Post-Legislative Scrutiny in New Zealand

A Focus on Delegated Legislation

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Abstract

In New Zealand, a scheme for the political post-legislative scrutiny of delegated legislation has operated since 1989. The Regulations Review Committee of the House of Representatives systematically considers delegated legislation and may inquire into matters relating to it. By convention the Committee is chaired by a member of an opposition party and is supported by a dedicated secretariat. It may, on grounds that go beyond vires, draw the attention of the House to any provision of any regulation. If one of its members moves to disallow a statutory instrument, and if debate on the member's motion is not brought on within a specified period, the instrument ceases to have legal effect. The note considers aspects of the Committee's jurisdiction, and whether the successful operation of the Committee may have led to excess focus on the scrutiny of delegated legislation at the expense of the systemic post-enactment scrutiny of primary legislation.

Keywords: post-legislative scrutiny, regulations review, parliamentary oversight, New Zealand, law reform proposals, comparative law.

A Introduction

In 1985 the New Zealand House of Representatives ('the House') adopted new standing orders[1] (SO) as part of a wider suite of changes to promote transparency, update New Zealand's constitutional landscape, and create a series of checks

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1 Standing Orders of the House of Representatives: in force 1 August 1985.

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and balances on executive power.[2] Notably, the new SOs empowered the creation of a parliamentary regulations review committee ('RRC', or 'the Committee'). By convention the Committee is chaired by a member of an opposition party. It is supported by a small, dedicated secretariat. It may, on grounds that go well beyond *vires*, draw the attention of the House to any provision of any regulation.[3] If one of its members moves to disallow a statutory instrument, and if debate on the member's motion is not brought on within a specified period, the instrument ceases to have legal effect.[4]

B Some Comment on the Jurisdiction of the Committee

The 1985 SOs were a significant new departure for scrutiny and transparency in New Zealand. Coupled with the enactment of the Regulations Disallowance Act 1989, they amount to significant progress in the control of delegated legislation in a jurisdiction that had long lagged behind other developed Commonwealth jurisdictions in that field.[5]

2 Other innovations included the Parliamentary Service Act 1985 (functional autonomy from the executive of parliamentary administration); Treaty of Waitangi Amendment Act 1985 (retrospective (to 1840) empowerment of the investigation of breaches of the treaty of cession) Constitution Act 1986 (formal repatriation of the constitution); the Public Finance Act 1989 (significantly enhanced budget transparency); the New Zealand Bill of Right Act 1990 (affirmation of basic civil and political rights, albeit in a non-entrenched statute); and the creation of a royal commission into the electoral system, leading eventually to a referendum in 1993 that saw a move to a mixed-member system of proportional representation from 1996 and the consequent advent of Western European-style coalition governments. A trend towards more transparency in public governance may be detected even before the change in government in 1984; for example, the New Zealand version of the Official Secrets Act was repealed and replaced with freedom of information legislation in 1981.

3 The grounds for drawing attention to a regulation are that the regulation: is not in accordance with the general objects and intentions of the enactment under which it is made; trespasses unduly on personal rights and liberties; appears to make some unusual or unexpected use of the powers conferred by the enactment under which it is made; unduly makes the rights and liberties of persons dependent upon administrative decisions which are not subject to review on their merits by a judicial or other independent tribunal; excludes the jurisdiction of the courts without explicit authorization in the enactment under which it is made; contains matter more appropriate for parliamentary enactment; is retrospective where this is not expressly authorized by the enactment under which it is made; was not made in compliance with particular notice and consultation procedures prescribed by applicable enactments; or for any other reason concerning its form or purport, calls for elucidation. Standing Order 319(2). Available at: https://www.parliament.nz/en/pb/parliamentary-rules/standing-orders-2017-by-chapter/chapter-5-Legislative-procedures/#_Toc490063095 (last accessed 9 January 2019).

4 As has occurred only once in the 33-year history of the Committee. Available at: https://www.parliament.nz/en/get-involved/features-pre-2016/document/50NZPHomeNews201303011/parliamentary-law-milestone-first-automatic-disallowance (last accessed 9 January 2019).

5 By way of comparison, the House of Lords established a committee for the review of regulations as early as 1925; the Commonwealth of Australia and some of its states instituted similar mechanisms between 1931 and 1960.

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I Items of Delegated Legislation That Are Not Legislative Instruments

There are, of course, improvements that can be made to any model. Departments and other large public agencies with well-defined lines of ministerial accountability are generally seized of resources, public service professionalism, and organizational memory and preparedness, meaning that it is more or less second nature for them to be aware of and comply with important procedural requirements concerning delegated legislation. They may usually be relied upon to play their part in ensuring that regulations under their purview are laid before the House within the requisite number of days of their making; to ensure that the purport of a regulatory change is clear and publicly accessible; and to know and take account of expert guidance and prior RRC jurisprudence in the drafting of regulations.

This is simply not the case, however, for the many industry, gaming, and racing supervisory bodies that remain empowered to make rules with the force of law. Such rules can contain significant penalties for breach and are subject to little other oversight: they must obviously be embraced within a systematic scrutiny model. It will clearly be beneficial to ensure that they are published and accessible in a single place. It remains to be seen, however, whether currently mooted new clarifications and definitions will do much to improve these bodies' cultural embrace of transparency, especially as to their law-making function. A better general regulatory framework combining financial incentives and penalties might be a more useful means of achieving this.

II Including Consistency with International Human Rights Obligations, and with Major Domestic Human Rights Legislation, in the Standing Order Grounds

In a similar vein, consideration of the consistency of regulations with the international obligations taken on by the Government of New Zealand is not something that the RRC may directly undertake. Such obligations are not incorporated into domestic law until legislated for, but – at least as to treaties, if not declarations – they may be relevant considerations in ministerial decision making.[6] Especially in the area of economic and social rights, because of their high policy content, these matters are often said to be difficult to subject to justiciability.[7] Why, then, should the RRC – a body comprised entirely of politicians – not be empowered to undertake some of the more inherently political evaluations from which the courts traditionally shy?

Questions such as whether a regulation is likely to impede the coherent domestic implementation of, say, the 2030 Agenda, or whether a relevant regulation-making power ought to demonstrate a greater awareness of the Declaration on the Rights of Indigenous Persons, let alone the International Convention on Economic, Social, and Cultural Rights or the Convention on the Elimination of All Forms of Discrimination Against Women, are important ones. They may touch on policy, but they also concern a fundamental question of legal morality: whether the executive branch of the government may habitually agree a course of action

6 *See, e.g., Tavita v. Minister of Immigration* [1994] 2 NZLR 257 (CA), *obiter*.
7 *See, e.g., Lawson v. Housing New Zealand* [1997] 2 NZLR 474 (HC), *obiter*.

on the international stage, yet fails to reflect such commitments via the consistent deployment of its power to make delegated legislation.

C Lack of Focus on Post-Legislative Scrutiny of Primary Legislation

I Lack of Systematic Post-Legislative Scrutiny of Primary Legislation

The good general health of regulation-making scrutiny in New Zealand seems apparent from any contemporary survey of the issue, but the situation is very different in respect of primary legislation.

In New Zealand, there are at least five processes for the review of Acts of Parliament. First, the Law Commission Act 1985 envisions the Commission as the central advisory body for promoting the systematic review, reform, and development of the law of New Zealand. The Commission can recommend reform of the law either of its own motion, or on ministerial reference. Second, under the State Sector Act 1988, as amended in 2013, Public Service Department Chief Executives have 'stewardship' of their agencies. This is said to include the need for departments to actively monitor and periodically assess the performance and condition of the regulatory regimes established by the legislation they administer, and to use that information to advise or act on problems, vulnerabilities, and opportunities for improvement. Third, a very small proportion of legislation contains an automatic requirement for review after a specified period of time. Fourth, under the Legislation Act 2012, a revision exercise is mandated for the re-enactment "in an up-to-date and accessible form, the law previously contained in all or part of 1 or more Acts." Finally, the 'subject' standing committees of the House conduct a very limited degree of post-legislative scrutiny.[8]

II Options for Reform

This patchwork of systems was part of what led the Productivity Commission in 2014 to conclude that New Zealand had a largely 'set and forget' approach to regulation, with in-depth legislative reviews tending to be crisis-driven rather than systematic.[9] A number of solutions to this problem clearly exist. The model now operating in the United Kingdom, where the government must publish a memorandum on the implementation of legislation 3-5 years after Royal Assent, with the intention of triggering a decision by the relevant House of Commons Committee whether further review of the legislation is merited, could be considered.[10] A replacement for PCO, responsible to the Speaker of the House rather than to the Attorney-General, and with the role not only of law drafting but of systematic

8 I acknowledge and have relied upon the very helpful summary of these options by Miller, 'Post-Legislative Scrutiny in New Zealand – Challenging the Status Quo', pp. 7-12. Available at: https://researcharchive.vuw.ac.nz/xmlui/bitstream/handle/10063/6332/paper_access.pdf?sequence=2 (last accessed 9 January 2019).

9 New Zealand Productivity Commission, Regulatory Institutions and Practices, 30 June 2014, p. 46.

10 UK Cabinet Office, Guide to Making Legislation, July 2015, p. 263.

review of the existing statute book, has also been floated.[11] A standing committee of the House, similar to the RRC, but with a mandate to examine primary legislation, has also been suggested.[12] The three might even usefully operate in tandem.

D Conclusions

New Zealand is often held up as a model of good governance and transparency, and there is much substantive justification for such descriptions.[13] However, the jurisdiction can be surprisingly slow to reform and innovate – 60 years passed between the establishment of a scrutiny of regulations committee in the UK and the creation of the RRC; little attention appears to have been paid in the 33 years since the Committee's creation to the ongoing relevance and adequacy of its powers. Despite this, the RRC does appear to represent a workable mechanism for post-legislative scrutiny of regulations. It would be regrettable if success in that area, combined with a 'set and forget' approach to regulation, were to lead to neglecting the need to address the systematic post-legislative scrutiny of primary legislation.

11 Palmer, 'Law-making in New Zealand: Is there a better Way?' (2014) Wai LR 1.

12 Miller, note 23 above, at pp. 20-22.

13 *See* https://www.weforum.org/agenda/2018/02/these-are-the-20-least-corrupt-countries-on-earth (last accessed 9 January 2019).