same inquiry, namely, does the regulation in question sit comfortably with the policy behind the principal legislation? If a regulation appears to make

<sup>226</sup> Regulations Review Committee “Investigation into the Road User Charges (Transitional Matters) Regulations 2012” (13 November 2012) at 6.

an unusual or unexpected use of a regulation-making power, it follows that the regulation is unlikely to be in line with the objects and intentions of the empowering Act. For this reason, when the Committee considers that a regulation breaches Standing Order 327(2)(a), it will often find that it also breaches Standing Order 327(2)(c).

## **II Purpose of the Act**

Central to this ground is Parliament’s intentions as they relate to the empowering Act. When addressing this ground, the Committee will determine whether the regulation-making power has been used in a manner that can be considered unusual or unexpected in light of the policy or intention behind the Act. For example, under the Biosecurity (Ruminant Protein) Regulations 1999 all “operators” were subjected to the duties and obligations set out in the regulations. The Committee was of the view that the definition of operator was too broad, and that it captured more people than was necessary to achieve the purposes of the regulations. It concluded that it was unusual and unexpected for the regulations to define operator in such broad terms because Parliament never intended the regulation-making power to be applied in such a vague manner.

As is the case with Standing Order 327(2)(a), deciphering the intention of an Act may require a broad appreciation of its different goals. The Committee’s investigation into the Legal Services Board (Civil and Criminal Legal Aid Remuneration) Instructions 1998 raised this issue.<sup>227</sup> Under the Legal Services Act 1991, the Board was responsible for setting guideline fees for remuneration of civil and criminal legal aid lawyers. Section 97(2) imposed a duty on the Board to assess “the amount that would constitute appropriate reimbursement by way of fees”. The complainants were concerned that in calculating the guideline fees, the Board had allocated insufficient time for certain types of proceedings. Given the Board’s duty under section 97(2), the complainants argued that it was an unusual and unexpected use of the Act to set fees that were realistic for some types of proceedings but not for others. The Committee responded by stating that the Board was required to balance different responsibilities under the Act. Section 95(1)(c) of the Act required the Board to ensure that the legal aid scheme was “as inexpensive, expeditious, and efficient as is consistent with the spirit of the Act”. Given these competing objectives within the Act, the Committee felt that there was nothing unusual or unexpected about the guideline fees as set down in the Instructions.

<sup>227</sup> Regulations Review Committee “Complaint Relating to Legal Services Board (Civil and Criminal Legal Aid Remuneration) Instructions 1998”, above n 167.

Provisions in regulations that contradict or undermine the provisions and intentions of their empowering Act may amount to an unusual or unexpected use of a regulation-making power. A straightforward example of this is the Committee's report on the New Zealand Teachers' Council (Conduct) Rules 2004.<sup>228</sup> While the Education Act gives the Teachers' Council a relatively "broad and unrestricted" power to set up a Disciplinary Tribunal, the Council's imposition of rules providing that, unless the Tribunal ordered otherwise, the Tribunal's hearings be held in private and information about the hearings not be published, would be inconsistent with offence provisions set out in the Education Act. This was because the offence provisions provide that, among other things, it is an offence not to comply with an order of the Tribunal providing for a hearing to be in private or imposing restrictions on publication. As the Committee noted, those offence provisions suggest that "Parliament intended that the Disciplinary Tribunal's proceedings would be open, and information relating to the proceedings be generally publicly available. If Parliament had intended that proceedings should generally be closed, there would be no need for it to create an offence of breaching the [relevant] orders."<sup>229</sup> Even though the Council had a broad power to set rules, the Committee stated that it could not set rules which expressly contradicted Parliament's intent in enacting the empowering Act. Furthermore, because the rules undermined the intentions of the empowering Act, they constituted an unusual or unexpected use of a regulation-making power. In its response to this investigation, the government noted its intention to amend the Education Act to act on the Committee's recommendations.<sup>230</sup>

An analysis of the empowering Act may reveal that Parliament did not intend for a Board or authority to act in the manner that it did. For instance, under the Survey (Departmental Fees and Charges) Regulations 1998, Land Information New Zealand introduced a new fee system for the examination of building plans.<sup>231</sup> Plans attracted either a standard examination fee or a limited examination fee, depending on the work required. The Department administered the system based on an accreditation system. Plans submitted by accredited surveyors would attract only the limited fee, while non-accredited surveyors would be required to pay for the standard fee. The system was designed to reflect the reduced

<sup>228</sup> Regulations Review Committee "Complaint Regarding the New Zealand Teachers' Council (Conduct) Rules 2004" (12 August 2013).

<sup>229</sup> Regulations Review Committee "Complaint Regarding the New Zealand Teachers' Council (Conduct) Rules 2004" (12 August 2013) at 12.

<sup>230</sup> "Government response to report of the Regulations Review Committee: Complaint Regarding the New Zealand Teachers' Council (Conduct) Rules 2004" (14 November 2013).

<sup>231</sup> Regulations Review Committee "Complaint Relating to Survey (Departmental Fees and Charges) Regulations 1998 and Survey Regulations 1998" [2001] AJHR I16D.

need to scrutinise the work of accredited surveyors. However, the Committee was concerned that the system of accreditation did not appear to be authorised by the regulation-making power or any other provision of the Survey Act 1986. The Committee concluded that the regime constituted an unusual and unexpected use of the power to set fees that was in no way envisaged by Parliament.

A similar example arose in the Committee's examination of three notices issued by the Plumbers, Gasfitters and Drainlayers Board.<sup>232</sup> The notices prescribed new training requirements that would be a condition of plumbers, gasfitters and drainlayers obtaining an annual practising licence. The notices were made under a power allowing the Board to prescribe minimum competency standards, as long as they are necessary to achieve certain matters (such as public health and safety, and competence of plumbers, gasfitters, and drainlayers), and do not unnecessarily restrict licensing or impose undue costs. The complainants alleged that the notices were an unusual or unexpected use of a regulation-making power because, among other things, a number of the prescribed courses did not relate solely to the core or technical skills needed for plumbing, gasfitting, or drainlaying (for instance, courses on consumer law, and on leadership) and the estimated annual cost of the training was between \$4000 and \$5000 per person. The Committee agreed that the notices represented an unusual or unexpected use of the regulation-making power. While it did not accept that prescribed training courses must relate solely to core or technical skills, it took the view that they "would need to have a reasonably strong link to core skills". Further, while the Board was entitled to offer practitioners other courses which would be useful to them, "such courses cannot be included in a system that is compulsory as a condition on licensing." The Committee also took the view that the Board had not given due consideration to the requirements that training not unnecessarily restrict licensing or impose undue costs on practitioners or the public. The Committee recommended that the House disallow the notices and that the government ask the Board to urgently review the training requirements in light of the Committee's findings. The government response indicated that it had required the Board to move up in priority a planned review of the training requirements, and instructed Ministry officials to work with the Board to ensure, among other things,

<sup>232</sup> Regulations Review Committee "Complaints Regarding Three Notices Issued by the Plumbers, Gasfitters and Drainlayers Board on March 2010 and the Plumbers, Gasfitters and Drainlayers Board (Fees) Notice 2010" (15 February 2011). The four notices were subject to an unsuccessful motion of disallowance (notices of motion given on 15 February 2011 and 15 March 2011).



compliance with section 32 of the Act.<sup>233</sup>

A further case of interest was Committee's examination of the Student Allowances Amendment Regulations (No 2) 2004.<sup>234</sup> The regulations modified several aspects of the student allowances scheme, which provides financial assistance for tertiary students. The first change was an increase in the threshold and abatement rates, which the complainant (the New Zealand University Students Association) was in favour of. However it opposed two other changes. First, the regulations removed the existing entitlement of previously married students and students in paid employment for 96 weeks to an independent circumstances grant. Secondly, the regulations required married students under 25 years of age and without dependants to be parentally income tested for the purposes of an allowance. Previously they had been exempt from parental income testing. Amongst several other grounds, the complainant argued that the regulations constituted an unusual or unexpected use of the Education Act 1989. This was because, contrary to the Ministry of Education's expectations, the number of allowance applicants had actually decreased following the new regulations, as had the number of allowance recipients. The Committee found that while this may have been a surprising outcome, it was not necessarily due to the effect of the new regulations. Furthermore, the Act clearly envisaged that student allowances would not be universally provided and that they would be targeted using criteria such as parental income. Accordingly the Committee found no breach of Standing Order ground 327(2)(c).

It may be that the exercise of a regulation-making power is so inappropriate or flawed that it represents an unusual or unexpected use of a regulation-making power. The New Zealand Food Standard, Amendment No 11, was one such example.<sup>235</sup> Under the Food Act 1981, the Minister of Health had authority to issue food standards that set out food safety and labelling requirements. The food standard in question required products containing royal jelly, bee pollen, or propolis to carry strict warnings advising consumers that these substances could cause severe allergic reactions. The Committee objected to the standard on a number of grounds. These included a finding that mandatory labelling could not be justified in light of the available evidence. This was especially so given that up to 95% of the industry voluntarily used some form of cautionary labelling. The Committee was also of the

<sup>233</sup> "Government Response to Report of the Regulations Review Committee: Complaints Regarding Three Notices Issued by the Plumbers, Gasfitters and Drainlayers Board on March 2010 and the Plumbers, Gasfitters and Drainlayers Board (Fees) Notice 2010" [2011] AJHR J1.

<sup>234</sup> Regulations Review Committee "Complaint Regarding Student Allowances Amendment Regulations (No 2) 2004" [2006] AJHR I16B.

<sup>235</sup> Regulations Review Committee "Complaint Relating to the New Zealand Food Standard 1996, Amendment No 11", above n 194.

opinion that the bee product industry had been unfairly singled out for regulatory control, as well as expressing concern that the standard appeared to have been issued partly due to a desire to conform with the equivalent Australian standard. For these reasons, the Committee found that the food standard could not be justified and, therefore, represented an unusual and unexpected use of the regulation-making power. At times, the purpose of the regulation-making power in legislation may be sufficiently broad that relatively extreme regulations may still not make an unusual or unexpected use of that power. For example, the Committee was satisfied that the power given to Canterbury area councils to issue “red cards” under the Canterbury Earthquake (Building Act) Order 2011, barring people from their own homes, was not an unusual or unexpected use of regulation-making power.<sup>236</sup> Section 71 of the Canterbury Earthquake Recovery Act 2011 allowed regulations made under that Act to grant exemptions from, modify or extend any provisions of any Act, including the Building Act 2004, provided those regulations were “reasonably necessary or expedient” to fulfil the purposes of the 2011 Act. The Committee considered that the Order was within the scope of the regulations Parliament would have considered in enacting section 71, even though it allowed “significant” modifications to the Building Act 2004.<sup>237</sup> The Committee noted, however, that should the Order no longer be in the interests of the community’s recovery from the earthquakes at a point in the future, the continuing existence of the Order could well breach this Standing Order ground.<sup>238</sup>

### III Wording

Where a regulation is deemed to be in breach of this Standing Order ground, it may be that fault lies not with the substance of the regulation, but with the way in which it is worded. For example, the Accident Rehabilitation and Compensation Insurance (Earner Premiums) Regulations 1992 prescribed rates of premiums for income earners.<sup>239</sup> Regulation 3 stated that: “The rate of earner premium for the purposes of the Act shall be 62.22 cents per \$100.00 or part thereof of earnings paid on or after the 1st day of April 1992”. On 1 April 1992, the complainants were paid wages and salaries for the previous two-week period. They

<sup>236</sup> Regulations Review Committee “Complaint regarding the Canterbury Earthquake (Building Act) Order 2011” (24 April 2014) at 11–12.

<sup>237</sup> Regulations Review Committee “Complaint regarding the Canterbury Earthquake (Building Act) Order 2011 (24 April 2014)” at 12.

<sup>238</sup> Regulations Review Committee “Complaint regarding the Canterbury Earthquake (Building Act) Order 2011” (24 April 2014) at 10.

<sup>239</sup> Regulations Review Committee “Complaint of the New Zealand Educational Institute on the Accident Rehabilitation and Compensation Insurance (Earner Premiums) Regulations 1992” [1992] AJHR I16F.

noted that earner premiums had been deducted from their income despite the regulations not having effect at the time the income was earned. The complainants argued that the premium should only have been deducted from income earned on or after 1 April 1992 and not from income earned prior to this date. The Committee agreed and found the regulation made an unusual and unexpected use of the regulation-making power in the empowering Act. The Committee stated that it should have been made clear in the regulation that income earned prior to this date was not liable to the earner premium.

Wording was also an issue with the Civil Aviation Regulations 1953, Amendment No 31.<sup>240</sup> The regulations had the effect of placing certain restrictions on civil aviation pilots and flight crew when no such restrictions were intended. The regulations prohibited any person from using a meteorological report or forecast in the planning, conduct, or control of a flight, unless the report or forecast had been supplied by an approved person. The complainants argued that the regulation unjustifiably denied the widespread aviation practice of relying on informal sources of weather information, for example, weather reports from other pilots. The Ministry of Transport stated that the regulation was never intended to curtail this practice. It acknowledged, however, that this was its effect. To this end, the Committee found that even though the regulation had been authorised by the regulation-making power, that power had been used in an unusual and unexpected way because of the absolute prohibition it imposed.

#### **IV Fees**

The Committee has reviewed fee-setting regulations under this Standing Order ground, and on several occasions it has found that the regulations constituted an unusual or unexpected use of the regulation-making power.

Firstly, the statutory authority to charge a fee should be clearly expressed. When investigating the Plumbers, Gasfitters, and Drainlayers (Fees and Disciplinary Levy) Amendment Notice 2015, the Committee expressed a dissatisfaction with the Boards' legal justifications for charging registered professionals a fee to supervise unregistered persons.<sup>241</sup> It was necessary to do so to recover the costs of ensuring that proper supervision of unregistered persons by the professionals occurred. The legal authority for doing so was based on a fee-setting provision to charge fees for the licensing of professionals and

<sup>240</sup> Regulations Review Committee "Inquiry into the Civil Aviation Regulations 1953, Amendment No 31" [1991] AJHR I16B.

<sup>241</sup> Regulations Review Committee "Investigation into the Plumbers, Gasfitters and Drainlayers (Fees and Disciplinary Levy) Amendment Notice 2015" (25 November 2015).

correcting the professional register, which was where the supervised persons were being recorded. In other words, the recording of unsupervised persons was treated as an administrative function of the Board relating to the licensing and registration of professionals, for which the Board had a regulatory power to make fees. The Committee said found this justification to be generally unsatisfactory, saying “It should not be such a laborious or complex process for one to ascertain the authority to charge a fee, through extensive explanation of logic.”<sup>242</sup> As such, ascertaining regulatory authority to set fees from the surrounding context will be insufficient.

Secondly, if a user of a service is required to pay a fee then, as a general rule, the user must receive the benefit of that service.<sup>243</sup> If the user is paying for something which he or she does not receive, then the regulation setting the fee may have constituted an unusual or unexpected use of the relevant power of promulgation. Two reports of the Committee illustrate the point. First, the Civil Aviation Regulations 1953, Amendment No 30, increased licence fees payable by flight crews and aircraft maintenance engineers.<sup>244</sup> Part of that fee was to offset the cost of research into training methods for pilots. The Committee found that existing pilots would receive no benefit from the research being undertaken and, therefore, requiring them to contribute to this research represented an unusual and unexpected use of the regulation-making power. Secondly, the Land Transfer Amendment Regulations 1998 increased fees for its services.<sup>245</sup> These increases were to cover the cost of a new automated land information system. Again, the problem was that current users were paying for something they may not receive any benefit from. Thus, people buying a property were required to pay for a system they might never use. Consequently the regulations were deemed to be in breach of this ground. The Committee recommended that the regulations be reviewed to ensure that the costs of the system be passed on to those who would actually benefit from it.

Further, without express parliamentary authorisation, regulations setting fees above the level necessary to cover costs will be an unusual or unexpected use of regulation-making power. The Committee has stated that public bodies authorised to set fees must ensure that

<sup>242</sup> Regulations Review Committee “Investigation into the Plumbers, Gasfitters and Drainlayers (Fees and Disciplinary Levy) Amendment Notice 2015” (25 November 2015) at 6.

<sup>243</sup> For more detailed guidance on the setting of fees by regulation, see the Office of the Auditor General’s “Guidelines on Costing and Charging for Public Sector Goods and Services”, above n 181; and Treasury’s “Guidelines on Setting Charges in the Public Sector”, above n 181.

<sup>244</sup> Regulations Review Committee “Inquiry into the Civil Aviation Regulations 1953, Amendment No 30” [1989] AJHR I16.

<sup>245</sup> Regulations Review Committee “Investigation into the Land Transfer Amendment Regulations 1998 and the Survey (Departmental Fees and Charges) Regulations 1998” [2001] AJHR I16D.

those fees simply cover the costs of the goods or services provided to individuals.<sup>246</sup> Fees that do not just cover costs, such as those that impose costs on a wider group in order for a public body to carry out a specific function, are not strictly fees but levies. In the Committee's view, imposing a levy using a fee-setting power is implicitly an unusual or unexpected use of that power.

In addition, the Committee has held that regulations that set fees must strictly follow the scheme of the empowering Act. In its report on the Marine and Coastal Area (Takutai Moana) Reclamation Fees Regulations 2012, the Committee rejected LINZ's argument that forcing applicants to pay a fee they had not previously been subject to fell within "method[s] by which [fees were] to be assessed."<sup>247</sup> LINZ were unable to point to examples of other regulations being interpreted in the way they argued. The Committee ruled that the regulations, which could set the 'methods or rates' for setting fees, could only extend to setting the monetary amount payable via formulae or ratios rather than changing the class of persons subject to fees. Any deviance from a strict interpretation of the fee-setting powers in the empowering Act will result in the regulations concerned constituting an unusual or unexpected use of that power.

The Committee has applied this reasoning even when the fee-setting power in the empowering Act includes a "catch-all" power to set fees for "any purpose", stating that such powers are strictly constrained by the purposes of the Act as well as the other specified functions for which fees may be set.<sup>248</sup> However, the government has not always agreed with this position. In its response to the Committee's report on the Marine and Coastal Area (Takutai Moana) Reclamation Fees Regulations 2012, the government stated that although the point noted in the above paragraph relating to 'methods or rates' was valid, widening the class of persons subject to fees *was* within the ambit of the "catch-all" power to make regulations "for any other matters contemplated by this Act or necessary for giving it full

<sup>246</sup> Regulations Review Committee "Complaint about two notices made by the Plumbers, Gasfitters and Drainlayers Board relating to an offences fee and the Complaint regarding the Offences Fee contained in the Amendment to the Plumbers, Gasfitters and Drainlayers Board (Fees) Notice 2010" (30 September 2013).

<sup>247</sup> Regulations Review Committee "Investigation into the Marine and Coastal Area (Takutai Moana) Reclamation Fees Regulations 2012" (30 September 2013) at 8.

<sup>248</sup> Regulations Review Committee "Complaint about two notices made by the Plumbers, Gasfitters and Drainlayers Board relating to an offences fee and the Complaint regarding the Offences Fee contained in the Amendment to the Plumbers, Gasfitters and Drainlayers Board (Fees) Notice 2010" (30 September 2013).

effect.”<sup>249</sup> This reasoning has the effect of allowing a general regulation-making power to supercede a specific fee-setting power, which is not in accordance with either the Committee’s approach to this Standing Order ground discussed above or the general approach to the use of omnibus powers. It remains to be seen whether the Committee will comment on this approach.

The Committee has also prevented a body from setting fees that constituted an unusual or unexpected use of a regulation-making power, even where that body needed to set such a fee to continue carrying out its statutory functions. In its report regarding the Plumbers, Gasfitters and Drainlayers Board (Fees) Notice 2010, the Committee prevented the Board from setting a particular fee, ruling that the “fee” concerned was in substance a levy rather than a fee. This was despite the fact that the levy concerned was necessary to enable the Board to continue carrying out one of its statutory functions. The Committee concluded that the Board could not rely on its statutory purposes to legitimise an improper use of a delegated fee-setting power.<sup>250</sup>

## V Levies

The imposition of a levy not in accordance with a levy-making power may represent an unusual or unexpected use of a regulation making power.<sup>251</sup> For example, section 143(1) of the Plumbers, Gasfitters and Drainlayers Act 2006 allows the Plumbers, Gasfitters and Drainlayers Board to impose a disciplinary levy to fund costs arising out of investigations relating to registered persons and disciplinary proceedings under Part 3 of the Act relating to registered persons. The Board had been using a disciplinary levy imposed under section 143(1) to fund enforcement action against non-registered persons and to fund certain other costs not relating to investigations, or disciplinary proceedings, relating to registered persons. The Committee took the view that that was an unusual or unexpected use of the levy-making power. It noted that “the power to levy is a power to tax a specified group, and must be

<sup>249</sup> “Government response to Report of the Regulations Review Committee: Investigation into the Marine and Coastal Area (Takutai Moana) Reclamation Fees Regulations 2012” (20 December 2013) at 6.

<sup>250</sup> Regulations Review Committee “Complaint about two notices made by the Plumbers, Gasfitters and Drainlayers Board relating to an offences fee and the Complaint regarding the Offences Fee contained in the Amendment to the Plumbers, Gasfitters and Drainlayers Board (Fees) Notice 2010” (30 September 2013).

<sup>251</sup> Regulations Review Committee “Complaints Regarding Three Notices Issued by the Plumbers, Gasfitters and Drainlayers Board on March 2010 and the Plumbers, Gasfitters and Drainlayers Board (Fees) Notice 2010” (15 February 2011). The four notices were subject to an unsuccessful motion of disallowance (notices of motion given on 15 February 2011 and 15 March 2011).

exercised strictly in terms of its statutory authority.” The Committee recommended that the House disallow the levy and ask the Board to review and reset the disciplinary levy taking into account the Committee’s recommendations. The government response indicated that the government had required the Board to conduct a full fees review (including of the disciplinary levy) and that it had directed Ministry officials to work with the Board to ensure that the levy reflected the Committee’s views.<sup>252</sup>

Further, the failure to follow a sufficiently fair and robust process in setting a levy may constitute an unusual or unexpected use of a regulation-making power. In its consideration of the Marine Safety Charges Amendment Regulations 2008, the Committee took the view that Maritime New Zealand had failed to “follow a fair, reasonable, robust, and coherent process” in setting a new marine safety levy for specified passenger ships under section 191 of the Marine Transport Act 1994.<sup>253</sup> Maritime New Zealand had set the levy on the basis of risk, assessed by reference to a ship’s passenger capacity and, among other things, ship operators’ ability to pay. The effect of the Regulations was that the levy payable by two large ferry operators increased by over three-fold, while small ferry operators were not required to pay the levy. The Committee accepted that Maritime New Zealand had been entitled to apportion cost on the basis of risk and ability to pay. However, it was not satisfied that, in imposing the levy, Maritime New Zealand had undertaken a sufficiently robust and coherent risk analysis, or followed a sufficiently transparent and robust information gathering process concerning, for instance, various parties’ ability to pay. On that basis, the levy represented an unusual or unexpected use of a regulation-making power. It recommended that when imposing the levy in the future, Maritime New Zealand follow a consistent, analytical, robust process, and maintain good records of its application, so as to bring the exercise of that power within the contemplation of Parliament’s original delegation.<sup>254</sup> The government response accepted this recommendation.<sup>255</sup>

<sup>252</sup> “Government Response to Report of the Regulations Review Committee: Complaints Regarding Three Notices Issued by the Plumbers, Gasfitters and Drainlayers Board on March 2010 and the Plumbers, Gasfitters and Drainlayers Board (Fees) Notice 2010” [2011] AJHR J1.

<sup>253</sup> Regulations Review Committee “Interim Report on the Complaint Regarding SR 2008/327 Marine Safety Charges Amendment Regulations 2008” [2009] AJHR I16A.

<sup>254</sup> Regulations Review Committee “Interim Report on the Complaint Regarding SR 2008/327 Marine Safety Charges Amendment Regulations 2008” [2009] AJHR I16A at 13-14.

<sup>255</sup> “Government Response to Interim Report of the Regulations Review Committee: Complaint Regarding SR 2008/327 Marine Safety Charges Amendment Regulations 2008” [2009] AJHR J1. The government’s progress in executing the Committee’s recommendations is set out in Regulations Review Committee “Complaint Regarding SR 2008/327 Marine Safety Charges Amendment Regulations 2008” [2011] AJHR I16K.

As mentioned above, when a body uses a fee-setting power to impose a levy, this will implicitly constitute a breach of this Standing Order ground.

## **VI Inappropriate Extension of Statutory Criteria by Regulation**

The use of a regulation-making power to allow application of one statutory provision where it is more appropriate to apply another statutory provision may be an unusual or unexpected use of a regulation-making power. For example, the Overseas Investment Act 2005 imposed certain criteria on overseas persons wanting to own or control sensitive New Zealand assets. The Act distinguished between two types of sensitive assets: sensitive land and significant business assets. A provision dealing with sensitive land prescribed certain criteria for considering whether the investment would or was likely to benefit New Zealand, which could be added to through a regulation-making power. However, a provision prescribing the criteria in relation to overseas investment in significant business assets did not allow the addition of criteria through regulation. In 2008 the Canadian Pension Plan Investment Board proposed to purchase a 40 percent shareholding in Auckland International Airport Limited. In response, the Overseas Investment Amendment Regulations 2008, made under the regulation-making power relating to sensitive land, added the additional criterion of “whether the overseas investment will, or is likely to assist, New Zealand to maintain New Zealand control of strategically important infrastructure.”<sup>256</sup> The Committee concluded that this was both an unusual and unexpected use of the regulation-making power.<sup>257</sup> It took the view that the Airport was more properly regarded as a significant asset and it was merely fortuitous that it happened to be on sensitive land. Therefore, using a regulation-making power relating to sensitive land to regulate something more properly regarded as a sensitive business asset was an unusual use of the regulation making power.

## **VII Transitional Matters**

The Committee has indicated that use of transitional regulation-making powers for any purpose other than facilitating the transition between old and new legislative regimes (for example, overriding or suspending primary legislation) will implicitly breach this Standing Order as an unusual or unexpected use of the power.<sup>258</sup> Regulations concerning transitional matters may seek to implement a policy change, or conversely, effect a ‘holding pattern’,

<sup>256</sup> Overseas Investment Amendment Regulations 2008.

<sup>257</sup> Regulations Review Committee “Complaint Regarding the Overseas Investment Amendment Regulations 2008”, above n 203.

<sup>258</sup> Regulations Review Committee “Investigation into the Road User Charges (Transitional Matters) Regulations 2012” (13 November 2012) at 7.



deferring a policy change contained in legislation from being carried out. As detailed below, both of these actions are implicitly a breach of this Standing Order ground. Further, the Committee has indicated that the use of transitional powers to delay an Act's coming into force is antithetical to the purpose of transitional powers, which exist to facilitate the coming into force of Acts, and is in itself an unusual or unexpected use of regulation-making powers.<sup>259</sup> The Committee has taken the view that, save in "exceptional cases", regulations concerning transitional matters that go beyond mere facilitation will breach this Standing Order ground.

### **VIII Addition or Reversal of a Matter of Substantive Policy**

The addition of a significant new policy factor to a piece of legislation or the reversal of a matter of substantive policy in an Act via regulation may amount to an unusual or unexpected use of a regulation-making power.

#### ***A Addition of New Policy Factors***

In its consideration of the complaint regarding the Overseas Investment Amendment Regulations 2008, the Committee took the view that the concept of "strategically important infrastructure" represented a significant new policy factor.<sup>260</sup> It concluded that this was an unusual and unexpected use of a regulation-making power because the concept belonged to "such a broad and significant class of assets [that] it deserved a statutory class of its own."<sup>261</sup> In other words, the regulations introduced a third type of property, that of strategically important infrastructure, where the Act had previously only recognised two types, sensitive land and significant business assets.

The Committee made three recommendations relevant to its findings under this Standing Order ground, and Standing Order 327(2)(f). First, that the Overseas Investment Act 2005 be amended to include strategically important infrastructure as a class of sensitive asset of its own. Secondly, the Act be amended either to omit section 17(g), or to add to section 17(2)(g), a requirement to consult with relevant parties. Finally, it made the more general recommendation that primary legislation not allow regulations to be made adding factors or criteria listed in primary legislation, where such factors or criteria are to be taken into

<sup>259</sup> Regulations Review Committee Investigation into the Road User Charges (Transitional Matters) Regulations 2012 (13 November 2012) at 7.

<sup>260</sup> Regulations Review Committee "Report on the Complaint Regarding the Overseas Investment Amendment Regulations 2008", above n 203.

<sup>261</sup> Regulations Review Committee "Report on the Complaint Regarding the Overseas Investment Amendment Regulations 2008", above n 203.

account in ministerial decision-making. The government response to this report stated that the first two specific recommendations about the Overseas Investment Act would be considered a part of a general review of the overseas investment screening regime to take place in 2009.<sup>262</sup> The final, more general, recommendation is to be addressed in the context of the government's regulatory reform programme.

If a regulation-making power is used on the advice of an expert panel, the Committee will be careful not to substitute its opinion for that of the panel. While reviewing a complaint about the Animal Welfare (Layer Hens) Code of Welfare 2012, the Committee considered whether drawing a distinction between behaviours essential to animal welfare and behaviours that were not was a permissible interpretation of the Act. The Act was not conclusive, and a lack of detail in the National Animal Welfare Advisory Committee's reports on the application of the Act mean that it could not be ascertained whether the code they had created reflected expert judgment about the needs of layer hens, or an impermissible interpretation of the statute that animal welfare could be sacrificed counter to the Act's overall purpose. The Committee did not uphold the complaint on the basis that even if the latter could be shown it is not clear it would have affected the code of welfare in any way.

## ***B Reversal of Matter of Substantive Policy***

In its report on the Road User Charges (Transitional Matters) Regulations 2012,<sup>263</sup> the Committee found that use of transitional powers in a manner that constituted a substantive reversal of policy implemented by the parent Act was an unusual or unexpected use of those powers, even when that reversal constituted the continuation of previously-existing policy. The regulations concerned exempted certain classes of vehicles from Road User Charges and the requirement to carry permits, and, in addition, delayed the coming into force of a section of the Act for a year. The Ministry claimed that the Regulations were promulgated in order to fix minor administrative errors in the legislation and to allow policy and management decisions to be made.<sup>264</sup> The Committee took the view that this "fixing" of errors actually amounted to a sharp reversal in policy, for which regulations, particularly those only authorised for transitional matters, were entirely unsuited. The Committee recommended the disallowance of all three regulations for making unexpected or unusual use of the powers,

<sup>262</sup> "Government Response to the Report of the Regulations Review Committee: Complaint Regarding the Overseas Investment Regulations 2008" [2009] AJHR J1.

<sup>263</sup> Regulations Review Committee "Investigation into the Road User Charges (Transitional Matters) Regulations 2012" (13 November 2012).

<sup>264</sup> Regulations Review Committee "Investigation into the Road User Charges (Transitional Matters) Regulations 2012" (13 November 2012) at 7-9.

which eventuated in the historic first successful use of the section 6 disallowance procedure in February 2013.<sup>265</sup>

## IX Henry VIII Clauses

Henry VIII clauses which amend primary legislation are generally discouraged.<sup>266</sup> In conjunction with its inquiry into Henry VIII clauses, the committee considered a Henry VIII clause in the Resource Management (Transitional) Regulations 1994.<sup>267</sup> The regulations were made pursuant to section 360(1) of the Resource Management Act 1991, which read as follows:

### **360 Regulations**

- (1) The Governor-General may from time to time, by Order in Council, make regulations for all or any of the following purposes:

...

- (g) Prescribing transitional and savings provisions relating to the coming into force of this Act, which may be in addition to or in place of any of the provisions of Part XV; and, without limiting the generality of the foregoing, any such regulations may provide that, subject to such conditions as are specified in the regulations, specified provisions of this Act will not apply, or specified provisions of Acts repealed or amended by this Act, or of regulations, Orders in Council, notices, schemes, rights licences, permits approvals, authorisations, or consents made or given thereunder shall continue to apply, during a specified transitional period.

The 1994 regulations replaced section 417A of the principal Act. Section 417A was itself the result of an amendment made by the Resource Management Amendment Act 1993. This was done out of concern that the Act had the effect of making virtually all activities on the surfaces of lakes and rivers non-complying activities. However, the Ministry for the Environment acknowledged that section 417A, as a result of drafting errors and a lack of consultation, did not satisfactorily correct the problem, and in some cases had had the opposite effect. Using the Henry VIII power contained in section 360(1)(g), regulations were passed that did remedy the situation.

<sup>265</sup> See Chapter 3.

<sup>266</sup> See Chapter 4 and 14.

<sup>267</sup> Regulations Review Committee “Inquiry into the Resource Management (Transitional) Regulations 1994 and the Principles that Should Apply to the Use of Empowering Provisions Allowing Regulations to Override Primary Legislation During a Transitional Period”, above n 84.

While acknowledging that the problems created by section 417A needed to be remedied, the Committee stated that the use of a Henry VIII clause should never be a substitute for adequate consultation and proper care in drafting. The Committee considered that the exercise of the Henry VIII clause constituted a breach of Standing Order ground 327(2)(c) on two grounds. First, regulations made pursuant to section 360(1)(g) of the Act had to relate to the coming into force of the Act. In this case, the regulation sought to correct an anomaly that was caused by an amendment to the Act and not the Act itself. Secondly, the regulations had the effect of suspending an amendment to the Act less than a year after it was made. For these reasons the Committee found the regulation to have been an unusual and unexpected use of the Henry VIII clause.

## 8

### Review of Decisions Impacting on Rights and Liberties: SO 327(2)(d)

#### **327 Drawing attention to a regulation**

- (1) In examining a regulation, the committee considers whether it ought to be drawn to the special attention of the House on one or more of the grounds set out in paragraph (2).
- (2) The grounds are, that the regulation—
  - ...
  - (d) unduly makes the rights and liberties of persons dependent upon administrative decisions which are not subject to review on their merits by a judicial or other independent tribunal:

*Hist:* SO 319(2)(d) (September 2014 to October 2020)  
 SO 315(2)(d) (October 2011 to August 2014)  
 SO 310(2)(d) (September 2008 to October 2011)  
 SO 315(2)(d) (August 2005 to September 2008)

## **I Introduction**

This ground is directed at those regulations that authorise the making of administrative decisions that can affect an individual's rights or liberties, for example a regulation requiring the granting of a licence or a permit to undertake a certain activity. The Committee may be of the opinion that this kind of decision is of such significance that an independent review on the merits of the decision should be available.

## **II Right of Appeal**

The Committee set out its approach to this ground as part of its investigation into the Biosecurity (Ruminant Protein) Regulations 1999. It stated that:<sup>268</sup>

<sup>268</sup> Regulations Review Committee "Investigation into the Biosecurity (Ruminant Protein) Regulations 1999", above n 208, at 12.

Where an administrative decision can affect a person's legal rights, privileges or legitimate expectations, there should be a right of appeal to, or review by, an independent body or person.

In this instance, the regulations placed an enforceable ban on feeding ruminant protein to ruminant animals, such as cows or sheep. Regulation 7 required all operators to prepare a ruminant control programme and granted the Director-General the power to suspend or cancel an operator's business indefinitely until satisfied that the programme met the necessary requirements. The Committee took objection to the absence of an independent review on the merits of a Director-General's decision to amend or cancel the registration of a programme. The absence of an adequate appeal mechanism meant that there was no check on the fairness or reasonableness of the decision. The Committee also found fault with the Director-General's power under regulation 12 to request certain information regarding an operator's programme. If not satisfied that all necessary information had been received, the Director-General was not required to make any decisions regarding the suitability of a programme. As an operator could quite conceivably have a legitimate reason for not wanting to supply the information, the Committee found that an independent review process was even more important.

In its investigation into the Legal Services Regulations 2011,<sup>269</sup> the Committee affirmed that reconsideration of a matter by the same decision-maker (or one that was not materially different from the original decision-maker) using the same criteria could not constitute a formal review mechanism.<sup>270</sup> In this instance, the Committee considered that the Ministry of Justice's internal review processes were, in effect, no different to the relevant Commissioner's initial exercise of decision making power; the rights that dissatisfied parties had regarding reviews were not specified; and the previously-existing independent review process had been disestablished. In the Committee's view, this process was not in itself a sufficiently independent form of review for the purposes of the Standing Order.

As a general rule, the greater the impact of a decision the greater the need for independent review. In other words, the more that is at stake when a decision is made, the more likely it is that the absence of an appeal mechanism will be considered "undue". The Committee's investigation into the Domestic Violence (Programmes) Regulations 1996 provides a good example.<sup>271</sup> The complainant organisation ran anger-management programmes for men

<sup>269</sup> Regulations Review Committee "Complaint regarding the Legal Services Regulations 2011" (19 September 2013).

<sup>270</sup> Regulations Review Committee "Complaint regarding the Legal Services Regulations 2011" (19 September 2013) at 6.

<sup>271</sup> Regulations Review Committee "Complaint Relating to the Domestic Violence (Programmes) Regulations 1996" [2001] AJHR I16E.

subjected to protection orders. In order to receive funding, the programme had to receive approval from a panel established by the regulations. The Committee found that a requirement that all panels operate under the rules of natural justice did not compensate for the lack of an appropriate review structure. The Committee stated that, “with funding in the vicinity of \$1 million a year at stake, it is imperative that the approvals on which such funding is dependent are open to review on the merits”.<sup>272</sup>

The potential impact of an administrative decision was also a crucial factor in the Committee’s investigation into the Marine Mammals Protection Regulations 1990.<sup>273</sup> The regulations required commercial operators who wished to transport people to view marine mammals to obtain a permit to do so. While the regulations contained a right of appeal to the Minister of Conservation for a suspension or revocation of an existing permit, there was no right of appeal for the non-granting of a permit to new applicants. The Committee pointed to the number of new applicants seeking permits and surmised that this was evidence of high expectation and interest in establishing commercial ventures for the purposes of marine mammal watching. The importance of a decision not to grant a permit to an applicant was such that a right of appeal for new applicants should have been included in the regulations.

When an administrative decision is based on criteria that are either unstated or unclear, the need for an independent review of that decision increases. In its investigation into the Marine Mammals Protection Regulations 1990, the Committee stated that, in situations where an administrative decision can affect livelihood and business interests, there must exist detailed criteria to guide and limit that decision.<sup>274</sup> In this instance it was unclear exactly what factors were to be taken into account when making the decision to issue a permit for commercial marine mammal watching. Because of this ambiguity, the Committee found the regulations to have breached this Standing Order ground. For similar reasons the Geothermal Energy Regulations 1961 were considered unsatisfactory.<sup>275</sup> Under the regulations the Minister of Energy had a discretion to issue licences to draw on geothermal energy in Rotorua. The Committee pointed to the absence of any mechanism to appeal a

<sup>272</sup> Regulations Review Committee “Complaint Relating to the Domestic Violence (Programmes) Regulations 1996” [2001] AJHR I16E at 7.

<sup>273</sup> Regulations Review Committee “Inquiry into the Marine Mammals Protection Regulations 1990” [1991] AJHR I16C.

<sup>274</sup> Regulations Review Committee “Inquiry into the Marine Mammals Protection Regulations 1990” [1991] AJHR I16C at 7.

<sup>275</sup> Regulations Review Committee “Report on the Committee’s Inquiry into the Geothermal Energy Regulations 1961” [1987] AJHR I16.

decision of the minister. This inadequacy was made worse by the fact that an applicant would have little idea in advance what criteria would be applied in granting the licence.

### III Review on the Merits

An important component of this Standing Order ground is the focus on the merits of the decision. A review on the merits is to be distinguished from a review of the process that led to the decision. A body that is able to review the merits of a decision is able to make a finding that the decision was wrong in substance. A body that looks at the process of a decision only looks at whether the decision-maker took all the steps that were required to be taken before making the decision. The merit of the decision is, strictly speaking, extraneous to this inquiry.

After an administrative decision is made, an individual aggrieved at the outcome may choose to seek ‘judicial review’ of the decision from a court. Yet this remedy may be unsatisfactory for complaints under this Standing Order, because the court is, in general, limited to a review of the process and not the merits of the decision. For this reason, the Committee has on several occasions rejected the suggestion that recourse to judicial review proceedings provides an adequate appeal mechanism for an administrative decision.<sup>276</sup> Recently, in its report on the Legal Services Regulations 2011, the Committee reaffirmed that, although aggrieved parties have the right to seek judicial review of administrative decisions, this right in itself does not constitute the formal, independent administrative review process on the merits of the decision, required by the Standing Order.<sup>277</sup> For such reasons, the Committee recently expressed concern for the Hurunui/Kaikōura Earthquakes Recovery (Coastal Route and Other Matters) Order 2016 which excluded the right of a person with an interest in land intended to be taken for public works to object in the Environment Court, without the creation of an alternative or modified process. The ability of the affected person to seek judicial review did not prevent the Order from raising concerns under SO 327(2)(d).<sup>278</sup> For the most part, then, the Committee is of the opinion that the availability of

<sup>276</sup> See for instance Regulations Review Committee “Complaint Relating to the Domestic Violence (Programmes) Regulations 1996”, above n 271, at 7; Regulations Review Committee “Inquiry into the Marine Mammals Protection Regulations 1990”, above n 273, at 11; and Regulations Review Committee “Investigation into the Biosecurity (Ruminant Protein) Regulations 1999”, above n 208, at 13.

<sup>277</sup> Regulations Review Committee “Complaint regarding the Legal Services Regulations 2011” (19 September 2013).

<sup>278</sup> Regulations Review Committee “Activities of the Regulations Review Committee in 2017” [2017] AJHR I.16D at 11.



judicial review is not likely to satisfy this Standing Order's requirement that review on the merits of a decision be available.

However, one report of the Committee provides a notable exception. Following an examination of the Fisheries (Allocation of Individual Catch Entitlement) Regulations 1999 the Committee concluded that judicial review could, in that case, provide a satisfactory appeal mechanism from an administrative decision.<sup>279</sup> The regulations allowed the chief executive of the Ministry of Fisheries to allocate individual catch entitlements (ICEs) for the purposes of commercial fishing. This meant that those organisations that held a permit would be limited as to the number of fish they could catch in a specified period. The complainants were concerned that there existed no right of appeal from a decision of the chief executive regarding ICEs. In response the Committee stated:<sup>280</sup>

We expect that the chief executive will act lawfully at all times, but any failure to do so will be subject to review by the courts... The role of the courts in determining fair process and lawful policy is not restricted by those regulations in our view.

The Committee was satisfied that in this particular instance judicial review proceedings provided an adequate safety net to ensure the propriety of an administrative decision. By focusing on the 'lawfulness' of the decision, the Committee quite openly acknowledged that such a review would be limited to an analysis of the process surrounding the decision and not its merit.

<sup>279</sup> Regulations Review Committee "Complaints Relating to the Fisheries (Allocation of Individual Catch Entitlement) Regulations 1999" [1999] AJHR I16P.

<sup>280</sup> Regulations Review Committee "Complaints Relating to the Fisheries (Allocation of Individual Catch Entitlement) Regulations 1999" [1999] AJHR I16P at 9-10.

## 9

### Excludes the Jurisdiction of the Courts Without Authority: SO 327(2)(e)

#### **327 Drawing attention to a regulation**

- (1) In examining a regulation, the committee considers whether it ought to be drawn to the special attention of the House on one or more of the grounds set out in paragraph (2).
- (2) The grounds are, that the regulation—
  - ...
  - (e) excludes the jurisdiction of the courts without explicit authorisation in the enabling statute:

*Hist:* SO 319(2)(e) (September 2014 to October 2020)  
 SO 315(2)(e) (October 2011 to August 2014)  
 SO 310(2)(e) (September 2008 to October 2011)  
 SO 315(2)(e) (August 2005 to September 2008)

This Standing Order ground seeks to protect the jurisdiction of the courts to review administrative decisions. The doctrine of the separation of powers, to which New Zealand broadly adheres, allows the judiciary to review the lawfulness of executive action. Generally, if this power is to be limited by regulation, then it must be explicitly authorised by an Act of Parliament.

At the time of writing, just one report of the Committee has addressed this ground in any detail.<sup>281</sup> The regulations in question did not expressly limit the jurisdiction of the courts to subject a decision to judicial review. Rather, the issue went to the timing of the regulations and the effect they would have on court proceedings. In 1993, the Kiwifruit Marketing Board (KMB) decided to recoup an overpayment made to growers for the previous year. Court proceedings commenced to determine whether the KMB had this power, and to determine whether it could take existing debt into account when setting future kiwifruit prices.

<sup>281</sup> Regulations Review Committee “Inquiry into the Kiwifruit Marketing Regulations 1977, Amendment No 10” [1993] AJHR I16I.

However, just days prior to the initial hearing into the matter, the Kiwifruit Marketing Regulations 1977, Amendment No 10 were promulgated. These regulations granted the KMB the very powers that were the subject of the court proceedings. Consequently, the planned court proceedings were rendered futile. The decision to make the regulations was justified on the basis that the overpayment issue needed to be resolved, and that the judicial process was proving too slow as a means of achieving this. Ultimately, the Committee concluded that the executive had the authority to make the regulations, but stated that the government should have waited for the litigation to run its course before making the regulations. It also expressed concern at a lack of consultation on the part of the government.

In the 2017 Activities Report, the Committee expressed concern that the Hurunui/Kaikōura Earthquakes Recovery (Coastal Route and Other Matters) Order 2016 may breach SO 327(2)(e). Part 6 (clause 32 to 38) of the Order modifies the process for taking land for public works where the Minister for Land Information considers it reasonably necessary to take land for the purpose of restoration work. Clause 3 excludes the right of the person with an interest in the land intended to be taken, to object in the Environment Court without replacing the right with an alternative or modified process.<sup>282</sup>

<sup>282</sup> Regulations Review Committee “Activities of the Regulations Review Committee in 2017” [2017] AJHR I.16D at 11.

## 10

### More Suited to Parliamentary Enactment: SO 327(2)(f)

#### **327 Drawing attention to a regulation**

- (1) In examining a regulation, the committee considers whether it ought to be drawn to the special attention of the House on one or more of the grounds set out in paragraph (2).
- (2) The grounds are, that the regulation—
  - ...
  - (f) contains matter more appropriate for parliamentary enactment:

*Hist:* SO 319(2)(f) (September 2014 to October 2020)  
 SO 315(2)(f) (October 2011 to August 2014)  
 SO 310(2)(f) (September 2008 to October 2011)  
 SO 315(2)(f) (August 2005 to September 2008)

It is well established that statutes should set out the policy and substance of the law. Conversely, regulations should be limited to technicalities and detail. This standing order ground is relevant when a regulation-making power is so wide that it authorises the making of regulations that contain matters of broad policy, principle or substance.

As a general rule, whether something is a matter of policy can be determined by its importance and its contestability. Take, for example, the Committee’s investigation into the Children, Young Persons, and Their Families (Residential Care) Regulations 1996.<sup>283</sup> The regulations gave staff powers of search and seizure over children and young persons placed in a residential facility. Whether children living in a residential facility should be subjected to such provisions was the subject of vigorous debate before the Committee. The Department of Social Welfare argued in favour of the regulations by pointing to the serious behavioural problems of the children, as well as the fact that some of them had either committed, or were suspected of committing, criminal offences. Conversely, the Commissioner for Children argued that such powers were wholly inappropriate given that the residences were required to foster a family-like environment. Ultimately, the Committee found that if such powers

<sup>283</sup> Regulations Review Committee “Investigation into Children, Young Persons, and Their Families (Residential Care) Regulations 1996” [1997] AJHR I16B.

were to be granted, they should be conferred by statute and not by regulation. This finding was echoed in the Committee's investigation into the Road User Charges (Transitional Matters) Regulations 2012,<sup>284</sup> where the Committee found that had Parliament been given the opportunity to consider the proposed change to the law, the regulations concerned may have been enacted differently; or at least provoked lengthy debate requiring submissions from interested parties, investigation and in-depth analysis. As a result, the Committee took the view that the matters dealt with in the regulations were more properly a matter for primary legislation.

The policy choices inherent in debates such as these mean that Parliament is the most appropriate body to decide what the substantive law should be. Regulations should only seek to implement policy and not establish it. Given the varied nature of law-making, there can be no definitive list of those matters that will be considered suitable for parliamentary enactment and those that may be dealt with by regulation. Other instances where the Committee has found a breach of this ground include:

- Regulations that had the effect of amending primary legislation so that it was no longer an offence to possess certain organisms. Only primary legislation should create or amend offence provisions.<sup>285</sup>
- Regulations that frustrate clear parliamentary intent, whether that intent is to do or not do something; or to have something occur on or by a certain date. The Committee has stated that any regulations that attempt to frustrate Parliament's intent, even by maintaining the status quo, are in themselves matters more suited to parliamentary enactment, and breach this Standing Order.<sup>286</sup>
- Regulations that specified the level of accident compensation payments that were to be paid to claimants. The Committee stated that if the regulations were to maintain their subordinate nature, they should not prescribe the extent of financial obligations to be fulfilled under the principal Act.<sup>287</sup>

<sup>284</sup> Regulations Review Committee "Investigation into the Road User Charges (Transitional Matters) Regulations 2012" (13 November 2012).

<sup>285</sup> Regulations Review Committee "Investigation into the Biosecurity (Rabbit Calicivirus) Regulations 1997", above n 208.

<sup>286</sup> Regulations Review Committee "Investigation into the Road User Charges (Transitional Matters) Regulations 2012", above n 284.

<sup>287</sup> Regulations Review Committee "Complaints Relating to the Accident Rehabilitation and Compensation Insurance (Social Rehabilitation) Regulations 1992" [1993] AJHR I16H.

- Regulations that change the substantive law. The Committee has indicated two major reasons why regulations of this type breach this Standing Order. The first is that if there is no ability to read the desired policy change into the existing administrative framework, the matter is clearly outside existing law and is in itself a matter better suited for parliamentary action.<sup>288</sup> Secondly, if an entity is actively and openly seeking change to substantive legislation, then regulations which seek to facilitate such change are clearly matters better suited for parliamentary enactment, even if plans exist to amend the relevant substantive law.<sup>289</sup>
- However, the Committee has recently reconfirmed that Parliament may expressly authorise regulations to change the substantive law within limits. For example, the Committee considered that the power granted in the Canterbury Earthquake (Building Act) Order 2011 to make substantive modifications to the Building Act 2004 was within the scope of the broad regulation-making power in the Canterbury Earthquake Recovery Act 2011.<sup>290</sup> Such modifications were *prima facie* matters more appropriate for parliamentary enactment, but Parliament had explicitly delegated such powers to the executive in an emergency situation with a full understanding of how those powers might be used, and so this Standing Order ground was not breached.
- Another similar example is where statutes amend pre-existing regulations. Section 25 of the Interpretation Act 1999 allows regulations amended or substituted by an Act of Parliament to be amended, replaced or revoked as if the statutory changes had been made by regulation. The Committee confirmed that s 25 authorises the amendment of regulations regardless of whether those regulations contain amendments by statute in their analysis of a complaint about the Accident Compensation (Motor Vehicle Account Levies) Regulations 2015.<sup>291</sup> The passage of regulations in circumstances contemplated by s 25 is not likely to breach this ground.
- Regulations that established the Kiwifruit Marketing Board. The Board was given monopolistic trading rights over kiwifruit exports worth over \$600 million a year. Such matters were considered matters of important policy that should have been subjected to

<sup>288</sup> Regulations Review Committee "Investigation into the Road User Charges (Transitional Matters) Regulations 2012", above n 284.

<sup>289</sup> Regulations Review Committee "Investigation into the Road User Charges (Transitional Matters) Regulations 2012," above n 284.

<sup>290</sup> Regulations Review Committee "Complaint regarding the Canterbury Earthquake (Building Act) Order 2011" (24 April 2014) at 12–13.

<sup>291</sup> Regulations Review Committee "Complaint about Accident Compensation (Motor Vehicle Account Levies) Regulations 2015" [2015] AJHR I16A.

the primary legislation.<sup>292</sup> Similarly, the Overseas Investment Amendment Regulations 2008 were found to add a significant new consideration to the Act (the concept of strategically important infrastructure).<sup>293</sup> The Committee concluded the Regulations were objectionable under this ground (as well as being an unusual and unexpected use of a regulation-making power). It concluded that this significant policy change was better suited to parliamentary enactment because it introduced “such a broad and significant class of assets [that] it deserved a statutory class of its own.”<sup>294</sup> In other words, the regulations introduced a third type of property, that of strategically important infrastructure, where the Act had previously only recognised two types, sensitive land and significant business assets.

- Rules for a statutory body that are inconsistent with either the purposes of the empowering Act or the rules of other similar bodies. In its report on the New Zealand Teachers’ Council (Conduct) Rules 2004, the Committee found that rules which forced a Disciplinary Tribunal’s hearings to be held in private and prevented the publication of details of those hearings breached this Standing Order.<sup>295</sup> The Committee stated that for a body’s Rules to differ so markedly from the purposes of the empowering Act and from the Rules of other similar Disciplinary Tribunals was a matter that ought to be enacted specifically by Parliament.
- Regulations that appeared to allow the Reserve Bank to become involved in trading activities beyond the state sector. The empowering Act made it clear that the core function of the bank was to act for the government. If the bank was to act for private interests, then this should have been authorised by primary legislation and not by regulations.<sup>296</sup>
- Regulations setting fees exceeding the level needed to cover costs in order to either maintain a financial reserve or to provide goods or services to individuals. In the absence

<sup>292</sup> Regulations Review Committee “Report of the Inquiry into the Appropriateness of Establishing the Kiwifruit Marketing Board Through Regulations[1988] AJHR I16. (It is worth noting that the Committee repeated these same concerns five years later in a separate report on regulations involving the Kiwifruit Marketing Board: Regulations Review Committee “Inquiry into the Kiwifruit Marketing Regulations 1977, Amendment No 10”, above n 281.)

<sup>293</sup> Regulations Review Committee “Complaint Regarding the Overseas Investment Amendment Regulations 2008”, above n 203.

<sup>294</sup> Regulations Review Committee “Complaint Regarding the Overseas Investment Amendment Regulations 2008”, above n 203, at 10.

<sup>295</sup> Regulations Review Committee “Complaint Regarding the New Zealand Teachers’ Council (Conduct) Rules 2004” (12 August 2013).

<sup>296</sup> Regulations Review Committee “Report on the Inquiry into the Reserve Bank of New Zealand Order 1988”, above n 202.

of approval by the empowering statute, the setting of fees above the level needed to cover costs will generally amount to the imposition of a tax without the authorisation of Parliament in contravention of section 22 of the Constitution Act 1986. The Committee has confirmed that any authority given to a public entity to charge a fee is implicitly capped at the level of cost recovery.<sup>297</sup> The collection of fees above the level needed to cover costs is therefore considered a matter for parliamentary enactment.<sup>298</sup>

Thus, the matters which can be considered more appropriate for parliamentary enactment are extensive in nature. A common thread that links the above examples is that they represent attempts to implement policies that in reality deserve the full attention of the parliamentary legislative process. In situations where an existing Act does authorise the making of regulations that contain matters of policy, the Committee has encouraged the government to legislate via statute and not through regulation:<sup>299</sup>

We consider that when the government proposes to exercise [a regulation-making] power in a way that goes beyond what is reasonable or acceptable, then it is preferable that the action be tested by being placed before Parliament, rather than being imposed through regulation.

<sup>297</sup> Regulations Review Committee “Complaint about two notices made by the Plumbers, Gasfitters and Drainlayers Board relating to an offences fee and the Complaint regarding the Offences Fee contained in the Amendment to the Plumbers, Gasfitters and Drainlayers Board (Fees) Notice 2010” (30 September 2013).

<sup>298</sup> Regulations Review Committee “Complaint regarding the Midwifery (Fees) Notice 2005”, above n 180. See also the Regulations Review Committee “Complaint Regarding SR 2008/327 Marine Safety Charges Amendment Regulations 2008”, above n 255; and Regulations Review Committee “Complaint about two notices made by the Plumbers, Gasfitters and Drainlayers Board relating to an offences fee and the Complaint regarding the Offences Fee contained in the Amendment to the Plumbers, Gasfitters and Drainlayers Board (Fees) Notice 2010” (30 September 2013). In those reports, the Committee took the view that levying powers are more akin to taxation powers than fee setting powers. In support of that view, it cited the Office of the Auditor-General’s “Good Practice Guide: Charging Fees for Public Sector Goods and Services”, above n 181 at [1.10], which states that a levy “differs from a fee for a specific good or service; it is more akin to a tax, but one that is charged to a specific group. It is usually compulsory to pay a levy. Levies charged to a certain group or industry are usually used for a particular purpose, rather than relating to specific goods or services provided to an individual.” For further discussion of levies see Chapters 7 and 14.

<sup>299</sup> Regulations Review Committee “Report on the Government’s Response to the Report on the Complaint Relating to Staffing Orders, Promulgated under Section 91H of the Education Act 1989, Affecting Area, Primary, Intermediate, and Secondary Schools” [1996] AJHR I16L at 7.



# 11

## Retrospective without Authority: SO 327(2)(g)

### **327 Drawing attention to a regulation**

- (1) In examining a regulation, the committee considers whether it ought to be drawn to the special attention of the House on one or more of the grounds set out in paragraph (2).
- (2) The grounds are, that the regulation—
  - ...
  - (g) is retrospective where this is not expressly authorised by the empowering statute:

*Hist:* SO 319(2)(g) (September 2014 to October 2020)  
 SO 315(2)(g) (October 2011 to August 2014)  
 SO 310(2)(g) (September 2008 to October 2011)  
 SO 315(2)(g) (August 2005 to September 2008)

## I Introduction

It is generally accepted that legislation should be forward-looking in its effect. If the legal status of past conduct is altered, there can be no certainty as to the legal status of current conduct. Furthermore, there is an inherent unfairness in changing the law after the event, as people cannot alter past actions to meet the requirements of a new law. Nevertheless, Parliament can, and does, pass laws that have retrospective effect. All the same, the practice is generally considered to be undesirable for the reasons outlined.

Standing Order ground 327(2)(g) acts as a restraint on the creation of retrospective delegated legislation. Given the concerns regarding retrospective legislation, a regulation should only be retrospective if expressly authorised by Parliament.<sup>300</sup> This ground has two elements, namely is the regulation retrospective in effect, and, if so, is that retrospectivity authorised by the empowering Act? Both elements will be examined in turn.

<sup>300</sup> Legislation Advisory and Design Committee, above n 135, ch 12.

## II Retrospectivity

The Committee's investigation into the Accident Rehabilitation and Compensation Insurance (Social Rehabilitation) Regulations 1992 provides an example of a regulation found to have been retrospective.<sup>301</sup> The regulations set new levels of payments to ACC claimants. While the regulations were promulgated between 17 September and 8 October 1992, they affected any application received on or after 1 July 1992. Thus, those claimants who had made an application in between this 3-4 month period found that a new set of regulations applied that did not exist at the time they lodged their applications. The Committee found the regulations to have a clear retrospective effect.

A second example of the Committee finding a regulation had retrospective effect is in its report on the Complaint Regarding Notice of Scopes of Practice and Related Qualifications Prescribed by the Nursing Council of New Zealand.<sup>302</sup> The notice split the title of second-level nurses so that those who qualified before 2000 would retain the title of "enrolled nurse" whereas those qualifying after this time would have the title of "nurse assistant". People enrolled in second-level nursing programmes after 2000 but prior to the notice becoming effective in September 2004, were informed by the polytechnics training them that their graduation would result in their recognition by the Nursing Council as "enrolled nurses". People enrolled as "enrolled nurses" during this period subsequently had their title changed to "nurse assistant". The Committee found the notice had unauthorised retrospective effect and recommended it be amended to remove this effect. Interestingly, the Committee noted that although there had been a number of retrospective changes to titles in the nursing profession, in this instance the change was unacceptable because, in contrast to other title changes within the profession, it mattered to the affected second-level nurses. To remedy this retrospective effect, clause 4 of the Notice, dealing with the scope of practice of enrolled nurses, was subsequently revoked and substituted by resolution of the House of Representatives pursuant to the procedure contained, at that stage, in section 9(1) of the Regulations (Disallowance) Act 1989, and now in section 46 of the Legislation Act 2012.<sup>303</sup>

In its report on the Marine and Coastal Area (Takutai Moana) Reclamation Fees Regulations 2012, the Committee considered that the regulations concerned were only

<sup>301</sup> Regulations Review Committee "Complaints Relating to the Accident Rehabilitation and Compensation Insurance (Social Rehabilitation) Regulations 1992", above n 287.

<sup>302</sup> Regulations Review Committee "Complaint regarding Notice of Scopes of Practice and Related Qualifications Prescribed by the Nursing Council of New Zealand" [2007] AJHR I16J.

<sup>303</sup> "Notice of Scopes Practice and Related Qualifications Prescribed by the Nursing Council of New Zealand Amendment Notice" Hon Dr Michael Cullen (23 September 2008 SR 2008/362) 650 NZPD 19223. For further discussion of this motion see Chapter 2.

indirectly retrospective.<sup>304</sup> Section 41 of the Marine and Coastal Area (Takutai Moana) Act 2011 allowed applicants seeking interests in reclaimed land to turn pre-existing claims under the Resource Management Act 1991 into claims under section 35 of the 2011 Act. The 2012 Regulations had the effect of forcing applicants who had already chosen to undergo this process to pay a fee in order to continue their applications, even though no fee had been payable at the time the Act was passed. The regulations' general effect was to retrospectively force applicants to pay a fee that had not been set at the time it became payable. The Committee found, though, that the regulations' "confirmation procedure" had altered the timing of the fee payment in an effort to avoid retrospectivity: the applicants were notified of the fee before becoming liable to pay it and were able to discontinue their applications if they chose not to pay the fee. For this reason, the Committee was not prepared to label the regulations directly retrospective. It was, however, willing to note that the regulations were indirectly retrospective to the extent that retrospectivity was only prevented by a provision that breached other Standing Order grounds.<sup>305</sup> In its response to this report, the government obliquely agreed with the Committee. The government accepted that the applicants did not know what the fees would be when they lodged applications, but stated that as the applicants were informed of the fee before becoming liable to pay it, the fees were not retrospective and were *intra vires* the relevant legislation.<sup>306</sup>

On at least four other occasions the Committee has concluded that regulations were entirely *not* retrospective. The first was the inquiry into the Accident Compensation Corporation (Accident Experience) Regulations 1992.<sup>307</sup> Section 40 of the Accident Compensation Act 1992 provided that the Accident Compensation Corporation could impose a penalty on an employer, or allow a rebate, based on the accident history of that employer. The complainant argued that the regulations operated retrospectively by taking into account previous claims. The Committee rejected the retrospective argument. It noted that while the accident history of an employer was relevant, any penalty imposed or rebate given was for the current year only and was not retrospective in effect.

Similar issues arose in the Committee's investigation into the Civil Aviation Regulations

<sup>304</sup> Regulations Review Committee "Investigation into the Marine and Coastal Area (Takutai Moana) Reclamation Fees Regulations 2012" (30 September 2013) at 8.

<sup>305</sup> In this case, Standing Orders of the House of Representatives 2020, SO 327(2)(a) and (c).

<sup>306</sup> Government response to Regulations Review Committee report "Investigation into the Marine and Coastal Area (Takutai Moana) Reclamation Fees Regulations 2012" (20 December 2013).

<sup>307</sup> Regulations Review Committee "Inquiry into the Accident Compensation (Accident Experience) Regulations 1992", above n 192.

1953, Amendment No 30.<sup>308</sup> The regulations increased licence fees for airline pilots. The Minister of Transport had stated that current holders of airline pilot licences should be required to contribute to the costs incurred by current student pilots. This was on the basis that the airline pilots had received heavy taxpayer subsidies when they were themselves student pilots. The complainants argued that seeking to recoup money from pilots in this way for costs incurred while studying amounted to a retrospective action. The Civil Aviation Authority responded by stating that the fees payable for a licence affected only applications for licences *after* the regulations came into force. The Authority argued that the minister's comments simply indicated a more equitable regime, and the Committee found no retrospectivity in the regulations.

Thirdly, the Committee's investigation into staffing orders raised the issue of retrospective validation of government actions.<sup>309</sup> Prior to new staffing orders being issued, the Ministry of Education gave instructions to schools to give notice of pending change in staffing levels. As a result of the notice, some teachers chose to resign before the new orders were brought into force. Whilst making a finding that regulations should not be anticipated by either the body administering the regulations or the people affected by them, the Committee concluded that the regulations fell just short of being retrospective.

Finally, the Committee's investigation into a complaint regarding the Overseas Investment Amendment Regulations 2008 considered regulatory intervention intended to disrupt a bid by the Canadian Pension Plan Investment Board to buy a 40 percent share in Auckland International Airport Limited.<sup>310</sup> A regulation-making power was used to add additional criteria to a statutory power of decision as to whether to allow overseas investment in sensitive land. In concluding the regulations were not retrospective in effect, the Committee adopted the approach of the Court of Appeal in *Foodstuffs (Auckland) Ltd v Commerce Commission*.<sup>311</sup> The Committee endorsed the Court's view that "the application of amended legislation to existing applications was acceptable as the applications were future looking and the decision did not address past transactions."<sup>312</sup>

<sup>308</sup> Regulations Review Committee "Inquiry into the Civil Aviation Regulations 1953, Amendment No 30", above n 244.

<sup>309</sup> Regulations Review Committee "Report on the Complaint Relating to Staffing Orders, Promulgated under Section 91H of the Education Act 1989, Affecting Area, Primary, Intermediate, and Secondary Schools", above n 206.

<sup>310</sup> Regulations Review Committee "Complaint Regarding the Overseas Investment Amendment Regulations 2008", above n 203.

<sup>311</sup> *Foodstuffs (Auckland) Ltd v Commerce Commission* [2002] 1 NZLR 353.

<sup>312</sup> Regulations Review Committee "Complaint Regarding the Overseas Investment Amendment Regulations 2008", above n 203.

All seven reports mentioned above are indicative of a strict approach to determining when a regulation can be considered retrospective. In the two instances in which a regulation was deemed directly retrospective, the regulation clearly altered the law as it stood prior to the regulation coming into force. The Committee has also shown willingness to declare a regulation indirectly retrospective where retrospectivity is only avoided by a breach of another Standing Order ground. The other four reports involved situations where the regulations were found to be prospective in their application.

### **III Expressly Authorised by the Empowering Statute**

Assuming that a regulation is considered retrospective, the retrospective element of the regulation must be expressly authorised by the empowering Act. The Committee has set a high threshold for determining what constitutes express authorisation. The clearest instance of an express authorisation was contained in the Sharemilkers' Agreements Order 2001.<sup>313</sup> The Order amended minimum terms and conditions for contracts between sharemilkers and employers contained in the Sharemilking Agreements Act 1937. The Committee found the Order was not retrospective, but concluded that even if it was, the Act authorised retrospectivity. Under section 4(4) of the Act it was possible for the Order to operate "before or after the date of the Order in Council". Potentially this allowed the Order to change the minimum terms and conditions of a contract prior to it actually coming into force.

In the Committee's investigation into the Accident Rehabilitation and Compensation Insurance (Social Rehabilitation) Regulations 1992, the Committee stated that:<sup>314</sup>

If a department finds itself unable to act because legislation does not provide for a matter then it should seek an amendment to that legislation, rather than interpret the law on the basis of administrative necessity.

In its report the Committee rejected an argument that the empowering Act implicitly authorised the regulations to have retrospective effect. The Corporation argued that the relationship between the date upon which the Act came into force and the date from which the regulations were required to cover applications was evidence of an acknowledgement by Parliament that levels of payments had to be set retrospectively. The Committee, however, required explicit authorisation that simply did not exist in the principal Act.

<sup>313</sup> Regulations Review Committee "Complaint Relating to the Sharemilking Agreements Order 2001" [2001] AJHR I16G.

<sup>314</sup> Regulations Review Committee "Complaints Relating to the Accident Rehabilitation and Compensation Insurance (Social Rehabilitation) Regulations 1992", above n 287, at 17.

A similar scenario occurred regarding the Marine and Coastal Area (Takutai Moana) Reclamation Fees Regulations 2012. In its report, the Committee considered and rejected LINZ's argument that it was theoretically possible that Parliament intended fees to be able to be set at a time after they became payable.<sup>315</sup> The Committee, again, required express acknowledgement that retrospectivity was possible in the text of the empowering Act, and concluded that LINZ had failed to point to statutory authority for this in the sections of the Marine and Coastal Area (Takutai Moana) Act 2011 concerned.

<sup>315</sup> Regulations Review Committee "Investigation into the Marine and Coastal Area (Takutai Moana) Reclamation Fees Regulations 2012" (30 September 2013) at 9.

## 12

### Non-Compliance With Notification and Consultation Procedures: SO 327(2)(h)

#### **327 Drawing attention to a regulation**

- (1) In examining a regulation, the committee considers whether it ought to be drawn to the special attention of the House on one or more of the grounds set out in paragraph (2).
- (2) The grounds are, that the regulation—
  - ...
  - (h) was not made in compliance with particular notice and consultation procedures prescribed by statute:

*Hist:* SO 319(2)(h) (September 2014 to October 2020)  
 SO 315(2)(h) (October 2011 to August 2014)  
 SO 310(2)(h) (September 2008 to October 2011)  
 SO 315(2)(h) (August 2005 to September 2008)

## **I Introduction**

Regulations can have a significant impact on the rights and liberties of individuals and organisations. Notification procedures allow those that may be affected by proposed regulations to be made aware of their existence. Consultation requirements are designed to give individuals and organisations the opportunity to offer their opinions on proposed regulations, and for those opinions to be considered by the body responsible for making the regulations. Consultation can also allow any problems or issues to be dealt with prior to the regulations coming into force.

For these reasons, a statute may specify that certain notification or consultation procedures must be undertaken as part of the regulation making process. Two issues may arise when the Committee considers Standing Order 327(2)(h); namely, what notification or consultation requirements did the empowering statute contain, and were those requirements met? Each issue will be examined separately.

## II When Consultation is Required

An Act may contain an express requirement to follow certain notification or consultation procedures. The duty to consult may be framed in several ways. Consultation may be required with specified individuals or groups. Alternatively, the individual or body exercising the power may be given a discretion to consult with ‘appropriate persons’ or ‘those that may be affected by the regulations’. An Act may simply provide that ‘consultation must take place’, while others will set out in some detail the various steps that must be undertaken before a regulation can be made. Section 5 of the Marine Reserves Act 1971 provides an example of the latter. It sets out extensive notification and consultation requirements before an Order in Council can be made declaring an area to be a marine reserve. These include:

- the notification of an application for an Order in Council to be published in various newspapers;
- a requirement to notify adjacent property owners, local bodies, and harbour boards, the Secretary for Transport and the Ministry of Agriculture and Fisheries;
- the preparation of a plan available for inspection free of charge;
- a requirement that the applicant answer any objections to the plan; and
- a duty on the Minister of Conservation to consider all submissions and objections and to uphold an objection if he or she finds that declaring an area to be a marine reserve would have an undue impact on such matters as commercial fishing interests and the recreational use of the area.

Having established what the consultation requirements in the empowering Act are, the Committee will examine whether they have been complied with. In this case, the Committee found that all obligations as outlined above had in fact been fully discharged.<sup>316</sup> The complainant had argued that the Department of Conservation, as the applicant, had failed to undertake sufficient non-statutory consultation with local interests. Whilst the Committee did express concern as to the level of general consultation, it did not find this standing order to have been breached. This was because the Department was only required to undertake the formal procedures set out in section 5 of the Act.

An issue that has arisen is whether there can be an implicit requirement to undertake consultation notwithstanding that there is no express requirement to do so. The Committee

<sup>316</sup> Regulations Review Committee “Complaint of Mrs Mary Bowers regarding the Marine Reserve (Whanganui (Cathedral Cove)) Order 1992” [1993] AJHR I16J.



has adopted different approaches.<sup>317</sup> On the one hand, the Committee has indicated consultation is required even when there is no express requirement to consult. The Whitebait Fishing (West Coast) Regulations 1994 changed the length and timing of the West Coast whitebaiting season. Part IIIA of the Act required extensive consultation procedures to be undertaken prior to the making of regulations. However, the regulations in question were made pursuant to a separate part of the Act that contained no such consultation requirements. This was despite the whitebaiting season being a matter that could have been dealt with under Part IIIA. The issue then became whether the consultation requirements in Part IIIA of the Act should have been adhered to when making the regulations notwithstanding that they were made pursuant to a different part of the Act. The Committee stated that this was ultimately a matter for a court to decide. Interestingly, however, it did make the following statement:<sup>318</sup>

It is the Committee's view that the question of whether consultation is necessary requires the department to look further than the express wording of the empowering provisions.

The Committee's observation was based, in part, on the unique statutory framework in which these particular regulations were made. The Committee found that Parliament would have intended there to be consistency between the extensive consultation procedures set out in Part IIIA and the making of regulations under different parts of the Act that affect matters also dealt with under Part IIIA.

On the other hand, in its more recent interim report on a complaint relating to an increased marine safety levy imposed under section 191 of the Marine Transport Act 1994,<sup>319</sup> the Committee was not prepared to find an implicit consultation requirement in relation to the levying power. The Committee nonetheless expressed reservations about the consultation process actually undertaken by Maritime New Zealand. Its concerns included that the consultation was run over the Christmas period, that the consultation period was only extended for those who asked to meet Maritime New Zealand or for those who asked for an extension, and that Maritime New Zealand had advised that the increase would be phased in when in fact the initial increase was 96 percent of the total increase. Further, the Committee recommended that the Marine Transport Act be amended to provide for a

<sup>317</sup> Regulations Review Committee "Complaint Relating to the Whitebait Fishing (West Coast) Regulations 1994" [1994] AJHR I16A.

<sup>318</sup> Regulations Review Committee "Complaint Relating to the Whitebait Fishing (West Coast) Regulations 1994" [1994] AJHR I16A at 13.

<sup>319</sup> Regulations Review Committee "Interim Report on the Complaint Regarding SR 2008/319 Marine Safety Charges Amendment Regulations 2008", above n 253.

statutory consultation process in relation to the levying power. The government response accepted this recommendation, and indicated that an amendment inserting a statutory consultation process would be included in the Maritime Transport Amendment Bill.<sup>320</sup>

### III What Constitutes Consultation

The Committee has previously adopted the common law definition of consultation established in the High Court decision of *Air New Zealand Limited v Wellington International Airport Ltd*.<sup>321</sup> The Committee has summarised the relevant considerations to be as follows:

- The essence of consultation is the communication of a genuine invitation to give advice and a genuine consideration of that advice.
- The effort made by those consulting should be genuine, not a formality; it should be a reality, not a charade.
- Sufficient time should be allowed to enable the tendering of helpful advice and for that advice to be considered. The time need not be ample, but must be at least enough to enable the relevant purpose to be fulfilled.
- It is implicit that the party consulted will be (or will be made) adequately informed to enable it to make an intelligent and useful response. The party obliged to consult, while quite entitled to have a working plan in mind, should listen, keep an open mind, and be willing to change and if necessary start the decision-making process afresh.
- The parties may have quite different expectations about the extent of consultation.

Initially, whether a body convened for the purpose of consultation has been properly convened can be a basis for invalidating a regulation. This issue arose in the Committee's report *Investigation into the Canterbury Earthquake District Plan Order 2014*. Section 72 of

<sup>320</sup> "Government Response to Interim Report of the Regulations Review Committee: Complaint Regarding SR 2008/319 Marine Safety Charges Amendment Regulations 2008", above n 255. The government's progress in executing the Committee's recommendations is set out in Regulations Review Committee "Complaint Regarding SR 2008/319 Marine Safety Charges Amendment Regulations 2008", above n 255.

<sup>321</sup> *Air New Zealand Ltd v Wellington Airport Ltd* HC Wellington, CP 403/91, 6 January 1992. See also Regulations Review Committee "Complaints Relating to the Accident Rehabilitation and Compensation Insurance (Social Rehabilitation) Regulations 1992", above n 287, at 12; Regulations Review Committee "Investigation into the Biosecurity (Rabbit Calicivirus) Regulations 1997", above n 188, at 13; and Regulations Review Committee "Complaints Regarding Three Notices Issued by the Plumbers, Gasfitters and Drainlayers Board on March 2010 and the Plumbers, Gasfitters and Drainlayers Board (Fees) Notice 2010" (15 February 2011) at 15.

the Christchurch Earthquake Recovery Act required the Review Panel, who advised the Minister, to be composed of four members including at least one member with appropriate legal qualifications. The legal member of the Panel recused themselves for consideration of the 2014 Order, raising the question of whether quorum had been met. Some members felt that given the silence of the Act on the specific issue there was no requirement for each piece of advice to be given by all members of the Panel. Other members felt that the member's recusal meant that for the duration of that recusal that the Panel had not been convened in accordance with s 72. This meant the Order was invalid. The Committee could not agree in this case whether the regulation in question was invalid, but the need to comply with such procedures is clear.

The reports of the Committee indicate some perennial problems regarding the conduct of consultations. The most common of these is consultation taking place within too short a time frame. If the time allocated for interested persons to consider and respond to the proposed regulations is too short, the entire consultation process may be of limited value. Sufficient time must be given to allow respondents to give proper consideration to the issues. It must also be sufficient to encourage the party administering the regulations to engage in a proper reflection of any advice or objections that have been made. Exactly what this time frame should be will vary in each case. In one instance only nine working days were allowed for organisations to consult on draft regulations and prepare submissions.<sup>322</sup> The Committee agreed that this did not allow sufficient time for all the relevant organisations to canvass opinion and provide effective analysis and feedback. In another instance, just five working days were allowed for submissions on proposed regulations.<sup>323</sup> In these instances the Committee concluded that what occurred was a process of notification rather than consultation.<sup>324</sup>

The effectiveness of consultation may also be impeded by the quality of information provided. The Committee has stated that a party under a duty to consult must provide a

<sup>322</sup> Regulations Review Committee "Complaints Relating to the Accident Rehabilitation and Compensation Insurance (Social Rehabilitation) Regulations 1992", above n 287.

<sup>323</sup> Regulations Review Committee "Investigation into the Biosecurity (Rabbit Calicivirus) Regulations 1997", above n 188.

<sup>324</sup> Regulations Review Committee "Complaint Relating to the Whitebait Fishing (West Coast) Regulations 1994", above n 317. Other reports in which the timeframe for consultation was an issue include Regulations Review Committee "Complaint Relating to the Accident Rehabilitation and Compensation Insurance (Counselling Costs) Regulations 1992" [1994] AJHR I16B and Regulations Review Committee "Investigation into the Land Transport (Driver Licensing and Driver Testing Fees) Regulations 1999 and the Land Transport (Driver Licensing) Rule 1999" [1999] ADJHR I16T.

reasonable amount of information, as those consulted must know what is proposed before they can be expected to give their views.<sup>325</sup> The Committee has further stated that what constitutes ‘reasonable information’ in a particular case will be whatever is sufficient to enable the consulted party to tender its views.<sup>326</sup> In this instance, the Ministry of Agriculture and Fisheries released a public discussion document that formed the basis of its consultation process. However, the document failed to make clear the exact nature of the obligations being imposed under the regulations. It also found that the Ministry had failed to address concerns that had been raised by several industry groups. The Committee concluded that the Ministry had failed to provide sufficient information to provide an effective consultation process.

Similar issues arose in the Committee’s investigation into the Whitebait Fishing (West Coast) Regulations 1994.<sup>327</sup> As noted above, the regulations altered the start/finish date of the whitebait season, and in so doing reduced the length of the season. The Committee made a finding that the public discussion document released by the Department of Conservation did not make it clear that a change to the length of the season was a possibility. As a result, members of the public making submissions did not address this issue. The Committee held that when it subsequently became clear to the Department that the length of the season would be changed, the Department had a responsibility to notify all those who had made submissions that a change was being mooted and to invite comment on the matter. This was because “as a general principle there is a requirement that a decision-maker who creates an expectation in people by his or her actions or words must treat people fairly”.<sup>328</sup>

One part of the requirement to provide sufficient information is the requirement to provide information on specific proposals. In its examination of three notices issued under the Plumbers, Gasfitters and Drainlayers Act 2006, the Committee took the view that consultation on an options paper did not satisfy a requirement that the Board consult “about

<sup>325</sup> Regulations Review Committee “Investigation into the Biosecurity (Ruminant Protein) Regulations 1999”, above n 208, at 21.

<sup>326</sup> Regulations Review Committee “Investigation into the Biosecurity (Ruminant Protein) Regulations 1999”, above n 208 at 21.

<sup>327</sup> Regulations Review Committee “Complaint Relating to the Whitebait Fishing (West Coast) Regulations 1994”, above n 317. See also Regulations Review Committee “Investigation into the Land Transport (Driver Licensing and Driver Testing Fees) Regulations 1999 and the Land Transport (Driver Licensing) Rule 1999”, above n 324.

<sup>328</sup> Regulations Review Committee “Complaint Relating to the Whitebait Fishing (West Coast) Regulations 1994”, above n 317, at 10.

its proposal for the contents of the notice.”<sup>329</sup> It suggested that, while an options paper might be good first step in a consultation process, the Board “was required to consult again about its specific recommendations for training requirements as a condition on licensing before going to the minister with them.”<sup>330</sup>

The effectiveness of the consultation may also be affected by the particular focus of the consultative process. For example, in its report on the Complaint Regarding Notice of Scopes of Practice and Related Qualifications Prescribed by the Nursing Council of New Zealand, the Committee took the view that the topic or focus of the consultation affected its meaningfulness.<sup>331</sup> The complainants were concerned about a change of the title of second-level nurses from “enrolled nurse” to “nurse assistant”, but the consultation restricted the topic of consultation to the titles of “nurse assistant” and “registered nurse assistant”. The Committee took the view the consultation would have been more meaningful had it also consulted on the title of “enrolled nurse”. Despite this concern, the Committee found that the Standing Order ground had not been made out as the notice and consultation prescribed by the Health Practitioners Competence Assurance Act 2003 had been complied with.

The issue of predetermination has arisen on several occasions. If the outcome of consultation is predetermined, then the consultation process may indeed become a ‘charade’. In the Committee’s investigation into the Biosecurity (Rabbit Calicivirus) Regulations 1997, possible evidence of predetermination came from a Cabinet Legislation Committee paper.<sup>332</sup> Prior to the closing date for submission on draft regulations, the paper detailed a proposal to introduce a bill into Parliament that would have had the effect of validating the proposed regulations. In response, the Committee stated that “it was clear to us that not only were the regulations going to be promulgated, but were going to be subsequently validated”. The Committee’s finding of predetermination was a major factor in its decision that the consultation process had been inadequate.

In the Committee’s investigation into the Accident Rehabilitation and Compensation

<sup>329</sup> Regulations Review Committee “Complaints Regarding Three Notices Issued by the Plumbers, Gasfitters and Drainlayers Board on March 2010 and the Plumbers, Gasfitters and Drainlayers Board (Fees) Notice 2010” (15 February 2011).

<sup>330</sup> Regulations Review Committee “Complaints Regarding Three Notices Issued by the Plumbers, Gasfitters and Drainlayers Board on March 2010 and the Plumbers, Gasfitters and Drainlayers Board (Fees) Notice 2010” (15 February 2011) at 15.

<sup>331</sup> Regulations Review Committee “Complaint Regarding Notice of Scopes of Practice and Related Qualifications Prescribed by the Nursing Council of New Zealand”, above n 302.

<sup>332</sup> Regulations Review Committee “Investigation into the Biosecurity (Rabbit Calicivirus) Regulations 1997”, above n 188.

Insurance (Counselling Costs) Regulations 1992, the complainants alleged that the Accident Compensation Corporation had made no attempt to respond to any of the issues they had raised.<sup>333</sup> It was further argued that the short time frame in which the consultation took place, together with the speed with which the regulations were promulgated, showed that the Corporation had demonstrated no real commitment to resolving the issues that had arisen from the draft regulations. In effect, the complainants argued that the result of the consultation was predetermined. Consistent with this argument, the Committee made a finding that the Corporation had undertaken a process of notification rather than consultation, and that this was largely due to the short timeframe under which consultation took place.

Finally, consultation with certain groups may be required as a result of the provisions of the empowering Act. For instance, section 4 of the Conservation Act 1987 requires the Department of Conservation to administer the Act so as to give effect to the principles of the Treaty of Waitangi. This may require extra consultation with Maori in order to give effect to those principles. The extent of this consultation will vary depending on the circumstances. The issue was addressed in the Committee's investigation into the Whitebait Fishing (West Coast) Regulations 1994, and the conclusion reached that more could have been done by the Department of Conservation to inform local Maori of the proposed regulations.<sup>334</sup>

<sup>333</sup> Regulations Review Committee "Complaint Relating to the Accident Rehabilitation and Compensation Insurance (Counselling Costs) Regulations 1992", above n 324.

<sup>334</sup> Regulations Review Committee "Complaint Relating to the Whitebait Fishing (West Coast) Regulations 1994", above n 317, at 19.

## 13

### Form or Purport Calls for Elucidation: SO 327(2)(i)

#### **327 Drawing attention to a regulation**

- (1) In examining a regulation, the committee considers whether it ought to be drawn to the special attention of the House on one or more of the grounds set out in paragraph (2).
- (2) The grounds are, that the regulation—
  - ...
  - (i) for any other reason concerning its form or purport, calls for elucidation.

*Hist:* SO 319(2)(i) (September 2014 to October 2020)  
 SO 315(2)(i) (October 2011 to August 2014)  
 SO 310(2)(i) (September 2008 to October 2011)  
 SO 315(2)(i) (August 2005 to September 2008)

Regulations can have a significant impact on the rights and obligations of people and organisations. It is crucial, therefore, that regulations are expressed in a clear and precise manner. Delegated legislation must be couched in terms that allow people to clearly understand what is required to comply with the law. Thus, the Committee may find a breach of this Standing Order ground where a regulation is ambiguous, not in clear English, requires clarification, or fails to contain a necessary component such as criteria upon which decisions are made.

The words “for any other reason” in Standing Order 327(2)(i) might suggest that this is a catch-all or “omnibus” ground that is breached when a regulation is improper but does not breach any of the eight other Standing Order grounds. On the contrary, it is limited to those regulations whose “form or purport” is objectionable or improper. This distinction was made by the Committee in its investigation into the Land Transport Rule 32012 - Vehicle Standards (Glazing). In its report the Committee stated:<sup>335</sup>

<sup>335</sup> Regulations Review Committee “Complaint Relating to Land Transport Rule 2012 - Vehicle Standards (Glazing)”, above n 193, at 15.

We agree with the Crown that findings of substantive unreasonableness are not appropriate under this ground of the Standing Orders. Findings should be restricted to the clarity of the language of the Rule itself, rather than the substance of the Rule.

Land Transport Rule 32012 imposed limits on the levels of window tinting for certain vehicles. The complainants argued that this Standing Order ground was breached because the limits were unreasonable, anomalous in their application, and failed to take into account different driving tasks and visibility factors. The Committee rejected this submission on the basis that these concerns went to the substance of the Rule. The Committee did, however, make a finding that the ground had been breached because the Rule had been drafted in a way that was confusing and ambiguous. Evidence was put before the Committee that the window glazing industry had to rely on fact sheets prepared by the Land Transport Safety Authority to interpret the rule. The Committee recommended that the Rule be amended to clarify the exact restrictions it imposed.

The reports of the Committee provide several other instances where regulations required clarification. In one instance, the regulations allowed the Accident Compensation Corporation to make a payment in crisis situations to counsellors for services not provided on a face-to-face basis.<sup>336</sup> The Committee found this wording to be confusing and unclear. It recommended that the regulation should instead state that payments were limited to one telephone contact session as this was what was intended.

The clarity of regulations is especially important when they impose obligations, as people must clearly know what is required of them in order to discharge those obligations. The Biosecurity (Ruminant Protection) Regulations 1999 placed significant obligations on every “operator” as defined in the regulations.<sup>337</sup> However, the Committee found that the definition of operator was such that it was unclear exactly who was considered to be an operator and therefore covered by the regulations. This ambiguity was made even worse by the fact that failure to comply with the regulations was to commit an offence of absolute liability. The Committee made a strong recommendation that the definition of operator be amended to provide greater clarity.<sup>338</sup>

The Committee also found fault with six codes of animal welfare made under the Animal

<sup>336</sup> Regulations Review Committee “Complaint Relating to the Accident Rehabilitation and Compensation Insurance (Counselling Costs) Regulations 1992”, above n 324.

<sup>337</sup> Regulations Review Committee “Investigation into the Biosecurity (Ruminant Protein) Regulations 1999”, above n 208.

<sup>338</sup> The Committee also made a finding that some of the obligations had been drafted in an ambiguous and vague manner and recommended their removal altogether.



Welfare Act 1999.<sup>339</sup> Codes of welfare were used to promote appropriate behaviour, establish minimum standards and promote best practice in relation to animals owned or in the charge of any person. Under the Act it was not an offence to breach a code, but it was a defence to a prosecution if a defendant could show that he or she equalled or exceeded a minimum standard in a code of welfare. The difficulty was that the codes had previously been voluntary codes and as such sought to provide information rather than set minimum standards of conduct. Thus a person who wished to avail himself or herself of a defence to a prosecution under the Act may have had difficulty proving that he or she satisfied the minimum standards in the codes because these standards were either unclear or unstated. Accordingly, the Committee found the codes to have breached this Standing Order ground.

Clarity of language is also important when the regulations in question seek to control an activity. Again, people must be able to ascertain from the regulations exactly what they can and cannot do. This is particularly relevant when granting a licence or a permit. For example, the Marine Mammals Protection Regulations 1990 established a permit system for commercial operators who wished to transport people to view marine mammals.<sup>340</sup> However, the regulations failed to specify detailed criteria upon which the Director-General of the Department of Conservation would exercise the discretion to grant a permit. The Committee recommended that such criteria be inserted into the regulations given the financial interests at stake for applicants. Similarly, the Committee expressed concern with the Hurunui/Kaikōura Earthquakes Recovery (Coastal Route and Other Matters) Order 2016. The Order facilitates restoration work on coastal routes. Clause 29 specifically set out the actions an agency may carry out in a reserve despite anything to the contrary in the management plan, Reserves Act, or the enactment which the reserve is held under. The clause specifies the actions as being able to:

- (a) undertake restoration work anywhere in a reserve;
- (b) operate a parking area for heavy motor vehicle anywhere in a reserve; and
- (c) prohibit persons from entering or remaining on a reserve.

The Committee sought the powers of (b) and (c) to be made clear to apply only to restoration work.<sup>341</sup>

<sup>339</sup> Regulations Review Committee “Investigation into Six Codes Deemed to be Codes of Welfare Under the Animals Act 1999” [2000] AJHR I16B.

<sup>340</sup> Regulations Review Committee “Inquiry into the Marine Mammals Protection Regulations 1990”, above n 273.

<sup>341</sup> Regulations Review Committee “Activities of the Regulations Review Committee in 2017” [2017] AJHR I.16D at 11 – 12.

## 14

### Occasional Reports

#### I Occasional Reports

Under Standing Order 326(4), the Regulations Review Committee may consider any matter relating to regulations and report on it to the House. This chapter provides summaries of the topics covered by these reports. These summaries constitute only a brief consideration of the issues raised by the Committee.

#### II Fees

In 1989, the Regulations Review Committee addressed a number of issues relating to the charging of fees by regulation.<sup>342</sup> Developments in the state sector had added a new impetus to the need to provide satisfactory answers to newly emerging questions about when and how fees could be charged. These included the corporatisation of a number of government departments, the vesting of the power to charge fees in someone other than the Governor-General, and the widespread implementation of user-pays policies.

First, the Committee established that there are some government activities where cost-recovery should not apply. Some examples include the armed forces, the police, and the House of Representatives. The Committee stated that because these services are provided to the community as a whole, charging fees is neither practicable nor appropriate. However, the more commercial the activity, the more cost-recovery becomes both suitable and feasible. Ultimately the service provided by the government might be only one of a number of suppliers, in which case the transaction is performed on a contractual basis.

Secondly, when charging a fee, an important issue is whether the ‘fee’ is so excessive that it is really a tax in disguise; if the fee is indeed considered a tax, then it must be approved by an Act of Parliament. Under Article 4 of the Bill of Rights 1688 (UK), it is illegal for the Crown

<sup>342</sup> Regulations Review Committee “Inquiry into the Constitutional Principles to Apply when Parliament Empowers the Crown to Charge Fees by Regulation” [1989] AJHR I16C. For more recent examples of the Committee’s view on setting fees by regulation, refer to its 2007 report on the complaint relating to the Midwifery (Fees) Notice 2005 and its 2005 report on its investigation into the complaints relating to Civil Court Fees Regulations. Further, the Office of the Auditor General’s Guidelines on Costing and Charging for Public Sector Goods and Services and the Treasury’s Guidelines for Setting Charges in the Public Sector also contain useful guidance: see above, n 181.

to seek to raise money without parliamentary approval.<sup>343</sup> In addition, section 22(a) of the Constitution Act 1986 provides that it shall not be lawful for the Crown, except by or under an Act of Parliament, to levy a tax. In considering whether a fee is a really a tax, the Committee suggested that any levy that is compulsory, for public purposes, and is enforceable must have prior parliamentary authority if it is to comply with constitutional requirements.<sup>344</sup>

Thirdly, the Committee addressed who should be responsible for fixing the fee. It took the view that, where fees are fixed by regulation, only the Governor-General acting with the advice and of the Executive Council should be responsible for the making of regulations setting fees. The Committee expressed concern at the practice of giving a third party the power to set fees by regulations, for example the Director-General of a government department. The Committee warned of a lack of accountability in these situations.

Fourthly, The Committee considered the basis on which a fee should be calculated. The Committee expressed concern at those situations where greater than cost-recovery is sought as this may indicate that the charging of fees is simply a revenue gathering exercise. The Committee did, however, temper this by stating:<sup>345</sup>

We accept there will be occasions when a substantial fee is entirely proper. Indeed that fee could be far greater than cost recovery. If a privilege has been granted to one individual or group to the exclusion of others, then the issue is more of a commercial contractual matter.

The Committee also acknowledged the argument that fees can be set at greater than cost recovery in order to discourage over-use of a service. However, in situations where fees charge greater than cost recovery, the Committee said that there is a greater obligation to inform the public that they are paying greater than cost recovery, and to explain why it is considered necessary.

Finally, the Committee considered the extent of information about fee setting that should be made available to the public. The Committee said that as a general rule, every department

<sup>343</sup> The Bill of Rights 1688 applies in New Zealand by virtue of the Imperial Laws Application Act 1988.

<sup>344</sup> The Committee cited and approved comments by the High Court of Australia in *Air Caledonie International v Commonwealth of Australia* [1988] 82 ALR 385: "If the person required to pay the exaction is given no choice about whether or not he requires the services and the amount of the exaction has no discernible relationship with the value of what is acquired, the circumstances may be such that the exaction is, at least to the extent that it exceeds the value, properly be seen as a tax".

<sup>345</sup> Regulations Review Committee "Inquiry into the Constitutional Principles to Apply when Parliament Empowers the Crown to Charge Fees by Regulation", above n 342, at 12.

should be able to quantify the cost of providing a service, and that this information should be made available to the public as a matter of course. In situations where there is a choice between the convenience of the government in not supplying the information, and the convenience of the public being given the information, the decision should be in favour of the public.

In its response, the government agreed with the general approach of the Committee and that it had established an officials committee to study the matter.<sup>346</sup> It noted the test laid down by the High Court of Australia in *Air Caledonie International* and endorsed the constitutional principle that no tax is to be levied without parliamentary approval. It further agreed that a “fee” may, on analysis, be found to be a tax in disguise. The government cautioned that it would not be willing to make the pricing policies of State Owned Enterprises (SOEs) subject to approval by either the government or the House. It said that to do so would be inconsistent with the requirement in section 4 of the State Owned Enterprises Act 1986 that SOEs run as profitable businesses. While the government agreed with the Committee’s aim of greater parliamentary scrutiny of fees and charges, it did not accept a Committee recommendation that an explanatory note should accompany all bills and regulations that quantify fees.

### **III Deemed Regulations and Disallowable Instruments that are not Legislative Instruments**

The Regulations Review Committee examines all “disallowable instruments” as defined in section 38 of the Legislation Act 2012. That definition includes instruments previously described as “deemed regulations”. Deemed regulations are a form of delegated legislation that are treated *as if they were* regulations. This is notwithstanding that they are made outside the traditional regulation-making process.<sup>347</sup> Deemed regulations can take a variety of forms and, like traditional regulations, cover a wide range of subject matters. Deemed

<sup>346</sup> “Government Response to the Report of the Regulations Review Committee: the Inquiry into the Constitutional Principles to Apply when Parliament Empowers the Crown to Charge Fees by Regulation” [1989] AJHR I20.

<sup>347</sup> The process used to make regulations and deemed regulations is normally quite different. For traditional regulations, they are drafted by Parliamentary Counsel Office; approved by Cabinet; made by the Governor-General in Executive Council; notified in the Gazette; and published in the Statutory Regulations (SR) series. By contrast, deemed regulations are not usually drafted by PCO but are the responsibility of the organisation making them; generally made by a single authority such as a minister or other official; not usually subject to Cabinet approval or submitted to the Governor-General in Executive Council; and infrequently published in the SR series.

regulations can include rules, codes, instructions, and standards. Two examples of deemed regulations include Privacy Codes of Practice issued under the Privacy Act 1993, and penal operational standards made by the Chief Executive of the Department of Corrections under the Penal Institutions Act 1954.

In 1999, the Committee undertook a thorough investigation into deemed regulations.<sup>348</sup> In 2004 the Committee produced a report on the principles for determining if delegated legislation is given the status of regulations.<sup>349</sup> In 2006 the Committee undertook an investigation into deemed regulations that were not being presented to the House.<sup>350</sup> In 2014, the Committee completed a report on the creation, identification and publication of “disallowable instruments that are not legislative instruments”. Each of these reports is discussed in turn.

### **A    1999 Report: Deemed Regulations**

The Committee identified two key issues in determining whether it is appropriate for legislation to provide the power to make deemed regulations. The first is whether it is appropriate for Parliament to delegate a law-making power at all.<sup>351</sup> The second issue is what form a power should take, and to whom it should be delegated. Because of the lack of checks in place for the making of deemed regulations as compared with ordinary regulations, the Committee stated that the creation of deemed regulations should be an exception to the rule. Furthermore, a regulation-making power to make deemed regulations should only be exercised in accordance with the following principles:

- *The importance of the delegated power:* In determining whether a delegated power is appropriate, an assessment should be made as to the likely effect the delegated legislation will have on the rights and interests of individuals. The Committee singled out criminal offences as being inappropriate for delegated legislation. Where Parliament had determined that offences can be imposed under delegated legislation, the instrument should be a regulation made by the Governor-General by Order-in-Council rather than a deemed regulation.

<sup>348</sup> Regulations Review Committee “Inquiry into Instruments Deemed to be Regulations - An Examination of Delegated Legislation” [1999] AJHR I16R.

<sup>349</sup> Regulations Review Committee “Inquiry into the Principles Determining Whether Delegated Legislation is Given the Status of Regulations” [2004] AJHR I16E.

<sup>350</sup> Regulations Review Committee “Investigation into Deemed Regulations that are not presented to the House of Representatives” [2006] AJHR I16E.

<sup>351</sup> This issue is addressed in some detail in Legislation Advisory Committee, above n 135, ch 14.

- *The subject matter of the power:* On occasion, the subject matter of delegated legislation may suggest that an alternative process to the traditional regulation-making process is appropriate. This may be where the subject matter is relatively detailed or technical. The Committee cited civil aviation rules as being more suitable for deemed regulations because of their highly technical requirements and their specific application to a certain class of persons.
- *The application of the power:* If the delegated legislation affects a narrowly defined or clearly identifiable group rather than the public at large, deemed regulations may be more appropriate than ordinary regulations. For example, civil aviation rules apply to pilots and others in the aviation industry and, as such, may be suited to deemed regulations. On the contrary, land transport rules affect all those who hold a driver's licence and should be contained in ordinary regulations rather than deemed regulations.
- *The agency to whom the power is delegated:* The most appropriate legislator should be chosen for the particular delegated legislation. This may be the Governor-General in Executive Council, an individual minister, an official, or another agency.

The government response to the Committee's recommendations came in two stages.<sup>352</sup>

In its first response, the government agreed that the principles identified by the Committee regarding deemed regulations should be taken into account when legislation is developed in order to determine whether ordinary regulations or deemed regulations were appropriate. It also agreed that the *Cabinet Manual* should be amended so that a power to make deemed regulations must be first identified and that it conforms with the principles stated in the Committee's report. The government also directed that, where a government bill empowers the making of deemed regulations, the reason for the provision must be included in the explanatory note to the bill.

The second government response dealt with the remaining Committee recommendations. The most noteworthy of these was the rejection of the recommendation that all deemed regulations be approved by Cabinet as part of the promulgation process. This

<sup>352</sup> The first was in October 1999, in which the government agreed with two Committee recommendations. Consideration of the remaining recommendations was deferred until the results of a working party could be considered. The report of this working party formed the basis of the government's second response, tabled in November 2000. "Government Response to the Report of the Regulations Review Committee: Inquiry into Instruments Deemed to be Regulations - An Examination of Delegated Legislation" [1999] AJHR A5; and "Further Government Response to the Report of the Regulations Review Committee: Inquiry into Instruments Deemed to be Regulations - An Examination of Delegated Legislation" [2000] AJHR A5.

was rejected on the basis that Cabinet is primarily a decision-making body and not a scrutiny or monitoring mechanism. While Cabinet does consider ordinary regulations, this is because: (a) ordinary regulations regularly relate to matters of significant concern; and (b) ordinary regulations are made by Order in Council and therefore will involve the executive in any case. Requiring Cabinet to scrutinise deemed regulations – which by their very nature are technical and detailed – would not sit comfortably with Cabinet’s collective decision-making role. Instead, the government stated that those authorities responsible for making deemed regulations should themselves ensure that the deemed regulations are constitutionally proper.

### ***B 2004 Report: Principles for Determining Status of Delegated Legislation***

Following on from its 1999 report on deemed regulations, the Committee investigated the proper classification of delegated legislation.<sup>353</sup> The Committee expressed concern that a number of legislative instruments that should have been eligible for scrutiny by the Regulations Review Committee were in fact not because they did not come under the definition of “regulations” in section 2 of the Regulations (Disallowance) Act 1989. This was because the instrument was not declared to be a regulation (ie it was not named as such, nor was it deemed to be a regulation for disallowance purposes) even though the instrument “exhibited all the characteristics of a law-making instrument and ought to be classified as a regulation”.<sup>354</sup>

The Committee considered how the apparent inconsistencies in classification could best be remedied. Ultimately it proposed that the definition of “regulations” in the Regulations (Disallowance) Act 1989 and the Interpretation Act 1999 be amended to broadly correspond to the Australian Legislative Instruments Act 2003. The latter Act reformed the Australian approach to delegated legislation by making the true character of an instrument (its substance rather than its form) the test for its status. In addition, the Act created a Federal Register of Legislative Instruments. If an instrument is not listed on this register, then it is not enforceable. The Committee argued strongly in favour of such a model for New Zealand. In addition to providing certainty as to the proper status of delegated legislation, the Committee also pointed to the benefits that would accrue from a common legislative

<sup>353</sup> Regulations Review Committee “Inquiry Into the Principles Determining Whether Delegated Legislation is Given the Status of Regulations”, above n 349.

<sup>354</sup> Regulations Review Committee “Inquiry Into the Principles Determining Whether Delegated Legislation is Given the Status of Regulations”, above n 349 at 7.

approach with Australia.

The government response to the proposal for amending legislation based on the Australian Legislative Instruments Act 2003 was only lukewarm. It argued that it was not clear that the change in approach would bring greater clarity to the law. It was worried that this approach would “capture a very wide range of instruments and have significant effects on the administrative processes of government departments and a range of other groups who issue instruments of legislative character”.<sup>355</sup>

The government stated that it would monitor the effectiveness of the Australian model over the next two years. It also said that it would require officials to advise Cabinet of situations when a bill provided for the making of legislative instruments that did not come under the established definition of “regulations”. The government rejected the Committee’s call for a central register of legislative instruments.

### ***C 2006 Report: Deemed Regulations Not Presented to the House***

It came to the Committee’s attention that a number of deemed regulations made in 2006 had not been presented to the House in accordance with section 4 of the Regulations (Disallowance) Act.<sup>356</sup> The Committee expressed concern that this could result in the courts holding such regulations to be invalid. The Committee attributed the failure of many organisations to present deemed regulations to the House to a lack of understanding concerning both the Regulations (Disallowance) Act’s requirements and the correct procedure for presenting deemed regulations to the House. The Committee recommended that provisions that deem instruments to be regulations for the purposes of the Regulations (Disallowance) Act contain a paragraph requiring presentation of the instruments to the House in accordance with that Act. Further, it wrote to all ministers advising them of the correct procedure for presenting deemed regulations to the House.

The government agreed with Committee’s recommendation.<sup>357</sup> In relation to new legislation containing a provision deeming an instrument to be a regulation, the government stated that a paragraph would be included requiring presentation of the instruments to the

<sup>355</sup> “Government Response to the Report of the Regulations Review Committee: Inquiry Into the Principles Determining Whether Delegated Legislation Is Given the Status of Delegated Legislation” [2004] AJHR A5 at 2.

<sup>356</sup> Regulations Review Committee “Investigation into Deemed Regulations that are not presented to the House of Representatives”, above n 350.

<sup>357</sup> “Government Response to Report of the Regulations Review Committee: Investigation into Deemed Regulations That Are Not Presented to the House of Representatives” [2006] AJHR J1.



House in accordance with the Regulations (Disallowance) Act 1989. In relation to existing legislation, the government said it would consider whether, and how best to, insert such a paragraph.

These changes have since been addressed in the Legislation Act 2012. Section 41 of that Act, which requires presentation of certain disallowable instruments to the House, automatically applies to all “legislative instruments”, which, as discussed in Chapter 3 above, encompasses instruments that were “regulations” under the 1989 Act and instruments stated by an Act to be disallowable (ie one form of deemed regulation). Provided that a parent Act explicitly states that instruments made under it are to be disallowable, they now must be presented to the House for scrutiny, even if they would previously have been classed as “deemed regulations” and are not strictly “legislative instruments”. Section 41 does not, however, include instruments with “significant legislative effect” (defined in section 39 of the Legislation Act 2012) if they are not overtly stated to be disallowable in the Act authorising their creation. This means that an instrument with significant legislative effect that is not stated to be disallowable will still fall within that Act’s disallowance regime, but will not be automatically presented to the House. Scrutiny of these types of instrument is reliant either on the Committee receiving a complaint regarding instruments of this type or exercising its powers without prompting. The result of this is that this class of instrument is less likely to face direct scrutiny than the classes addressed above. Regardless, the automatic presentation to the House of “deemed regulations”, provided that they are stated to be disallowable by their parent Act, is a significant change under the 2012 Act.

#### ***D 2014 Report: Disallowable instruments that are not legislative instruments (DINLIs)***

The category of instrument once known as “deemed regulations”, As mentioned in Chapter 3, now falls within the Legislation Act, as “disallowable instruments that are not legislative instruments” or “DINLIs” (although, as noted in Chapter 3, this term has been criticised as confusing and will be overtaken by new terminology in the Legislation Act 2019). Generally, these instruments contain codes and rules for specific professions or industries. These instruments, as with deemed regulations, must be presented to the House and are subject to scrutiny by the Regulations Review Committee. They are not, however, drafted by the Parliamentary Counsel Office, but rather by specific bodies to whom drafting power has been delegated by primary legislation.

The Committee’s scrutiny of DINLIs is similar to its scrutiny of legislative instruments, although it has noted that difficulty in identifying and accessing these instruments

sometimes causes delay between the instrument being made and the Committee scrutinising it that does not occur in the scrutiny of legislative instruments.<sup>358</sup>

The Committee has noted that it often finds the following problems:<sup>359</sup>

- the instrument does not specify the date on which it was made;
- the instrument does not specify under which empowering provision it was made;
- the instrument does not specify the date on which it comes into force;
- the instrument does not mention whether any relevant statutory prerequisites were complied with prior to the instrument being made;
- the instrument is not accompanied by explanatory notes;
- the instrument was not presented to the House within 16 working days in accordance with section 41 of the Legislation Act 2012;
- the instrument is not clearly notified in the Gazette, including inconsistent naming practices; and
- the instrument is not made available on the website of the agency empowered to make it.

The Committee has considered that many of the problems with the creation, identification and publication of DINLIs were minor, but that their combined effect made the parliamentary scrutiny process of these instruments difficult and inefficient.<sup>360</sup>

In 2014, the Committee completed a report into DINLIs, focusing on the lack of clarity surrounding the creation, publication and status of these instruments.<sup>361</sup>

It made a number of recommendations as follows.<sup>362</sup>

<sup>358</sup> Regulations Review Committee “Activities of the Regulations Review Committee in 2013” (27 June 2014) at 17 and Regulations Review Committee “Activities of the Regulations Review Committee” [2017] AJHR I.16D at 13.

<sup>359</sup> Regulations Review Committee “Activities of the Regulations Review Committee in 2013” (27 June 2014) at 17 and Regulations Review Committee “Activities of the Regulations Review Committee” [2017] AJHR I.16D at 13.

<sup>360</sup> Regulations Review Committee “Activities of the Regulations Review Committee in 2013” (27 June 2014) at 17 and Regulations Review Committee “Activities of the Regulations Review Committee” [2017] AJHR I.16D at 13 at 7–8.

<sup>361</sup> Regulations Review Committee “Inquiry Into the Oversight of Disallowable Instruments That are not Legislative Instruments” (11 July 2014).

<sup>362</sup> Regulations Review Committee “Inquiry Into the Oversight of Disallowable Instruments That are not Legislative Instruments” (11 July 2014) at 5.

- A register of delegated legislation ought to be created by statute, similar to the Australian Federal Register of Legislative Instruments reviewing a similar recommendation made in 2004.<sup>363</sup>
- An agency ought to be designated as responsible for DINLIs as an area of law.
- There ought to be a piece of legislation that ensures that every empowering provision (in any Act or delegated legislation, whether already made or yet to be made) states into which category delegated legislation made under it falls.
- In conjunction with the above recommendations, the “significant legislative effect” test ought to be removed from the Legislation Act 2012.
- Whether or not a register is established, all DINLIs required to be presented to the House ought to explicitly include both the words “disallowable instruments” and the requirements for their presentation.
- If a register is not established, the Legislation Act ought to be amended so that DINLIs must be notified in the *Gazette* and published in full on the relevant bodies’ website, a template is developed for *Gazette* notices, and a step-by-step guide is created for the process of making DINLIs.

It is worth noting that the first of the Committee’s recommendations, that a register of legislative instruments be established, had already been recommended by the Committee (and rejected by the government) a decade prior in 2004. The Committee heard evidence from the Parliamentary Counsel Office that it had been directed by Cabinet early in 2014 to investigate the feasibility of such a register.

The government responded separately to each of the Committee’s six recommendations.<sup>364</sup>

First, the government noted the Committee’s concern that DINLIs were often difficult to identify and agreed that citizens ought to have ready access to the law in order to comply with their rights and obligations. While PCO was already required to publish all Acts and Legislative Instruments on the legislation website, “other instruments” were only published on a discretionary basis and it relied on information from other agencies to do so. It also noted that the *Gazette*, linked directly from the legislation website, was also required to either publish DINLIs in full or notify of their making with a link to the relevant agency

<sup>363</sup> Regulations Review Committee “Inquiry Into the Principles Determining Whether Delegated Legislation is Given the Status of Regulations”, above n 349.

<sup>364</sup> “Government Response to Report of the Regulations Review Committee: Inquiry Into Disallowable Instruments That are not Legislative Instruments” (9 December 2014).

website. The government did, however, accept that a central register would provide a broader central source of authoritative, official and current legislation and it directed the PCO to explore the viability of an amendment to the Legislation Act 2012 establishing such a register based on the Australian Commonwealth model. Finally, the government noted that there were policy and mechanical issues surrounding the establishment of a register in legislation that would take some time to solve (for example, the consequences of a failure to register in terms of an instrument's legal status), so directed the PCO to continue to use its best endeavours to list DINLIs on the legislation website in the meantime.

Secondly, the government was not convinced that the designation of a single agency as responsible for DINLIs would alleviate the Committee's concerns. The government argued that every agency administering DINLIs was already responsible for the stewardship of those instruments under the State Sector Act 1988, and that the LAC Guidelines, the Cabinet Manual and a Cabinet Office circular relating to delegated legislation all provided those agencies with sufficient information. Further, PCO already provided drafting training to these agencies and was able to assist agencies on a discretionary basis where necessary. The government was also concerned that designating an agency as responsible for DINLIs (instead of or alongside agencies themselves) would make matters more unclear. The government considered that the establishment of a register would better solve the Committee's concerns on this point.

Thirdly, the government did not support the Committee's recommendation that empowering provisions ought to be made (by legislation) to state which category instruments made under them would fall into. It stated its reluctance to devote resources to drafting and enacting provisions that were, in most cases, unnecessary, as it considered the definitions in the Legislation Act provided sufficient detail.

Fourthly, the government did not agree with the Committee that the "significant legal effect" test should be removed from the Legislation Act. It noted that the Committee had welcomed this provision in the Legislation Bill as it prevented instruments from being excluded from scrutiny simply based on how they were described (the substance rather than form consideration discussed in Chapter 3). The government considered that the test was straightforward and that the Committee was best placed using its knowledge, experience and judgment to determine whether instruments fell within it. Removing the test, the government argued, would *weaken* legislative scrutiny of executive actions.

Fifthly, the government rejected the Committee's recommendations relating to the physical form of DINLIs. It said that under the Legislation Act, DINLIs are disallowable even if they are not presented to the House and do not state that they are disallowable. Stating such requirements would not necessarily relieve the Committee of the task of examining instruments that did not conform to these requirements. The government tentatively

supported changes to the presentation requirements for DINLIs. It stated that current government drafting practice in light of the Legislation Act 2012 was to explicitly include such presentation requirements, and the Act had subsequently amended many other Acts to make these requirements clear.

Finally, the government responded to the Committee's final three recommendations in short form. An amendment to the Legislation Act providing for the publication and notification of DINLIs may be appropriate but should await any decision about the establishment of a register. Further, current drafting practices for Bills that authorised the making of DINLIs were to include notification and publication requirements and a specification of those instruments' status. The PCO was in the process of creating a guide to drafting tertiary instruments including DINLIs, and it (alongside the LAC Guidelines and the Cabinet Manual) already provided assistance to agencies in drafting on request.

In response to Cabinet's directive, the PCO has established the Access to Subordinate Instruments Project. The project aims to create a single, comprehensive, official public source for all New Zealand legislation through:<sup>365</sup>

- modernising and simplifying the statute book and legislative process;
- developing a drafting, document management, lodgement and publication system; and
- modifying the current system of publishing legislation and the New Zealand website.

This project was well received by the Committee,<sup>366</sup> and is in the process of being implemented by the Legislation Act 2019, Secondary Legislation Bill and Legislation (Repeals and Amendments) Act 2019.<sup>367</sup>

#### **IV Henry VIII Clauses**

A Henry VIII clause is a type of regulation-making power that enables primary legislation (ie, a statute) to be amended, suspended or overridden by regulation. The Regulations Review Committee has considered that a power to alter the effect or scope of legislation constitutes a Henry VIII clause, even if the power does not allow changes to the text of primary legislation.<sup>368</sup> Such clauses are generally viewed as being undesirable on the basis that only Parliament should be able to amend its own laws. They are often contained in Acts

<sup>365</sup> Information about the project can be found on the PCO website at: <[www.pco.govt.nz/asip](http://www.pco.govt.nz/asip)>.

<sup>366</sup> Regulations Review Committee "Briefing on Government responses to two reports of the Regulations Review Committee" (16 May 2017) at 4.

<sup>367</sup> See explanation in Chapter 3.

<sup>368</sup> Regulations Review Committee "Activities of the Regulations Review Committee in 2012" (19 March 2014) at 18.

that effect large and complex legislative reform. Allowing a regulation to amend or revoke primary legislation is justified on the basis that once in operation, a new Act may require minor amendments to make it workable. The Committee has noted that:<sup>369</sup>

It is inevitable in the case of a lengthy and complex reform that anomalies, discrepancies and mistakes will become apparent from time to time and that these will need to be rectified promptly. On this basis, the Committee believes it to be reasonable to include in the statute the power to amend by regulation for the purpose of correcting inconsistencies or errors which are the cause of immediate difficulties and the correction of which cannot appropriately await the process of amendment by statute.

The Committee used to take the view that Henry VIII clauses should be only used in exceptional circumstances (and never routinely in reforming legislation) and be drafted in “the most specific and limited terms possible.”<sup>370</sup> The Committee considered the appropriateness of Henry VIII clauses, as part of its inquiry into the Resource Management (Transitional) Regulations 1994.<sup>371</sup> It endorsed the views of the Donoughmore Committee (UK) that such clauses should be avoided unless demonstrably essential.<sup>372</sup> Furthermore, such a clause:<sup>373</sup>

Can only be essential for the limited purpose of bringing an Act into operation and it should accordingly be in most precise language restricted to those purely mechanical arrangements vitally requisite for that purpose; and the clause should always contain a maximum time limit of one year after which the powers should lapse.

<sup>369</sup> Regulations Review Committee “Inquiry into the Resource Management (Transitional) Regulations 1994 and the Principles that Should Apply to the Use of Empowering Provisions Allowing Regulations to Override Primary Legislation During a Transitional Period”, above n 84 at 15.

<sup>370</sup> Regulations Review Committee “Inquiry into the Resource Management (Transitional) Regulations 1994 and the Principles that Should Apply to the Use of Empowering Provisions Allowing Regulations to Override Primary Legislation During a Transitional Period”, above n 84 at 16.

<sup>371</sup> Regulations Review Committee “Inquiry into the Resource Management (Transitional) Regulations 1994 and the Principles that Should Apply to the Use of Empowering Provisions Allowing Regulations to Override Primary Legislation During a Transitional Period”, above n 84. Although this report was specifically concerned with transitional regulations, the majority of the discussion is applicable to Henry VIII clauses more generally.

<sup>372</sup> Donoughmore Report, above n 80.

<sup>373</sup> Donoughmore Report, above n 80 at 61.

Since 2018, however, the Committee has scrutinised these clause “in a more practical manner”, focusing on whether the regulation-making power is “necessary” and has “appropriate constraints on the use of the power”.<sup>374</sup>

The Committee has also addressed a number of technical issues that ought to be taken into account when the use of a Henry VIII clause is being considered. First, in its inquiry into resource management regulations, the Committee said that Henry VIII clauses should be drafted in the most specific and limited terms possible. The Committee identified three acceptable purposes for which a Henry VIII clause may be used:

- (a) to alter the start date or expiry date of the principal Act;
- (b) to preserve a right not intended to be affected by the legislation; and
- (c) correcting references used in the legislation.

The Committee further stated its preference that where a department seeks the use of such a wide power, it should be required to justify why that power is necessary before the appropriate select committee.

Secondly, the Committee said that when an empowering provision is used to promulgate regulations that override primary legislation, consultation must be “full and proper”, adopting the definition of consultation established in *Air New Zealand v Wellington International Airport Ltd*.

Thirdly, the Committee argued that all such empowering provisions should contain a sunset provision, ie, a clause that states that all regulations made pursuant to the Henry VIII clause are to expire in a specified number of years. The Committee recommended that the sunset provision should apply to the empowering provision itself.

Fourthly, the Committee addressed whether confirmation by Parliament was desirable. It said a sunset clause exists giving a regulation a relatively short life, there is little advantage in requiring confirmation by Parliament, provided that the sunset clause is not greater than three years. If it is greater than three years, the Committee recommended parliamentary confirmation be a requirement of the Act.

In its response, the government agreed in principle with most of the Committee’s recommendations.<sup>375</sup> The government agreed that a Henry VIII clause should only be used

<sup>374</sup> Regulations Review Committee “Activities of the Regulations Review Committee in 2018” (20 March 2019) at 4.

<sup>375</sup> “Government Response to the Report of the Regulations Review Committee: the Inquiry into the Resource Management (Transitional) Regulations 1994 and the Principles that Should

in exceptional circumstances; more particularly when a new legislative regime is put in place. The government also agreed a Henry VIII clause and any regulations made pursuant to it should be subject to a three-year sunset clause (although there may be occasions when a longer period is permissible). If a Henry VIII clause contains a sunset clause of more than three years, parliamentary confirmation is generally desirable. The government did not, however, agree that a formal consultation process should be put in place before a regulation overriding primary legislation is made.

## V National Emergency Powers

National emergency powers are often Henry VIII powers granted for the specific purpose of speeding emergency responses. Following criticisms regarding the Government's regulatory programs to manage the Canterbury rebuild, the Committee inquired into the legislative response to future national emergencies with a view to setting out the constitutional principles that should underpin any recovery process. The Committee considered public and expert commentary relating to the Canterbury Earthquake Recovery Act 2011 and constitutional discussions arising from public scrutiny of the government response. It took particular guidance from the Law Commission's related work on the response phase of national emergencies.<sup>376</sup> The issues canvassed reflect concerns about Henry VIII clauses, in light of the frequently pressing needs for quick responses. The Committee saw the purpose of the inquiry as being:<sup>377</sup>

[T]o establish the most appropriate legislative model for enabling and facilitating response to, and recovery from, national emergencies once a state of emergency has been lifted, while maintaining consistency with essential constitutional principles, the rule of law, and good legislative practice.

A central issue before the Committee during the inquiry was whether broad powers to make law by Order in Council were constitutionally appropriate. The Committee noted *An open letter to New Zealand's people and their Parliament* which outlined several serious concerns.<sup>378</sup> These included that Ministers had the power to amend statutes while pursuing

Apply to the Use of Empowering Provisions Allowing Regulations to Override Primary Legislation During a Transitional Period" [1996] AJHR I20.

<sup>376</sup> Regulations Review Committee "Inquiry into Parliament's legislative response to future national emergencies" [2016] AJHR I16B.

<sup>377</sup> Regulations Review Committee "Inquiry into Parliament's legislative response to future national emergencies" [2016] AJHR I16B at 12.

<sup>378</sup> Regulations Review Committee "Inquiry into Parliament's legislative response to future national emergencies" [2016] AJHR I16B at 12 at 6 and 17; see the full letter signed by 27



too-broad statutory purposes, that these powers were excluded from review by the courts and that people harmed by poor decisions would be ineligible for compensation. The authors of that letter considered the 2011 Act to be a poor precedent that was in danger of repetition. The Committee held there were valuable lessons to be taken from reactions to the 2011 Act;<sup>379</sup>

We consider that the criticisms expressed in the *Open letter to New Zealand's people and their Parliament* about the inclusion of powers to make Orders in Council overriding Acts were well-made. They served to remind everyone involved in the process of legislating for the recovery from the Canterbury earthquakes that overriding primary legislation with delegated legislation was contrary to constitutional norms and carried risk of abuse. The safeguards and checks put in place helped ensure that the powers were not abused, but were used moderately and consistently with the purpose for which they were granted.

Nevertheless, the regulation-making power was broader than was necessary, and we believe it is useful to consider some further checks and safeguards that could be incorporated if it becomes necessary to consider using similar powers in a future national emergency.

The Committee took a view on emergency powers generally consistent with its previous reports on transitional regulatory powers and Henry VIII clauses.<sup>380</sup> The significance of those powers comes from a lack of scrutiny and accountability for the Executive that should be avoided unless “demonstrably essential” and subject to appropriate safeguards.<sup>381</sup> Although emergencies may make broader powers necessary in this way, it is their urgency that excuses rather than justifies the provision of powers that are normally not appropriate;<sup>382</sup>

In its previous reports, the committee has stated that a Henry VIII empowering provision should be contained in an Act only in exceptional circumstances, should never be used routinely in reforming legislation, and ought to be subject to appropriate controls and safeguards. It has also stated previously that Henry VIII clauses should be drafted in the most specific and limited terms possible, and has also advocated the adoption of a formal consultation process before regulations that override primary legislation are made. In

academics at Andrew Geddis “An open letter to New Zealand’s people and their Parliament” (28 September 2010) *Pundit* <pundit.co.nz>.

<sup>379</sup> Regulations Review Committee “Inquiry into Parliament’s legislative response to future national emergencies” [2016] AJHR I16B at 12 at 17.

<sup>380</sup> Regulations Review Committee “Inquiry into Regulation-making powers that authorise transitional regulations to override primary legislation” (15 July 2014).

<sup>381</sup> Donoughmore Report, above n 80; see also Tim Macindoe and Lianne Dalziel “New Zealand’s response to the Canterbury earthquakes” (paper delivered to Australia-New Zealand Scrutiny of Legislation Conference, 2011).

<sup>382</sup> “Inquiry into Parliament’s legislative response to future national emergencies”, above n 376, at 16.

addition, the committee has recommended that sunset provisions should apply to the regulations made pursuant to a Henry VIII clause, as well as to its empowering provision.

These substantial concerns about the breadth of ministerial powers in the response to the Canterbury earthquakes led the Committee to state that a “sectoral” approach to national emergency powers should be preferred. Rather than legislating generically and in advance, the Committee concurred with the Law Commission that emergency legislation should be sensitive to the circumstances of the emergency being responded to. In particular, a general emergency response law should not confer a broad emergency regulation-making power. This is because a suitably general power would be inappropriately broad.

However, and following this logic, the Committee acknowledged the Law Commission’s view that it may not be possible to confer all necessary powers under a governing statute and making broad regulatory powers necessary. The first situation is where the consequences of a disaster are unforeseen and events unfold in an unexpected way. The second possible justification is where the nature of the emergency itself is unforeseen and it may be necessary to take extreme measures to counter it; war being the obvious example. Even in such cases the broad powers conferred would still need to be linked to specific limits such as the statutory purpose and fundamental rights.

On the basis of the above, the Committee expressed three general principles and made 11 recommendations related to what it considered to be the appropriate legislative response to a national emergency. The first principle, supporting four recommendations, was that executive powers to override enactments should extend only as far as necessary to deal with the emergency specifically and should only be exercised for that purpose. Although the 2011 Act had a reasonable form and started from an appropriate perspective, its powers to override enactments were broader than was necessary. The Committee considered that careful consideration of the types of legislation overridden was necessary to understand the proper scope for such powers, and that for some a truncated legislative process would be suitable instead of Executive regulation-making.

The specific recommendations were: that emergency legislation should be tailored to situations as they arise, and not passed in advance; the amount of time an emergency Bill was before select committees should be maximised; that there was no need for special-constituted committees; and that emergency powers should be conferred by statute over regulations in the first instance.

Second, comprising five recommendations, the Committee expressed the principle or theme that emergency legislation should include safeguards to protect constitutional values. In particular, the Committee thought that primary legislation should still be preferred to broad regulatory powers and that there should be a periodic renewal or sunset powers where such powers were available. Oversight mechanisms should include a competent review panel

to advise the Minister on Orders in Council, and the ordinary availability of judicial review should be maintained. In particular:<sup>383</sup>

We think that part of the *quid pro quo* for Parliament conferring such broad powers to the executive to make Orders in Council overriding primary legislation in emergencies is that citizens should be able to ask the Court to review the lawfulness of such Orders in Council. In turn, the Court should not be impeded by attempts to exclude its jurisdiction to conduct this exercise. There were no successful challenges to any of the Orders in Council made under the 2010 or 2011 Acts. As the Law Commission recognised in its 1991 Report, in practice, the courts are extremely unlikely to prejudice a necessary emergency response by granting an injunction

Some measure may be needed to prevent meritless, dilatory claims but the Committee viewed this as a question “in the eye of the beholder”.<sup>384</sup> Properly constructed, it was likely that powers actually required to respond to emergencies would be broadly similar to ordinary powers, and where different treatment was justified that this would not exclude normal oversight mechanisms. The specific recommendations were: Henry VIII clauses in emergency legislation should be limited so as to only apply to limited lists of enactments stipulated in advance; Orders in Council should be subject to scrutiny before and after being made; rights to judicial review should not be limited; emergency legislation should conform to international standards; and that bespoke emergency powers should be in place only so long as necessary and subject to sunset clauses.

Third, supporting two recommendations, the Committee expressed the view that legislation designed for emergencies should seek to minimise a delay in response times. The Committee viewed this as an operational rather than legislative matter, and that existing institutions could perform that function. Relevant factors included preserving a chain of command and communication network, ensuring responders were changed, and making plans for the provision of supplies to those who could need it. These factors are, however, not regulatory in nature. The Committee recommended that the executive remain mindful of the needs of local communities, and that the responsible Minister should keep the House duly informed of their activities.

<sup>383</sup> “Inquiry into Parliament’s legislative response to future national emergencies”, above n 376, at 23.

<sup>384</sup> “Inquiry into Parliament’s legislative response to future national emergencies”, above n 376, at 10.

## VI Affirmative Resolution Procedures

In a 2007 report, the Regulations Review Committee considered the growing use of the affirmative resolution procedure.<sup>385</sup> As noted in Chapter 2, regulations may need to be approved by a formal resolution of the House. The affirmative resolution procedure is a hybrid form of legislating. Parliament delegates a regulation-making power to the executive, but the House of Representatives must then approve the use of that power before a regulation can have effect. The empowering Act will generally prescribe a 28-day period in which the House may scrutinise the power before it is allowed to give its approval, ensuring that scrutiny actually occurs and that the House does not immediately authorise the power without at least the prospect of debate.

Under the Legislation Act 2012, regulations subject to affirmative resolution procedures are not “disallowable instruments” and therefore do not presently fall within the Committee’s investigative ambit.<sup>386</sup> However, this will be changed when the Legislation Act 2019 comes into force (all secondary legislation subject to disallowance, with limited exceptions).<sup>387</sup>

The Committee identified two ways the procedure has been used. First, it has been used in relation to delegated legislation that directly affects the Offices of Parliament. The Committee agreed with the submission of the Chief Parliamentary Counsel that this was an appropriate use of the procedure. The Committee agreed it was inappropriate that the executive could make regulations or a minister issue instructions affecting an Office of Parliament without the House’s knowledge and approval. The use of the procedure in the Public Finance Act 1989 was cited as a good example of this. Under the Public Finance Act, draft minister’s instructions regarding non-financial reporting to an Office of Parliament must be presented to the House and may not be issued until they have been approved by resolution of the House.

<sup>385</sup> Regulations Review Committee “Report on the Inquiry Into the Affirmative Resolution Procedure” [2007] AJHR I16I. The 2007 report followed a 2004 interim report (Regulations Review Committee “Interim Report on the Inquiry Into the Affirmative Resolution Procedure” [2004] AJHR I16F). The 2007 report marks a shift in the Committee’s view on the acceptable use of the affirmative resolution procedure. Although the Committee declined to set general principles for the use of the procedure, it appears there are now quite limited circumstances in which use of the procedure is appropriate.

<sup>386</sup> For further discussion and examples of the current affirmative resolution procedure, see Ross Carter, Jason McHerron and Ryan Malone *Subordinate Legislation in New Zealand* (LexisNexis, 2013) at 142–148.

<sup>387</sup> Legislation Act 2019, s 115.

The second way the procedure has been used is as a procedural safeguard for Henry VIII clauses. Such clauses allow an Act (often the schedules to that Act) to be amended by regulation. The Committee has generally taken a dim view of the use of Henry VIII clauses, arguing they should only be used in situations not involving significant policy issues or in cases requiring extreme urgency. The Committee took the view that the use of the procedure – in, for example, the Misuse of Drugs Act 1975 – to amend lists and numbers in schedules could raise significant policy issues. It was concerned that such amendments undermine Parliament's role as lawmaker, and blur the distinction between Parliament and the executive. The Committee was not convinced that the added protection provided by the affirmative resolution procedure was sufficient to allay its concerns about using delegated legislation to amend primary legislation. It was concerned that doing so might encourage inappropriate use of Henry VIII clauses and could reduce the level of public scrutiny and accountability that occurs in amendments through primary legislation.

In addition to the issues addressed above, the Committee identified a number of additional problems with the use of the procedure. First, one of the rationales of the procedure when it was introduced was that it would allow for the quick passing of legislation. The Committee found that, in practice, the process is no quicker than passing an Act under urgency, and in many cases, through the normal process. It noted that, as a matter of general principle, the latter course is more appropriate due to the additional public scrutiny and accountability it provides. Further, the Committee said the latter approach was appropriate even in urgent matters concerning public health and safety (a point which differed from its support in the interim report for the use of the affirmative resolution procedure in such circumstances).

Secondly, the Law Commission and the Chief Parliamentary Counsel noted that amendments to primary legislation using the procedure were subject to a higher risk of challenge by judicial review. The Committee was concerned the procedure might undermine parliamentary sovereignty. Under the doctrine of parliamentary sovereignty, amendments to acts through primary legislation are not subject to judicial review; however, amendments made by regulation are subject to judicial review, as courts have jurisdiction to consider delegated legislation.

Thirdly, the Committee noted a similar point made by the Chief Parliamentary Counsel that the procedure blurs the distinction between the process of making delegated legislation and the process of making acts of Parliament. Though regulations subject to the procedure receive parliamentary affirmation through a resolution of the House, this resolution is not in itself law, meaning regulations made in this way are not immune from judicial review. The Committee took the view that it was neither necessary nor desirable that the relationship

between Parliament and the courts should be tested in this way.

Fourthly, the Committee agreed with the Chief Parliamentary Counsel's submission that using the procedure in this way was administratively cumbersome because it required the use of two subordinate legislative instruments to achieve the desired result. Although the Committee was of the view the affirmative resolution procedure should not be used in conjunction with Henry VIII clauses, it said there may be other situations where delegated legislation dealing with matters of policy should be subject to affirmative resolution procedure. However, it did not provide any general principles of when this was appropriate, instead reiterating the general undesirability of using delegated legislation in this way.

Fifthly, the Committee raised two procedural concerns. Under the Standing Order the appropriate select committee has a maximum of 28 days to consider a resolution. While this quick turnaround period is a result of the need for the process to be expeditious, it limits the quality of the select committee's scrutiny. The Committee noted that while this may not be a concern in relation to non-contentious issues, the time is insufficient in regards to policy matters on which public submissions would be desirable. Further, the appropriate select committee cannot recommend amendments to an Order-in-Council subject to the affirmative resolution procedure. This requires the rather inefficient process of a new Order-in-Council, a new notice of motion, and a further referral to the select committee.

The 2007 report ultimately made the following recommendations:

- The affirmative resolution procedure should not be used in conjunction with provisions that allow the amendment of primary legislation by delegated legislation.
- The affirmative resolution procedure is appropriately used to approve resolutions that specifically regulate the administration and governance of Offices of Parliament and parliamentary agencies.

The report also suggested that the Standing Orders Committee consider amending the Standing Orders so that:

- A select committee would have a minimum of three months to examine a resolution affirming regulations, rather than 28 days.
- Amendments recommended by a select committee, to which a notice of motion has been referred, would be incorporated without repeating the select committee process.

In its response to the recommendations, the government agreed in principle that the affirmative resolution procedure should not be used in conjunction with provisions that

allow the amendment of primary legislation by delegated legislation.<sup>388</sup> The government also agreed that the affirmative resolution procedure is appropriately used to approve resolutions that specifically regulate the administration and governance of Offices of Parliament and parliamentary agencies.

Though not formally required to do so, the government response also addressed the recommendations relating to the Standing Orders Committee.<sup>389</sup> The government noted that an extension of the time for select committee approval had the potential to undermine the utility of the procedure where rapid change is necessary. Subsequently, the Standing Orders Committee was unable to agree on this proposal.<sup>390</sup> The government agreed that allowing amendments recommended by a select committee, to which a notice of motion has been referred, to be incorporated without repeating the select committee process would enhance the affirmative resolution procedure. The standing order was amended to this effect.

## **VII Regulations-Making Powers That Authorise Treaties to Override New Zealand Enactments**

During its examination of the Child Support (Reciprocal Agreement with Australia) Order 2000, the Regulations Review Committee encountered what it considered to be a concerning practice.<sup>391</sup> The order implemented an agreement between New Zealand and Australia making provision for inter-country payment for child support and spousal maintenance. Clause 4 of the order provided that the agreement had force and effect so far as it related to New Zealand, notwithstanding anything in the Child Support Act 1991 or in any other Act. Thus, the regulation effectively provided for the agreement to override any New Zealand enactment. This ‘overriding treaty regulation’ was yet a further example of a Henry VIII clause. Having received advice that this was not a unique situation, the Committee undertook a broad inquiry into the practice.

<sup>388</sup> “Government Response to the Report of the Regulations Review Committee: Inquiry into the affirmative resolution procedure” [2007] AJHR J1.

<sup>389</sup> “Government Response to the Report of the Regulations Review Committee: Inquiry into the affirmative resolution procedure”, above n 388. Report of the Standing Orders Committee “Review of Standing Orders” [2008] AJHR I18B.

<sup>390</sup> Standing Orders Committee “Review of Standing Orders”, above n 389.

<sup>391</sup> Regulations Review Committee “Inquiry Into Regulation-Making Powers That Authorise International Treaties To Override Any Provisions of New Zealand Enactments” [2002] AJHR I16H.

It considered the circumstances in which overriding treaty regulations are used, and whether they can ever be considered appropriate. The Committee identified a number of general principles that should govern their use.

First, the Committee found that of the approximately 700 Acts of the New Zealand Parliament then in force, 10 implemented a treaty by regulation, while at the same time authorising the regulations to override primary legislation. Of these 10 Acts, two *implicitly* authorised the overriding of the principal Act, four *explicitly* authorised the overriding of the principal Act, while a further four explicitly allowed the overriding of *any* Act (ie not just the principal Act).

Secondly, the Committee said that overriding treaty regulations are best avoided on account of the dangers presented by Henry VIII clauses endorses the submission of the Solicitor-General on this point. The Committee drew on its 1995 report into Henry VIII clauses, which had recommended that such clauses be used only in exceptional circumstances and that they should be drafted in the most limited and specific terms possible.<sup>392</sup> It also acknowledged concerns expressed by some submitters that overriding treaty regulations could potentially overrule fundamental protections offered by core statutes such as the New Zealand Bill of Rights Act 1990. Accordingly, the Committee recommended to the government that overriding treaty regulations be used only in exceptional circumstances. The Committee did nevertheless acknowledge that there may be two situations in which an overriding treaty regulation might be permissible. The first was when a treaty dealt with technical matters that had a very narrow application. The Committee felt that there would be few such situations. The second permissible use was in an emergency situation, or where the requirements imposed on New Zealand by a treaty changed rapidly. All the same, the Committee expressed a preference that Parliament pass a bill under urgency to deal with such situations.

Thirdly, the Committee considered the limits that should apply to the creation and use of overriding treaty regulations. It said regulation-making powers authorising overriding treaty regulations should be drafted so as to ensure the authority delegated has precisely defined limits. Only the empowering Act should be capable of being overridden. Only where absolutely necessary should Acts beyond the empowering Act be liable to being overridden. Further, regulation-making powers should only allow for the overriding of minor and/or

<sup>392</sup> Regulations Review Committee “Inquiry into the Resource Management (Transitional) Regulations 1994 and the Principles that Should Apply to the Use of Empowering Provisions Allowing Regulations to Override Primary Legislation During a Transitional Period”, above n 84.



technical provisions of a New Zealand statute. The Committee noted that these types of regulations are automatically subject to disallowance under the Regulations (Disallowance) Act 1989 (and now under the Legislation Act 2012). It also identified other methods by which Parliament could affect additional scrutiny, including various positive and negative means of affirmation and recommended that some method of additional parliamentary scrutiny be included in any bill that contains a regulation-making power permitting an overriding treaty regulation. As part of this, it recommended the ‘national interest analysis’ (an analysis that must be undertaken pursuant to Standing Orders outlining the rationale of the treaty, as well as costs and obligations) should include a justification of why a regulation-making power authorising an overriding treaty regulation is considered necessary.

### **VIII Commencement of Legislation by Order in Council**

In New Zealand legislation usually commences either:

- on the day the bill receives the Royal Assent;
- on a fixed date in the bill;
- on a date to be fixed by the Governor-General by Order in Council; or
- a combination of the above, i.e. some parts of a bill will come into force on a fixed date or the date the bill receives the Royal Assent, and some parts will come into force on a date fixed by the Governor-General.

The Committee has investigated the commencement of legislation by Order in Council on a number of occasions.

#### **A 1996 Report**

In a 1996 report, the Committee noted that this issue is a significant one because Parliament, having passed a particular piece of legislation, effectively hands over a critical power to the executive, namely the power to decide when and if a particular piece of legislation should come into force.<sup>393</sup>

The Committee noted that the practice of commencing legislation in this way is growing in New Zealand, with no limits or controls as to the timing of the advice to the Governor-General that a particular piece of legislation should be commenced. Concern was also expressed that Parliament may not always realise that it is handing over such a significant power to the Executive Council. Finally, the Committee noted that there could exist issues of

<sup>393</sup> Regulations Review Committee “Investigation into the Commencement of Legislation by Order in Council” [1996] AJHR I16K at 7.

access to the law in situations when it is unknown when a law will come into effect. The Committee stated that as a principle, people should be entitled to know the particular date upon which laws will come into force.

The Committee recognised that there are arguments in favour of the commencement of legislation by Order in Council. Firstly, complex legislation may take time to implement and only the minister will be in a position to know when a provision is ready for commencement. Secondly, changes may be needed to the commencement date in a bill when legislation passes through Parliament. Commencement by Order in Council reduces the need for the correction of this date. Thirdly, the actual passage of legislation may be required to focus the relevant departments and organisations on the provisions and policies needed to implement the legislation. Passing the bill (but not necessarily bringing it into force) may have this effect.

The Committee also identified a number of disadvantages that can result from the commencement of legislation by Order in Council. The overriding concern is that the Executive Council may thwart the will of Parliament by not commencing the legislation at all. It further allows the executive to delay the implementation of a law that is contrary to the wishes of a government department or agency. The Committee also expressed concerns at the potential for ‘window-dressing’ and ‘blackmail’. In the former, Cabinet may allow a particular Act to pass through Parliament in order to appease a particular group with no intention of implementing the proposal. The possibility of blackmail may occur if the government only recommends a commencement order on the condition that a particular member of Parliament or group behave in a certain way. In the view of the Committee, these risks increased under MMP, where the views of the executive and Parliament are more likely to be in conflict with each other.

The Committee made the following major recommendations at the conclusion of its report.<sup>394</sup>

- As a general rule, legislation should incorporate a fixed commencement date.
- Provisions for the commencement of legislation by Order in Council should be used only in rare and exceptional circumstances.
- If a fixed commencement date is not incorporated in a bill, the bill should incorporate a provision that it be brought into force automatically after a specified period of no more than one year following its enactment.

<sup>394</sup> “Government Response to the Report of the Regulations Review Committee: the Investigation into the Commencement of Legislation by Order in Council” [1997] AJHR A5.

- 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.
- When legislation is commenced by Order in Council, it must come into effect at least 28 days after notification in the Gazette to ensure people have time to familiarise and adjust to the coming into effect of the new law.

In its response, the government agreed that as a general principle the commencement of legislation enacted by Parliament should not be delegated to the executive, but that there are cases where it is necessary to do so. While agreeing that commencement by Order in Council should be rare, the government observed that, for certain types of legislation, commencement by Order in Council is essential, for instance when legislation ratifying a treaty must be commenced at a future and as yet unknown date. The government proposed that:

- (1) the *Cabinet Manual* be amended to indicate that, as a general principle, bills should not incorporate provisions for commencement by Order in Council; and
- (2) that the cover sheet for draft bills must set out whether the proposed bill includes provision for commencement by Order in Council and the reason for the provision.

The government did not accept the automatic one-year recommendation on the basis that a blanket rule would undermine the purposes behind having legislation commenced by Order in Council. The government accepted that reasons for setting a commencement date via Order in Council should be included in explanatory notes to government bills. The government did not accept the recommendation of a 28-day delay in commencement following notification in the Gazette. It opposed legislative recognition of the administrative rule and considered that recognition of a 28-day delay in the *Cabinet Manual* allows a degree of flexibility where required.

## **B 2002 Report**

In 2002, as part of an investigation into the Local Electoral Act Commencement Order 2001, the Committee reiterated the principles that should apply to the commencement of legislation by Order in Council:<sup>395</sup>

<sup>395</sup> Regulations Review Committee “Investigation into the Local Electoral Act Commencement Order 2001 and the Commencement of Legislation by Order in Council” [2002] AJHR I16L at 17.

- As a general principle, the commencement of legislation should not be delegated by Parliament to the executive.
- Provisions for the commencement of legislation by Order in Council should not be included unless they are clearly justified.
- If a commencement date is to be set by Order in Council, the reason for this should be included in any explanatory memorandum accompanying the bill.

The Committee also set out several principles that relate to the making of the Order in Council itself:<sup>396</sup>

- When an Order in Council is used to commence legislation, it should, wherever possible, be used in a way consistent with the government's explanatory note to the bill in which the empowering provision was introduced to Parliament;
- Where the power to commence legislation by Order in Council is to be used, this should be done in accordance with the expectations of Parliament; and
- The government should develop a timeframe for commencing each enactment or provision that is to be brought into force by Order in Council.

### ***C 2009 Reports***

In 2009 the Committee once again investigated the use of commencement of legislation by Order in Council in the following (with its reports reiterating the principles set out in its 1996 and 2002 reports):

- Securities Amendment Act 2002 Commencement Order 2009 (SR 2009/10);<sup>397</sup>
- Copyright (New Technologies) Amendment Act 2008 Commencement Amendment Order (No 2) 2009.<sup>398</sup>

In its investigation into the Securities Amendment Act 2002 Commencement Order 2009, the Committee took the view that the length of time between the enactment of section 25 of the Securities Amendment Act 2002 and the order bringing it into force (approximately six and half years) was unacceptable. It recommended that the government take note of the

<sup>396</sup> Regulations Review Committee "Investigation into the Local Electoral Act Commencement Order 2001 and the Commencement of Legislation by Order in Council" [2002] AJHR I16L at 17.

<sup>397</sup> Regulations Review Committee "Securities Amendment Act 2002 Commencement Order 2009 (SR 2009/10)" [2009] AJHR I22A.

<sup>398</sup> Regulations Review Committee "Investigation into the Copyright (New Technologies) Amendment Act 2008 Commencement Amendment Order (No 2) 2009 (SR 2009/51)" [2009] AJHR I22B.

report and “ensure that any delegated power to commence legislation is exercised in a timely manner, so as to not frustrate Parliament’s decision to make law.”

The government response agreed that, for the reasons set out by the Committee, “delegated powers to commence legislation should be exercised in a timely manner.”<sup>399</sup> It went on to note, however, that in its view current safeguards (including the requirement that, as a matter of Cabinet’s procedure for approving the introduction of bills, the use of a commencement order in relation to a bill must be justified to Cabinet and the reasons set out in the bill’s explanatory memorandum) were sufficient.

In its investigation of the Copyright (New Technologies) Amendment Act 2008 Commencement Amendment Order (No 2) 2009, the Committee took the view that the Order, which amended previous commencement orders and delayed the commencement of s 92A of the Copyright Act 1994 without specifying a new commencement date, did not represent good law-making practice. It noted that while there may have been policy concerns about implementing section 92A:<sup>400</sup>

Good law-making practice suggests that the legislation should be returned to the House of Representatives for decision as to its disposal. The Executive should not act to frustrate Parliament’s will by delaying commencement of section 92A of the Copyright Act 1994 for reasons unforeseen at the time it was delegated the power to commence the legislation.

Accordingly, it recommended that reconsideration of section 92A be returned to the Parliament.

The government response stated that the government had acted on the Committee’s recommendations by introducing a bill to the House proposing the repeal of section 92A of the Copyright Act 1994, and the amendment of Part 6 of the Act to provide new enforcement measures for copyright owners against illicit file sharing.<sup>401</sup>

<sup>399</sup> “Government Response to the Regulations Review Committee’s Investigation into the Securities Amendment Act 2002 Commencement Order 2009” [2010] AJHR J1.

<sup>400</sup> “Government Response to the Regulations Review Committee’s Investigation into the Securities Amendment Act 2002 Commencement Order 2009” [2010] AJHR J1 at 6.

<sup>401</sup> “Government Response to the Regulations Review Committee’s Investigation into the Copyright (New Technologies) Amendment Act Commencement Amendment Order (No 2) 2009” [2010] AJHR J1.

## ***D 2014 Comments***

In 2014, the Committee noted that there had been a substantial increase in the number of pieces of legislation set to be commenced by Order in Council.<sup>402</sup> By reference to its previous reports as well as the Legislation Advisory Committee guidelines, the Committee restated the principles it considered were applicable to commencement via Order in Council:

- As a general principle, legislation should incorporate a fixed commencement date;
- Provisions for the commencement of legislation by Order in Council should be used only in rare and exceptional circumstances;
- If a fixed commencement date is not included, bills should include provisions by which they are automatically brought into force after a specific period of no more than one year following enactment, unless brought into force earlier by Order in Council; and
- The reasons for any bill requiring commencement by Order in Council should be included in the bill's explanatory memorandum and considered by the Select Committee considering the bill.

## ***E 2016 Comments***

In 2016, the Committee again expressed concern with Acts being commenced by Orders in Council. Four Bills included provisions that the resulting Act would commence on a date set by an Order in Council. In particular, four clauses of the Food Safety Law Reform Bill were to be commenced by an Order in Council. The explanatory note provided that this delayed commencement would enable regulations to be made. The Committee found, however, that these clauses contained no fall-back commencement dates and that no explanation was given justifying the delay being open-ended. The Committee recommended that a fall-back date be inserted. The Primary Production Committee accepted these recommendations.<sup>403</sup>

## **IX Material Incorporated by Reference**

Occasionally, legislation will give legal effect to the provisions of a document without repeating those provisions in the text of the incorporating legislation. Examples include international treaties, foreign government technical standards, private sector industry

<sup>402</sup> Regulations Review Committee "Activities of the Regulations Review Committee in 2014" (8 August 2014) at 15–16.

<sup>403</sup> Regulations Review Committee "Activities of the Regulations Review Committee in 2016" [2017] AJHR I.16C at 5.

standards and codes of practice, and manufacturers' specifications. Incorporating material in this manner is more common in delegated legislation than in primary legislation.

The Regulations Review Committee has issued two reports concerning material incorporated by reference. In its 2004 report, the Committee considered the desirability of this practice, as well as possible areas for improvement.<sup>404</sup> In its 2008 report, the Committee considered copyright issues in relation to the accessibility of material incorporated by reference.<sup>405</sup> The Committee's findings in each report and the associated government response, including the changes made in the Legislation Act 2012, are discussed below.

### **A    2004 Report: *Desirability of Incorporation by Reference***

The 2004 report considered the desirability of incorporating material by reference, as well as possible areas for improvement. The Committee noted that incorporating material by reference did have its benefits, including utilising existing standards and avoiding the repetition of large amounts of technical material. However, these benefits had to be balanced against a number of other factors. First, by incorporating material by reference, Parliament devolved its law-making powers to bodies outside its control. Secondly, incorporated material is not subject to parliamentary scrutiny. Thirdly, the protections that exist with the making of primary and secondary legislation are largely absent. Nor are there any guarantees that there will have been adequate consultation. Finally, obligations imposed by the material may not be clear, while access may be problematic.

The Committee then considered the circumstances in which incorporation by reference was acceptable. In an earlier report on deemed regulations, the Regulations Review Committee had identified a number of general principles that should apply to the incorporation of material by reference via deemed regulations:<sup>406</sup>

- The power to incorporate material by reference should be expressly authorised in the empowering statute.
- This power should be exercised in a limited number of cases where the document is appropriate for that purpose.

<sup>404</sup> Regulations Review Committee "Inquiry into Material Incorporated by Reference", above n 158.

<sup>405</sup> Regulations Review Committee "Further Inquiry into Material Incorporated by Reference", above n 158.

<sup>406</sup> Regulations Review Committee "Inquiry into Instruments Deemed to be Regulations – An Examination of Delegated Legislation", above n 348.

- The material should be technical in nature, impose clear obligations, be written in text of an official language of New Zealand, and be readily available.
- The material should clearly state that it has been incorporated into New Zealand law.

In response, the Legislation Advisory Committee was asked by the government to produce a set of guidelines as to the appropriate use of incorporation by reference. The guidelines produced were consistent with those of the Regulations Review Committee. Two in particular are worth noting:

- Incorporation by reference should only be used where it is impracticable to do otherwise (this constitutes a noticeably high standard).<sup>407</sup>
- Standard clauses be used in Acts and delegated legislation that authorised incorporation. Amongst other things, these clauses contained a requirement that material incorporated by reference be made available for free on the Internet.

The Regulations Review Committee received advice from the Chief Parliamentary Counsel that standard incorporating clauses had since been employed. The Committee strongly endorsed this practice and said that it expected standard clauses to be used in most instances.

In a survey of government agencies, the Committee also found that the level of incorporation by reference was significant, particularly in the area of transport law. It noted that a number of scrutiny mechanisms did exist, including the participation by government entities in standard-setting, the use of international experts and organisations, some statutory consultation and public access requirements, inter-agency consultation and consistency with key New Zealand legislation (for example the New Zealand Bill of Rights Act 1990) in accordance with Cabinet Office procedure. While acknowledging that some of these protections could apply in any given case, the Committee recommended that “a comprehensive and consistent approach” should be adopted, “with all agencies applying similar standards and practices.”<sup>408</sup>

Concerned about the proliferation of incorporation by reference, the Committee recommended that the Cabinet Manual and associate protocols be amended so that the forms accompanying draft bills stated whether the bill included any material incorporated by reference and whether the proposed legislation complied with the LAC guidelines. The Committee also recommended that, when existing Acts are reviewed and amended, they be

<sup>407</sup> See Legislation Advisory Committee, above n 135, at [10.6.1]. See now Legislation Advisory and Design Committee, above n 135, at [15.3].

<sup>408</sup> Regulations Review Committee “Inquiry into Material Incorporated by Reference”, above n 158.



changed to ensure consistency with the LAC guidelines. Furthermore, it recommended that draft regulations that propose incorporation by reference be forwarded to the Regulations Review Committee where there are any issues of concern regarding the incorporation.

In its response, the government agreed with most of the Committee's recommendations.<sup>409</sup> In particular, it agreed that the *Step by Step Guide* and the *Cabinet Manual* be amended so that submissions accompanying bills indicate whether any material was being incorporated by reference and, if so, confirming that the Legislation Advisory Committee guidelines have been complied with. It also agreed that, where possible, existing Acts that provided for incorporation by reference be amended to ensure consistency with those guidelines. It supported the idea that draft regulations that incorporate material by reference be referred to the Regulations Review Committee where there are concerns regarding the application of the guidelines. The government rejected the Committee's recommendation that a centralised government website be established providing links to the government agency sites that contain material incorporated by reference.

Material incorporated by reference is also addressed in the Legislation Act 2012. Part 3 of the Act enshrines many of the Committee's recommendations. Section 49 of the 2012 Act sets out the relatively broad yet constrained set of material that may be incorporated by reference, particularly (as the Committee recommended) that of a technical nature. Sections 51 and 52 provide relatively strict requirements regarding departments' responsibilities as to the availability of material incorporated by reference to the public, both before and after the making of the legislative instrument concerned and both in person and over the Internet. Also included in these sections is the requirement that the material be written in an official language of New Zealand. Furthermore, original copies of material incorporated by reference must be retained by the chief executive of the relevant department at all times.<sup>410</sup> In addition, any amendment to the incorporated material by its author will not amend the legislative instrument unless the author's amendment is specifically incorporated by another legislative instrument.<sup>411</sup>

Parent Acts may, however, exempt legislative instruments from the above requirements. This must be done expressly, and it is expected that the Committee would raise any issues regarding exemptions were it to review the legislation in question. Moreover, all instruments

<sup>409</sup> "Government Response to the Report of the Regulations Review Committee: the Inquiry into Material Incorporated by Reference" [2004] AJHR A5.

<sup>410</sup> Legislation Act 2012, s 54.

<sup>411</sup> Legislation Act 2012, s 53.

containing material incorporated by reference are automatically designated as disallowable instruments and are thus subject to the Committee's investigative ambit.<sup>412</sup>

### ***B 2008 Report: Model Clauses and Copyright***

The Committee's 2004 report endorsed the use of standard clauses where any new bill contains material incorporated by reference. Model clauses, drafted by the Parliamentary Counsel Office, were published in an appendix to the 2004 report and contained a requirement that material incorporated by reference be made available for free on the Internet. This was considered an appropriate means of ensuring public access to the law. However, after the 2004 report, it came to Committee's attention that third parties often hold the copyright in material incorporated by reference. Therefore, making such material available for free on the internet could potentially breach the copyright interests of third parties. The 2008 report considered the appropriate means of addressing the tension between public access to material incorporated by reference, and the need to protect the interests of copyright holders.<sup>413</sup>

The Committee took the view that, in general, the Internet remained the appropriate means of providing public access to material incorporated by reference. However, in order to address the copyright issues relating to this practice, it adopted the following recommendations of the Legislation Advisory Committee:

- The Legislation Advisory Committee Guidelines be amended to explicitly alert readers to the potential copyright problems presented by requiring material incorporated by reference to be made available on the Internet. The guidelines should give alternatives to mandatory publication, and criteria for varying the mandatory publication requirement.
- The model clauses published in the 2004 report, and clauses reflecting alternatives to mandatory publication, should be incorporated into the Legislation Advisory Committee Guidelines.
- Reports to Cabinet on legislation that proposes to permit incorporation by reference be required to address any copyright issues, along with the proposed means of making the material available to the public if Internet publication is not practical because of copyright issues.

<sup>412</sup> Legislation Act 2012, s 56.

<sup>413</sup> Regulations Review Committee "Further Inquiry into Material Incorporated by Reference", above n 158.

- The model clauses published in the 2004 report be enacted in a statute of general application such as the Interpretation Act 1999, so that they need not be re-enacted each time they are required.

The government agreed with first two recommendations, namely that the Legislation Advisory Committee Guidelines be amended to address copyright problems, and that the model clauses be incorporated into those guidelines. It did not support the third recommendation that reports to Cabinet address any copyright issues. The government took the view that it was inappropriate to include the suggested level of detail in the *CabGuide* or in Cabinet templates, especially as proposals to Cabinet are already required to comply with Legislation Advisory Committee guidelines. The government was satisfied that amendments to the guidelines in accordance with recommendations one and two would ensure policy-makers consider the copyright issues raised by the Committee. Finally, the government agreed that the model (or similar) clauses published in the 2004 report be enacted in a statute.

The Committee's subsequent recommendations in relation to copyright were addressed by the Legislation Act 2012. Under sections 51(1)(c) and 52(2)(c) of the Act, when regulations incorporating material by reference are made, there is a presumption that the relevant chief executive must make that material available for free over the Internet, via a website administered by the relevant department. However, sections 51(3) and 52(4) create an exception to this requirement, providing that chief executives may, if necessary, establish an Internet link between the relevant department's website and a location where the materials are hosted free of charge by someone who has the copyright in them, thereby circumventing attribution issues. Sections 51(6) and 52(7) of the Act also specifically prevent chief executives from using section 66 of the Copyright Act 1994 (which legitimises breaches of copyright by statutory authority) to justify their actions under these sections. If departments simply cannot make material incorporated by reference available for free online (either on their own website or via hyperlink) for copyright reasons, then sections 51(1)(c) and 52(2)(c) exempt them from the requirement that this occur. Even when provision of the material for free over the Internet would constitute a breach of copyright, the material will still be available to the public in person on request from the head office of the department concerned (as well as any other place the relevant chief executive chooses), under sections 51 and 52 of the Act.

## **C 2013 Report: Costs**

In its 2013 Activities Report, the Committee noted its concerns regarding the costs surrounding standards incorporated by reference.<sup>414</sup> When considering the Energy Efficiency (Energy Using Products) Amendment Regulations 2013, the Committee found that the standards incorporated into law by reference to these regulations were not available online free of charge. Instead, users of the particular standards were required to either view those standards in person or purchase copies from Standards New Zealand at a cost. This was found to be true of a large number of other standards incorporated by reference in regulations.

The Committee acknowledged the financial limitations within which government departments and agencies were operating. It remained concerned, however, that users of the standards concerned would be required to pay to access the law. This was particularly so given the general increase in the number of standards incorporated by reference over time, which in 2013 stood at 1,186 standards in 238 different documents held by 19 different regulators.<sup>415</sup>

The Committee stated that charging the public to access the law was “less than ideal” and that although there was no obvious solution to the problem, it would continue to monitor the situation.<sup>416</sup>

## **X Currency of Existing Regulations**

Those regulations in force must be current. In other words, regulations should not remain in force if they serve no purpose, and in particular where their empowering statute has been repealed and there is no replacement act, or where it is known that no replacement act is intended to carry them over.

The Committee reported on the currency of all regulations in force at the time in its “Inquiry into the ongoing requirement for individual regulations and their impact”. The only other time such a review had taken place was in 1988. The Committee has undertaken ad

<sup>414</sup> Regulations Review Committee “Activities of the Regulations Review Committee in 2013” (27 June 2014) at 9–10.

<sup>415</sup> Regulations Review Committee “Activities of the Regulations Review Committee in 2013” (27 June 2014) at 9–10.9.

<sup>416</sup> Regulations Review Committee “Activities of the Regulations Review Committee in 2013” (27 June 2014) at 9–10.10.

hoc reviews in the currency of all regulations in force in 1998 and 2007.<sup>417</sup> In its 2007 review, it found, amongst other things, that of the approximately 2,943 regulations in force, 526 served no purpose and should be revoked.<sup>418</sup>

The Committee also addressed the need for a systemic currency review process. The Committee was concerned by the large number of spent regulations remaining in force. It attributed the number of spent regulations remaining in force to a lack of ongoing departmental review, but noted that this was not the case for all departments, some having sophisticated regulatory review regimes in place.

The Committee recommended the use of sunset clauses, whereby regulations expire on a prescribed date, to address currency problems. It was of the view that sunset clauses would force agencies to examine their regulations within the expiry period and assess whether they needed to be remade. It referred to the Legislative Instruments Act 2003 in Australia that automatically imposes a sunset period on all regulations from the day they are registered. It agreed with the Legislation Advisory Committee's recommendation that 10 years was the appropriate expiry period, but rejected its suggestion of a ten-year roll over period. Instead the Committee suggested a 1 year rollover period upon certification by the Attorney-General. Whilst the purposes of a rollover period were to allow regulations that were obviously required to remain in force, and to avoid inadvertent expiry, a more limited rollover period was considered necessary to avoid the risk of departments not sufficiently engaging in the review process and relying on the rollover process to continue regulations. The Committee recommended the report be referred to the Law Commission for the development of a detailed proposal for the inclusion of a sun-setting system, applicable to all statutory regulations, in a statute. Furthermore, it recommended that statutory provision be made reflecting the Committee's recommendations and any detailed proposal made by the Law Commission.

The Committee identified a number of other options for ensuring the currency of regulations but rejected these in favour of the use of sunset clauses.<sup>419</sup>

<sup>417</sup> Regulations Review Committee "Inquiry into the ongoing need for individual regulations and their impact" [2007] AJHR I16L; and Regulations Review Committee "Inquiry into all regulations in force as at 14 November 1988" [1988] AJHR I16B.

<sup>418</sup> The Committee recommended the regulations be revoked in consultation with the responsible government department, using section 16 of the Acts and Regulations Publication Act 1989.

<sup>419</sup> These included: ad hoc departmental review responding to issues or government direction; ad hoc parliamentary review (by subject committees or Regulations Review Committee) arising from inquiry, complaint or petition; an independent agency dedicated to review ("a red tape commission"); planned departmental review where departments/ministers undertake to

In addition to considering the appropriate mechanism for review, the Committee considered whether all regulations should be required to state their purpose. The rationale for this was that a regulation can only be declared redundant following the assessment of its original purpose. The Committee concluded this was unnecessary as a general rule, because the purpose of a regulation is ordinarily ascertainable from the empowering Act and the empowering provision. The Committee noted that where this was not the case, Cabinet papers and other policy documents provided an alternative source for determining purpose. However, it stated that it was still desirable for departments to consider the utility of stating the purpose of regulations on a case by case basis.

The Committee also made two other recommendations to address the underlying causes of spent regulations remaining in force:

- the production of a comprehensive register of departmental responsibility for all regulations; and
- changes to the Cabinet processes to ensure that spent regulations are repealed when primary legislation is repealed.

The first recommendation arose from the apparent confusion concerning which department was responsible for some regulations. Though the responsible department is listed at the end of the original regulation, the administering department may have changed, been replaced, or responsibility been transferred. The Committee attributed this in part to the lack of an official current record of departmental responsibility for regulations. To address this problem, it recommended a publicly accessible list of departmental responsibility be produced and maintained for all regulations.

The second recommendation arose because a number of spent regulations were not specifically revoked when the empowering act had been repealed and was not replaced, or there was no other act intended to carry those regulations over. The Committee recommended the section of the *CabGuide* headed “Associated regulations” be amended to require any Cabinet paper associated with a proposal for a bill to list all existing regulations that could be revoked by the bill.

In its response, the government considered that further evaluation of the Committee’s recommendations in relation to systematic review was necessary before any decision was made. Although this work has not yet been carried out,<sup>420</sup> it directed the Ministry of Justice,

review regulations at the time of making; and legislated departmental review, where legislation requires review of regulations after a specified period.

<sup>420</sup> Ross Carter, Jason McHerron and Ryan Malone *Subordinate Legislation in New Zealand* (LexisNexis, 2013) at 363.

in consultation with the Parliamentary Counsel Office and other appropriate government departments, and in collaboration with the Law Commission, to provide further guidance to Cabinet on the inclusion of a sun-setting system, applicable to all statutory regulations, in a statute, and the implications of such a system on departmental resources and Parliamentary Counsel Office law drafting resources.

The government agreed with the Committee that the regulations identified by the Committee as spent should be revoked. In relation to the Committee's recommendations concerning a publicly accessible list of departmental responsibility, the government supported undertaking further work to investigate the desirability and feasibility of implementing this recommendation. In relation to the suggested amendment to the "Associated regulations" section of the *CabGuide*, the government supported the undertaking of further work to determine the practical implications of implementing this recommendation. The Ministry of Justice and Parliamentary Counsel Office were to undertake this further work in consultation with other government departments, including the Cabinet Office, and in collaboration with the Law Commission.

## **XI Regulatory Impact Statements**

In the 2007 report on the ongoing need for individual regulations and their impact addressed in the previous chapter, the Committee also reviewed the requirements for regulatory impact statements and business compliance cost statements, and the exemptions from these requirements.<sup>421</sup> The Cabinet approval process for new regulations requires departments to undertake a regulatory impact analysis, and publish its findings in a regulatory impact statement. A regulatory impact analysis requires the relevant department to consider the impact of the regulation on a range of outcomes, including economic, social, cultural, health, and environmental outcomes. Business compliance costs, previously considered separately in a business compliance cost statement, are now considered as a part of the regulatory impact analysis. Regulations may be exempted from regulatory impact assessment on limited grounds.

In the Committee's experience, both regulatory impact statements and business compliance cost statements were useful when considering whether there were grounds under Standing Order 327 (2) to draw regulations to the attention of the House. It noted that some regulations that were the subject of upheld complaints would have benefited from the rigour of developing regulatory impact statements. Furthermore, the use of regulatory

<sup>421</sup> Regulations Review Committee "Inquiry into the ongoing need for individual regulations and their impact", above n 417.

impact statements in relation to regulations that impose fees and charges was useful because it required a rigorous cost-benefit approach to fee-setting.

At the time the review began, a regulatory impact statement or business compliance cost statement was not required for:

- deemed regulations;
- regulations of a minor or mechanical nature that do not substantially alter existing arrangements;
- costs impacting on charities; and
- increased costs where there is no new fee or business obligation.

The Committee noted the excepted categories of regulations represented a significant number of regulations, and it was thus necessary to consider whether these exceptions were justified in light of the advantages conferred by a regulatory impact analysis.

Since the review was initiated, the regulatory impact analysis exemption has been amended so that all regulations that require Cabinet approval trigger a regulatory impact analysis. As noted in Chapter 3, deemed regulations are included in the definition of disallowable instruments in the Legislation Act 2012, meaning those deemed regulations requiring Cabinet approval are no longer exempted. The Committee supported this change because regulations requiring Cabinet approval were likely to address policy issues affecting a broad spectrum of the population, making it appropriate for the regulatory impact analysis process to apply.

Initially the Committee was of the view that deemed regulations setting fees and charges that were not subject to Cabinet approval would also benefit from a regulatory impact analysis. The Committee raised the same concern in relation to other exempted fee-imposing regulations, particularly those of a minor or mechanical nature. However, following discussions with the Regulatory Impact Analysis Unit, the Committee accepted that the appropriate standards for measuring regulations setting fees and charges could already be found in the Treasury and Audit Office guidelines.

Despite the Committee accepting that the Treasury and Audit Office guidelines provide appropriate standards for setting fees and charges, it was concerned that too many regulations imposing significant costs were escaping the regulatory impact analysis process on the minor or machinery nature exemption. The Committee raised the possibility that claimed exemptions from a regulatory impact analysis process be policed by the Regulatory



Impact Analysis Unit.<sup>422</sup> The Unit disagreed, instead emphasising the self-regulatory nature of the regulatory impact analysis system. Under this model, the Regulatory Impact Analysis Unit focuses on areas likely to significantly impact upon economic growth, while imposing safeguards for ensuring compliance with regulatory impact analysis requirements. The main safeguard is the requirement departments publish their regulatory impact statements. This requires confirmation to Cabinet that regulatory impact statement requirements, including the code of good regulatory practice, have been complied with. Furthermore, the Unit audits completed regulatory impact statement documents. The Committee accepted this approach, but said it was unclear whether the Unit's audit function extended to the claiming of exemptions from the regulatory impact statement process. It recommended the audit function included proposals claiming the exemption. The Committee also recommended clear guidelines be provided for the application of the exemption criteria, with the aim of ensuring matters with significant cost implications for the public are not exempted from regulatory impact assessment.

The last issue addressed by the Committee was whether business compliance cost statements treated costs to charities in fee-setting regulations as business costs. As noted, the business compliance costs are now included in regulatory impact statements. The Committee found that charities are not treated as businesses for the purpose of compliance cost analysis, but are in terms of the broader social impacts of regulation. The Committee recommended charities be treated in the same manner as businesses for the purposes of analysing compliance costs in a regulatory impact statement.

The government agreed with all the Committee's recommendations, and noted that they had already been implemented. However, in relation to the treatment of charities for the purpose of analysing compliance costs, the government considered the interests of charities and similar individuals or organisations were adequately addressed by the regulatory impact analysis requirements. The government also asked the Regulatory Impact Analysis Unit to consider amending existing guidelines to ensure that assessing compliance costs on all affected parties (including charities) was included in the analysis, as a part of its programme of developing and distributing further guidance material to departments. The Regulatory Impact Analysis system has been significantly amended since this report.<sup>423</sup>

<sup>422</sup> The Regulatory Impact Analysis Unit transferred from the Ministry of Economic Development to Treasury from November 2008.

<sup>423</sup> See Treasury "Impact Analysis Requirements for Regulatory Proposals" <[www.treasury.govt.nz](http://www.treasury.govt.nz)>.

## XII Instruments of Exemption in Primary Legislation

Instruments of exemption formally release individuals or classes of people and things from the obligation to comply with legislative requirements. For example, section 47 of the Maritime Transport Act 1994 allows the Director of Maritime New Zealand to exempt any person, ship, or maritime product from any specified requirement in any maritime rule. The Committee inquired into the use of such instruments because of its concern that, in some cases, exemptions “have been so numerous and applied so broadly that the exemptions have supplanted the framework of rules to which they relate.”<sup>424</sup>

The Committee’s 2008 inquiry into the use of instruments of exemption in primary legislation sought to establish a set of principles to govern the appropriate use of exemptions. Furthermore, it sought to clarify the status of exemption instruments for the purposes of the Regulations (Disallowance) Act 1989.

In general terms the Committee examined the following two issues:<sup>425</sup>

- When are instruments of exemption regulations under the Regulations (Disallowance) Act 1989?
- What are the principles governing the appropriate use of exemption-making provisions?

Whether or not an instrument of exemption falls within definition of regulation in the Regulations (Disallowance) Act has important consequences. Those instruments falling within the definition of regulation in the Act are susceptible to, amongst other things, Regulations Review Committee scrutiny and the application of the disallowance procedures set out in the Act. Further, all instruments to which the Regulations (Disallowance) Act applies must be tabled before the House.<sup>426</sup>

The Committee took the view that there was a lack of clarity about whether some exemption notices were regulations for the purposes of the Regulations (Disallowance) Act. Exemptions notices in the form of regulations made under an Act by the Governor-General in Council or by a Minister of the Crown are a clear example of an instrument of exemption covered by paragraph (a) of the definition of regulation in the Act. However, the status of

<sup>424</sup> Regulations Review Committee “Inquiry into the use of Instruments of Exemption in Primary Legislation” [2008] AJHR I16Q.

<sup>425</sup> The Committee also considered the following matters, which are canvassed in this chapter: the appropriate principles for imposing conditions in relation to exemptions, principles for publication of requirements for instruments of exemption, concerns relating to fragmentation of the law through the use of exemptions, and the impact this may have on public access to the law.

<sup>426</sup> Regulations (Disallowance) Act 1989, s 4.

other forms of exemption instrument is not always as clear. Paragraph (b) of the definition of regulation in the Act states that an instrument that “varies or extends the scope or provisions of an enactment” is a regulation, whether or not it is made by Order in Council.<sup>427</sup> The Legislation Advisory Committee suggested that instruments of exemption occupy a sliding scale: at one end, it placed minor concessions to individuals or bodies that have a minimal or no impact on the scope of an Act and are administrative in nature; at the other, instruments that are legislative in nature and that clearly and significantly extend or vary the scope of an Act. The Legislation Advisory Committee took the view that the latter fall within the definition of regulation in paragraph (b). In contrast, the New Zealand Law Society distinguished between specific and general exemptions, the former type of exemption applying to a particular transaction, event, or entity not fitting within the general law, the latter more widely to the general public. The Law Society took the view that those exemptions applying to the general public be regarded as regulations under paragraph (b).

In determining whether the Regulations (Disallowance) Act should apply to an instrument of exemption, the Committee adopted the two-stage test suggested by the Legislation Advisory Committee. First, does the instrument fall within the definition of regulation in the Regulations (Disallowance) Act? Secondly, is the instrument legislative in nature? For instance, does it affect a large group of people, and is it of a continuing nature? The Committee rejected the Parliamentary Counsel Office’s suggested approach of going directly to the question of legislative character (in accordance with the test set out in Cabinet Office Circular CO (O8) 4).<sup>428</sup> The Committee concluded this test was too narrow, stating it “would exclude exemptions for individuals or narrow classes of person even if they extend the scope or provisions of an enactment.”<sup>429</sup> The Committee expressed concern that this may lead to some exemptions varying or extending the scope of an enactment not being subject to parliamentary scrutiny. Ultimately, the Committee recommended that once a decision was made as to whether an exemption instrument was a regulation under the recommended test, the empowering provision should explicitly state whether or not the exemption instrument is subject to the Regulations (Disallowance) Act.

<sup>427</sup> Regulations (Disallowance) Act 1989, s 4.

<sup>428</sup> Under this test an instrument is legislative in character, and therefore a regulation, if it fulfils the following two criteria. First, does the instrument regulate the public generally or any class of the public (including an occupational class)? Secondly, does it prescribe or impose obligations, confer entitlements, or create benefits or privileges?

<sup>429</sup> Regulations Review Committee “Inquiry into the use of Instruments of Exemption in Primary Legislation”, above n 424.

The Committee also considered the broader question of the desirability of the disallowance procedure applying to all exemption instruments. It concluded that the procedure should only apply to those instruments falling within the test suggested by the Legislation Advisory Committee. It rejected the submission by some departments that exemptions given to individuals should not, as a general rule, be subject to the disallowance procedure. The departments argued that individuals and departments go through the exemption process in good faith and make commitments following the granting of an exemption. The Committee took the view that: (a) in general, exemption decisions are already susceptible to a degree of external scrutiny through judicial review; and (b) the transparency provided by parliamentary scrutiny would be particularly useful in relation to exemptions providing a competitive advantage.

In relation to the principles governing the use of exemption making provisions, the Committee recommended that the key principles and the recommendations of the Legislation Advisory Committee noted in its report be reflected in the Legislation Advisory Committee Guidelines and, where applicable, the Guide to Cabinet and Cabinet Committee processes. In addition, the Committee recommended that where the power to make an exemption is supplemented by a power to impose conditions, any conditions must be consistent with the objects of the empowering Act and no more onerous than the requirements they replace.<sup>430</sup>

Two issues addressed in these recommendations warrant further discussion. First, the Committee considered what criteria ought to be attached to the exercise of an exemption-making power. It noted that the criteria differ depending on the different requirements from which exemptions may be given. It concluded that, at a minimum, there should be an express requirement that granting the exemption is consistent with the objectives of the empowering Act, and ideally there should be further guidance.

Secondly, the Committee considered whether all exemption instruments ought to be published. It concluded that it was not appropriate for all exemptions to be published. It accepted the Legislation Advisory Committee's suggestion that, as a general rule, exemptions of general application or of significant or wide-ranging effect should be published in the Statutory Regulations series. However, in other cases, publication in the Statutory Regulations series may not be appropriate. For instance, exemptions applying to individuals should not normally be published as statutory regulations. Where publication in the Statutory Regulations series is inappropriate, other means of publication may be used - for

<sup>430</sup> Regulations Review Committee "Inquiry into the use of Instruments of Exemption in Primary Legislation", above n 424, at 13-14.

instance, publication in the *Gazette*, in industry publications or on the internet. In other cases, exemptions are too trivial, too private, or too commercially sensitive to be published at all.

Apart from adopting the key recommendations and principles of the Legislation Advisory Committee in its recommendations, the Committee made a recommendation concerning exemption powers which include the power to impose terms and conditions. The Committee concluded that such a power be subject to an express statutory limitation. It recommended that an appropriate limitation was that any condition should be consistent with the objects of the empowering Act and no more onerous than the original requirement in the legislation. In relation to the recommendation that the Legislation Advisory Committee Guidelines, and where applicable the Guide to Cabinet and Cabinet Committee processes (now known as the *Cabguide*), be amended in accordance with the key principles and the recommendations contained in the Legislation Advisory Committee's submission, the government response invited the Legislation Advisory Committee to consider whether to amend its guidelines accordingly.<sup>431</sup> The government took the view that it would not be appropriate to include the level of detail contained in the key principles and recommendations in the Guide to Cabinet and Cabinet Committee processes. The government did not substantively respond to the other two recommendations (relating to the appropriate test determining whether an exemption instrument is a regulation for the purposes of disallowance, and the appropriate limitations on an exemption-making power containing the power to impose terms and conditions). Instead, it took the view these recommendations related to the quality of regulations more generally and should be addressed in the context of the government's regulatory reform programme.<sup>432</sup>

The Legislation Advisory Committee largely adopted these suggestions its Guidelines.<sup>433</sup> In addition, the Legislation Act 2012 contains amendments to over 100 existing Acts in its schedule. Many of these amendments clarify whether or not exemptions made under these Acts are legislative or disallowable instruments; and whether or not they fall within the Legislation Act's disallowance procedure. Given the Regulation Review Committee's

<sup>431</sup> "Government Response to the Report of Regulations Review Committee on its Inquiry Into the Use of Instruments of Exemption in Primary Legislation" [2009] AJHR J1.

<sup>432</sup> "Government Response to the Report of Regulations Review Committee on its Inquiry Into the Use of Instruments of Exemption in Primary Legislation", above n 431.

<sup>433</sup> Legislation Advisory Committee *Guidelines on the Process and Content of Legislation* (Wellington, 2014), ch 14 and Legislation Advisory and Design Committee *Legislation Guidelines* (Wellington, 2018), ch 16.

difficulty in ascertaining the status of exemptions made under these Acts in its 2008 inquiry, this development may alleviate some of the issues raised in that inquiry.<sup>434</sup>

The Legislation Guidelines state that that the power of exemption should be subject to the following safeguards:<sup>435</sup>

- consistency with the purpose of the empowering Act;
- clear criteria for the exercise of power;
- a requirement to give reasons;
- an ability to seek judicial review of the exercise of an exemption power; and
- a process to review exemptions and ongoing need for the exemption power at regular intervals.

In additions, statutory sunsets or review clauses, and annual reporting requirements may also be appropriate.

In considering the Taxation (Annual Rates for 2017-18, Employment and Investment Income, and Remedial Matters) Bill the Committee expressed concern with its exemption creating powers. Clauses 200 and 231 of the Bill enabled an employer or registered person over the electronic filing threshold to seek out an exemption from the Commissioner where they met the requirement in the relevant provisions. The Committee found the Bill unclear as to whether the exemptions granted would be disallowable instruments. Further, the Committee noted the Bill did not require reasons for the exemptions and did not explicitly require the exemption to be time limited. The Committee recommended amendments to remedy these concerns.<sup>436</sup>

### **XIII Transitional regulations that override primary legislation**

The Committee has expressed its concern regarding the use of transitional regulations in a manner that could amend or override primary legislation. Power to make regulations of this type is a particular kind of Henry VIII provision.

In 2012, the Committee stated that using transitional regulations for any purpose other than facilitating the transition between old and new legislation could be a breach of SO 327(2)(c) which may lead to regulations facing disallowance upon scrutiny from the

<sup>434</sup> For further discussion regarding exemptions see Ross Carter, Jason McHerron and Ryan Malone *Subordinate Legislation in New Zealand* (LexisNexis, 2013), at 58–62.

<sup>435</sup> Legislation Advisory and Design Committee *Legislation Guidelines* (Wellington, 2018), ch 16.

<sup>436</sup> Regulations Review Committee “Activities of the Regulations Review Committee in 2017” [2017] AJHR I.16D at 7.

Committee (discussed in Chapter 7).<sup>437</sup> Despite this, the Committee has continued to note that empowering provisions in Bills could (either implicitly or explicitly) authorise the making of transitional regulations that override primary legislation. The Committee has laid out the following concerns:<sup>438</sup>

- These types of provisions may become seen as an acceptable means of modifying or overriding primary legislation without reference to Parliament.
- These types of provisions may become ordinary, rather than being used only in rare and exceptional circumstances.
- The growing prevalence of these provisions would compound their precedent effect.
- The language and scope of these provisions may eventually extend beyond technical and machinery matters into substantive policy, which would constitute an abuse of regulation-making power.<sup>439</sup>
- Use of these provisions may lead to a “slipshod” approach to policy development and drafting, with regulations being regularly used to address undeveloped policy or fill legislative gaps.
- Transitional issues may eventually be relegated entirely to regulations rather than being dealt with in primary legislation, which is not in the public interest.

The Committee completed a report into transitional regulations overriding primary legislation in July 2014.<sup>440</sup>

The Committee began by restating the general principles it had previously identified as applying to the use of transitional override powers:<sup>441</sup>

<sup>437</sup> Regulations Review Committee “Investigation into the Road User Charges (Transitional Matters) Regulations 2012” (13 November 2012) at 7.

<sup>438</sup> Regulations Review Committee “Activities of the Regulations Review Committee in 2013” (27 June 2014) at 25; Regulations Review Committee “Activities of the Regulations Review Committee in 2014” (8 August 2014) at 9.

<sup>439</sup> Regulations of this type would also breach SO 327(2)(c), see discussion at Chapter 7.

<sup>440</sup> Regulations Review Committee “Inquiry into Regulation-making Powers that Authorise Transitional Regulations to Override Primary Legislation” (15 July 2014) at 7.

<sup>441</sup> Regulations Review Committee “Inquiry into the Resource Management (Transitional) Regulations 1994 and the Principles that Should Apply to the Use of Empowering Provisions Allowing Regulations to Override Primary Legislation During a Transitional Period”, above n 84.

- A provision that allows the making of regulations to amend the empowering Act should be used only in exceptional circumstances and should not be used routinely in reforming legislation.
- A complex reform involving the amalgamation of a large number of statutes may justify the use of an empowering provision allowing regulations to override the primary legislation, while essentially technical amendments or a rewrite of an existing Act which does not amount to a substantial change in the principles and context do not.
- A regulation-making provision that provides for regulations to override primary legislation should be drafted in the most specific and limited terms possible and must at all times be consistent with and in support of the provisions of the empowering Act.
- Any such provisions should always have a limited lifespan of no more than 3 years, which should generally be sufficient to allow adequate time for addressing any technical difficulties that arise.
- Regulations made pursuant to such an empowering clause should also include a sunset provision not exceeding 3 years.
- Where an empowering provision contains a sunset clause with a life of more than 3 years, regulations made pursuant to such a provision should be subject to parliamentary confirmation.

The Committee was concerned at the growing prevalence of these provisions. It noted that in 1995, when it had first established these principles, it could only find eight examples of such provisions. It was able to identify, however, 27 more Acts passed since 2000 and three bills before the House at the time of writing in July 2014 that contained such provisions (although there has been an apparent decrease in the use of these provisions since 2010). The Committee said it would continue to monitor the practice of including these provisions in bills closely, and recommended that the government take note of its report and take steps to limit its use of these provisions in line with the principles restated above.

The government noted that general practice since 1995 had been to draft empowering provisions in line with the principles the Committee had set out in 1995 (and restated in 2014).<sup>442</sup> These principles had also been adopted by the Legislation Advisory Committee in the most recent edition of the *Guidelines*. The government considered that, aside from some particular contexts, regulation-making powers of this kind in legislation had been used in a

<sup>442</sup> “Government Response to the Report of the Regulations Review Committee: regulation-making powers that authorise transitional regulations to override primary legislation” (9 December 2014) at 2.



circumspect and limited manner. These provisions were drafted in specific and restrained terms, consistent with both the purpose of their Act and the purpose for which the regulation-making power had been created. Almost all contained sunset clauses, and since August 2013 these provisions had to be specifically identified in the legislative disclosure statement, improving parliamentary and public scrutiny.

The government also commended the evidence heard by the Committee from Justice Gageler of the High Court of Australia who had stated that provisions of this kind were “not a return to the executive autocracy of a Tudor monarch, but the striking of a legislated balance between flexibility and accountability”.<sup>443</sup> The government agreed that sparing use of these provisions was common in other jurisdictions similar to New Zealand.

The government considered that there had been very limited use of these provisions since 1995 given the large number of Acts passed by Parliament in any given year. These provisions were generally used where Acts contained complex reforms or there were implementation issues, for example the legislative reforms required to establish the Auckland super-city in 2009 and 2010. They were also used in exceptional circumstances such as those following the Canterbury earthquakes in 2010 and 2011. The limited number of these provisions since 2000 indicated to the government that where they were enacted, both Select Committees and Parliaments in general had been satisfied that they were necessary, given the Committee’s 1995 principles.

The government stated generally that it supported the Committee’s intention to continue to monitor the situation and to apply the existing principles so as to ensure that provisions of this kind were not used improperly or routinely. However, the government considered no clear need has been established for it to take steps to limit the use of transitional override powers in legislation.<sup>444</sup> The Committee has discussed with PCO the possibility of establishing a standard form of wording for use in empower provisions that authorise transitional override powers. This would provide a consistent “marker” that such provisions exist.<sup>445</sup>

<sup>443</sup> “Government Response to the Report of the Regulations Review Committee: regulation-making powers that authorise transitional regulations to override primary legislation” (9 December 2014) at 2.3.

<sup>444</sup> Regulations Review Committee “Briefing on Government responses to two reports of the Regulations Review Committee” (16 May 2017) at 4.

<sup>445</sup> Regulations Review Committee “Briefing on Government responses to two reports of the Regulations Review Committee” (16 May 2017) at 4.

## Appendices

### A Inquiries into Regulations (up to 31 December 2019)

Report	Report Date	Government Response	Response Date	S0 grounds
Complaint about the Social Security (Income and Cash Assets Exemptions) Regulations 2011	16 Sep 2019			(a)
Complaint about the Shipping (Charges) Amendment Regulations 2013 and the Marine Safety Charges Amendments Regulations 2013	12 Dec 2016			(a), (c), (f)
Complaint about Animal Welfare (Layer Hens) Code of Welfare 2012	14 Oct 2016			(a), (c), (h)
Investigation into the Canterbury Earthquake District Plan Order 2014	10 Dec 2015			(a)
Complaint about Accident Compensation (Motor Vehicle Account Levies) Regulations 2015	25 Nov 2015			(c), (f)
Investigation into the Plumbers, Gasfitters, and Drainlayers (Fees and Disciplinary Levy) Amendment Notice 2015	25 Nov 2015			
Complaint regarding the Exclusive Economic Zone and Continental Shelf (Environmental Effects – Permitted Activities) Regulations 2013	16 May 2014			(a), (b)
Complaint regarding the Canterbury Earthquake (Building Act) Order 2011	24 Apr 2014	Government response to Report of the Regulations Review Committee on Complaint regarding the Canterbury Earthquake (Building Act) Order 2011	16 Jul 2014	(a), (b), (c), (f)

Report	Report Date	Government Response	Response Date	S0 grounds
Complaint regarding the Legal Services Regulations (payment for legal aid work) Regulations 2011	16 Apr 2014			(a), (b), (c)
Complaint regarding the Civil Aviation Charges Regulations (No 2) 1991 Amendment Regulations 2012	26 Feb 2014			(a), (b), (c), (d), (f), (h), (i)
Complaint regarding the New Zealand (Australia New Zealand Food Standards Code) Food Standards 2002, Amendment No 53	21 Feb 2014			(a), (b), (c), (d)
Complaint about two notices made by the Plumbers, Gasfitters and Drainlayers Board relating to an offences fee and the Complaint regarding the Offences Fee contained in the Amendment to the Plumbers, Gasfitters and Drainlayers Board (Fees) Notice 2010	30 Sep 2013			(c), (f)
Investigation into the Marine and Coastal Area (Takutai Moana) Reclamation Fees Regulations 2012	30 Sep 2013	Government response to Report of the Regulations Review Committee on Investigation into the Marine and Coastal Area (Takutai Moana) Reclamation Fees Regulations 2012	20 Dec 2013	(a), (c), (g)
Complaint Regarding the New Zealand Teachers Council (Conduct) Rules 2004	12 Aug 2013	Government response to Report of the Regulations Review Committee on Complaint Regarding the New Zealand Teachers Council (Conduct) Rules 2004	14 Nov 2013	(a), (b), (c), (f)

Report	Report Date	Government Response	Response Date	S0 grounds
Investigation into the Road User Charges (Transitional Exemption for Certain Farmers' Vehicles) Regulations 2013	12 Aug 2013			
Complaint Regarding the Road User Charges (Transitional Matters) Regulations 2012	13 Nov 2012	Regulations disallowed; partly remade as Road User Charges (Transitional Exemption for Certain Farmers' Vehicles) Regulations 2013.	27 Feb 2013	(c), (f)
Complaint Regarding the Legal Services Regulations 2011	1 Jun 2012			(a), (d)
Complaint Regarding the Resource Management (Forms, Fees, and Procedure) Amendment Regulations 2009	5 Oct 2011			(a)
Complaint Regarding Marine Safety Charges Amendment Regulations 2008	14 Jun 2011			(c), (f), (h)
Complaints Regarding Three Notices Issued by the Plumbers, Gasfitters and Drainlayers Board and the Plumbers, Gasfitters and Drainlayers Board (Fees) Notice 2010	15 Feb 2011	Government Response to Report of the Regulations Review Committee on Complaints Regarding Three Notices Issued by the Plumbers, Gasfitters and Drainlayers Board and the Plumbers, Gasfitters and Drainlayers Board (Fees) Notice 2010	12 May 2011	(c), (h)
Complaint Regarding Rules for Cadastral Survey 2010	24 Nov 2010			(c)
Complaint Regarding the New Zealand (Mandatory Fortification of Bread with Folic Acid) Amendment Food Standard 2009	4 Aug 2010			(a), (c), (h)

Report	Report Date	Government Response	Response Date	S0 grounds
Interim Report on the Complaint Regarding the Resource Management (Forms, Fees, and Procedure) Amendment Regulations 2009	2 Dec 2009	Government Response to Report of the Regulations Review Committee on Complaints Regarding Resource Management (Forms, Fees, and Procedure) Amendment Regulations 2009	3 Mar 2010	(a)
Complaint Regarding the Medicines Regulations 1984	21 Oct 2009			(a)
Interim Report on the Complaint Regarding SR 2008/327 Marine Safety Charges Amendment Regulations 2008	31 Aug 2009	Government Response to Interim Report of the Regulations Review Committee on Complaint Regarding SR 2008.327 Marine Safety Charges Amendment Regulations 2008	27 Nov 2009	(c), (f), (h)
Complaint Regarding the Overseas Investment Amendment Regulations 2008	30 Sep 2008	Government Response to Report of the Regulations Review Committee on Complaint Regarding the Overseas Investment Amendment Regulations 2008	4 Mar 2009	(b), (c), (d), (f), (g)
Interim Report on Complaint Regarding the Medicines Regulations 1984	22 Apr 2008			(a)
Complaint Regarding Dairy Industry Restructuring (Raw Milk) Regulations 2001	22 Aug 2007	Government Response to Report of the Regulations Review Committee on Complaint Regarding the Dairy Industry Restructuring (Raw Milk) Regulations 2001	16 Nov 2007	(a)

Report	Report Date	Government Response	Response Date	S0 grounds
Complaint Regarding Notice of Scopes of Practice and Related Qualifications prescribed by the Nursing Council of New Zealand	3 Jul 2007	Government Response to Report of the Regulations Review Committee on a Complaint Regarding Notice of Scopes of Practice and Related Qualifications Prescribed by the Nursing Council of New Zealand	18 Sep 2007	(a), (b), (c), (g), (h)
Complaint Regarding Midwifery Fees Notice 2005	28 Mar 2007	Government Response to Report of the Regulations Review Committee on a Complaint Regarding the Midwifery (Fees) Notice 2005	26 Jun 2007	(a), (b), (c), (i)
Complaint Regarding Differential Airport Charges Notice 1997 (Taupo Airport)	29 Nov 2006			(a), (b), (c), (h)
Complaint Regarding Commodity Levies (Eggs) Order 2004	20 Jun 2006			(a), (c)
Complaint Regarding the Land Transfer (Computer Registers and Electronic Lodgement) Amendment Act Commencement Order 2002	22 May 2006			(a), (b), (c), (d), (f)
Complaint Regarding Student Allowances Amendment Regulations (No 2) 2004	22 May 2006			(a), (b), (c)
Final Report on Complaint About Animal Welfare (Layer Hens) Code of Welfare 2005	9 May 2006			(a), (c), (f), (i)
Complaint Regarding the Limits and Exclusions on Class 4 Venue Costs Notice 2004	7 Jun 2005			(a), (f), (i)
Complaints Regarding Regulation 8 of the Gambling (Harm Prevention and Minimisation) Regulations 2004	23 May 2005			(a), (b), (h), (i)

Report	Report Date	Government Response	Response Date	S0 grounds
Complaint Regarding Land Transport Rule: Vehicle Equipment 2004 (Rule 32017)	16 May 2005			(a), (c), (i)
Investigation and Complaint About Civil Court Fees Regulations 2004	18 Feb 2005	Government Response to Regulations Review Committee Report On Investigation and Complaint about Civil Court Fees Regulations 2004		(a), (b), (c), (f)
Complaint Regarding Fisheries (Declaration of New Stocks Subject to Quota Management System) Notice (No 2) 2002	5 Sep 2003			(b), (h), (i)
Investigation and Complaints Relating to Civil Court Fees Regulations	17 Jun 2002			(a), (b), (e), (f)
Investigation into the Local Electoral Act Commencement Order 2001 and the Commencement of Legislation by Order in Council	17 Jun 2002			
Complaint Relating to the Land Transport (Driver Licensing and Driver Testing Fees) Amendment Regulations 2001	11 Jun 2002			(a), (b)
Interim Report on Complaints Relating to the Births, Deaths, and Marriages Registration (Fees) Amendment Regulations 2001, and Investigation into Identity Services Regulations	27 Mar 2002			
Interim Report on an Investigation into the Gaming and Lotteries (Licence Fees) Amendment Regulations 2001	27 Mar 2002			

Report	Report Date	Government Response	Response Date	S0 grounds
Complaints Relating to the Sharemilking Agreements Order 2001	30 Oct 2001	Government Response to the Report of the Regulations Review Committee on Complaints Relating to the Sharemilking Agreements Order 2001	23 Jan 2002	(a), (b), (c), (g)
Complaint Relating to the Domestic Violence (Programmes) Regulations 1996	Aug 2001	Government Response to the Report of the Regulations Review Committee on Complaint Relating to the Domestic Violence (Programmes) Regulations 1996	6 Nov 2001	(d)
Complaint Relating to Survey (Departmental Fees and Charges) Regulations 1998 and Survey Regulations 1998	Apr 2001	Government Response to Report of the Regulations Review Committee on Complaints Relating to Survey (Departmental Fees and Charges) Regulations 1998 and Survey Regulations 1998	12 Jul 2001	(a), (i)
Complaint relating to Meat (Residues) Regulations 1996	Mar 2001			(a)
Investigation into Six Codes Deemed to be Codes of Welfare Under the Animal Welfare Act 1999	1 Aug 2000	Government Response to the Report of the Regulations Review Committee on Investigation into Six Codes Deemed to be Codes of Welfare Under the Animal Welfare Act 1999	27 Oct 2000	(b), (d), (i)
Investigation into the Biosecurity (Ruminant Protein) Regulations 1999	1 Aug 2000	Government Response to the Report of the Regulations Review Committee on Investigation into the Biosecurity (Ruminant Protein) Regulations	26 Oct 2000	(b), (c), (d), (h), (i)



Report	Report Date	Government Response	Response Date	SO grounds
Complaints Relating to the Accident Insurance (Reviews Costs and Appeals) Regulations 1999	11 Oct 1999			(a), (b)
Complaints Relating to the Accident Insurance (Insurer's Liability to Pay Costs of Treatment) Regulations 1999 (AJHR I16V)	4 Oct 1999	Government Response to the Report of the Regulations Review Committee on Complaints Relating to the Accident Insurance (Insurer's Liability to Pay Costs of Treatment Regulations) 1999	15 Mar 2000	(a), (b), (d), (f)
Special Report in Relation to an Investigation into the Land Transport (Driver Licensing and Driver Testing Fees) Regulations 1999 and the Land Transport (Driver Licensing) Rule 1999	9 Sep 1999			
Investigation into the Land Transport (Driver Licensing and Driver Testing Fees) Regulations 1999 and the Land Transport (Driver Licensing) Rule 1999	24 Aug 1999	Government Response to the Report of the Regulations Review Committee on Investigation into the Land Transport (Driver Licensing and Driver Testing Fees) Regulations 1999 and the Land Transport (Driver Licensing) Rule 1999	10 Feb 2000	
Complaints Relating to Accident Insurance (Insurer Returns) Regulations 1999	24 Aug 1999	Government Response to the Report of the Regulations Review Committee on Complaints Relating to Accident Insurance (Insurer Returns) Regulations 1999	13 Oct 1999	(b)

Report	Report Date	Government Response	Response Date	S0 grounds
Complaint Relating to the New Zealand Food Standards 1996, Amendment No 11	2 Jul 1999	Government Response to the Report of the Regulations Review Committee on Complaint Relating to the New Zealand Food Standard 1996, Amendment No. 11	20 Sep 1999	(a), (c), (d), (h), (i)
Complaints Relating to the Fisheries (Allocation of Individual Catch Entitlement) Regulations 1999	14 Jun 1999			(a), (b), (c), (d), (f), (h), (i)
Investigation into the Land Transfer Amendment Regulations 1998 and the Survey (Departmental Fees and Charges) Regulations 1998	14 Jun 1999	Government Response to the Report of the Regulations Review Committee on Investigation into the Land Transfer Amendment Regulations 1998 and the Survey (Departmental Fees and Charges) Regulations 1998	10 Sep 1999	(c)
Complaint relating to Legal Services Board (Civil and Criminal Legal Aid Remuneration) Instructions 1998	14 Dec 1998			(a), (c), (h)
Complaint Relating to Land Transport Rule 32012 – Vehicle Standards (Glazing)	1 Sep 1998	Government Response to the Report of the Regulations Review Committee's Inquiry on a Complaint Relating to Land Transport Rule 32012: Vehicle Standards (Glazing)	1 Dec 1998	(a), (b), (c), (i)

Report	Report Date	Government Response	Response Date	S0 grounds
Investigation into the Disputes Tribunals Amendment Rules 1997 and the Disputes Tribunals Amendment Rules 1998	27 Aug 1998	Government Response to the Report of the Regulations Review Committee on its Investigation into the Disputes Tribunals Amendment Rules 1997 and the Disputes Tribunals Amendment Rules 1999	11 Nov 1998	(a)
Complaint Relating to the Accident Compensation (Referred Treatment Costs) Regulations 1990	10 Aug 1998	Government Response to the Report of the Regulations Review Committee on a Complaint Relating to the Accident Compensation (Referred Treatment Costs) Regulations 1990	17 Nov 1998	(b), (c)
Investigation into the Transport (Drivers Licensing) Amendment Regulations 1998	21 Jul 1998	Government Response to the Report of the Regulations Review Committee on the Transport (Driver Licensing) Amendment Regulations 1998	19 Oct 1998	
Investigation into the Gaming and Lotteries (Licence Fees) Regulations 1997	29 Jun 1998	Government Response to the Report of the Regulations Review Committee on The Gaming and Lotteries (Licence Fees) Regulations 1997	8 Sep 1998	(c)
Complaint Relating to the Immigration Regulations 1991, Regulation 32B	23 Feb 1998	Government Response to the Report of the Regulations Review Committee on a Complaint into the Immigration Regulations 1991, Regulation 32B	28 May 1998	(a), (c)

Report	Report Date	Government Response	Response Date	S0 grounds
Investigation into the Biosecurity (Rabbit Calicivirus) Regulations 1997	23 Feb 1998	Government Response to the Report of the Regulations Review Committee on the Investigation into the Biosecurity (Rabbit Calicivirus) Regulations 1997	18 May 1998	(a), (c), (f), (h)
Complaint Relating to the Accident Rehabilitation and Compensation Insurance (Employment Premiums) Regulations 1995 and 1996	3 Sep 1997	Government Response to the Report of the Regulations Review Committee on Complaint Relating to the Accident Rehabilitation and Compensation Insurance (Employment Premiums) Regulations 1995 and 1996	2 Dec 1997	(a), (c), (i)
Investigation into Children, Young Persons, and Their Families (Residential Care) Regulations 1996	25 Aug 1997	Government Response to the Report of the Regulations Review Committee on Investigation into Children, Young Persons, and Their Families (Residential Care) Regulations 1996	18 Nov 1997	(b), (f)
Complaint Relating to Part 121 and Part 135 of the Civil Aviation Rules Promulgated Under Section 28 of the Civil Aviation Act 1990	3 Jul 1997	Government Response to the Report of the Regulations Review Committee on Complaint Relating to Part 121 and Part 135 of the Civil Aviation Rules Promulgated under Section 28 of the Civil Aviation Act 1990	10 Sep 1997	(a), (b), (c), (f)

Report	Report Date	Government Response	Response Date	SO grounds
Report on the Government's Response to the Report on the Complaint Relating to Staffing Orders, Promulgated Under Section 91H of the Education Act 1989, Affecting Area, Primary, Intermediate, and Secondary Schools	26 Aug 1996	Government Response to the Report of the Regulations Review Committee on the Complaint Relating to Staffing Orders Promulgated under Section 91H of the Education Act 1989 Affecting Area, Primary, Intermediate and Secondary Schools	10 Mar 1997	
Investigation into the Citizenship Regulations 1978, Amendment No 6, promulgated Under the Citizenship Act 1977, and Their Impact on Children of Families Granted Entry to New Zealand on Humanitarian, Re-Unification, or Refugee Grounds	14 Jun 1996	Government Response to the Report of the Regulations Review Committee - Investigation into the Citizenship Regulations 1978, Amendment No. 6, Promulgated under the Citizenship Act 1977, and their Impact on Children of Families Granted Entry to New Zealand on Humanitarian, Re-Unification, or Refugee Grounds	20 Aug 1996	(a), (b), (c)
Report on the Government's Response to the Inquiry into the Resource Management (Transitional) Regulations 1994 and the Principles that Should Apply to the Use of Empowering Provisions Allowing Regulations to Override Primary Legislation During a Transitional Period	06 Jun 1996			

Report	Report Date	Government Response	Response Date	S0 grounds
Complaint Relating to Staffing Orders, Promulgated Under Section 91H of the Education Act 1989, Affecting Area, Primary, Intermediate, and Secondary Schools	28 Mar 1996	Government Response to the Report of the Regulations Review Committee on the Complaint Relating to Staffing Orders, Promulgated Under Section 91H of the Education Act 1989, Affecting Area, Primary, Intermediate and Secondary Schools	12 Jun 1996	(b), (f), (g)
Inquiry into the Resource Management (Transitional) Regulations 1994 and the Principles that Should Apply to the Use of Empowering Provisions Allowing Regulations to Override Primary Legislation During a Transitional Period	14 Jun 1995	Government Response to the Report of the Regulations Review Select Committee on the Inquiry into the Resource Management (Transitional) Regulations 1994 and the Principles That Should Apply to the Use of Empowering Provisions Allowing Regulations to Override Primary Legislation During the Transitional Period	28 Sep 1995	(c)
Complaints Relating to the Accident Rehabilitation and Compensation Insurance (Counselling Costs) Regulations 1992	24 Nov 1994	Government Response to the Report of the Regulations Review Committee on Complaints Relating to the Accident Rehabilitation and Compensation Insurance (Counselling Costs) Regulations 1992	7 Mar 1995	(b), (c), (h), (i)

Report	Report Date	Government Response	Response Date	SO grounds
Complaint Relating to the Whitebait Fishing (West Coast) Regulations 1994	6 Oct 1994	Government Response to the Report of the Regulations Review Committee on the Complaint of the West Coast Whitebaiters' Association Relating to the Whitebait Fishing (West Coast) Regulations 1994	8 Dec 1994	(h)
Matter Raised by Koru Aquaculture Ltd Relating to the Freshwater Fish Farming Regulations 1983, Amendment No 3	30 Sep 1993			(b), (c)
Complaint of Mrs Mary Bowers Regarding the Marine Reserve (Whanganui A Hei (Cathedral Cove)) Order 1992	19 Aug 1993			(h)
Inquiry into the Kiwifruit Marketing Regulations 1977, Amendment No 10	8 Jul 1993	Government Response to the Report of the Regulations Review Committee on the Inquiry into the Kiwifruit Marketing Regulations 1977, Amendment No 10	22 Dec 1993	(b), (e), (f)
Complaints Relating to the Accident Rehabilitation and Compensation Insurance (Social Rehabilitation) Regulations 1992	15 Jun 1993	Government Response to Report of the Regulations Review Committee on Complaints Relating to the Accident Rehabilitation and Compensation Insurance (Social Rehabilitation) Regulations 1992	9 Sep 1993	(a), (b), (c), (f), (g), (h)

Report	Report Date	Government Response	Response Date	S0 grounds
Inquiry into the Accident Compensation (Accident Experience) Regulations 1992	23 Dec 1992	Government Response to Report of the Regulations Review Committee on the Inquiry into the Accident Compensation (Accident Experience) Regulations 1992	2 Mar 1993	(a), (g)
Inquiry into Accident Compensation Employers and Self-Employed Persons Levies 1991	19 Nov 1992	Government Response to Report of the Regulations Review Committee on the Inquiry into the Accident Compensation Employers and Self-Employed Persons Levies Order 1991	2 Mar 1993	(c)
Complaint of the New Zealand Educational Institute on the Accident Rehabilitation and Compensation Insurance (Earner Premiums) Regulations 1992	4 Aug 1992	Government Response to Report of the Regulations Review Committee on the Complaint of the New Zealand Education Institute on the Accident Rehabilitation and Compensation Insurance (Earner Premium) Regulations 1992	10 Nov 1992	(c), (f)
Two Complaints Relating to the Lake Taupo Regulations 1976	22 Aug 1991	Government Response to Report of the Regulations Review Committee on Two Complaints Relating to the Lake Taupo Regulations 1976	19 Nov 1991	(a), (b), (c), (i)
Inquiry into Marine Mammals Protection Regulations 1990	15 Aug 1991	Government Response to Report of the Regulations Review Committee on Marine Mammals Protection Regulations 1991	19 Nov 1991	(d), (i)



Report	Report Date	Government Response	Response Date	S0 grounds
Inquiry into the Civil Aviation Regulations 1953, Amendment No 31	28 May 1991	Government Response to Report of the Regulations Review Committee on Inquiry into the Civil Aviation Regulations 1953, Amendment No. 31	24 Sep 1991	(b), (c)
Inquiry into the Accident Compensation Employers and Self-Employed Persons Levy Order 1990	21 Mar 1991	Government Response to Report of the Regulations Review Committee on Inquiry into the Accident Compensation Employers and Self-Employed Persons Levy Order 1990		(c)
Inquiry into the Civil Aviation Charges Regulations 1990	4 Sep 1990			
Inquiry into Airport Authority By-laws Approval Orders	16 Aug 1990			
Inquiry into the Civil Aviation Regulations 1953, Amendment No 30	5 Oct 1989	Government Response to Report of the Regulations Review Committee on the Inquiry into the Civil Aviation Regulations 1953, Amendment No. 30	29 May 1990	(a), (b), (c), (g), (i)
Report on the Government's Response to the Committee's Inquiry into the Reserve Bank of New Zealand Order 1988	5 Oct 1989			
Inquiry into Fees Charged Under the Weights and Measures Regulations 1987	13 Dec 1988	Government Response to Report of the Regulations Review Committee on the Inquiry into Fees Charged Under the Weights and Measures Regulations 1987	11 Apr 1989	(b), (d)

Report	Report Date	Government Response	Response Date	S0 grounds
Inquiry into the Reserve Bank of New Zealand Order 1988	13 Dec 1988	Government Response to Report of the Regulations Review Committee on the Inquiry Into the Reserve Bank of New Zealand Order 1988	30 May 1989	(a), (c), (f), (i)
Inquiry into the Appropriateness of Establishing the Kiwifruit Marketing Board through Regulations	24 Nov 1988	Government response to Report of the Regulations Review Committee on the Inquiry into the Appropriateness of Establishing the Kiwifruit Marketing Board Through Regulations	2 Mar 1989	(b), (c), (d), (f), (i)
Report on the Government's Response to the Committee's Inquiry into the Geothermal Energy Regulations 1961	8 Oct 1987	Government Response to Report of the Regulations Review Committee on the Geothermal Energy Regulations 1961	8 Oct 1987	
Inquiry into the Geothermal Energy Regulations 1961	30 Jun 1987	Government Response to Report of the Regulations Review Committee on the Inquiry into the Geothermal Energy Regulations 1961	30 Sep 1987	

## B Occasional Reports (up to 31 December 2019)

Report	Report Date	Government Response	Response Date
Subordinate Legislation Confirmation Bill (No 4)	06 Dec 2019		
Subordinate Legislation Confirmation Bill (No 2)	29 Nov 2018		
Subordinate Legislation Confirmation Bill (No 3) (260-2)	16 Aug 2017		
Briefing on Government responses to two reports of the Regulations Review Committee	16 May 2017		
Inquiry into Parliament's legislative response to future national emergencies	01 Dec 2016	Government Response to the Report of Regulations Review Committee on Inquiry into Parliament's legislative response to future national emergencies	8 March 2017
Subordinate Legislation Confirmation Bill (No 2) (159-1)	10 Nov 2016		
Subordinate Legislation Confirmation Bill (28-2)	02 Nov 2015		
Interim Report on Inquiry into Parliament's legislative response to future national emergencies	7 May 2015		
Briefing on regulation-making powers that authorise transitional regulations to override primary legislation	15 Jul 2014	Government Response to the Report of the Regulations Review Committee on regulation-making powers that authorise transitional regulations to override primary legislation	9 December 2014
Inquiry into the oversight of disallowable instruments that are not legislative instruments	11 Jul 2014	Government Response to the Report of the Regulations Review Committee on Inquiry into the oversight of disallowable instruments that are not legislative instruments	9 December 2014
Interim Report on the Orders in Council Made Under the Canterbury Earthquake Response and Recovery Act 2010 and the Canterbury Earthquake Recovery Act 2011	5 Oct 2011		
Report by the New Zealand Delegation to the Australia-New Zealand Scrutiny of Legislation	20 Sep 2011		

Conference, Brisbane, 26-28 July 2011			
Interim Report on the Orders in Council Made Under the Canterbury Earthquake Response and Recovery Act 2010	Dec 2010		
Report by the New Zealand Delegation to the Australia-New Zealand Scrutiny of Legislation Conference: Scrutiny and Accountability in the 21 <sup>st</sup> Century	26 Feb 2010		
Investigation into the Copyright (New Technologies) Amendment Act 2008 Commencement Amendment Order (No 2) 2009 (SR 2009/51)	15 Feb 2010	Government Response to Report of the Regulations Review Committee on its Investigation into the Copyright (New Technologies) Amendment Act Commencement Amendment Order (No 2) 2009	22 June 2010
Investigation into Securities Amendment Act 2002 Commencement Order 2009	10 Dec 2009	Government Response to Report of the Regulations Review Committee on its Investigation into Securities Amendment Act 2002 Commencement Order 2009	10 March 2010
Inquiry into use of Instruments of Exemptions in Primary Legislation	30 Sep 2008	Government Response to the Report of the Regulations Review Committee on the Inquiry into use of Instruments of Exemptions in Primary Legislation	4 March 2009
Further Inquiry into Material Incorporated by Reference	12 Sep 2008	Government Response to the Report of the Regulations Review Committee on the Further Inquiry into Material Incorporated by Reference	12 February 2009
Inquiry into the Ongoing Requirement for Individual Regulations and their Impact	12 Dec 2007	Government Response to Report of the Regulations Review Committee on the Inquiry into the Ongoing Requirement for Individual Regulations and their Impact	7 March 2008
Inquiry into affirmative resolution procedures	30 May 2007	Government Response to Report of the Regulations Review Committee on the Inquiry into affirmative resolution procedures	28 August 2007
Investigation Into Deemed Regulations That Are Not Presented to the House of Representatives	9 Aug 2006	Government Response to Report of the Regulations Review Committee on the Investigation Into Deemed Regulations That Are Not Presented to the House of Representatives	8 November 2006

Ninth Australasian and Pacific Conference on Delegated Legislation & Sixth Australasian and Pacific Conference on the Scrutiny of Bills	20 Apr 2005		
Inquiry into Material Incorporated By Reference	12 Jul 2004	Government Response to the Report of the Regulations Review Committee on the Inquiry into Material Incorporated by Reference	29 September 2004
Interim Report on the Inquiry into Affirmative Resolution Procedures	12 Jul 2004	Government Response to the Report of the Regulations Review Committee on the Interim Report on the Inquiry into Affirmative Resolution Procedures	29 September 2004
Inquiry into the Principles Determining Whether Delegated Legislation is Given the Status of Regulations	30 Jun 2004	Government Response to the Report of the Regulations Review Committee on the Inquiry into the Principles Determining Whether Delegated Legislation is Given the Status of Regulations	29 September 2004
Eighth Australasian and Pacific Conference on Delegated Legislation and Fifth Australasian and Pacific Conference on the Scrutiny of Bills	12 Mar 2003		
Inquiry into Regulation-Making Powers that Authorise International Treaties to Override any Provisions of New Zealand Enactments	12 Mar 2002		
First International Conference on Regulation Reform Management and Scrutiny of Legislation	Aug 2001		
Seventh Australasian and Pacific Conference on Delegated Legislation and Fourth Australasian and Pacific Conference on the Scrutiny of Bills	10 Sep 1999		
Report on the Subordinate Legislation Bill	1 Sep 1999		
Inquiry into Instruments Deemed to be Regulations – An Examination of Delegated Legislation	06 Jul 1999		
Sixth Australasian and Pacific Conference on Delegated Legislation and Third Australasian and Pacific Conference on the Scrutiny of Bills	28 Oct 1997		
Investigation into the	23 Aug 1996		

Commencement of Legislation by Order in Council	
Investigation into Access to Regulations	5 Aug 1996
Fifth Australasian and Pacific Conference on Delegated Legislation and Pacific Conference on the Scrutiny of Bills and Issues Arising Therefrom	14 Dec 1995
Proposals for a Regulations (Miscellaneous Provisions) Bill	4 Jun 1992
Report on the Government's Response to the Committee's Inquiry Into the Constitutional Principles to Apply When Parliament Empowers the Crown to Charge Fees by Regulation	16 Aug 1990
Inquiry into the Drafting of Empowering Provisions in Bills	12 Jul 1990
Report on the Statutory Publications Bill	15 Nov 1989
Inquiry into the Constitutional Principles to Apply when Parliament Empowers the Crown to Charge Fees by Regulation	25 Jul 1989
Inquiry into all Regulations in Force During 1988	13 Dec 1988
Proposals for a Regulations Bill	5 Feb 1987
Regulation Making Powers in Legislation	4 Feb 1987

## C Annual Reports (up to 31 December 2019)

Report	Report Date
Activities of the Regulations Review Committee in 2019	12 May 2020
Activities of the Regulations Review Committee in 2018	20 Mar 2019
Activities of the Regulations Review Committee in 2017	17 Aug 2017
Activities of the Regulations Review Committee in 2016	13 Aug 2016
Activities of the Regulations Review Committee in 2015	28 Nov 2016
Activities of the Committee in 2014	8 Aug 2014
Activities of the Committee in 2013	27 Jun 2014
Activities of the Committee in 2012	19 Mar 2014
Activities of the Committee in 2011	5 Oct 2011
Activities of the Committee in 2010	15 Mar 2011
Activities of the Committee in 2009	26 Feb 2010
Activities of the Committee in 2008	30 Sep 2008
Activities of the Committee in 2007	28 Feb 2008
Activities of the Committee in 2006	7 Mar 2007
Activities of the Committee in 2005	2 Aug 2005
Activities of the Committee in 2004	20 Apr 2005
Activities of the Committee in 2002	29 May 2003
Activities of the Committee in 2001	6 May 2002
Activities of the Committee in 2000	28 Mar 2002
Activities of the Committee in 1999	8 Oct 1999
Activities of the Committee in 1998	Jan 1999
Activities of the Committee in 1997	7 Apr 1998
Activities of the Committee from 1 April 1995 to 31 March 1996	31 Jul 1996
Activities of the Committee from 1 March 1994 to 31 March 1995	29 Jun 1995
Activities of the Committee from 1 April 1992 to 23 September 1993	30 Sep 1993
Activities of the Committee from 28 November 1990 to 31 March 1992	18 Aug 1992
Activities of the Committee in 1990	4 Sep 1990
Activities of the Committee in 1988 and 1999	28 Jun 1990
Activities of the Committee in 1987	23 Jun 1988
Activities of the Committee in 1986	24 Feb 1987

## D Changes to Standing Orders and *Cabinet Manual*

The table below records relevant numbering changes to Standing Orders and the *Cabinet Manual*:

Standing Orders 2020	Standing Orders 2014 and 2017	Standing Orders 2011	Standing Orders 2008	Standing Orders 2005
SO 185	SO 184	SO 181	SO 180	SO 185
SO 256	SO 252	SO 249	SO 248	SO 253
SO 326	SO 318	SO 314	SO 309	SO 314
SO 327	SO 319	SO 315	SO 310	SO 315
SO 328	SO 320	SO 316	SO 311	SO 316
SO 330	SO 322	SO 318	SO 313	SO 317

Cabinet Manual 2017	Cabinet Manual 2008	Cabinet Manual 2001
Para 7.82	Para 7.77	Para 5.46
Para 7.84	Para 7.84	Para 5.51
	Para 7.85	Para 5.52
	Para 7.86	Para 5.53
	Para 7.87	Para 5.54
	Para 7.88	Para 5.55
	Para 7.89	Para 5.56



## E Changes to governing legislation

This table sets out the key equivalent provisions in legislation governing disallowance.

Legislation Act 2019	Legislation Act 2012	Regulations (Disallowance) Act 1989
Section 114	Section 41	Section 4
Section 116	Section 42	Section 5
Section 117	Section 43	Section 6
Section 118	Section 44	Section 7
Section 118	Section 45	Section 8
Section 119	Section 46	Section 9
Section 120	Section 47	Section 10