

# **New Zealand Jurisdiction ReportAustralia-New Zealand Scrutiny of Legislation Conference**

**11-14 July 2016, Perth**

## **Report of the New Zealand Regulations Review Committee**

### **The Regulations Review Committee**

#### **Committee membership**

Hon David Cunliffe (Chairperson) – New Zealand Labour Party

Andrew Bayly (Deputy Chairperson) – New Zealand National Party

Hon David Parker – New Zealand Labour Party

Hon Chester Borrows – New Zealand National Party

Christopher Bishop – New Zealand National Party

#### **Committee functions**

The New Zealand Parliament's Standing Orders provide five functions for the Regulations Review Committee. They are set out in full in Appendix 2. In summary they are:<sup>1</sup>

- to examine all regulations
- to consider draft regulations referred to the committee by a Minister and report on them to the Minister
- to consider provisions in bills which provide for–
- regulation-making powers, and
- any matter relating to regulations–
- and to report on these matters to the committee considering the bill
- to inquire into any matter relating to regulations and report on it to the House
- to investigate complaints about the operation of regulations and report to the House if the committee wishes.

The Standing Orders defines “regulations” as “any delegated legislation, including legislative instruments and disallowable instruments within the meaning of the Legislation Act 2012.”<sup>2</sup>

Standing Orders specify the grounds on which the committee may draw the House's attention to a regulation. They are that a regulation:<sup>3</sup>

- is not in accordance with the general objects and intentions of the empowering statute

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<sup>1</sup> SO 318.

<sup>2</sup> SO 3.

<sup>3</sup> SO 319(2).

- trespasses unduly on personal rights and liberties
- appears to make some unusual or unexpected use of the powers conferred by the empowering statute
- 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
- excludes the jurisdiction of the courts without explicit authorisation by the empowering statute
- contains a matter more appropriate for parliamentary enactment
- is retrospective where this is not expressly authorised by the empowering statute
- was not made in compliance with particular notice and consultation procedures prescribed by statute
- for any other reason concerning its form or purport, calls for elucidation.

When considering regulation-making powers in bills the committee has regard to these grounds and also considers the established principles of good legislative practice which are discussed in the Legislation Advisory Committee's *Guidelines on Process and Content of Legislation* (LAC guidelines).<sup>4</sup>

#### **Practices, challenges and success in considering primary legislation**

In examining bills, the committee aims to determine whether the delegation of Parliament's law-making power is appropriate and clearly defined. The committee is concerned with whether the regulation-making powers represent good legislative process, rather than matters of policy, which are for the respective committees to assess.

In addition to Standing Order considerations, the committee will look at whether regulation-making powers are consistent with good legislative design, including the principles set out in the LAC guidelines:

- that matters of policy and substance should not be delegated to regulations
- that regulations should not override, suspend or amend Acts ("Henry VIII powers")
- that law-making powers should not be delegated without provision for adequate controls and independent scrutiny.

This year, the committee scrutinised the Greater Christchurch Regeneration Bill and recommended that the Local Government and Environment Committee consider amending three clauses to narrow the powers and clarify the intent specified for each clause. In its bill commentary, the Local Government and Environment Committee noted that its suggested amendments to the clauses in question would address the committee's concerns.

When conducting scrutiny of the Child Protection (Child Sex Offender Register) Bill, the committee recommended that the Social Services Committee ask officials to justify an exemption clause, and the need to amend the schedule of qualifying offences by Order in

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<sup>4</sup> Legislation Advisory Committee, *Guidelines on Process and Content of Legislation*, at: <http://www.ldac.org.nz/guidelines/lac-revised-guidelines/>

Council. The Social Services Committee was not satisfied that these powers were justified, and in its report back to the House it recommended that they be removed.

### **How often the Regulations Review Committee exercises its functions**

The committee meets weekly in sitting weeks, and almost always includes scrutiny on its agenda. Its routine scrutiny functions involve regularly reporting to other select committees on regulation-making powers in bills; in 2015 the committee made 16 reports of this nature. The committee also regularly scrutinises regulations, but in the period from 1 August 2014 to 31 December 2015, out of 442 scrutinised legislative instruments, only one set was drawn to the attention of the House. The committee rarely uses its disallowance function, with only one occurrence in recent years, in 2013.<sup>5</sup>

### **Types of scrutiny and inquiries taken**

When conducting its scrutiny function, the committee takes a systematic approach to improving regulation-making processes.

#### **Regulations**

Regulations are automatically examined by the committee after they are presented to the House. Generally this occurs on a quarterly basis. If a regulation raises significant issues, the committee may seek information directly from the relevant Minister. The committee can investigate the regulation further if it is not satisfied with the information received. Once the committee has concluded its investigation, it may report to the House with its recommendations. The Government must respond within 60 working days, regardless of whether it accepts the recommendations.<sup>6</sup>

The committee may also consider draft regulations when they are referred by a Minister; however this rarely occurs in practice.

#### **Regulation-Making Powers in Bills**

The Committee has discretion to examine regulation-making powers in bills before another select committee, and report to that select committee with its findings. In practice, however, the Committee considers all bills once they have been referred to a subject select committee. Although the subject select committee has no obligation to accept the Committee's regulations, they often recommend to the House that the regulation-making power is amended in accordance with the Committee's advice.

#### **Complaints regarding Regulations**

Any person aggrieved at the operation of a regulation may lay a complaint before the committee. Unless the committee unanimously decides not to proceed with the complaint, the complainant will be given an opportunity to address the committee. The committee may decide to further investigate the complaint based on the Standing Order grounds.

#### **Standard inquiry timeframes and processes**

The committee automatically examines all regulations after they are presented to the House, which in practice occurs on a quarterly basis. Bills are examined immediately after referral to a subject select committee.

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<sup>5</sup> The Committee recommended that three regulations in the Road User Charges (Transitional Matters) Regulations 2012 be disallowed on the grounds that they breached Standing Orders 319(2)(c) and (f).

<sup>6</sup> SO 252.

Once a complaint is made to the committee, it must be placed before the committee at its next meeting.<sup>7</sup> Timeframes for complaints processes depend on whether the committee resolves to proceed with the complaint, the individuals or organisations with interest in the complaint subject matter, and any further information or responses required. In practice, they are generally resolved within a few months.

#### **How often the Regulations Review Committee reports to Parliament**

From the period 1 August 2014 to 31 December 2015, the committee presented 7 reports to the House. The committee also reports to a subject select committee considering a bill if it finds issues with the regulation-making powers in that bill. In 2015 it made 16 reports to select committees.

#### **Significant reports, activities, and scrutiny of legislation practices since the July 2011 conference**

##### **Access to Subordinate Instruments Project**

In response to a Regulations Review Committee report which recommended that a register of delegated legislation be established, the Parliamentary Counsel Office established the Access to Subordinate Instruments Project (ASIP). ASIP's objective is to improve access to legislation by publishing subordinate instruments on the New Zealand legislation website. Subordinate instruments are legislation that is made under the delegated law-making authority of Parliament, and includes regulations, rules and bylaws, amongst other forms of instruments. ASIP would result in a single comprehensive, official public source for all New Zealand legislation.

A business case is being prepared for ASIP in preparation for a decision in late 2016 on whether the project is to proceed. If it does proceed, ASIP will likely involve—

- simplification and modernisation of legal and legislative processes:
- development of a drafting, document management, lodgement and publication system:
- modifications to the current legislative publication system and the New Zealand legislation website.

##### **Inquiry into Parliament's legislative response to future national emergencies**

After the 2011 Canterbury earthquakes, the Standing Orders Committee recommended an inquiry focused on enabling ongoing response and recovery to national disasters. Referred to the committee in 2014, the Inquiry aims to establish a framework for legislating to provide for the recovery from an emergency after the lifting of a state of national emergency, while maintaining consistency with essential constitutional principles, the rule of law, and good legislative practice. The committee expects to report back on the Inquiry by the end of this Parliament, with robust recommendations for Parliament's legislative response to future national emergencies.

##### **Constraints on the Regulations Review Committee's ability to scrutinise legislation**

The committee has reported that there are numerous small issues with disallowable instruments (where they are not legislative instruments) that have a cumulative impact on effective scrutiny. They include difficulties with easily identifying disallowable instruments,

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<sup>7</sup> SO 320

and a lack of guidance on making and notifying disallowable instruments. The committee hopes that ASIP will remedy these issues.

A second constraint is time. Every now and then, select committees will be referred bills that have very short report back timeframes, which makes it difficult for the committee to review potential regulation-making powers and report back to the subject select committee in time for them to meaningfully consider the committee's findings and still meet that deadline.

## **Trends in legislation**

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

When the committee is referred regulation-making powers that provide for the making of regulations dealing with matters of policy, it tends to recommend that these powers either be amended or omitted completely, on the grounds of Standing Order 319(2)(f).<sup>8</sup> This is because of the well-established principle that statutes should set out the policy of a law, while regulations provide the details necessary for the implementation of the law.

### **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. On the basis that only Parliament should amend its own laws; the committee has stated that these clauses should only be used in exceptional circumstances. If there is another mechanism for achieving the purpose of the clause which contains the Henry VIII provision, the committee will usually recommend that the clause be deleted.

### **Commencement by Order in Council**

The committee has expressed concern that legislation with a commencement date to be set by Orders in Council gives the Executive the power to “decide not only when, but whether a particular piece of legislation should come into force”.<sup>9</sup> The Legislation Advisory Committee's guidelines include the general principle that legislation should incorporate a fixed commencement date, and that provisions for the commencement of legislation by Order in Council should only be used in rare and exceptional circumstances. As a result, the committee expects that any bill containing a commencement date to be set by Order in Council should set out the reasons for this in the explanatory note accompanying the bill so the select committee can determine whether the circumstances are rare and exceptional.

### **Broad, open-ended powers**

Regulation-making powers should specify the limits of the delegated legislative power as clearly as possible. If a regulation-making power is too broad there is potential that it may be used for purposes not intended by Parliament. If the committee considers that a regulation-making power is too broad and open-ended, it will recommend that the bill be amended to narrow the breadth of the power specified.

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<sup>8</sup> The committee considers whether a regulation ought to be drawn to the attention of the House on the ground that it contains matter more appropriate for parliamentary enactment.

<sup>9</sup> Regulations Review Committee, Investigation into the commencement of Legislation by Order in Council, 1996, I.16K. p4

## **Other issues: continued scrutiny of orders made under emergency legislation**

Since late 2010 the committee's work has included the scrutiny of orders made under emergency legislation relating to earthquakes in Canterbury in 2010 and 2011. Both the 2010 and 2011 Acts relating to the Canterbury earthquakes permitted Orders in Council to make "any provision reasonably necessary or expedient" for the purpose of the Act. These orders could grant exemptions from, modify, or extend any provisions of any enactment (with some exceptions listed). Concern has been expressed about the extraordinary nature of this power.

The committee considers it very important to monitor the operation of orders in force and any new orders that may be made, because the Regulations Review Committee's scrutiny is the only way in which Parliament can exercise any oversight of the powers conferred on the Government to make these orders. The committee has therefore been very active in its scrutiny of orders made under this legislation.

Under the 2011 Act, a further scrutiny mechanism was incorporated, requiring all draft Orders in Council to be reviewed by the Canterbury Earthquake Recovery Review Panel before they were made. In 2015, the committee dealt with an informal complaint regarding the Canterbury Earthquake (Christchurch Replacement District Plan) Order 2014. That Order was reviewed by the panel; however, the Convenor of the panel had a conflict of interest and so recused himself from being a party to the discussion of the Order or any vote required. This raised an issue as the Convenor was the only member of the panel who fulfilled the Act's requirement to include a person with legal expertise.

The committee conducted an inquiry into whether the panel that considered the 2014 Order was properly constituted, and whether the 2014 Order was validly made. Although the Ministry for the Environment and the Canterbury Earthquake Recovery Authority disagreed that there was an issue with the panel's constitution, the Order was validated by the Greater Christchurch Regeneration Act 2016, which replaced the 2011 Act.

Although the move away from recovery toward regeneration has reduced the extensive executive powers provided by the 2010 and 2011 Acts, it still contains a number of Ministerial and chief executive powers and provisions. The committee will remain active in its scrutiny of legislation made under the 2016 Act.