



Interim report on the Regulatory Standards Bill

277—1

Report of the Commerce Committee

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Interim report on Regulatory Standards Bill

Recommendation

The Commerce Committee recommends that the House take note of its report.

Introduction

The Commerce Committee is considering the Regulatory Standards Bill, which seeks to improve the quality of regulation in New Zealand. As part of its legislative scrutiny function, the Regulations Review Committee has reported to us on concerns arising from the proposed principles for responsible regulation in the bill.

Advice received from the Regulations Review Committee

The purpose of this interim report is to make available advice from the Regulations Review Committee in relation to the bill. The advice raises the following concerns about the bill which we consider should be brought to the attention of the public:

- The bill would result in an overlap of principles with existing principles
- Delegated legislation reviewed by the committee would also be subject to the statement of compatibility and court review processes in the bill
- Some important principles have been included in the bill while others have been omitted (therefore inconsistencies arise concerning the Regulations Review Committee's role in advising other committees about regulation-making powers in bills)
- There are risks to the transparency of law-making processes
- The Legislation Bill, which is currently before the House, already proposes a structured process for the ongoing revision of legislation.

As part of our consideration of the bill, we would welcome the views of interested parties on the concerns raised by the Regulations Review Committee. The advice received from the committee can be found in Appendix B of this report.

Appendix A

Committee procedure

The bill was referred to us on 5 July 2011. We called for public submissions on 7 July 2011. We received 45 submissions from interested groups and individuals.

Committee members

Hon Lianne Dalziel (Chairperson)
Hilary Calvert
David Clendon
Clare Curran
Melissa Lee
Peseta Sam Lotu-liga
Hon David Parker
Katrina Shanks
Jonathan Young

Appendix B



REGULATIONS REVIEW COMMITTEE

15 September 2011

Hon Lianne Dalziel
Chair
Commerce Committee

Regulatory Standards Bill

The purpose of the Regulatory Standards Bill is stated as being to improve the quality of Acts of Parliament and other kinds of legislation. One means of doing this is by providing a benchmark for responsible regulation through a set of statutory principles.

The bill is of interest to the Regulations Review Committee because we undertake legislative scrutiny of instruments which will be subject to the principles of responsible regulation in the bill. As well, Standing Orders provide us with the function, in respect of a bill before another committee, of reporting to the committee considering the bill on any matter relating to regulations.¹ These are the reasons for this advice to the Commerce Committee.

One of the committee's functions which is directly relevant to the issue of legislative quality is the function of scrutinising "regulations" which comprises a wide range of

¹ SO 309(3)(c).

delegated legislation.² When doing so we use specified grounds set out in Standing Orders.³

Scrutiny by the committee occurs following regulations being made; however, the remedy of disallowance by Parliament is available if we form the view that a regulation breaches one or more of the Standing Order grounds.⁴

Another function directly relevant to the issue of legislative quality is our function to consider and report to other select committees on regulation-making powers in bills.⁵ When doing so we refer to both the Standing Order grounds and the guidelines for good legislative practice contained in the Legislation Advisory Committee's *Guidelines on Process & Content of Legislation* (LAC guidelines).⁶

In its work the committee also refers back to various reports it has completed following inquiries into matters of principle and sometimes refers departments to requirements in the Cabinet Manual and *Cabguide*.

It is fair to say that working in this area involves building up specialist knowledge of a reasonably large number of principles from this range of sources. Although, the LAC guidelines deal comprehensively with most issues. We agree that scrutiny of law-making processes could be improved and there is some argument for providing greater accessibility to key principles. This might assist with compliance with these. It is not clear to us, however, that the Regulatory Standards Bill will achieve this.

The explanatory note of the bill says that the principles have been “distilled from sources such as the Legislative Advisory Committee guidelines, the common law, and

² “Regulations” is defined widely in the Regulations (Disallowance) Act 1989 and it is this definition which applies in Standing Orders. Although note that the terminology and definitions will change in this area if the Legislation Bill is enacted in its current form.

³ SO 310(2) lists the grounds the committee must consider when examining a regulation. These are that the regulation:

- ♦ is not in accordance with the general objects and intentions of the statute under which it is made:
- ♦ trespasses unduly on personal rights and liberties:
- ♦ appears to make some unusual or unexpected use of the powers conferred by the statute under which it is made:
- ♦ unduly makes the rights and liberties of persons dependent upon administrative decisions which are not subject to review on their merits by a judicial or other independent tribunal:
- ♦ excludes the jurisdiction of the courts without explicit authorisation in the enabling statute:
- ♦ contains matter more appropriate for parliamentary enactment:
- ♦ is retrospective where this is not expressly authorised by the empowering statute:
- ♦ was not made in compliance with particular notice and consultation procedures prescribed by statute:
- ♦ for any other reason concerning its form or purport, calls for elucidation.

⁴ This happened most recently in relation to three notices issued by the Plumbers, Gasfitters and Drainlayers Board which were the subject of a disallowance motion by the Chair which was debated in the House on 12 May 2011 following a report by the committee recommending parts of the notices be disallowed at: http://www.parliament.nz/en-NZ/PB/SC/Documents/Reports/1/8/1/49DBSCH_SCR5012_1-Complaints-regarding-three-notices-issued-by-the.htm.

⁵ SO 310(3).

⁶ Legislation Advisory Committee, *Guidelines on Process & Content of Legislation* (LAC guidelines) available at http://www.justice.govt.nz/lac/pubs/2001/legislative_guide_2000/guidelines.pdf.

Parliament's Regulations Review Committee". However, it is not clear to us what criteria have been employed to select the particular group of principles which have been included in the bill and which will, if the bill is enacted, be accorded legislative status. It appears to us that some uncertainty is likely to arise around having different and overlapping sets of legislative quality principles, some with legislative status and some without.

Issues which are now discussed in turn below are:

- Overlap of principles in the bill with existing principles
- Delegated legislation reviewed by the committee will also be subject to the statement of compatibility and court review processes in the bill
- The committee's role in advising other committees about regulation-making powers in bills
- Transparency of law-making processes
- Legislation revision processes in the Legislation Bill

Overlap of principles in the bill with existing principles

The first point to note is that the principles included in the bill overlap with long-standing established principles. Two matters arise however. First, as mentioned above it is not clear what criteria have been employed to select the particular group of principles which have been included in the bill. Some important principles are contained in the bill, some are not. Second, the way in which some of the principles have been expressed in the bill differs from the way the subject matter is dealt with under existing rules.

An example of an established principle which is effectively duplicated in the bill is contained in clause 7(1)(d) which provides that taxes should only be authorised or imposed by an Act. A statutory prohibition on the Crown levying taxes without the express authority of Parliament is already provided for in section 22(a) of the Constitution Act 1986.

In other cases a principle in the bill deals with the same subject matter as an existing principle but is expressed in a different way.

For example, principles around fee setting are dealt with in the bill – in clause 7(1)(e) – in a different way to established principle. At present the Regulations Review Committee currently scrutinises regulations which set fees with reference to guidelines issued by the Auditor-General.⁷ Government departments setting fees follow these guidelines and are aware that they may receive letters from us asking them to demonstrate that the guidelines were followed (we regularly do so particularly when significant increases are made to fees).

A key concept in the Auditor-General's guidelines is that of cost recovery. This concept is not mentioned in the bill. Although, we note there is some overlap between the Auditor-General's guidelines and the bill as both include an efficiency criterion in

⁷ Controller and Auditor-General, *Charging fees for public sector goods and services* (2008) <http://www.oag.govt.nz/2008/charging-fees/docs/charging-fees.pdf>.

relation to fees. It is not clear concerning this example whether the bill is intended to override the Auditor-General's guidelines and make a policy change in this area or whether both sets of rules would apply. If the former, the bill appears to be making a reasonably substantial change in this area. If the latter, it seems likely that some uncertainty will arise over how the principles will operate together.

Another example of where a principle in the bill differs from existing principle is seen in the rights and liberties principle in clause 7(1)(b). This clause contains an exception to infringement of a specified group of rights and liberties – this will be permissible where it is necessary to provide for, or protect, any such liberty, freedom, or right of another person. It appears that this provision will also be subject to the general exception to the principles provided in clause 7(2). This test for determining when some rights and liberties can be limited differs from the test in Standing Orders currently used by the committee when scrutinising regulations. The committee considers whether regulations “trespass unduly on personal rights and liberties”. A third version of a legal test defining justifiable limits on rights is found in section 5 of the New Zealand Bill of Rights Act 1990 (NZBORA).

Government departments will need to consider all three tests in relation to some rights issues when making regulations.

When departments grapple with these overlap issues we think a significant consideration will be that some principles (those in the bill) will have legislative status and others will not. Our view is that this point needs to be explored further with officials. We suggest officials be asked to explain how it is anticipated the principles in the bill will operate where existing principles overlap with these.

Delegated legislation reviewed by the committee will also be subject to the statement of compatibility and court review processes in the bill

The definitions of **legislation**, **legislative instrument**, and **public entity** in clauses 4 and 5 of the bill mean that the principles, the compatibility statement process, and review by the courts as proposed by the bill, will cover statutes and a wide range of instruments made under powers delegated by statute. Although, we note that the definition of **legislative instrument** in clause 4 differs from that in the Legislation Bill. We suggest that this will cause some confusion if both definitions are enacted.

The range of instruments made under delegated powers which will be covered by the bill appears to comprise a much broader category than the category of instruments currently subject to formal parliamentary scrutiny by the Regulations Review Committee.

However, conversely, the delegated legislation which is reviewed by the Regulations Review Committee will be subject to the principles in the bill and the statement of compatibility and court review processes.

Therefore, if the bill is enacted, two different sets of standards of legislative quality will operate in relation to the scrutiny or review of the delegated legislation reviewed by the committee. One set of standards will apply to parliamentary scrutiny of this legislation

by this committee and a second set of standards will apply the compatibility statement process and to review by the courts.

This mismatch may not be problematic per se. However, the committee notes that if the bill is enacted in its present form there may be flow-on effects for its jurisdiction.

For example, a proposal has already been made to the Standing Orders Committee to include reference to a proportionality principle in the Standing Order scrutiny grounds relating to the committee's work.⁸ This concept appears in the bill in clause 7(1)(k) and in the general exception to the principles contained in clause 7(2). The proportionality principle is relevant to clause 7(2) because the wording of the clause is very similar to the wording used in section 5 of the NZBORA and the legal test for section 5 involves, in part, consideration of a proportionality component.⁹

Concerning the proposal to add a proportionality principle to the Standing Order scrutiny grounds, the committee said in a recent letter to the Standing Orders Committee, that given some uncertainty around the legal tests in the bill the proposal may raise quite complex legal and policy issues.

We said that although we were not in a position to give a fully considered view on these matters, it appeared to us that the addition of a proportionality principle in Standing Orders, as proposed in Mr Hide's letter, might introduce a much more complex process than might first be apparent.

We also said that the resourcing issues, including for members sitting on the committee, would possibly be substantial if a proportionality principle were to apply to the committee's main scrutiny function under SO 309(1). To provide some context to the discussion we noted that in both 2009 and 2010, approximately **400** statutory regulations were considered by the committee and in 2010 approximately **150** deemed regulations were considered by the committee.

We do not have any particular recommendation to make in respect of possible follow-on effects for the Regulations Review Committee's work but take the view that the information may be useful for the Commerce Committee when considering the bill.

The committee's role in advising other committees about regulation-making powers in bills

⁸ A letter from the committee to the Standing Orders Committee dated 6 April 2011 concerning the proposal to add a proportionality principle to Standing Orders is available at: http://www.parliament.nz/NR/rdonlyres/01845C39-4517-4D74-98A6-5390AAC71F7E/195784/49SCSO_EVI_00DBSCH_INQ_10324_1_A181077_Regulations.pdf.

⁹ The proportionality component is contained in the fourth limb of the section 5 test set out in *Hansen v The Queen* [2007] 3 NZLR 1 (SC). Tipping J listed the questions to ask when applying section 5. These are:

- Does the limiting measure serve a purpose sufficiently important to justify curtailment of the right?
- Is the limiting measure rationally connected with its purpose?
- Does the limiting measure impair the right no more than is reasonably necessary for sufficient achievement of its purpose?
- Is the limit in due **proportion** to the importance of the objective?

A second existing process for addressing some legislative quality issues is the committee's review of regulation-making powers in all bills. As mentioned above, the scrutiny grounds in Standing Orders and the LAC guidelines form the basis of this work.

The committee sent **16** and **15** reports to other select committees in 2010 and 2011 (thus far) respectively, raising concerns about regulation-making powers in bills. Common issues included open-ended commencement by Order in Council, exemption-making powers without adequate controls, and broad powers to make policy in regulations without adequate controls.

These are all legislative quality issues that raise the well-established principle that powers to make delegated legislation should have sufficient safeguards and constraints to satisfy Parliament that the power will be exercised properly and will not be abused.¹⁰ None of these issues which we have noted concerns about in the past two years are included in the bill, even though it will apply to a large range of delegated legislation.

However, the bill contains, for example, a similar type of legislative quality principle relevant to delegated legislation, namely that taxes should only be imposed or authorised by an Act - clause 7(1)(d). As noted above, this principle is already enshrined in legislation in section 22(a) of the Constitution Act 1986 so we are unsure why this needs to be repeated in the bill.

This example provides an illustration of our concern about the inclusion of some important principles in the bill and not others.

Transparency of law-making processes

The Regulations Review Committee supports greater transparency in law-making processes, which is a stated aim of the bill. However, we suggest that further consideration – not necessarily only by the Commerce Committee – needs to be given to making greater use of explanatory notes. We had cause recently to look closely at the use of explanatory notes for the Scrutiny of Legislation Conference 2011. Our committee sent a delegation to the conference, and along with the Australian parliaments who were represented there, presented a paper on this topic for discussion with the other parliaments.

Our research showed that:

- New Zealand currently has no legislative requirements relating to explanatory notes.
- Standing Order 253 requires all bills which are introduced to have an explanatory note which states the policy the bill seeks to achieve.¹¹
- Speakers' ruling 95/3 says there is no absolute standard to which an explanatory note must conform; and an explanatory note must be drafted in factual, not argumentative, terms.¹²

¹⁰ LAC guidelines, Introduction to Chapter 10.

¹¹ See <http://www.Parliament.nz/en-NZ/PB/Rules/StOrders/1/b/6/00HOHPBReferenceStOrders2-Standing-Orders-of-the-House-of-Representatives.htm>.

- The *Cabguide* says that explanatory notes should:¹³
 - if the bill contains a provision empowering the making of **deemed regulations**, set out the reasons for doing so
 - if **commencement** is proposed to be determined by way of **Order in Council**, set out the reasons for doing so
 - include the web address (URL) for the regulatory impact statement (which is a government agency document that sets out the agency's best advice on the problem definition, objectives, identification, and analysis of the full range of practical options¹⁴)

In the committee's experience even these few requirements are not always complied with which raises issues around education and monitoring both within the executive and more widely in relation to bodies outside the executive who exercise delegated powers to make law.

The quality of explanatory notes has also recently been the subject of comment by us in our work. In relation to bills, when reporting to other select committees on exemption-making powers in bills we have noted on several occasions that we would prefer to see reasons why these are considered to be necessary included in explanatory notes. Our concern is based on the recommendation by the Legislation Advisory Committee in 2008 that where an exemption-making power is contained in a bill the explanatory note should state why the power is necessary, and set out the conditions and criteria that will apply to the granting of exemptions under the power.¹⁵

In relation to regulations, we recently raised with the Parliamentary Counsel Office (PCO) an issue about the quality of the explanatory notes in the initial orders made under the emergency legislation made in relation to the Canterbury earthquake in September 2010.¹⁶ We suggested that in the future explanatory notes should provide more detail so that they could be understood by people without significant knowledge of the legislation being modified or extended. PCO told us that the orders our concerns related to were drafted quickly, and focused on the details of the substantive changes they effected to the law; therefore, the information in the explanatory notes was "curtailed". PCO agreed that more

¹² See <http://www.Parliament.nz/en-NZ/PB/Rules/Rulings/>.

¹³ The paper for the Cabinet Legislation Committee seeking to introduce a bill must confirm that these things are present in the explanatory note to the draft bill, see: <http://www.cabguide.cabinetoffice.govt.nz/procedures/legislation/introducing-a-bill> and <http://www.cabguide.cabinetoffice.govt.nz/procedures/regulatory-impact-analysis>.

¹⁴ See <http://www.cabguide.cabinetoffice.govt.nz/procedures/regulatory-impact-analysis#ris>.

¹⁵ Report of the Regulations Review Committee, *Inquiry into the use of instruments of exemption in primary legislation*, October 2008, AJHR I.16Q at: http://www.Parliament.nz/en-NZ/PB/SC/Documents/Reports/e/a/a/48DBSCH_SCR4226_1-Inquiry-into-the-use-of-instruments-of-exemption.htm at p 13.

¹⁶ Discussed in the committee's report at: http://www.parliament.nz/en-NZ/PB/SC/Documents/Reports/9/d/8/49DBSCH_SCR4941_1-Interim-report-on-the-Orders-in-Council-made-under.htm. http://ourhouse.parliament.nz/NR/rdonlyres/7D0AE025-59B0-4CA1-9592-1AB8F64AD3C1/221319/DBSCH_SCR_4941_InterimreportontheOrdersinCouncilma.pdf

detail in the explanatory notes would be desirable, and told us that it planned to provide more detail in the future.

An approach New Zealand may wish to consider can be seen currently in the United Kingdom in relation to human rights issues in bills, although the approach could apply more widely to other quality criteria. Ministers are advised in the Cabinet Office *Guide to Making Legislation* that the government has made a commitment to provide more detailed information about the most significant human rights issues in government bills in its explanatory notes. The guide says the assessment of the bill's impact on Convention rights should be as detailed as possible setting out any relevant case law and presenting the government's reasons for concluding that the provisions in the bill are Convention compatible. Further, the guide states that the purpose of the explanatory notes is to assist parliament, both in debates on Bills and through the Joint Committee on Human Rights, and all explanatory notes must provide this information.¹⁷ We understand that compliance with these rules is monitored by select committees.

We suggest that consideration be given to greater use of explanatory notes to monitor compliance with legislative quality criteria, by Parliament, in relation to those to who it has delegated law-making powers.

Legislation revision processes in the Legislation Bill

In December 2010 the Regulations Review Committee reported the Legislation Bill back to the House. The bill is waiting on its second reading. The commentary to the bill says it is intended to modernise and improve the law regarding the publication, availability, reprinting, revision, and official versions of legislation, and bring it together into one piece of legislation.

The bill will replace the Statutes Drafting and Compilation Act 1920, the Acts and Regulations Publication Act 1989, and the Regulations (Disallowance) Act 1989.

The bill includes a structured process for the ongoing revision of legislation. This includes the redrafting of Acts to update language and by other means, for example the use of diagrams, improve accessibility as well as the identification of obsolete or redundant enactments which can then be removed from the statute book.

We noted in our report that we supported the proposed process for the passing of these bills as set out in the Law Commission's report *Presentation of New Zealand Statute Law*, which recommended a special select committee be established for the purpose of considering such bills.¹⁸ However, we considered that such a process should be decided by the House and therefore noted that we encourage the Standing Orders Committee to consider the procedure laid out in the Commission's report in its current review of the Standing Orders.

¹⁷ United Kingdom Cabinet Office *Guide to Making Legislation* at <http://www.cabinetoffice.gov.uk/sites/default/files/resources/Guide-to-Making-Legislation.pdf> at paras 11.63, 12.27 & 12.28.

¹⁸ *Presentation of New Zealand Statute Law*, Law Commission Report 104, October 2008.

In our view, if the Legislation Bill is passed in its current form, the revision process will address some of the issues the promoter of the Regulatory Standards Bill is concerned with.

Recommendations

The Regulations Review Committee recommends that the Commerce Committee consider:

- Exploring with officials the anticipated effect of giving legislative status to a selected group of legislative quality principles on wider established principles, including where principles concerning the same subject matter in both categories overlap and in some cases are expressed quite differently.
- Recommending that greater use be made of explanatory notes to promote greater transparency in law-making and compliance with established principles.
- Take note of the legislation revision process provided in the Legislation Bill.

Conclusion

I trust these comments will be of assistance to your committee in its consideration of the Regulatory Standards Bill.

Legislative Counsel, Catherine Rodgers, is available to brief your committee on our report, if you require such a briefing. Please contact the Clerk of Committee, Amanda Wall on 817-6644 or amanda.wall@parliament.govt.nz if you have any questions or would like to arrange a briefing.

Yours sincerely



Charles Chauvel

Chairperson