Regulations Review Committee Digest

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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 (third) edition the Digest has been updated to include material from reports of the Committee issued during the sitting of the 48th New Zealand Parliament, and, where appropriate, any government responses (including those responses issued between the dissolution of the 48th Parliament in October 2008 and the Digest's publication).

The Digest has been updated in several other respects. References to the Standing Orders of the House of Representatives, Cabinet Manual 2008, and CabGuide (previously Step by Step Guide) have been updated to reflect amendments either to the numbering or formatting of those instruments (for previous numbering, see Appendix D). While the wording of the relevant Standing Orders and Cabinet Manual clauses remains the same, the numbering has changed. Because of this, references in the Digest have been updated to reflect the current numbering of the relevant Standing Orders and Cabinet Manual clauses. Secondly, the appendices listing the Committee's reports and the government responses have been updated, and now identify the Standing Order grounds relevant to the Committee's complaint reports. Finally, in the online version, references to the reports published by the Committee since the last edition of this Digest contain hyperlinks to the full Regulations Review Committee reports.

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The Centre, along with the Updating Author and Consultant Editor of the third edition, would also like to specifically thank Tim Workman, Clerk-Assistant (Legal Services), Office of the Clerk of the House of Representatives, and Suzanne Giacometti, Parliamentary Counsel, Parliamentary Counsel Office, for their guidance and feedback on the contents of the Digest.
Chapter 1  Introduction

The Regulations Review Committee was established in 1986 as part of a wider process of constitutional reform aimed at reining in the power of the Executive in New Zealand. The main concern was that delegated legislation was being used by the Executive to push through government policy initiatives. This was appealing to the Executive because of the relative ease of passing laws in this way and the general avoidance of Parliamentary scrutiny, which included debate in the House, three readings, and, in most cases, referral to the relevant subject select committee. However, this practice undermined the constitutional principle that, "democratically elected and accountable members of Parliament [should] retain control over the content of the law." Delegated legislation, on the other hand, is only meant to provide the detail necessary for the implementation of the law. Hence, the Regulations Review Committee was established as a standing Committee of the House in order to provide a consistent level of parliamentary scrutiny over the use of delegated legislation.

This Digest provides an overview of the history, role and work of the Regulations Review Committee. It is divided into fourteen chapters. Chapter 2 discusses the nature of regulations and delegated legislation in general. Chapter 3 discusses the forms of scrutiny of regulations available. Chapter 4 sets out the composition, operation, and functions of the Regulations Review Committee. Chapters 5-13 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.

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3 Ibid, 10.
4 Ibid.
5 Geoffrey Palmer "Deficiencies in New Zealand Delegated Legislation" (1999) 30 VUWL 1, 2 ["Deficiencies"].
6 Standing Orders of the House of Representatives (Brought into force 20 February 1996; amended 11 September 2008), SO 180(1)(b) [Standing Orders].
Chapter 2  Regulations

A  What are Regulations?

When Parliament passes a bill it becomes an Act of Parliament, also known as a statute. 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 legislation.\(^7\) Regulations are one form of delegated legislation.

Regulations come about through the exercise of a power to legislate granted to the executive by Parliament via statute.\(^8\) In this sense, Acts are 'primary legislation' and regulations are a form of 'secondary legislation'. Regulations are defined by section 2 of the Regulations (Disallowance) Act 1989 as follows:\(^9\)

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).

Regulations deal with a vast array of subject matter. For instance, regulations may provide for the issuing of licenses or permits, govern the use of harbours and reserves, set levels of fees for government services, and establish laws relating to aviation and transport. One notable feature of the definition of regulations in the Regulations (Disallowance) Act 1989 is that under (e) it includes what are known as deemed regulations. A deemed regulation is an instrument made pursuant to delegated authority that does not come under (a) to (d) but is 'deemed' to be a regulation nonetheless. As a consequence, the instrument is scrutinised by the Regulations Review Committee as well as being covered by the provisions of the Regulations (Disallowance) Act 1989.\(^10\)

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\(^7\) Delegated legislation is also known as subordinate legislation or a statutory instrument.

\(^8\) For further discussion regarding delegated legislation in New Zealand see Morris and Malone, above n 2, 7-31; Palmer and Palmer Bridled Power, above n 1, 202-209; and David McGee Parliamentary Practice in New Zealand (3rd ed, Dunmore Publishing Ltd, 2005) 396-423.

\(^9\) Section 29 of the Interpretation Act 1999 also defines regulations. The definition is the same as that in section 2 of the Regulations (Disallowance) Act 1989.

\(^10\) Deemed regulations sit alongside "traditional" regulations as a form of secondary legislation. The Regulations Review Committee has expressed concern as to the increasing use of deemed regulations as they are not subjected to the same controls as traditional regulations prior to their coming into force. 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
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. The *Cabinet Manual 2008* provides that "regulations should not, in general, deal with matters of substantive policy, have retrospective operation, purport to levy taxes or contain provisions that purport to amend primary legislation". These are matters of such importance that they are properly the domain of an Act of Parliament.

**B Why Delegate Regulation-Making Powers?**

In 1962, a parliamentary select committee (the "Algie Committee") undertook an examination of the case for delegating law-making powers and the use of regulations. The Committee accepted the six reasons used to justify delegated legislation put forward by the Donoughmore Committee (UK) in its 1932 report on ministerial powers. These were:

- 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;
- emergency conditions requiring speedy or instant action.

It is clear that the New Zealand Parliament 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. 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.

The Algie Committee placed considerable weight on the argument that delegated legislation can overcome Parliament's 'limitation of aptitude' to deal with technical matters. This included "detailed technical knowledge, for example, of trade marks, designs, diseases, poisons, legal procedure and so on, upon which the Minister can and does consult experts". Using regulations to pass laws on such matters has two advantages. First, 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. 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". 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. The advantage regulations have in making
corrections is that they can usually be made considerably faster than can an Act of Parliament.
Provided any consultation requirements are satisfied, regulations can be made quite swiftly. 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.

C Dangers in Delegating Regulation-Making Power

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. Herein lies the key issue, namely 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. Alternatively, 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.

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". Given the impact of the regulations on individuals and

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17 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
18 This kind of regulation-making power is known as a "Henry VIII clause". These are further discussed in
Chapter 14(D).
19 It should be noted, however, that Parliament can pass laws under urgency which can facilitate the rapid
20 Geoffrey Palmer "Deficiencies", above n 5, 12.
businesses, many commentators argued that the freezes were of such importance that only Parliament should have had the power to bring them into force.21

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Chapter 3  Scrutiny of Regulations

A  History

In 1929, Lord Hewart of Bury wrote that in the United Kingdom the delegation of law-making powers from Parliament to the executive had become "a persistent and well-contrived system, intended to produce, and in practice producing, a despotic power which ... places government departments above the sovereignty of Parliament and beyond the jurisdiction of the courts".\textsuperscript{22} Lord Hewart alleged that the executive had been given the ability to legislate on matters of substantive policy through the enactment of 'skeletal' statutes that left regulations to deal with the substance of the law. In 1932, the Report of the Committee on Ministers' Powers acknowledged the criticisms made by Hewart and others, but refuted any notion that delegated legislation was in itself undesirable:\textsuperscript{23}

\begin{quote}
We do not agree with those critics who think that the practice is wholly bad. We see definite advantages, provided that the statutory powers are exercised and the statutory functions are performed in the right way. But risks of abuse are incidental to it, and we believe that safeguards are required, if the country is to enjoy the advantages of the practice without suffering from its inherent dangers.
\end{quote}

In New Zealand, one such safeguard was the Regulations Act 1936. Section 3 of the Act required all regulations, once made, to be forwarded to the government printer and to be made available for public sale. This had the effect of significantly increasing access to regulations. Previously regulations were only published in the \textit{New Zealand Gazette} and this had proved an inconvenient reference source.\textsuperscript{24}

In 1962, an important change was made to the way in which regulation-making powers were drafted.\textsuperscript{25} Previously, regulation-making powers were conferred in two parts: first, authorising the making of regulations deemed necessary for giving full effect to the Act, and secondly, without limiting that general power, authorising the making of regulations for a number of specified purposes. This standard format was changed by reversing the order in which these two parts appeared. Typically, the Governor-General now has the power to make regulations for a number of specified purposes, the last of which is a power to make regulations for such matters considered necessary to give full effect to the empowering Act. In a submission to the Algie Committee, the Chief Law Draftsman made observed that:\textsuperscript{26}

\begin{quote}
What was previously a general power, which was expressly declared not to be limited by a list of specific topics which followed it, is now placed, in a more limited form, at the bottom of a list of specific topics and can fairly be regarded as dealing with subsidiary or incidental matters.
\end{quote}

This change reflected a more cautious delegation of law-making powers. If the "general power" is limited to subsidiary or technical matters, Parliament can retain control over the exact

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{22} Lord Hewart of Bury \textit{The New Despotism} (E Benn, London, 1929) 14.
\item \textsuperscript{23} The Donoughmore Report, above n 13, 14.
\item \textsuperscript{24} Palmer "Deficiencies", above n 5, 3.
\item \textsuperscript{25} See Algie Committee, above n 12, 7-8. See also Regulations Review Committee "Inquiry into the Drafting of Empowering Provisions in Bills" [1990] AJHR I16.
\item \textsuperscript{26} Algie Committee, above n 12, 8.
\end{itemize}
\end{footnotesize}
purposes for which regulations can be made.

In its report, the Algie Committee reflected on the effectiveness of parliamentary control of delegated legislation. In particular, it considered whether a specialised parliamentary committee should be created to deal solely with delegated legislation. The Committee rejected the idea on the basis that the supervision of delegated legislation by Law Drafting staff and an advisory officer from the Justice Department was satisfactory. It also took the view that there was no evidence that the executive abused its regulation-making powers. Nevertheless, the Committee did recommend that the Statutes Revision Committee be given the task of scrutinising delegated legislation referred to it by the House. In 1962, the Standing Orders were amended so that the Statutes Revision Committee could draw the attention of the House to any regulation that: (i) trespassed unduly on personal rights and liberties; (ii) appeared to make some unusual or unexpected use of the powers conferred by the statute under which it was made; or (iii) required elucidation.

The Statutes Revision Committee undertook a review of its own scrutiny of delegated legislation in 1985.\textsuperscript{27} The Committee noted that only 11 regulations had been referred to it in the previous 20 years. It further stated that because most of the Committee's work was devoted to the scrutiny of bills, it did not have the time to effectively scrutinise delegated legislation. At best, the Committee felt that it had been able to consider a small number of controversial regulations. Accordingly, it recommended the establishment of a separate delegated legislation committee. The Regulations Review Committee was duly constituted in July of 1985.

\textbf{B \hspace{1em} Non-Parliamentary Scrutiny}

Before discussing the scrutiny of regulations by the Regulations Review Committee, it must be pointed out that scrutiny does take place outside the confines of Parliament. This is done by the executive and judicial branches of government.

\textit{1 \hspace{1em} Executive Scrutiny}

In terms of executive scrutiny, the \textit{Cabinet Manual} puts in place rules dealing with the making and publication of new regulations.\textsuperscript{28} The Manual notes that regulations should only deal with matters of a technical or detailed nature and warns that regulations must not be \textit{ultra vires} the empowering statute. It also sets out a nine-step guideline process for the promulgation of regulations. Most notably:

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

It is worth noting that the 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

\textsuperscript{27} Statutes Revision Committee "First Report on Delegated Legislation" [1985] AJHR I5A.

\textsuperscript{28} \textit{Cabinet Manual} 2008, above n 11, 99.
from a legal perspective". 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. 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. The Cabguide also states that the minister responsible for a set of regulations must be present at the Executive Council (when 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. The 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. It must be remembered, however, that these checks only apply to the making of traditional regulations and not deemed regulations.

2 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. 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 the time of writing reveals a similar trend, with eleven cases addressing whether particular regulations were ultra vires. Despite these relatively low figures, the fact that the courts are able to declare a regulation unlawful acts as an important check on those exercising delegated regulation-making powers.

C Parliamentary Scrutiny

In 1962, the Algie Committee wrote:

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.

30 CabGuide available at cabguide.cabinetoffice.govt.nz/.
35 This figure was obtained from a search of the LexisNexisNZ online database, and should be regarded as indicative only (search conducted 14 April 2009).
36 Palmer "Deficiencies", above n 5, 12.
37 Algie Committee, above n 12, 6.
Supervision of regulations by Parliament can take five forms: (i) the laying of all regulations before the House of Representatives; (ii) confirmation of regulations by an Act of Parliament; (iii) approval of regulations by resolution of the House; (iv) amendment or disallowance of regulations under the Regulations (Disallowance) Act 1989; and (v) scrutiny by the Regulations Review Committee.

1 **Laying of all Regulations**

Section 4 of the Regulations (Disallowance) Act 1989 requires regulations to be laid before the House no later than 16 sitting days after they are made. This applies to all regulations, including deemed regulations. A mandatory presentation requirement for all regulations ensures that the House is aware that regulations had been made, and allows for parliamentary debate as to their merit.38

2 **Confirmation of Regulations by Statute**

Occasionally, an Act may provide that regulations made pursuant to it must be confirmed by statute. If confirmation is not provided within the specified period, the regulations become invalid. This mechanism provides Parliament with the opportunity to consider the policy issues raised by the regulations and to give, or withhold, its approval.39 Confirmation is typically achieved through the enactment of an annual Subordinate Legislation Confirmation and Validation Bill.

3 **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 expressed concern at the growing use of affirmative resolution procedures. These concerns are discussed later.40

4 **Regulations (Disallowance) Act 1989**

Parliament is able to exercise significant post-promulgation powers under the Regulations (Disallowance) Act 1989. In particular:

- Section 5 provides that the House may, by resolution, disallow any regulations or provisions of regulations.
- Section 6 provides that any member of the Regulations Review Committee may give a notice of motion to disallow any regulation. Unless Parliament disposes of the motion within 21 sitting days of it being made, the regulation is deemed to have been disallowed.

38 Ibid, 9.
40 See Chapter 14(E).
Section 9(1) allows the House, by resolution, to amend any regulations or to revoke any regulations and substitute other regulations.

The automatic 21-day disallowance mechanism contained in section 6 is a key provision. Under the Act, any Member of Parliament may put forward a notice of motion to amend or disallow regulations. Yet this type of notice of motion faces considerable hurdles within the parliamentary process. First, it must compete with other members' business on a members' day in the House. Secondly, the notice lapses if not debated within one week. By contrast, the automatic 21-day disallowance mechanism 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. Quite simply, if the government does not facilitate this debate, the regulations will be disallowed automatically.

At the time of writing the section 6 disallowance procedure has only been used on four occasions in the House – none of which were successful. Yet the value of the Act lies primarily in the 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 a Committee's views are taken seriously". Thus, the prospect of a disallowance motion being moved by a member of the Regulations Review Committee may encourage the executive to amend regulations to address the Committee's concerns.

The power to amend or revoke regulations contained in section 9(1) of the Act also serves as a reminder to those that exercise regulation-making powers that Parliament ultimately retains control over delegated legislation. Indeed, 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". A motion pursuant to section 9(1) was moved in the House of Representatives for the first time on 26 September 2008. 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.

5 Regulations Review Committee

The Regulations Review Committee is the main parliamentary watchdog over the constitutionally proper use of regulation-making powers. It takes responsibility for the scrutiny of regulations, draft regulations, and regulation-making powers in bills. The operation and functions of the Committee will be discussed in the following chapter.

41 The four regulations in question were (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). Only two of the four motions have been debated and voted on, while the other two motions lapsed on the dissolution of Parliament.


44 "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. See Chapter 11 for a discussion of the Committee's conclusions concerning the notice.
Chapter 4  Regulations Review Committee

A  Composition and Operation

Standing Orders requires that a Regulations Review Committee be established at the commencement of each Parliament.\(^{45}\) In the 49th Parliament (elected in 2008) the Committee had seven voting members appointed to it. By convention it is chaired by a non-government member of Parliament. 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".\(^{46}\) Instead, the Committee provides technical scrutiny of regulations. For example, the Kiwifruit Marketing Regulations 1977, Amendment No 4 established the Kiwifruit Marketing Board.\(^{47}\) The regulations also gave the Board monopoly export rights, meaning it could compulsory acquire export kiwifruit from growers. In examining the regulations, the Committee passed over the policy decision to establish the Board in the first place, noting that:\(^{48}\)

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.

The Regulations Review Committee 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, and 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 is completely absent from committee decision making. Furthermore, on occasion the Committee will make a majority finding while in the same report noting the differing views of the minority.\(^{49}\)

B  Functions

It is worth setting out in full the current Standing Orders as they relate directly to the

45 Standing Orders, above n 6, SO 180(1)(b).
48 Ibid, 5.
Regulations Review Committee.  

180 Establishment and life of select committees

(1) The following select committees are established at the commencement of each Parliament:
(a) the subject select committees specified in Standing Order 184, and
(b) the Officers of Parliament Committee, the Privileges Committee, the Regulations Review Committee, and the Standing Orders Committee.
(2) The House may establish other select committees.
(3) A select committee continues in existence for the duration of the Parliament unless the House provides otherwise or, in the case of a committee established for a particular purpose, until the committee makes its final report.

309 Functions of Regulations Review Committee

(1) The Regulations Review Committee examines all regulations.
(2) A Minister may refer draft regulations to the committee for consideration and the committee may report on the draft regulations to the Minister.
(3) In respect of a bill before another committee, the committee may consider—
(a) any regulation-making power,
(b) any provision that contains a delegated power to make instruments of a legislative character, and
(c) any matter relating to regulations, —
and report on it to the committee that is considering the bill.
(4) The committee may consider any matter relating to regulations and report on it to the House.
(5) The committee investigates complaints about the operation of regulations, in accordance with Standing Order 311, and may report on the complaints to the House.

310 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:
(b) trespasses unduly on personal rights and liberties:
(c) appears to make some unusual or unexpected use of the powers conferred by the statute under which it is made:
(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:
(e) excludes the jurisdiction of the courts without explicit authorisation in the enabling statute:
(f) contains matter more appropriate for parliamentary enactment:
(g) is retrospective where this is not expressly authorised by the empowering statute:
(h) was not made in compliance with particular notice and consultation procedures prescribed by statute:
(i) for any other reason concerning its form or purport, calls for elucidation.

Standing Orders, above n 6.
311 Procedure where complaint made concerning regulation

(1) Where a complaint is made to the committee or to the chairperson of the committee by a person or organisation aggrieved at the operation of a regulation, the complaint must be placed before the committee at its next meeting for the committee to consider whether, on the face of it, the complaint relates to one of the grounds on which the committee may draw a regulation to the special attention of the House.

(2) The person or organisation making the complaint is given an opportunity to address the committee on the regulation unless the committee agrees by unanimous resolution not to proceed with the complaint.

Standing Order 309 establishes four different functions of the Committee. They are to consider: (i) regulations; (ii) draft regulations; (iii) regulation-making powers in bills; (iv) and any matter relating to regulations. These are discussed below.

1 Regulations

The Committee's examination of regulations takes two forms. First, pursuant to Standing Order 309(1) it automatically examines all regulations after they are made. In 2007 for instance the Committee scrutinised 405 regulations, and in 2008 it scrutinised 312 regulations.\(^{51}\) Secondly, any person aggrieved at the operation of a regulation may place a complaint before the Committee pursuant to Standing Order 311(1). Unless the Committee decides to proceed no further with the complaint, the complainant is given an opportunity to address the Committee on the regulation. The Committee may then decide to investigate the complaint further. The Committee will investigate the regulations based on the nine grounds listed in Standing Order 310(2).

As a result of 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 90 days.\(^{52}\) On at least four 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.\(^{53}\)

2 Draft Regulations

Unlike regulations that stand automatically referred to it, the Regulations Review Committee can only consider draft regulations when they are referred to it by a minister. The


\(^{52}\) Standing Orders, above n 6, SO 248.

Committee has stated that the optimal time to scrutinise regulations is before the regulations have come into force.54

While the Committee is usually unaware of regulations in draft form, occasionally it does hear of proposed regulations through complaints made to the Committee.55 In such a case 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. Sometimes this process can be formalised. 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 as per Standing Order 309(1).

3 Regulation-Making Powers in Bills

Standing Order 309(3) entitles the Committee to examine regulation-making powers contained in a bill before another select committee. 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 310(2). 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.56

It is important to note that whether or not the Committee examines a regulation-making power in a bill is a matter for its own discretion. When the Committee was first established, it could only report on a regulation-making power at the request of the select committee considering the bill.57 That its work is no longer subject to the whim of another select committee constitutes a clear recognition of the role the Regulations Review Committee plays in ensuring that Parliament delegates law-making powers appropriately.

Where the Committee does consider a regulation-making power in a bill, it will provide the relevant select committee with a report outlining its concerns.58 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.

4 Matters Relating to Regulations

Standing Order 309(4) is a general power that is used to report to the House on matters related to regulations. 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.59 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 procedure.

54 Regulations Review Committee "Activities of the Regulations Review Committee During 1999" [1999] AJHR 116X.
56 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 atop of the cliff function and of enduring value": Kidd, above n 21, 4.
58 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 116F, 13-27.
59 For a complete list of occasional reports tabled in Parliament see Appendix B.
Overview

1 Role

Doug Kidd, twice chairman of the Regulations Review Committee and former Speaker of the House, has stated that the work of the Committee:

… 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.

The Regulations Review Committee is at the heart of parliamentary scrutiny of regulations. 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 Orders 310(2). Yet 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. It also issues occasional reports in an effort to educate and to clarify matters relating to the delegation of law-making powers. The Committee also acts as a useful tool for those adversely affected by regulations. Whereas courts are limited to a finding of *ultra vires* when dealing with regulations, the Regulations Review Committee can examine a regulation according to the much wider grounds listed in Standing Order 310(2). While the Committee has a power of recommendation only (coupled with the automatic disallowance provisions in the Regulations (Disallowance) Act 1989), its ability to effect changes to regulations is significant.

2 Standing Order Grounds

As noted earlier, the Committee examines regulations based on the nine grounds listed in Standing Order 310(2). The following nine Chapters 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 instance 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.

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60 Kidd, above n 21, 1-2.
Chapter 5  General Objects and Intentions of the Act:
SO 310(2)(a)

A  **Standing Order 310(2)(a)**

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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. 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". The distinction is an 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 310(2)(a) are separate and distinct grounds of review. The Committee did acknowledge, however, that of all the grounds listed in Standing Orders 310(2), this ground is "closest to raising the question of *ultra vires*". 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.

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61 The other two grounds most often discussed are SO 310(2)(b) (undue trespasses on personal rights and liberties) and 310(2)(c) (unusual or unexpected use of a regulation-making power).
64 Ibid, 10.
B 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. 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 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 310(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. 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.

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. 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 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. 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 310(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.

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. In 1998, the Committee undertook an investigation into the Disputes Tribunal Amendment Rules 1997 and 1998. 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 310(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.


70 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.

71 The Committee has produced a report on the setting of fees by regulations. For a summary of the report see Chapter 14(B).

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. 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 objects of each Act. In the 2002 report, the Committee felt unable to draw conclusions as to whether Standing Order 310(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.

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 310(2)(a). However, it did find the Standing Order ground was made out in relation to the charging of fees in excess of costs in order to maintain a financial 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. 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.

C Regulation-Making Powers

As noted previously, the crucial aspect of any delegated law-making power 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

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75 These are available respectively at oag.govt.nz/2008/charging-fees%20 and treasury.govt.nz/publications/guidance/finmgmt-reporting/charges.

76 It also found that this breached Standing Order ground 310(2)(f), see Chapter 10.

77 See Chapter 2(C).
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.

1 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.

2 The 'General' Purpose

As discussed earlier, 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 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. Likewise, in 1962 the Delegated Legislation Committee stated that the general purpose authorised the making of regulations for subsidiary or incidental matters only. This is a view shared by the Regulations Review Committee.

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". 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". 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.

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78 See Chapter 3(A).
79 Shanahan v Scott (1957) 96 CLR 245.
81 Regulations Review Committee "Investigation into the Biosecurity (Rabbit Calicivirus) Regulations 1997" [1998] AJHR I16E.
82 Ibid, 8.
3 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 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. 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. 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.

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). 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 310(2)(a).

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

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83 Previously applications from children that accompanied an adult's application were processed free of charge.
85 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 – section 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.
86 See Chapter 12.
87 Regulations Review Committee "Complaint Relating to Land Transport Rule 32012 - Vehicle Standards (Glazing)" [1998] AJHR I16K.
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".89

More recently, the Committee considered a complaint from the Animal Rights Legal Advocacy Network in relation to a code of animal welfare.90 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.

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".91 The Committee nevertheless found the code to be in breach of Standing Order 310(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.

4 **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

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89 Ibid, 11.
91 Ibid, 16.
Fonterra's activities in order to provide a level playing field for competition. Section 115 of the Act permitted regulations requiring Fonterra to supply raw milk to independent processors, at a specified price or 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 raw milk price for raw milk supplied to independent contractors 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 Raw Milk regulations.

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. 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 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.

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92 Regulations Review Committee on "Complaint Regarding the Dairy Industry Restructuring (Raw Milk) Regulations 2001" [2007] AJHR I16K.


Chapter 6 Undue Trespass on Personal Rights and Liberties: SO 310(2)(b)

A Standing Order 310(2)(b)

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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 310(2)(b).

The Committee has established a three-step test for determining whether a regulation breaches Standing Order 310(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? The following analysis of this ground is based on the three limbs of this test.

B Does a Personal Right or Liberty Exist?

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". 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. 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 International 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", 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

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95 Regulations Review Committee "Report on the Complaint Regarding the Overseas Investment Amendment Regulations 2008" [2008] AJHR 116P.

96 Ibid.
1989 had the potential to make teachers redundant and/or lead to a loss of income. The Committee concluded that the orders "may well result in personal rights and liberties being unduly trespassed upon". 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. Such rights or interests may not necessarily 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. For instance, in 1999 the Committee examined the Accident Insurance (Review Costs and Appeals) Regulations 1999. 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. 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 specifically allowed regulations to be made which had the effect of requiring workers to contribute towards the costs of their treatment in certain cases.

Whether a treaty that is consistent with New Zealand domestic law can provide a source of rights capable of being trespassed upon is matter that 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

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98 Ibid, 9.
100 Regulations Review Committee "Complaints Relating to Accident Insurance (Reviews Costs and Appeals) Regulations 1999" [1999] AJHR I16W.
101 Regulations Review Committee "Complaints Relating to the Accident Insurance (Insurer's Liability to Pay Costs of Treatment) Regulations 1999" [1999] AJHR I16V.
right to citizenship.\(^{102}\)

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.\(^{103}\) 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 kilograms 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.

### C 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 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".\(^{104}\) 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".\(^{105}\) 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

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


105 Ibid, 5.
such a significant impact on a child's right to citizenship that it did constitute a trespass to that right.

**D Undue Trespass**

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

1 **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. 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.

2 **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. 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. The Weights and Measures Regulations 1987 required the machine to be tested for accuracy at a cost of $2000. The Committee found that 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). 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 lead to a significant downturn in demand for window tinting, leading to some business closures and job loses. 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.

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3 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. 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 were in breach of Standing Order 310(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.

4 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. Amongst 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.

5 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 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'). 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.

6 Lack of Criteria

Similar issues were raised when the Committee investigated a complaint regarding the Accident Compensation (Referred Treatments Costs) Regulations 1990. 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.

111 Regulations Review Committee "Investigation into the Biosecurity (Ruminant Protein) Regulations 1999" [2000] AJHR I16A.

Chapter 7  Unusual or Unexpected Use of the Powers:  
SO 310(2)(c)

A  **Standing Order 310(2)(c)**

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<td>appears to make some unusual or unexpected use of the powers conferred by the statute under which it is made:</td>
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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 310(2)(a). Central to both grounds is the policy or intention behind the empowering Act. Under Standing Order 310(2)(a), the issue is whether the regulation is consistent with the objects and intentions of the empowering Act. Under Standing Order 310(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. Both grounds 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 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 310(2)(a), it will often find that it also breaches Standing Order 310(2)(c).

B  **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 310(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. 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".

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

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. 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 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 further case of interest was Committee's examination of the Student Allowances Amendment Regulations (No 2) 2004. 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 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 310(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

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115 Regulations Review Committee "Complaint Regarding Student Allowances Amendment Regulations (No 2) 2004" [2006] AJHR I16B.
Standard, Amendment No 11, was one such example. 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 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.

C 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. 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 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. 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.

118 Regulations Review Committee "Inquiry into the Civil Aviation Regulations 1953, Amendment No 31" [1991] AJHR I16B.
D Fees

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.\(^{119}\) 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 regulation-making power. Two reports of the Committee illustrate the point. First, the Civil Aviation Regulations 1953, Amendment No 30, increased license fees payable by flight crews and aircraft maintenance engineers.\(^{120}\) 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.\(^ {121}\) 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.

E 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."\(^ {122}\) The Committee concluded that this was both an unusual and unexpected use of the regulation-making power.\(^ {123}\) 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

\(^{119}\) 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 and the Treasury's Guidelines Setting Charges in the Public Sector.

\(^{120}\) Regulations Review Committee "Inquiry into the Civil Aviation Regulations 1953, Amendment No 30" [1989] AJHR I16.

\(^{121}\) Regulations Review Committee "Investigation into the Land Transfer Amendment Regulations 1998 and the Survey (Departmental Fees and Charges) Regulations 1998" [2001] AJHR I16D.

\(^{122}\) Overseas Investment Amendment Regulations 2008.

\(^{123}\) Regulations Review Committee "Report on the Complaint Regarding the Overseas Investment Amendment Regulations 2008" [2008] AJHR I16P.
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.

\section*{F Addition of Significant New Policy Factor}

The addition of a significant new policy factor to a piece of legislation through regulations may amount to an unusual or unexpected use of a regulation-making power. 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.\footnote{Ibid.} 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."\footnote{Ibid.} 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 310(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, either (a) repeal the provision containing the regulation-making power, or (b) add a requirement to consult with relevant parties to it. 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 account in ministerial decision-making.

The government response 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.\footnote{"Government Response to the Report of the Regulations Review Committee on Complaint Regarding the Overseas Investment Regulations 2008" [2009] AJHR J1.} The final, more general, recommendation is to be addressed in the context of the government's regulatory reform programme.

\begin{footnotes}
\item \footnote{Ibid.}
\item \footnote{Ibid.}
\item \footnote{"Government Response to the Report of the Regulations Review Committee on Complaint Regarding the Overseas Investment Regulations 2008" [2009] AJHR J1.}
\end{footnotes}
Chapter 8  Review of Decisions Impacting on Rights and Liberties: SO 310(2)(d)

A  Standing Order 310(2)(d)

310  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:

This Standing Order 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 license 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.

B  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:

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.

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.\textsuperscript{128} The complainant organisation ran anger-management programmes for men 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".\textsuperscript{129}

The potential impact of an administrative decision was also a crucial factor in the Committee's investigation into the Marine Mammals Protection Regulations 1990.\textsuperscript{130} 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.\textsuperscript{131} 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.\textsuperscript{132} Under the regulations the Minister of Energy had a discretion to issue licenses to draw on geothermal energy in Rotorua. The Committee pointed to the absence of any mechanism to appeal a 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 license.

\section{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

\textsuperscript{128} Regulations Review Committee "Complaint Relating to the Domestic Violence (Programmes) Regulations 1996" [2001] AJHR I16E.

\textsuperscript{129} Ibid, 7.

\textsuperscript{130} Regulations Review Committee "Inquiry into the Marine Mammals Protection Regulations 1990" [1991] AJHR I16C.

\textsuperscript{131} Ibid, 7.

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 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. 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 did provide a satisfactory appeal mechanism from an administrative decision. 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:

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.

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135 Ibid, 9-10.
Chapter 9  Excludes the Jurisdiction of the Courts Without Authority: SO 310(2)(e)

A  Standing Order 310(2)(e)

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<td>... (e) excludes the jurisdiction of the courts without explicit authorisation in the enabling statute:</td>
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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. 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.136 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. 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.

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Chapter 10  More Suited to Parliamentary Enactment: SO 310(2)(f)

A  Standing Order 310(2)(f)

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<td>(2)  The grounds are, that the regulation—</td>
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<td>(f) contains matter more appropriate for parliamentary enactment:</td>
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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 policy or substance.

As a general rule, whether something is a matter of policy can be determined by its importance and its contestability. Take the Committee's investigation into the Children, Young Persons, and Their Families (Residential Care) Regulations 1996.\(^\text{137}\) 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 were to be granted, they should be conferred by statute and not by regulation.

The policy choices inherent in a debate such as this 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.\(^\text{138}\)
- 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

\(^{137}\) Regulations Review Committee "Investigation into Children, Young Persons, and Their Families (Residential Care) Regulations 1996" [1997] AJHR 116B.

\(^{138}\) Regulations Review Committee "Investigation into the Biosecurity (Rabbit Calicivirus) Regulations 1997" [1998] AJHR 116E.
nature, they should not prescribe the extent of financial obligations to be fulfilled under the principal Act.\textsuperscript{139}

- 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 the primary legislation.\textsuperscript{140} Similarly, the Overseas Investment Amendment Regulations 2008, discussed in Chapter 7, were found to add a significant new consideration to the Act (the concept of strategically important infrastructure).\textsuperscript{141} 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."\textsuperscript{142} 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.

- 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.\textsuperscript{143}

- Regulations setting fees exceeding the level needed to cover costs in order to maintain a financial reserve. In the absence of approval by the empowering statute, the setting of fees above the level needed to cover costs may amount to the imposition of a tax without the authorisation of Parliament in contravention of the Constitution Act 1986. The collection of fees for this purpose is therefore considered a matter for parliamentary enactment.\textsuperscript{144}

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

\textsuperscript{139} Regulations Review Committee "Complaints Relating to the Accident Rehabilitation and Compensation Insurance (Social Rehabilitation) Regulations 1992" [1993] AJHR I16H.

\textsuperscript{140} 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" [1993] AJHR I16L.

\textsuperscript{141} Regulations Review Committee "Complaint Regarding the Overseas Investment Amendment Regulations 2008" [2008] AJHR I16P.

\textsuperscript{142} Ibid, 10.


\textsuperscript{144} Regulations Review Committee "Complaint regarding the Midwifery (Fees) Notice 2005" [2007] AJHR I16H.
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.

Chapter 11  Retrospective without Authority:
SO 310(2)(g)

A  Standing Order 310(2)(g)

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<td>(g)</td>
<td>is retrospective where this is not expressly authorised by the empowering statute:</td>
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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 310(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. 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.

B  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.\(^\text{146}\) 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.\(^\text{147}\) 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


\(^{147}\) Regulations Review Committee "Complaint regarding Notice of Scopes of Practice and Related Qualifications Prescribed by the Nursing Council of New Zealand" [2007] AJHR I16J.
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 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 section 9(1) of the Regulations (Disallowance) Act 1989.148

On at least four other occasions the Committee has concluded that regulations were not retrospective. The first was the inquiry into the Accident Compensation Corporation (Accident Experience) Regulations 1992.149 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.

Secondly, similar issues arose in the Committee's investigation into the Civil Aviation Regulations 1953, Amendment No 30.150 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.151 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

148 "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 also Chapter 3.


150 Regulations Review Committee "Inquiry into the Civil Aviation Regulations 1953, Amendment No 30" [1989] AJHR I16.

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.\(^{152}\) 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*.\(^{153}\) 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."\(^{154}\)

All six 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 retrospective the regulation clearly altered the law as it stood prior to the regulation coming into force. The other four reports involved situations where the regulations were prospective in their application.

C  **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 Sharemilker's Agreements Order 2001.\(^ {155}\) 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:\(^ {156}\)

> 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


\(^ {154}\) Regulations Review Committee "Complaint Regarding the Overseas Investment Amendment Regulations 2008" [2008] AJHR 116P.

\(^ {155}\) Regulations Review Committee "Complaint Relating to the Sharemilking Agreements Order 2001" [2001] AJHR 116G.

regulations were required to cover applications was evidence of an acknowledgement by Parliament that levels of payments had to be set retrospectively. The Committee required explicit authorisation that simply did not exist in the principal Act.
Chapter 12  Non-Compliance With Notification and Consultation Procedures: SO 310(2)(h)

A  **Standing Order 310(2)(h)**

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<td>The grounds are, that the regulation—</td>
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<tr>
<td>(h)</td>
<td>was not made in compliance with particular notice and consultation procedures prescribed by statute:</td>
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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 310(2)(h), namely what notification or consultation requirements did the empowering statute contain, and were those requirements met? Each issue will be examined separately.

B  **When is Consultation 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. 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. On one occasion the Committee has made such a finding. 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:

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.

Arguably the Committee has opened the door here to future complainants claiming that there exists an implicit requirement to consult in an Act, even though no express requirement exists. Yet the precedent value of this finding may be limited given 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.

C What Constitutes Consultation?

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

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157 Regulations Review Committee "Complaint of Mrs Mary Bowers regarding the Marine Reserve (Whanaganui (Cathedral Cove)) Order 1992" [1993] AJHR I16J.

158 Regulations Review Committee "Complaint Relating to the Whitebait Fishing (West Coast) Regulations 1994" [1994] AJHR I16A.

159 Ibid, 13.

160 Air New Zealand Ltd and Others v The Wellington International Airport Ltd (6 January 1992) HC WN CP 403/91. See also Regulations Review Committee "Complaints Relating to the Accident Rehabilitation and Compensation Insurance (Social Rehabilitation) Regulations 1992" [1993] AJHR I16H, 12 and also
• 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.

The reports of the Committee indicate some perennial problems in this regard. 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. 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. In these instances the Committee concluded that what occurred was a process of notification rather than consultation.

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 reasonable amount of information, as those consulted must know what is proposed before they can be expected to give their views. 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. 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. 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".

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. 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. 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

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168 Regulations Review Committee "Complaint regarding Notice of Scopes of Practice and Related Qualifications Prescribed by the Nursing Council of New Zealand" [2007] AJHR 116J.
169 Regulations Review Committee "Investigation into the Biosecurity (Rabbit Calicivirus) Regulations 1997" [1998] AJHR 116E.
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 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.\footnote{Regulations Review Committee "Complaint Relating to the Accident Rehabilitation and Compensation Insurance (Counselling Costs) Regulations 1992" [1994] AJHR I16B.} 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.\footnote{Regulations Review Committee "Complaint Relating to the Whitebait Fishing (West Coast) Regulations 1994" [1994] AJHR I16A, 19.}
Chapter 13  Form or Purport Calls for Elucidation: SO 310(2)(i)

A Standing Order 310(2)(i)

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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, 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 310(2)(i) might suggest that this is a catch-all 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:172

> 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.173 The Committee found this wording to be confusing and unclear. It recommended that the

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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.\textsuperscript{174} 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.\textsuperscript{175}

The Committee also found fault with six codes of animal welfare made under the Animal Welfare Act 1999.\textsuperscript{176} 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.\textsuperscript{177} 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.

\textsuperscript{174} Regulations Review Committee "Investigation into the Biosecurity (Ruminant Protein) Regulations 1999" [2000] AJHR 116A.

\textsuperscript{175} 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.

\textsuperscript{176} Regulations Review Committee "Investigation Into Six Codes Deemed to be Codes of Welfare Under the Animals Act 1999" [2000] AJHR 116B.

\textsuperscript{177} Regulations Review Committee "Inquiry into the Marine Mammals Protection Regulations 1990" [1991] AJHR 116C.
Chapter 14  Occasional Reports

A  Occasional Reports

Under Standing Order 309(4), the Regulations Review Committee may consider any matter relating to regulations and report on it to the House. This chapter will provide summaries of eight areas covered by these reports. These summaries constitute only a brief consideration of the issues raised by the Committee. For a more detailed analysis, a full reading of the relevant report may be appropriate.

B  Fees

The following discussion on the charging of fees by regulation relates to a Regulations Review Committee occasional report from 1989. 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 and 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 Setting Charges in the Public Sector should be consulted.

In 1989, the Regulations Review Committee sought to answer a number of outstanding questions regarding the charging of fees by regulation. Recent developments in the state sector had added a new impetus to the need to provide satisfactory answers. 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. The Committee's investigation into the charging of fees by regulations was premised on three questions. They were:

1. When should a government service be "free" in that it is paid for from general taxation?
2. When is parliamentary approval required for the charging of fees for a service?
3. Assuming that a fee should be charged:
   (a) who should fix the fee?
   (b) on what basis is the fee to be calculated?
   (c) what information, if any, ought to be made available to the public to explain how the fee was calculated?

178 Both reports are discussed in above in Chapter 5.
179 These are available respectively at oag.govt.nz/2008/charging-fees%20H and treasury.govt.nz/publications/guidance/finngmnt-reporting/charges.
180 Regulations Review Committee "Inquiry into the Constitutional Principles to Apply when Parliament Empowers the Crown to Charge Fees by Regulation" [1989] AJHR I16C.
1 Free Government Services

As a starting principle, 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.

2 Parliamentary Approval for the Charging of Fees

Under Article 4 of the Bill of Rights 1688 (UK), it is illegal for the Crown to seek to raise money without parliamentary approval. 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 situations where people are charged a fee as a result of a regulatory regime, the issue may be 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. 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.

3 Questions

In the context of a situation where a fee can properly be charged, the Committee addressed several issues it thought relevant:

(1) First, who should be responsible for fixing the fee? The Committee was of 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.

(2) Secondly, on what basis should a fee 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: 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.

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182 The Committee cited and approved comments by the High Court of Australia in Air Caledonie International and Others 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".
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 argued that there is a greater obligation to inform the public that they are paying greater than cost recovery, and why it is considered necessary.

(3) Finally, what information should be made available to the public to explain how the fee was calculated? The Committee stated that as a general rule, every department 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.

4 Government Response

In its response, the government stated that it agreed with the general approach of the Committee and that it had established an officials committee to study the matter. 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 stated 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.

C Deemed Regulations

The Regulations Review Committee examines all "regulations" as defined in section 2 of the Regulations (Disallowance) Act 1989. That definition includes deemed regulations. In 1999, the Committee undertook a thorough investigation into deemed regulations. In 2004 the Committee produced a report on the principles for determining if delegated legislation is given the status of regulations. In 2006 the Committee undertook an investigation into deemed regulations that were not being presented to the House. Each of these reports is discussed in turn.


185 Regulations Review Committee "Inquiry into Instruments Deemed to be Regulations - An Examination of Delegated Legislation" [1999] AJHR 116R.

186 Regulations Review Committee "Inquiry Into the Principles Determining Whether Delegated Legislation is Given the Status of Regulations" [2004] AJHR 116E.

187 Regulations Review Committee "Investigation into Deemed Regulations that are not presented to the House of Representatives" [2006] AJHR 116E.
In the 1999 report the Committee addressed the following issues:

- The distinction between regulations and deemed regulations.
- When it is appropriate for legislation to provide a power to make deemed regulations.
- Appropriate printing and publication requirements for deemed regulations.
- Appropriate drafting standards for deemed regulations.
- Appropriate consultation requirements for deemed regulations.
- The incorporation of material into deemed regulations by reference.

The Committee's examination of the first two issues is discussed below.

2 Regulations and 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. What separates traditional regulations from deemed regulations is their method of promulgation and their printing and publication requirements.

The process used to make regulations and deemed regulations is normally quite different. Traditional regulations are:

- drafted by Parliamentary Counsel Office (PCO).
- approved by Cabinet.
- made by the Governor-General in Executive Council.
- notified in the Gazette.
- 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.
- infrequently published in the SR series.

Deemed regulations can take a variety of forms, and like traditional regulations, cover a wide range of subject matters. Deemed 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.

There is also an issue as to whether deemed regulations should be considered a form of secondary or tertiary legislation. Traditionally, all delegated legislation fell into one of two categories. Regulations made by the Governor-General by Order in Council were referred to as secondary legislation. Any delegated legislation that did not have the character of regulations fell into the second category, known as tertiary legislation. Tertiary legislation included such things as Manuals, Notices, and some Codes. In the Committee's view deemed regulations are properly
included alongside ordinary regulations as a form of secondary legislation. This is because Parliament has expressed an intention that deemed regulations be treated as if they were regulations.

3 **When Are Deemed Regulations Appropriate?**

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. 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.

- **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 drivers license 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.

4 **Government Response**

The government response to the Committee's recommendations came in two stages. The

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This issue is addressed in some detail by the Legislation Advisory Committee *Guidelines on Process and Content of Legislation*, May 2001, 124-131. For the current (amended) version see justice.govt.nz/lac.
first was in October 1999 in which the government agreed with two Committee recommendations. 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 confirms 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 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.


In 2001, the Regulations Review Committee began an inquiry into the proper classification of delegated legislation. A report was subsequently presented to the House in 2004. Following on from its 1999 report on deemed regulations, 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 the Regulations (Disallowance) Act 1989. This was because the instrument was not declared to be a regulation (i.e 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 lawmaking instrument and ought to be classified as a regulation".

Having received weighty submissions on the matter, 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

191 Regulations Review Committee "Inquiry Into the Principles Determining Whether Delegated Legislation is Given the Status of Regulations" [2004] AJHR I16E.
192 Ibid,7.
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 approach with Australia.

6 Government Response

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 further contended that:

[t]he proposed provision 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.

As a minor concession, the government stated that it would monitor the effectiveness of the Australian model over the next two years. It also stated 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.

7 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. 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 purposed 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.

8 Government Response

The government agreed with Committee's recommendation. 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 House in accordance with the Regulations (Disallowance) Act. In relation to existing legislation, the government said it

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194 Regulations Review Committee "Investigation into Deemed Regulations that are not presented to the House of Representatives" [2006] AJHR I16E.

would consider whether, and how best to, insert such a paragraph.

D  Henry VIII Clauses

1  When is a Henry VIII Clause Justified?

A Henry VIII clause is a type of regulation-making power that enables primary legislation (i.e. a statute) to be amended by regulation. 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 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 Regulations Review Committee has noted that:196

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.

In 1932, the Donoughmore Committee (UK) laid down conditions on the use of Henry VIII clauses.197 It stated that such clauses should be avoided unless demonstrably essential. Furthermore, such a clause:198

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.

The Regulations Review Committee has expressly agreed with these views. It has stated that a Henry VIII clause should only be contained in an Act in exceptional circumstances, and should never be used routinely in reforming legislation.199

2  How Should the Provision be Drafted?

Whilst not laying down specific guidelines on the content of empowering provisions (given the variable nature of the subject matter in question) the Committee stated 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: (i) to alter the start date or expiry date of the principal Act (ii) to preserve a right not intended to be affected by the legislation; and (iii) correcting references used in the legislation. The Committee further stated its preference that

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197 The Donoughmore Report, above n 13.
198 Ibid, 61.
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.

3 What Consultation Should Take Place?

The Committee stated that when an empowering provision is used to promulgate regulations that override primary legislation, consultation must be "full and proper". The committee adopted the definition of consultation established in *Air New Zealand Ltd v Wellington International Airport Ltd* as outlined earlier. The Committee also advocated the adoption of a formal consultation process before regulations that override primary legislation are made.

4 Should There be a Sunset Provision?

The Committee argued that all such empowering provisions should contain a sunset provision, i.e. 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.

5 Should Such Regulations be Subject to Confirmation by Parliament?

The Committee stated that where 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.

6 The Resource Management (Transitional) Regulations 1994

The Committee's inquiry into Henry VIII clauses took place as part of its investigation into the Resource Management (Transitional) Regulations 1994. The regulations were made pursuant to section 360(1) of the Resource Management Act 1991, which read as follows:

\[361(1)\] 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 licenses, 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.

While acknowledging that section 417A required re medying, 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 310(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.

7 Government Response

In its report, the government agreed in principle with most of the Committee's recommendations. The Government agreed that a Henry VIII clause should only be used in exceptional circumstances; more particularly when a new legislative regime is put in place. The government concurred with the view that 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.

E Affirmative Resolution Procedures

1 Background

In a 2007 report, the Regulations Review Committee considered the growing use of the affirmative resolution procedure. As noted in Chapter 1, 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 2007 report followed a 2004 interim report. 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.

2 Use of the Procedure

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

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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.

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 additional 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 four further 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 it was neither necessary nor desirable that the relationship between Parliament and the courts should be tested in this way.

Finally, 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 the 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.

3 Standing Order 317

As well as substantive concerns about the use of the affirmative resolution procedure the Committee had two procedural concerns relating to Standing Order 317. First, under the Standing Order the appropriate select committee has a maximum of 28 days to consider a resolution. While this quick turn around 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.

Secondly, 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.

4 Recommendations and Government Response

In the 2007 report, the Committee made two recommendations concerning the appropriate use of the procedure. The recommendations are set out below, along with the Government response to each.204

(1) The affirmative resolution procedure should not be used in conjunction with provisions that allow the amendment of primary legislation by delegated legislation.

The government agreed with this as a matter of general principle. However, it argued there may be a limited number of cases where the process is necessary, and in such cases the affirmative resolution procedure was a useful safeguard.

(2) 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 government agreed with this recommendation.

5 Recommendations on Standing Orders

The Committee also made two recommendations to the Standing Orders Committee about Standing Order 317.205 Though not formally required to do so, the Government response addressed these recommendations also.206 The Committee's recommendations and the response of both the government and the Standing Orders Committee are set out below.207


205 Regulations Review Committee "Activities of the Regulations Review Committee in 2007" [2007] AJHR I16M.


207 Standing Orders Committee "Review of Standing Orders" [2008] AJHR I18B.
(1) A select committee should have a minimum of three months to examine a resolution affirming regulations, rather than 28 days. 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.208

(2) Amendments recommended by a select committee, to which a notice of motion has been referred, should be incorporated without repeating the select committee process. The government considered this could enhance the affirmative resolution procedure. Standing Order 317 was amended to this effect, and renumbered SO 313, with effect from 4 October 2008.

F Regulations-Making Powers That Authorise Treaties to Override New Zealand Enactments

1 Overriding Treaty Regulations

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.209 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. It inquired as to 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.

2 Usage

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 (i.e. not just the principal Act). The Child Support Act 1991 was one such Act.

3 Are Overriding Treaty Regulations Ever Appropriate?

The Committee endorsed the submission of the Solicitor-General that overriding treaty regulations are best avoided on account of the dangers presented by Henry VIII clauses. 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

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208 Ibid.
limited and specific terms possible.\textsuperscript{210} 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.

4 \textit{Proper Limits}

The Committee then considered the issue of the limits that should apply to the creation and use of overriding treaty regulations. It argued that:

- 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.
- Regulation-making powers should only allow for the overriding of minor and/or technical provisions of a New Zealand statute.
- The Committee noted that any such regulation is automatically subject to disallowance under the Regulations (Disallowance) Act 1989. It also outlined other methods by which Parliament could effect additional scrutiny, including various positive and negative means of affirmation. The Committee recommended to the government that some method of additional parliamentary scrutiny be included in any bill that contains a regulation-making power permitting an overriding treaty regulation.
- 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.

G \textit{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

\textsuperscript{210} 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.
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.

In 1996, the Committee undertook an investigation into the commencement of legislation by Order in Council. 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.

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 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.

1 **Advantages**

The Committee outlined three main arguments in favour of the commencement of legislation by Order in Council. They were:

- 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.
- 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.
- 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.

2 **Disadvantages**

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.

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3 Government Response

The Committee concluded its report with five major recommendations. These recommendations are listed below as are the Government response to each.\(^{212}\)

1. **As a general rule, legislation should incorporate a fixed commencement date.**
   
   The government agreed that as a general principle the commencement of legislation enacted by Parliament should not be delegated to the legislation, but that there are cases where it is necessary to do so.

2. **Provisions for the commencement of legislation by Order in Council should be used only in rare and exceptional circumstances.**
   
   While agreeing to this in principle, 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.\(^{213}\)

3. **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.**
   
   The government did not accept this recommendation on the basis that a blanket rule would undermine the purposes behind having legislation commenced by Order in Council.

4. **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.**
   
   The Government accepted this recommendation in so far as it applies to explanatory notes to government bills.

5. **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.**
   
   The Government did not accept this recommendation on the basis that it sought legislative recognition of the administrative rule to this effect as set out in the *Cabinet Manual*. The status quo was deemed acceptable on the basis that the *Cabinet Manual* allows a degree of flexibility where required.

4 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

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\(^{213}\) See *Cabinet Manual* 2008, above n 11, para 7.92.
legislation by Order in Council:214

• 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:215

• 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.

• The government should develop a timeframe for commencing each enactment or provision that is to be brought into force by Order in Council.

II Material Incorporated by Reference

1 Incorporation 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 standards, 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.216 In its 2008 report, the Committee considered copyright issues in relation to the accessibility of material incorporated by reference.217 The Committee's findings in each report and the associated government response are discussed below.

2 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

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216 Regulations Review Committee "Inquiry into Material Incorporated by Reference" [2004] AJHR 116G.
217 Regulations Review Committee "Further Inquiry into Material Incorporated by Reference" [2008] AJHR 116O.
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:218

- 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.
- 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 principles as to the appropriate use of incorporation by reference. The principles produced were consistent with those of the Regulations Review Committee in its earlier report on deemed regulations. Two in particular are worth noting:

- The Legislation Advisory Committee stated that incorporation by reference should only be used where it is impracticable to do otherwise (this constitutes a noticeably high standard).
- The Legislation Advisory Committee recommended that standard clauses be used in Acts and delegated legislation that authorised incorporation.

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.

Having undertaken a survey of government agencies, the Committee 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."219

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218 Regulations Review Committee "Inquiry into Instruments Deemed to be Regulations – An Examination of Delegated Legislation" [1999] AJHR I16R.

Concerned about the proliferation of incorporation by reference, the Committee recommended that the *Step by Step Guide* and *Cabinet Manual 2001* (now the *CabGuide* and *Cabinet Manual 2008*) 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 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.

3  **Government Response**

In its response, the government agreed with most of the Committee's recommendations.\(^\text{220}\) 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.\(^\text{221}\) 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.

4  **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.\(^\text{222}\)

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.

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\(^{221}\) As of May 2009, these changes have not been made.

\(^{222}\) Regulations Review Committee "Further Inquiry into Material Incorporated by Reference" [2008] AJHR I16O.
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.
- The model clauses published in the 2004 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.

5 Government Response

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. However, it considered the Interpretation Act 1999 was only one of a number of possible legislative vehicles for doing so; it directed the Ministry of Justice and Parliamentary Counsel Office, in consultation with other government departments, to undertake further work to determine the appropriate legislative vehicle and form of the model clauses. This further work is to be reported back to Cabinet within six months of the government response being presented to the House.

I 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.

1 Ad hoc reviews of Currency

In 2007 the Committee reported on the currency of all regulations in force at the time.\(^2\)\(^{223}\) The only other time such a review had taken place was in 1988.\(^2\)\(^{224}\) Like the 1988 report, the 2007 report reviewed all regulations in force at the time to see whether they were still required or

\(^2\)\(^{223}\) Regulations Review Committee "Inquiry into the ongoing need for individual regulations and their impact" [2007] AJHR I16L.

\(^2\)\(^{224}\) Regulations Review Committee "Inquiry into all regulations in force as at 14 November 1988" [1988] AJHR I16B.
should be revoked. The Committee found, amongst other things, that of the approximately 2,943 regulations in force, 526 served no purpose and should be revoked. The Committee stated that the length of time since its last general review and the large number of spent regulations remaining in force illustrated the inadequacy of ad hoc review. It also 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. As a result the 2007 report considered the various mechanisms available for a more systematic currency review process.

2 Systematic Review of Currency

The Committee concluded that the use of sunset clauses, whereby regulations expire on a prescribed date, was the most appropriate mechanism. 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 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 sunsetting 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 also considered other options for ensuring the currency of regulations but rejected these in favour of the use of sunset clauses. The options included:

- ad hoc departmental review responding to issues or Government direction;
- ad hoc parliamentary review (by subject committees or the 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 review regulations at the time of making;
- legislated departmental review, where legislation requires review of regulations after a specified period.

The first two options reflected the status quo which, as noted, the Committee considered inadequate. The third option of establishing an independent regulatory review agency was considered unjustified in light of the limited role of reviewing for spent regulations. The Committee did not believe there was an appropriate existing body capable of carrying out such a review function. The Committee viewed the fourth option of legislated departmental review as not sufficiently systematic. In particular, department by department review was susceptible to the risk of regulations falling between the cracks.

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225 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.
3  Statement of Regulation's Purpose

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.

4  Other Causes of Spent Regulations Remaining in Force

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.

5  Government Response

The government considered that further evaluation of the Committee's recommendations in relation to systematic review was necessary before any decision was made. It directed

- the Ministry of Justice, 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 by 31 December 2008 on:
  - the inclusion of a sunsetting 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. This further work will be undertaken by the Ministry of Justice and Parliamentary Counsel Office, in collaboration with the Law Commission, and reported to Cabinet by 30 June 2009. 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 will undertake this further work in consultation with other government departments including the Cabinet Office, and in collaboration with the Law Commission. The further work is to be reported to Cabinet by 30 June 2009. It will include consideration of:

- The scope of any requirement to consider the effect of a proposed bill on existing regulations, for example, whether such a requirement would apply regardless of the size and scale of any legislative amendment;
- The most effective mechanism for providing guidance and advice during the policy development process on considering the effect of a proposed bill on existing regulations. Options include inviting the Legislation Advisory Committee to include material in its guidelines, or the CabGuide;
- The most effective point in the Cabinet and legislative process for consideration to be given to existing regulations that could be revoked by a bill; and
- The appropriate reporting mechanism for ensuring compliance with any requirement to consider whether any regulations could be revoked.

J Regulatory Impact Statements

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.

1 Review of 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. 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 310(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 impact statements in

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227 Regulations Review Committee "Inquiry into the ongoing need for individual regulations and their impact" [2007] AJHR 116L.
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. The Committee forwarded a discussion document to the Ministry of Economic Development seeking comment on whether:

• all or certain classes of deemed regulations should be required to undergo the regulatory impact statement/business compliance cost statement process;
• the criteria for exempting regulations of a minor or machinery nature should be tightened, one suggestion being that all fees regulations should be required to undergo the regulatory impact statement/business compliance cost statement process; and
• the application of the business compliance cost statement process should be strengthened to ensure that compliance costs to charities in fee-setting regulations are treated as business costs, and that increased costs from increases to existing fees be subjected to the business compliance cost statement process.

The findings and recommendations in relation to each exception are set out below.

Since the review was initiated the regulatory impact analysis exemption had been amended so that all regulations (as defined in the Regulations (Disallowance) Act 1989) that require Cabinet approval trigger a regulatory impact analysis. As noted in Chapter 2, deemed regulations are included in the definition of regulations in the Regulations (Disallowance) Act 1989, 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, the Committee accepted the Ministry of Economic Development's submission 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 within the Ministry of Economic Development. The Ministry 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 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 an regulatory impact statement.

2 Government Response

The government agreed with all the Committee's recommendations, and noted the Ministry of Economic Development is already implementing them. 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 Regulatory Impact Analysis Unit was asked to consider amending existing guidelines to ensure that assessing compliance costs on all affected parties (including charities) is included in the analysis, as a part of its programme of developing and distributing further guidance material to departments.

K 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

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228 The Regulatory Impact Analysis Unit transferred from the Ministry of Economic Development to Treasury from November of 2008.
to which they relate.”229 The Committee's 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:230

- When are instruments of exemption regulations under the Regulations (Disallowance) Act 1989?
- What are the principles governing the appropriate use of exemption making provisions?

1 Regulations (Disallowance) Act 1989

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.231

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 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 nor it is made by Order in Council.232 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

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229 Regulations Review Committee "Inquiry into the use of Instruments of Exemption in Primary Legislation" [2008] AJHR I16Q.

230 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 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.

231 Regulations (Disallowance) Act 1989, s 4.

(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). 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? 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." 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.

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.

2 Principles Governing the use of Exemption Making Provisions

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 where applicable); and

- 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.

The key principles and recommendations of the Legislation Advisory Committee concerning the use of exemption instruments were as follows:

- The power to exempt from a statute or regulations should only be conferred where there is good reason.

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233 Regulations Review Committee "Inquiry into the use of Instruments of Exemption in Primary Legislation" [2008] AJHR 116Q.
• Exemptions may be appropriate to deal with unforeseen circumstances that cannot be envisaged by a statute when it was enacted.

• Exemptions may be appropriate where there is an urgent need to adapt the law to new circumstances, particularly where that need is urgent and it would not be possible to change the law by quickly amending legislation, or where it is not appropriate to amend a general provision to take account of one-off, exceptional circumstances.

• Exemptions may be appropriate if an area of law must adapt to constantly or frequently changing circumstances.

• Exemptions may be appropriate to avoid having to comply with an obligation that would otherwise be impracticable or unreasonable or would cause hardship.

• Exemptions may be appropriate in dealing with departures from the legislative regime that are minor or inconsequential, as opposed to significant policy changes.

• The following processes and requirements should be adhered to when an exemption power is conferred:
  - Consistent terminology should be used in drafting exemption provisions.
  - Standardised provisions should be used by PCO in drafting exemption authorising provisions in Acts.
  - The accompanying Cabinet paper and Bill's explanatory note should note the proposed presence of an exemption power. Both should give reasons why the inclusion of such powers is necessary and set out the conditions and criteria that will apply to the granting of exemptions under the power.
  - If a proposed regulation contains an exemption power, the Cabinet paper that accompanies it should note this, give reasons why it is necessary, and set out conditions and criteria that will apply to the granting of exemptions under the power.
  - Provisions empowering the granting of exemptions should specify: (a) what form the exemption instruments should take; (b) whether the exemption instruments will be regulations for the purposes of the Regulations (Disallowance) Act 1989; and (c) whether the exemption instruments will be regulations for the purposes of the Acts and Regulations Publications Act 1989 (and, if not, alternative publication requirements (if any) should be specified).
  - An exemption empowering Act should set out clear purposes for the granting of exemptions.
  - An exemption empowering Act should set out clear criteria for the granting of exemptions. Those criteria should expressly include, at least, a requirement that granting the exemption is consistent with the objectives of the empowering Act, and ideally further guidance.
  - There should be a requirement to give reasons when an exemption is granted and to state them in the exemption instrument itself.
  - All exemption empowering provisions should state that exemption instruments granted under them should expire within five years. Exemption instruments should contain a sunset clause to that effect.
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 instance, publication in the Gazette, 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.

3 Government Response

In relation to the recommendation that the Legislation Advisory Committee Guidelines, and where applicable the Guide to Cabinet and Cabinet Committee processes, be amended in accordance with the key principles and the recommendations contained in Legislation Advisory Committee's submission, the government response invited the Legislation Advisory Committee to consider whether to amend its guidelines accordingly. The government took the view it would not be appropriate to include the level of detail contained in the key principles and the 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.


## Chapter 15  Appendix A: Inquiries into Regulations

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<td>Activities of the Committee in 1986</td>
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Appendix D: 2008 Changes to Standing Orders, Cabinet Manual and Step By Step Guide

In 2008 the Standing Orders of the House of Representatives were amended, and a new edition of the Cabinet Manual was produced. In addition, the Step by Step Guide to Cabinet and Cabinet Committee Processes was renamed the CabGuide. The wording of the respective standing orders, paragraphs, and clauses relevant to the Regulations Review Committee remains the same (with the exception of the reduction in the Cabinet Manual 2008 of the steps in the process for developing regulations to be made by Order in Council from ten to nine); however, their numbering has changed. The table below records the corresponding provisions.

The CabGuide is only available online (cabguide.cabinetoffice.govt.nz); and it is no longer arranged clause by clause. Previous references in the Digest to these clauses have therefore been omitted and replaced with references to the relevant web address.

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