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**The evolution of the New Zealand Regulations Review
Committee: Systems, Scrutiny and Complaint**

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Introduction

In New Zealand we often do things a little differently. You are Aussies so you already know that. It is with that in mind that I approach this paper on the work of the Regulations Review Committee.

I want to give a brief overview of our role and functions, look at how things have evolved in the current term of Parliament. I will focus on the more strategic and selective approach to our work, and the efforts being put into building better work systems.

I also want to spend some time on what I believe is a unique aspect of the committee's work, the complaints function. The complaints function gives citizens the opportunity to speak directly to the committee on their concerns and is a direct public law tool for holding the Executive regulatory function to account.

The role and functions of the Regulations Review Committee

The Regulations Review Committee is a specialist select committee of our legislature, tasked under standing orders with holding the Executive's regulation making function to account. It has the ability to scrutinise the regulatory powers in all Bills and all secondary and tertiary instruments made by the Executive.

It also plays an important public watchdog role through the complaints process, a function that is perhaps even more valuable as the fourth estate is under mounting pressure and the statutory review entities bear a greater load.

Most of the committee's work is self-generated and operates independently of the business of the House. Importantly, it has a tradition of functioning in a non-partisan manner and working by consensus.

By convention, the committee is chaired by an Opposition Member of Parliament. (In previous Parliaments it also had an Opposition majority). This reinforces the scrutiny role performed by the committee acting as Parliament's delegate to review the legislative actions of the executive. In common with other scrutiny committees, the traditional stance of the committee is to examine legislation without becoming involved in issues of policy. The committee's examination focuses on the regulation-making process and the implementation of the policy behind the regulations, rather than calling into question the merits of the basic Government policy itself.

The committee's functions and powers are set out in the Standing Orders of the House of Representatives. The Regulations Review Committee examines all regulations that are disallowable instruments to determine whether the regulation ought to be drawn to the special attention of the House. There are nine grounds for drawing an examination to the special attention of the House, most of which are familiar to Australian jurisdictions:¹

¹ SO 319(2).

- is not in accordance with the general objects and intentions of the enactment under which it is made:
- trespasses unduly on personal rights and liberties:
- appears to make some unusual or unexpected use of the powers conferred by the enactment under which it is made:
- 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 in the enactment under which it is made:
- contains matter more appropriate for parliamentary enactment:
- is retrospective where this is not expressly authorised by the enactment under which it is made:
- was not made in compliance with particular notice and consultation procedures prescribed by applicable enactments:
- for any other reason concerning its form or purport, calls for elucidation

The committee carries out several other functions:

- Reporting on draft regulations referred to it by a Minister
- Reporting to subject select committees on regulation making powers in bills
- Conducting inquiries into matters relating to regulations, and
- Investigating complaints about regulations from members of the public.

The 2014-17 RRC approach: Towards a more systematic focus

Historically the committee has conducted its scrutiny function over disallowable instruments and bills with the routine presentation of exhaustive summaries by the committee staff to members. The current committee has varied this practice. An “80/20” approach is undertaken whereby:

- The committee has delegated to staff the task of undertaking a first pass review of all relevant instruments
- Staff highlight a subset of instruments most likely to offend standing orders in a material way
- Members focus their attention on this subset and pursue matters of interest with more rigour.
- The comprehensive list is tabled as an appendix and members have the opportunity to elevate items from that as they see fit.

The committee time freed up by this more focused approach has been allocated to:

- Grappling with reform of the regulatory lodgement, search and publication systems (see below)

- Undertaking targeted reviews of disallowable instruments and bills with more depth and vigour, sometimes involving multiple rounds of correspondence with agencies and subject committees
- Dealing with a range of public complaints in a way that has challenged departments to respond.

Systems Reform: The ACIP project

The 2014 committee identified early a number of frequent errors and system failures that it has sought to address at source

- Late or inconsistent lodgement of draft and final regulations
- Variable awareness of the lodgement requirements by agencies and departments
- Limited, manual search-ability of secondary and tertiary instruments
- Confusing nomenclature and a consequent poor level of understanding among government and public stakeholders in relation to different types of instruments

The committee used the annual debate on the Subordinate Legislation Validation Bill to engage with the Attorney-General and Parliamentary Counsel on these issues and a work programme to address them.

More detail will be provided in our subsequent presentation, but at a high level this project includes:

- Identification of issues and redefinition of processes from first principles
- Benchmarking against Australian state and commonwealth systems
- Re-engineering of business processes around instrument design, lodgement and collation
- Transition to a fully searchable and interactive online database, which is intended to be a repository of record and replace the current *Gazette* system
- Simplification of terminology, to be focussed on end users and stakeholders, leading to potential amendment of the 2012 Legislation Act.

The committee is working with the Parliamentary Counsel Office who have the overall lead on design and implementation going forward over a two year work plan.

The complaints process

The committee's power to investigate complaints about regulations from members of the public is a significant function. While the scrutiny of regulations is limited to how a regulation may operate in theory, a complaint from a member of the public will draw attention to how a regulation is working in practice. The committee's complaint jurisdiction provides some of the committee's most rewarding and interesting work.

Any person or organisation aggrieved at the operation of a regulation can make a complaint to the committee. A complaint can be made about any regulation, at any time. In practice, however, complaints tend to be made shortly after regulations have been promulgated.

Once a complaint is made to the committee, it must be placed before the committee at its next meeting. Unless the committee unanimously agrees to proceed no further, the Standing Orders provide that the person making the complaint must be given the opportunity to address the committee.²

A complainant is expected to address his or her concerns to a particular regulation and should address the particular grounds in the Standing Orders that are offended by the regulation.

The committee's process

Once a complaint is received the committee decides whether or not to proceed. The committee has received a number of complaints about instruments which do not fall within its jurisdiction and has not been able to proceed.

If the committee resolves to proceed, it sends a copy of the complaint to the department that administers the regulations or appropriate Minister for initial comment. The committee may ask the complainant and the government agency whether there is anyone else who has an interest in the matter complained about. This allows early identification of other persons or organisations that may wish to be heard during the complaint.

Once the committee has completed its preliminary processes, it then invites the complainant to present its complaint to the committee at an open hearing of evidence. The department and other interested parties are present and then have the opportunity to respond to the matters raised by the complainant.

The hearing process, release of papers and responses may take place over several weeks, even months, if the committee asks for further evidence. It is a very interactive process. During a hearing of evidence departmental officials, Ministers, industry or professional organisations and individuals may appear before the committee. Even the media may arrive with television cameras at a complaints hearing.

Remedies

It is the practice of the Regulations Review Committee to report to the House on its investigation and conclusion of a complaint. In reporting its findings the committee usually makes recommendations to the Government. The Government is obliged to table

² SO 320

a response within 60 days of the report being presented.³ While recommendations contained in a report of the committee are not binding on the Government, the government is given the opportunity to formally address the issues raised.

The committee has had considerable success in obtaining positive responses to its recommendations. A commentator in 2002 estimated that the committee has achieved an approximately 84% strike rate in obtaining some kind of affirmative response from the government to the recommendations it has made.⁴ Analysis of the 12 Government responses to committee reports relating to complaints since 2002 shows that 17 of the 18 recommendations made were agreed to.

Disallowance

Another check on regulations is the power of disallowance. The Legislation Act 2012 provides for the automatic disallowance of disallowable instruments if a notice of motion given by a Regulations Review committee member is not disposed of within 21 sitting days.⁵ If the disallowance motion is moved in the House, voted on and defeated, disallowance will not occur. The legal effect of disallowance is that the regulation is treated as having been revoked.⁶

Disallowance acts more as a deterrence than a regular remedy. The disallowance provisions have been used sparingly since their original enactment in 1989. Regulations have been disallowed on one occasion using the provisions, and amended on one other.⁷ In the case of the disallowance, the motion was moved by the Chair of the Regulations Review Committee, and after 21 sitting days the automatic disallowance mechanism came into play. One of the regulations concerned was then immediately reinstated by the Government, a matter on which the committee expressed its regret. The motion to amend a regulation arose in 2008 and was agreed to by the House, with the effect of revoking clause 4 of the Notice of Scopes of Practice and Related Qualifications prescribed by the Nursing Council of New Zealand.

Six other disallowance motions have been lodged since 1989. Of these 6 motions, 4 have been debated and voted down and 2 lapsed on the dissolution of the Parliament. These motions arose from complaints made to the committee.

The relatively infrequent use of the disallowance power in New Zealand does not mean that it is ineffective. A disallowance motion provides the opportunity for concerns about regulations to be debated in the House. Significantly, automatic disallowance acts as an

³ SO.252(1).

⁴ Delegated Legislation, presented by Mai Chen and George Tanner, New Zealand Law Society Seminar 2002, page 70.

⁵ Legislation Act 2012, s 43

⁶ Legislation Act 2012, s 44.

⁷ 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, SR 2013/32 and Notice of Scopes of Practice and Related Qualifications prescribed by the Nursing Council of New Zealand, Hon Dr Michael Cullen (23 September 2008) 650 NZPD 19223.

incentive for the government to co-operate with the committee to satisfactorily resolve issues, so as to avoid disallowance.

Ministers and departments have shown a willingness to work with the committee to resolve issues and prevent an adverse report or a disallowance motion. However following the Road User Charges (Transitional Matters) Regulations episode, there may be scope for considering provisions equivalent to those found in Commonwealth, Tasmania, ACT and Northern Territory jurisdictions which prevent a Government reinstating regulations or making regulations the same in substance as regulations that have been disallowed within a specified time period.

Effectiveness of complaints

The committee has reported on some 58 complaints in 29 years. Complaints have related to a broad range of areas regulated by delegated legislation. There have been a significant number of complaints concerning accident compensation regulations, transport matters, and food, agriculture and fisheries matters. Court fees and legal aid matters have also been regularly before the committee.

In the 51st Parliament the committee has reported on just one formal complaint to date. This related to the Accident Compensation (Motor Vehicle Account Levies) Regulations 2015. The complaint concerned an alleged discrepancy between definitions of the same term in 2 enactments. After close examination and hearing of evidence, the complaint was found not to be made out.

The committee currently has 3 complaints under active consideration, and has taken specialist advice from the Office of the Auditor General in relation to one of these.

Making a complaint to the Regulations Review Committee is a relatively informal and low cost method of challenging a regulation. There is no special format for making a complaint nor is legal representation required. Some complainants come directly to the committee, while members of Parliament, the Ombudsmen or lawyers refer others.

In many cases complaints are made by industry, professional or representative organisations. Some complainants appear on their own behalf, while a lawyer or a team of lawyers may represent others. Departmental officials, Ministers and Crown Counsel may appear to defend the regulations against complaint.

Complainants often end up at the committee having tried many other approaches to government officials, Ministers or the Ombudsmen. Ministers and departmental officials have the opportunity to hear and respond to how their law-making impacts in practice on ordinary lives. Many complainants welcome the opportunity to have their say and receive a response, even if they do not always get the remedy they are seeking.

Case study (I): Plumbers, Gasfitters and Drainlayers

As a case study of the complaints work of the committee, and indeed the work of the committee generally one need look no further than the Plumbers, Gasfitters and Drainlayers Board.

Since 2008 the Board, which was established by legislation to regulate plumbers, gasfitters and drainlayers, has been the subject of a number of complaints to the committee. The report of the committee's investigation into the Plumbers, Gasfitters, and Drainlayers (Fees and Disciplinary Levy) Amendment Notice 2015 begins rather ominously:

*"We have an extensive history with the Plumbers, Gasfitters, and Drainlayers Board (the Board) that dates back to 2008. Previous matters we have reported to the House include complaints about three notices issued by the Board, complaints about two notices relating to an offences fee, and recommendations that clauses related to a disciplinary levy be disallowed by Parliament."*⁸

2010 complaints

The complaints alleged that the training requirements specified in 3 Notices issued by the Board, with the approval of the Minister, under the Plumbers, Gasfitters, and Drainlayers Act 2006 were an unusual or unexpected use of the power to prescribe competency standards.

Central to the complaint was the additional costs that would result from training requirements that related to peripheral matters such as consumer law and leadership.

The committee found that the Notices were an unusual and unexpected use of the statutory power. It took the view that the training requirements prescribed under the Act needed to have a reasonable link to core or technical skills. The Committee further found the Board had not taken sufficient regard of the requirement to not unnecessarily restrict licensing or impose undue costs on the practitioners or the public.

The committee also found that the Board had not properly consulted with practitioners before making the Notices. The committee found that consultation on an options paper did not satisfy the requirement to consult about its proposal for the contents of the Notice. Further consultation on the specific recommendations being made to the Minister was also required.

The committee recommended that the Government ask the Board to review the training requirements taking into account the findings of the committee. The committee also took the unusual step of recommending that the House disallow the offending provisions in the

⁸ Report of the Regulations Review Committee "Investigation into the Plumbers, Gasfitters, and Drainlayers (Fees and Disciplinary Levy) Amendment Notice 2015" [2015] AJHR I16D, p.2.

Notices. This resulted in a short debate and a vote in the House defeating the motion. However, the Government response, also presented on 12 May, agreed with the committee recommendations to the Government and the Board finally implemented the recommendations of the committee.

2012 complaints

Sadly this was only the beginning for the Plumbers, Gasfitters, and Drainlayers Board. In 2012 the committee received further complaints from industry. The complaints related to the addition of an offence fee in the Plumbers, Gasfitters, and Drainlayers (Fees) Notice 2010. The fee was to cover costs of prosecutions taken by the Board.

The primary legislation made no provision for the funding of prosecutions.

The committee heard evidence from the parties and from the Auditor-General. It found that the amendment of the 2010 fees notice was an unusual or unexpected use of the regulation making power and that the notice contained matter more appropriate for parliamentary enactment. The fee was more in the nature of a levy and amounted to a tax.

By the time the committee came to report on these complaints an amendment had been made to the primary legislation empowering the Board to make a levy for the purposes of covering costs of prosecution.

Case study (II): Shipping Charges

The current committee has been dealing at length with a set of complaints about the setting of fees and charges by Maritime New Zealand, and in particular that the level of the charge exceeded that of cost recovery and amounted to a disguised tax.

The complainant raised the following matters in his complaint—

- the fees and levies set by the regulations exceed the actual cost to Maritime NZ of providing services; he alleged that this meant that Maritime NZ continually increased its costs, in order to justify the level at which fees and levies are set
- the level at which the fees were set was driving some boat owners and operators to take their boats out of the shipping industry; and
- international shipping operators benefit from the system, because they are being subsidised by domestic operators

The response of the Ministry of Transport (the department responsible for the regulations) including the following points—

- that the fees set by the regulations reflected the findings of an external funding review and a value-for-money exercise, which was itself undertaken in response to the committee's 2009 report on a complaint about the Marine Safety Charges Amendment Regulations 2008
- the current fees were being phased in over a six-year transition period (2013 – 2018)

- the new fees regime was expected to result in a small increase in costs for operators running single ships, and a decrease of up to 50% for operators running multiple ships
- international shipping operators are cross-subsidising domestic operators, and have been for some time, via the marine safety charge

Following initial hearings the committee took the view that a number of complex accounting issues required detailed scrutiny. The committee sought specialist advice on a number of matters including—

- the extent to which direct and overhead costs was internalised within the base hourly rate charged by Maritime New Zealand
- the disparity between international and domestic costs and charges.
- process issues regarding the degree of documentation and transactions provided in respect of the funding review.

The committee requested the support of the Office of the Auditor General, which has conducted an investigation and provided an initial report to the committee. The committee has yet to finalise its view on some aspects of the complaint so a finding has yet to be made.

This case study is salient not – as in the Plumbers case – because of its longevity, but because of its complexity and the high level of industry concern. As an aside, allegations relating to this case resulted in the referral of a matter by a member to the Speaker of the House for consideration by the Privileges Committee. The Speaker found a potential case to answer and the matter concerned is still before Privileges.

Case Study (III): Offshore minerals licensing

A complaint was received by the committee in relation to the regulatory regime for charging licence fees for offshore mineral exploration.

Prior to 2013, the granting of rights to prospect, explore, or mine for minerals on the continental shelf was dealt with under the Continental Shelf Act 1964. Amendments made to primary legislation in 2013 transferred this regime to the Crown Minerals Act 1991. This move meant that the fees regulations under the Crown Minerals Act (which had previously applied only to on-shore minerals) then applied to offshore minerals.

Applying a fee intended for on-shore mining to offshore mining was problematic in light of the substantial size of offshore permitting areas as opposed to on-shore permitting areas and that fees were imposed on a per hectare basis.

The department responsible recognised these difficulties and undertook a partial fees review in 2014 in respect of the fees. The resulting amendment regulations introduced a separate annual fee for an offshore mining permit on a per square kilometre basis. This new fee was a substantial reduction from that which applied under the earlier regulations.

The new fee was back-dated to the beginning of the permitting year in which the new regulations were made, but no back-dated reduction or refund was offered for the one earlier permitting year in which the on-shore fee was applied to offshore permits.

A licence holder affected by the earlier fee complained that the failure to reduce or refund the fee paid in the earlier permitting year was unfair and that therefore an unusual or inappropriate use of the regulation was still in place.

The committee has asked the department to consider a range of options for addressing these concerns and will consider its report before making a finding and reporting to the House. (Details of the case are confidential until reported).

Conclusion

The New Zealand Regulations Review Committee plays a useful role in monitoring the standards of regulatory practice across government, and can play the role of bulwark against Executive “regulatory exuberance”.

The committee is structured to provide political balance and to operate by consensus through its weighting of a government majority with an Opposition Chair and a long tradition of consensus decision making and bipartisanship.

The 2014 -17 committee has attempted to bring a more systematic approach to its work: applying an iterative and focussed methodology to scrutiny of instruments promulgated and to draft legislation.

Resources released by this sharper focus have been applied, inter alia, to pushing for and supporting the reform of the promulgation, storage and dissemination of instruments themselves. A major reform and re-engineering project is now being led by the Parliamentary Counsel office with regular committee input, to move to a fully searchable online system (drawing on Australian best practice⁰ within two years.

The complaints function of the committee represents scrutiny in action because ordinary citizens have the opportunity to bring their concerns about regulations to the committee. In this case an industry that considered it was being inappropriately regulated had the opportunity to put its case without the need to go to court.

The process is interactive and gives members of Parliament an insight into how people are affected by delegated legislation. Complainants, Ministers, and departmental officials have the opportunity to put the competing arguments about a complaint before the committee. In many cases, complainants derive considerable satisfaction on "having their say" before a parliamentary committee.

The number of complaints made to the committee is relatively small. The committee has been careful to ensure that complainants address the Standing Order grounds and that the committee does not get involved in matters of policy. This may be one reason why the complaint function has not been used excessively or inappropriately.

Sometimes issues arise that are more do with the empowering legislation or implementation of the regulations. While the committee has no jurisdiction over primary legislation or administrative actions of officials, the committee can draw these matters to the attention of the relevant Minister or department. The government has responded positively in most instances to some or all of committee's recommendations. Most importantly, citizens have the opportunity to be heard in respect of their concerns regarding the operation of delegated legislation.