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**Regulations and
Other Subordinate
Legislative Instruments:
Drafting, Publication,
Interpretation and
Disallowance**

Ross Carter

December 2010

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TE WHARE WĀNANGA O TE ŪPOKO O TE IKA A MĀUI



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Regulations and Other Subordinate Legislative Instruments: Drafting, Publication, Interpretation and Disallowance

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About the Author

Ross Carter is Parliamentary Counsel with the New Zealand Parliamentary Counsel Office, based in Wellington, New Zealand. This paper was first finalised for publication on 21 July 2010, and then updated in October and December 2010. It is based, in large part, on the insights of other, more experienced parliamentary counsel. It *does not* represent government policy or the views of the PCO; it represents *only* the author's personal views.

I Introduction

This paper examines New Zealand subordinate legislation and the laws (past, present, and future) on how it may or must be drafted, published, interpreted, and disallowed. In particular, this paper looks at how New Zealand's law on subordinate legislation has developed, in order to try to show that different kinds of subordinate legislation have been, are, and will be relevant for each of those different purposes (drafting, publication, interpretation, and disallowance).

The paper begins with a discussion of the Ordinances, instruments under Ordinances, and prerogative instruments of New Zealand as a Dependency of its parent Colony and, later, of New Zealand as a separate Colony. It then traces the background to the Regulations Act 1936 (NZ) and to New Zealand's current law on "regulations". Legal duties to draft subordinate legislation and to table it (and the consequences of its not being tabled as required) in Parliament are noted. The paper then also notes the enactment of general powers to revoke spent instruments, along with the discretion to publish instruments that are not "regulations" required by law to be published. Rules regulating courts' practice and procedure, and their special nature, are considered. So also is the development of the 28-day "rule" of practice for commencement of certain legislative instruments, and the development of parliamentary scrutiny by the Regulations Review Committee. The Regulations Review Committee's and others' contributions to the Bill ultimately enacted as the Acts and Regulations Publication Act 1989 (NZ) and the Regulations (Disallowance) Act 1989 (NZ) are then discussed, as are the effects of the Interpretation Act 1999, and the use to date of the disallowance procedure. The paper then reviews complexities, assumptions, and gaps in current definitions, and calls by the Regulations Review Committee for reform along the lines of Australia's Legislative Instruments Act 2003 (Cth). The paper ends with a discussion of the Legislation Bill that the Government introduced to New Zealand's Parliament on 25 June 2010, its definitions of "disallowable instruments", "legislative orders" and "regulations", an important issue it leaves for the future, and the important changes it would make.

II Publication, Interpretation, and Disallowance of Subordinate Colonial Ordinances

The first written law in force and enacted in New Zealand was subordinate legislation. New Zealand was initially a Dependency of its parent Colony, New South Wales. On 15 June 1839, the territory comprised in the commission of Sir George Gipps, Governor of New South Wales, was enlarged by Letters Patent. Gipps accordingly became the Captain-General and Governor-in-Chief of the colony of New South Wales and of "any territory which is or may be acquired ... by Her Majesty, Her Heirs or Successors within that group of islands in the Pacific ocean commonly called

New Zealand".¹ The Governor and Legislative Council of New South Wales were authorised to enact laws for New Zealand as a Dependency. On 16 June 1840, the Legislative Council of New South Wales passed an Act providing for the extension to New Zealand of New South Wales laws, so far as they could be applied to New Zealand.² In all, six New South Wales Acts were enacted for New Zealand.³

New Zealand became a separate Crown Colony by Royal Charter and Letters Patent issued by Queen Victoria on 16 November 1840.⁴ The Charter and Letters Patent created a Legislative Council. They also authorised that Legislative Council to make, following any relevant Royal instructions, "all such laws and ordinances as may be required for the [Colony's] Peace, Order, and good government".⁵ Royal Instructions provided that the Council comprised the Governor of New Zealand and at least six other persons (the Treasurer, the Attorney-General, the Colonial Secretary and three Senior Justices of the Peace). A quorum was five members including the Governor, who had the sole rights to propose ordinances and raise questions for debate, could rely on the support of the three permanent officials, and could (and, at least once, did) dismiss any of the three non-official members who proved uncooperative.⁶

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- 1 Letters Patent issued in London dated 15 June 1839. On 19 January 1840 in Sydney, Governor Gipps issued three Proclamations dated 14 January 1840. One indicated the 15 June 1839 Letters Patent extended his commission so it covered New Zealand. On 30 January 1840, the day after his arrival in New Zealand, Hobson published and proclaimed both Gipps' 15 June 1839 commission under the Great Seal extending the boundaries of the Government of New South Wales and the 30 July 1839 commission under the Royal Sign-manual appointing Hobson Lieutenant-Governor: Hobson to Gipps (GBPP 560, 5-6 February 1840) vol 33 at 8.
 - 2 An Act to declare that the laws of New South Wales extend to Her Majesty's dominions in the Islands of New Zealand; and to apply the same, so far as is applicable, in the administration of justice therein; and to indemnify certain Officers, for acts already done 1840 (NSW) 3 Vict No 28.
 - 3 An example is the New Zealand Customs Duties Act 1840 (NSW) 4 Vict No 19, which made customs duty payable on tobacco imported into New Zealand on or after 1 January 1843. That date was advanced to 1 January 1842 by s 18 of the Customs Ordinance 1841 (NZ) 4 Vict No 3.
 - 4 The 16 November 1840 Royal Charter and Letters Patent were made under an Act (UK) 3 & 4 Vict c 62 passed on 7 August 1840 and amending the New South Wales Act 1828 (UK) 9 Geo 4 c 83 to empower Her Majesty by letters patent to separate the Dependency of New Zealand from its parent colony of New South Wales. New Zealand ceased to be a Dependency of New South Wales on 3 May 1841, when Hobson read the Commission proclaiming him Governor of the separate Crown Colony.
 - 5 Queen Victoria gave Royal instructions on 5 December 1840, including that all ordinances that Hobson was to enact on the advice and with the consent of (a majority of) the Council were to "be drawn up in a simple and compendious form, avoiding so far as may be all prolixity and tautology", and that the Governor publish, in January or as early as practicable in a year "a complete collection ... for general information, of all Ordinances enacted during the preceding year".
 - 6 Alexander McLintock *Crown Colony Government in New Zealand* (Government Printer, Wellington, 1958) at 132 (on the dismissal of GB Earp, a Wellington Merchant representing Cook Strait interests).

On 3 June 1841, in rooms attached to Government House, Auckland, and open to the public, the Legislative Council under the Colony's Governor, Royal Navy Captain William Hobson, used its law-making power to make the New South Wales Laws Extension Ordinance 1841 4 Vict No 1 (NZ). The Ordinance's purposes were:⁷

... to declare that the Laws of New South Wales so far as they can be made applicable shall [on and after 16 November 1840] extend to and be in force in Her Majesty's Colony of New Zealand [in the like manner as all other Laws of England, and as if repealed and re-enacted in the Ordinance;] and

... to indemnify the Lieutenant-Governor and other Officers [of New Zealand, as a Dependency of its parent Colony of New South Wales] for[, and validate,] certain acts done and performed between the date of the said Royal Charter and Letters Patent and the day of passing this Ordinance.

Governor Hobson said, at the opening on 14 December 1841 of the Council's second session:⁸

When New Zealand was erected into an independent colony, the machinery of its Government was too imperfect to enable us at once to mature those enactments which in addition to the Statute and Common Law of England, were required by the peculiar circumstances of a young community. I, accordingly, at the first Session of the Legislative Council, proposed for their adoption a bill giving effect in New Zealand to the laws of New South Wales.

Ordinances of the New Zealand Legislative Council had to be "for the [Colony's] Peace, Order, and good government".⁹ That is, as Lord Hoffmann observed in the case of *Bancoult*, "the traditional formula by which legislative powers are conferred upon the legislature of a colony or a

7 New South Wales Laws Extension Ordinance 1841 4 Vict No 1 (NZ) Title.

8 John Curnin confirms the declaratory nature of the first 1841 Ordinance so far as it relates to the operation in New Zealand of laws of New South Wales, and adds that "the absolute assumption" in 1841 that the law of England as at 14 January 1840 applied in New Zealand was later confirmed by the English Laws Act 1858 (NZ): John Curnin *Index to the Laws of New Zealand as Existing on January 1, 1877* (New Zealand Times, Wellington, 1877) at 19. See also the English Acts Act 1854; BJ Cameron "Law Reform in New Zealand" (1956) NZLJ 88 at 88; *Chamberlains v Lai* [2007] NZSC 40, [2007] 2 NZLR 7 at [84] and footnote 163 per Elias CJ, Gault and Keith JJ. 14 January 1840 was "the date of the proclamation by Governor Gipps of New South Wales of the extension of his jurisdiction to such of the territories of New Zealand as might be acquired in sovereignty by Lieutenant-Governor Hobson".

9 Royal Charter and Letters Patent issued by Queen Victoria on 16 November 1840.

former colony upon the attainment of independence".¹⁰ As that case shows, it limits effectually laws made under colonial Acts (but does not also limit laws made under the Crown's prerogative power to legislate for a ceded colony).¹¹

The Ordinances were also subject to (and, unless for "annual supplies" appropriation, or expressed to commence earlier because otherwise the delay would cause "serious injury or inconvenience", could not take effect until signification and publication of) Her Majesty's "final assent, disallowance, or other direction thereupon".¹² The Colonial Office's response to the New South Wales Laws Extension Ordinance 1841 (NZ) was that Her Majesty should refuse it final assent until amended so s 3 cured not every invalidity in officials' acts, but instead only invalidity arising from informalities in the coming into office, or appointment, of the specified office holders or appointees.¹³

10 *R (Bancoult) v Secretary of State For Foreign and Commonwealth Affairs* [2008] UKHL 61 at [47]. The House of Lords, by a 3-2 majority, upheld the validity of a prerogative order – primary legislation. Compare *R v (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2001] QB 1067 (Div C) per Laws LJ and Gibbs J, which quashed cl 4 of the Immigration Ordinance 1971 as the British Indian Ocean Territory Commissioner's power under the British Indian Ocean Territories Order 1965 (SI No 1920) (made under the Colonial Boundaries Act 1895) to legislate for the "peace, order and good government" of the Territory – a group of coral atolls known as the Chagos Islands – did not include a power to expel all the inhabitants. See also *Sharma v Attorney General of Trinidad and Tobago* [2009] UKPC 37 at [23] per Lord Hope ("for some purposes, the use of Letters Patent may indeed assume a legislative character"). Compare the Order in Council dated 30 July 1923 (printed in the 16 August 1923 *New Zealand Gazette* (1923 No 63) at 2211), made under the British Settlements Act 1887 (UK), which appoints the Governor-General of New Zealand as the Governor of the Ross Dependency, and empowers that Governor to make rules and regulations for its peace, order, and good government. Such regulations include those made by the Governor on 14 November 1923: printed in No 80 (15 November 1923) *New Zealand Gazette* at 2815.

11 Professor Colin Aikman wrote in 1966: "The Crown still retains limited prerogative powers to legislate. Prerogative legislation is, of course, not subordinate; the Crown has *original* authority. The only recent instances of the exercise of these powers in New Zealand are the Proclamations prohibiting enemy commerce during the two world wars [proclaimed, for example, *Gazette* 1914 at 3747-3751 and Contraband Proclamation 1940], and those regulating the grant of awards and medals [(for example, *Gazette* 1907 at 240 and SR 1948/40)]: Colin Aikman "Administrative Law" in JL Robson (ed) *New Zealand: Development of its Laws and Constitution* (2nd ed, Stevens, London, 1967) at 129.

12 Queen Victoria's Royal instructions of 5 December 1840 to Governor Hobson, s 24

13 NA Foden *New Zealand Legal History 1642 to 1842* (1965) at 161. McLintock says that "[o]nly three ordinances were disallowed, the most important being the Municipal Corporations Ordinance [(1842) 5 Vict No 6 (NZ)]: McLintock, above n 6, at 103 footnote 103. Foden gives the reasons for the disallowance: giving Corporations power to erect lighthouses was inconsistent with the Crown's prerogative to do so, the unskilful and hazardous vesting of lands in Corporations, and the inconsistency with a then recent Act governing Crown lands in Australia. See also Damen Ward "Civil Jurisdiction, Settler Politics, and the Colonial Constitution, Circa 1840-58 (2008) 39 VUWLR 497; John E Martin "Refusal of Assent – A Hidden Element of Constitutional History in New Zealand" (2010) 41 VUWLR 51; Ward (2010) 41 VUWLR (forthcoming).

New Zealand's legal independence from its former parent colony came with the commencement on 25 April 1842 of the New South Wales Laws Repeal Ordinance (1842) 5 Vict No 19 (NZ). It not only repealed the New South Wales Laws Extension Ordinance 1841 (NZ) and all New South Wales laws previously in force in New Zealand, but also provided that "[n]o Law Act or Ordinance of New South Wales shall hereafter be of any force or effect whatever within the Colony of New Zealand."¹⁴

Section 4 ("Interpretation") of the New South Wales Laws Extension Ordinance 1841 (NZ) required specified terms in New South Wales laws, which by virtue of the Ordinance applied to New Zealand, to be construed in their application to New Zealand as the corresponding New Zealand term.¹⁵ However, New Zealand had no general interpretation legislation until the Governor-in-Chief of New Zealand, Governor Grey, with the advice and consent of the Legislative Council (including the Attorney-General, William Swainson) on 22 July 1851 enacted the Interpretation Ordinance 1851 (NZ) 15 Vict No 3, "[a]n Ordinance to provide for the Interpretation of Ordinances, and for the shortening of language used therein." That Ordinance, while "copying much of" Lord Brougham's Interpretation Act 1850 (UK) 13 & 14 Vict c 21, "[a]n Act for shortening the Language used in Acts of Parliament", also "added interestingly to it".¹⁶ One such "interesting addition" was s 3: "the language of every Ordinance shall be construed according to its plain import, and where it is doubtful, according to the purpose thereof". Another was s 10: "all Proclamations made or to be made by the Governor-in-Chief, or Lieutenant-Governor, under the authority and in pursuance of any Ordinance, shall be deemed to be part of such Ordinance, and shall be read therewith, and shall [(as s 8 required for an Ordinance)] be taken judicial notice of accordingly".¹⁷

The first official *New Zealand Government Gazette*, which replaced various semi-official predecessors, was published on 7 July 1841.¹⁸ Two very early examples of items of subordinate legislation made under New Zealand Colonial Ordinances, and published in full in the *New Zealand Government Gazette* on 18 May 1842, are the following:¹⁹

- A Proclamation given on 14 May 1842 under s 1 of the Cattle Trespass Ordinance (1842) Sess II No 16 (which provided for the summary recovery of compensation for damage done

14 New South Wales Laws Repeal Ordinance (1842) 5 Vict No 19 (NZ), cl 2.

15 For example, "the New South Wales Government Gazette" was to be construed as "the New Zealand Government Gazette".

16 Law Commission *A New Interpretation Act* (NZLC R17, 1990) at [9].

17 Judicial notice of Ordinances and Acts (but not also Proclamations) continued in the Interpretation Act 1858 (NZ), s 1; Interpretation Act 1868 (NZ), s 4; and Interpretation Act 1878 (NZ), s 8. An example of a power to make a (commencement) Proclamation is the Provincial Councils Ordinance (1851) 15 Vict No 6, s 53.

18 Rachel Salmond "Government Printing in New Zealand, 1840 to 1843" (Elibank Press, Wellington, 1995).

19 Vol II No 20 (18 May 1842) *New Zealand Government Gazette*.

by cattle trespassing), and declaring to be within that Ordinance's operation, on and after 1 July 1843, described areas of "the Township of Auckland".

- A Proclamation given on 16 May 1842 under ss 1 and 2 of the Raupo Houses Ordinance (1842) Sess II No 17 (which imposed a £20 annual tax on every building constructed wholly or in part of raupo, nikau, toitoi, wiwi, kakaho, straw or thatch of any description, and situate within boundaries defined by proclamation), and declaring to be within that Ordinance's operation, on and after 16 November 1843, described areas of "the Township of Auckland".

The 15 June 1842 *New Zealand Government Gazette* (Vol II No 24) contains the full text of a set of Harbour and Quarantine Regulations made by His Excellency the Governor with the advice of the Executive Council on 13 June 1842 under ss 6 and 7 of the Harbour Regulations Ordinance (1842) Sess II No 15.

Another, later example of a legislative instrument under a New Zealand Colonial Ordinance, albeit one made after the Imperial Act of 1846 establishing a General Assembly for New Zealand, and the UK Parliament Act of 1852 granting a representative constitution to New Zealand, is a Proclamation by Governor-in-Chief Gore Browne, published in 1860.²⁰ By that Proclamation, Governor Gore Browne extended the operation of the Weights and Measures Ordinance (1846) 10 Vict No 10, from and after 30 April 1860, and under s 27 of that Ordinance, "to all that territory situate in the Province of Auckland ... known and defined as the Electoral Districts of the 'City of Auckland', the 'Suburbs of Auckland,' and the 'Pensioner Settlements'".

In his June 1850 memorandum opening the *Ordinances of New Zealand 1841 to 1849*, Colonial Secretary Alfred Domett explained that one portion of that work (the second part of the appendix) was a summary of all of the related Proclamations and Notices which had appeared in the *Government Gazettes*:²¹

Many of these may be considered almost as component parts of the Ordinances themselves; nearly all are ancillary to their working, and essential to their proper administration. The knowledge that very few complete copies of the *Gazettes* are in the possession of the magistrates or the public, led to the compilation of this portion of the book.

²⁰ Proclamation published in No 7 (24 February 1860) *New Zealand Gazette* at 42.

²¹ Alfred Domett *Ordinances of New Zealand 1841-1849* (Wellington, 1850).

III Background to the 1936 Act and to Current New Zealand Law on "Regulations"

Before the Regulations Act 1936 (NZ), there was no general provision in any New Zealand Act for the official publication of items of subordinate legislation.²² Items of subordinate legislation were in practice published in full in the *Gazette*. Hence various New Zealand Acts refer to "regulations [or other instruments] gazetted".²³ And under s 14 of the Interpretation Act 1868, "rules regulations and proclamations and other acts matters and things" took effect, in the absence of any provision to the contrary, from the time of their publication in the *Gazette*. However, the definition of "Proclamation" in s 4 of the Interpretation Act 1888 (NZ) required in a general way publication in

22 A specific provision in an Imperial Act in force in New Zealand by s 3(1) and sch 1 of the Imperial Laws Application Act 1988 (NZ) is s 54 of the Naval Prize Act 1864 27 and 28 Vict c 25. In its application to New Zealand, s 54 is replaced by s 4 of the Acts and Regulations Publication Act 1989. "The Law Book Company of New Zealand Ltd published thirteen volumes of their series *Rules, Regulations and By-Laws made under the New Zealand Statute*. Volume I covered the period 1910–1914 and the final volume 1935–36. With the commencement of publication of the official *Statutory Regulations* series, the private venture appears to have ceased": Geoffrey Palmer "Deficiencies in New Zealand Delegated Legislation" (1999) 30 VUWLR 1 at 3 footnote 6. Section 60 of the New Zealand Constitution Act 1852 (UK) required the Governor to have "printed in the Government *Gazette* for general information" Acts the Governor assented to in Her Majesty's name. Section 13 of the Interpretation Act 1878 repealed s 60 of the New Zealand Constitution Act 1852 (UK) and provided (subject to a proviso that the Governor was not precluded from directing that an Act be gazetted) that "it shall not be necessary to gazette the Acts passed by the General Assembly ... but copies of all such Acts shall be procurable by purchase, at such places in the colony as the Governor from time to time may appoint". See also the Interpretation Act 1888, s 9; Acts Interpretation Act 1908, s 14; Acts Interpretation Act 1924, s 13; Acts and Regulations Publication Act 1989, s 17.

23 See also cl 11(3)(a) to (f) of the draft Bill in Law Commission *Legislation and its Interpretation: Statutory Publications Bill* (NZLC R11, 1989) at 15 [Law Commission *Legislation and its Interpretation*]. Other examples include the Westland and Nelson Coal Fields Administration Act 1877 (L), s 29 ("by warrant duly gazetted"); Incorporated Societies Act 1908, s 3 ("regulations made by the Governor-General under the authority of this Act by Order in Council gazetted"); Legislature Act 1908, s 234(1) ("Order in Council gazetted"); Military Manoeuvres Act 1915, s 8 ("The Governor-General may from time to time, by Order in Council gazetted, make regulations"); Finance Act (No 2) 1931, s 39(11) ("Save in so far as the same are expressly excepted by the Governor-General by Order in Council gazetted"). Section 214 of the Harbours Act 1878 (NZ) required every Order in Council made under that Act to be gazetted but also "published in such other manner as to the Governor in Council may seem best for making it known to all bodies or persons interested therein".

the *Gazette* of Proclamations.²⁴ Further, s 17 of that 1888 Act ensured that, in all courts and all legal proceedings, production of a Proclamation, Order in Council, order, regulation, or "other instrument whatsoever" made or issued at any time, and as purportedly printed in a copy of the *Gazette* (or as purportedly printed by the Government Printer), was prima facie evidence of that instrument.²⁵

The Regulations Act 1936 (NZ) ("An Act to make provision for the printing and publication of statutory regulations and for matters incidental thereto") was felt to be necessary because subordinate legislation was hard to find in the *Gazette*. It had become "more and more inconvenient for practical reference with the increasing bulk of the *Gazette* as a record of general acts of authority", as Attorney-General Mason noted in his 1938 foreword to the first (1936–37) volume of the Statutory Regulations (SR) series under the 1936 Act. The 1936 Act was therefore enacted, and the SR series established by it, "to enable regulations to be printed and sold separately, very much after the style in which the statutes are printed and sold, instead of being published [as required by law or as a matter of practice] in the *Gazette*".²⁶ Publication in the SR series was thought to enhance access as it was difficult to find legislative "regulations" among other "general" administrative material in the *Gazette*.

24 See also New Zealand Constitution Act 1852 (UK), s 82 (requiring the Governor to publish in the *New Zealand Government Gazette* "the Proclamation of this Act, and all Proclamations to be made under the provisions thereof"); Interpretation Act 1908 (NZ), s 5 ("Proclamation"); Interpretation Act 1924 (NZ), s 4 ("Proclamation"); Law Commission *Legislation and its Interpretation*, above n 23, at [11]; Law Commission *A New Interpretation Act*, above n 16, at [404]; and Interpretation Act 1999 (NZ), s 29 ("Proclamation"). The Constitution Act 1986, s 18(3)(b) and (4) provide for Proclamations summoning (or changing the meeting place of), proroguing, or dissolving Parliament to take effect on being read publicly as prescribed but also to be later gazetted. See *Constitutional Reform – Second Report of an Officials Committee* (1986) at [3.72]-[3.83].

25 See also Evidence Act 1905 (NZ), ss 28–32; Evidence Act 1908 (NZ), ss 28–32; Regulations Act 1936 (NZ), ss 5 and 7(4); Acts and Regulations Publication Act 1989 (NZ), ss 23–24; Evidence Act 2006 (NZ), s 216; and Evidence Act 2006 Commencement Order 2007. Compare Municipal Corporations Act 1900, s 430(5) ("The production of a copy of the *Gazette* containing [rules and regulations under that Act] shall be conclusive evidence in all Courts of the contents of such rules or regulations, and that the same have been duly made."); Customs Law Act 1908 (NZ), s 297; and Defence Act 1990 (NZ), s 99.

26 HGR ("Rex") Mason, Attorney-General "Regulations Bill: second reading" (22 July 1936) 246 NZPD 36. See also J Christie "Review of Legislation, 1935: British Empire: New Zealand" (1937) 19(2) J Comp Leg 100: "The Regulations Act (1936 No. 17) makes provision for the separate publication of Governmental regulations (instead of, as has heretofore been the case, in the *Government Gazette*), and for their republication, from time to time, with amendments incorporated." At the New Zealand Law Conference in 1936, Mason said "[e]veryone knows how hard it is to find the regulation one wants by hunting through the *Gazettes*. If the rules and regulations were published in a form as easily accessible as the statutes, how much better it would be!": Mason "The Attorney-General's Address" (1936) 12 NZLJ 79 at 79–80. A 1909 book review noted "those elusive Regulations ... buried in big volumes of the *Gazette* ... what loss of time and turning over of old volumes is necessitated in looking these up!": *The Evening Post* (Wellington, 19 June 1909) at 13 <paperspast.natlib.govt.nz>.

Section 3 of the Regulations Act 1936 (NZ) followed, at least in certain respects, s 3 of the Rules Publication Act 1893 (UK). CK Allen explains that the 1893 United Kingdom Act was (after the Report of the Committee on Ministers' Powers (1932) recommended that it be completely revised)²⁷ repealed and replaced by the Statutory Instruments Act 1946 (UK).²⁸

Section 1(2) of the Statutory Instruments Act 1946 (UK) ensures that "Statutory Instruments" include documents used to exercise, after 1 January 1948, powers under earlier Acts of "rule-making authority" to make "statutory rules" (those terms having the meanings in the Rules Publication Act 1893 (UK)). But reg 1(2) of the Statutory Instruments Regulations 1947 (UK), made under s 8(1)(d) of the Statutory Instruments Act 1946 (UK), makes clear that to be a "statutory rule" for this purpose a document must be "of a legislative and not of an executive character", and not expressly excluded from that Act's operation.²⁹ Allen says the distinction between a legislative document and an executive document, a distinction first used in regulations made under the 1893 United Kingdom Act, presents "one of the most teasing problems in the whole of our administrative law", and that in applying it "the method has been, and is bound to be, the method of the Gordian knot" (famously cut by Alexander the Great).³⁰

Section 3(1) of the Regulations Act 1936 (NZ) required all "regulations" made after that Act's commencement, on 1 August 1936, to be "numbered, printed, and sold" by the Government Printer. Section 3(1) was, however, subject to a proviso that enabled the Attorney-General to exempt specified regulations or classes of regulations from the operation of the printing and sale duties in s 3 "if in his [or her] opinion it is unnecessary or undesirable that they should be printed under this Act".³¹ Section 2(1) and (2) defined "regulations", for the purposes of the Act, as follows:

27 *Report of the Committee on Ministers' Powers* (Cmd 4060, 1932). Chaired by Richard Walter Hely-Hutchinson, 6th Earl of Donoughmore, the Committee was appointed in 1929 following criticism of subordinate legislation in Lord Hewart *The New Despotism* (Ernst Benn Ltd, London, 1929). See Philip Joseph "Delegated Legislation in New Zealand" (1997) 18 Stat LR 85; and Michael Taggart "From 'Parliamentary Powers' to 'Privatization': The Chequered History of Delegated Legislation in the Twentieth Century" (2005) 55 U Toronto LJ 575. For parallel New Zealand developments, see the resolution condemning legislation by regulation that was adopted as part of the "Proceedings of the First Annual Legal Conference" (1928) 4 NZLJ 44 at 51; GW Forbes "Delegated Legislative Powers: A Defence of the System" (1933) 9 NZLJ 92; RM Algie "A System Open to Abuse: Legislation by Orders in Council" (1933) 9 NZLJ 93.

28 Carleton Kemp Allen *Law and Orders* (Stevens and Sons Ltd, London, 1945) at 57-60; and Carleton Kemp Allen "Statutory Instruments Today" (1955) 71 LQR 490 at 491-494.

29 See also the New Zealand Parliament's Regulations Review Committee "Report on Proposals for a Regulations Bill" [1986] I AJHR 16B at [17.3]-[17.4].

30 See also *Blackpool Corporation v Locker* [1948] 1 KB 349 at 369-371 (CA) per Scott LJ, a case on sub-delegated legislation (Ministerial circulars under Defence Regulations).

31 "This power ... if exercised would, when read with the fact that there is no general provision requiring notification of the making of regulations, enable regulations to be made and enforced which were not

2 Interpretation

- (1) In this Act the expression "regulations" means and includes—
- (a) Regulations, rules, or by-laws made under the authority of any Act by the Governor-General in Council or by any Minister of the Crown or by any other authority empowered in that behalf;
 - (b) Orders in Council, Proclamations, notices, warrants, and instruments of authority made under any Act which extend or vary the scope or provisions thereof;
 - (c) Regulations made under any Imperial Act or under the prerogative rights of the Crown and having force in New Zealand,—
- but does not include regulations made by any local authority or by any authority or persons having jurisdiction limited to any district or locality.
- (2) If any question arises as to whether any instrument is a regulation within the meaning of this Act, it shall be determined by the Attorney-General.

Several points can be made on this definition. First, it is unclear whether the concept of "regulations" is intended to be defined exhaustively, or merely illustratively.³² Secondly, it is also unclear whether and how the definition relies on the form (as opposed to the substance or effect) of an instrument, as well as its maker. Thirdly, the s 2(2) provision for determinations by the Attorney-General, especially when coupled with the exclusionary proviso to s 3(1), shows very telling uncertainty, but also fits poorly with the courts' role of determining finally the Act's meaning and application.³³

Publication in the SR series replaced any legally-required publication or notification in the *Gazette*. Hence a requirement in an Act that regulations be published or notified in the *Gazette* was,

available to the public. The public need not even know of the existence of the regulations. While it is not suggested that this provision has been abused, it does seem an undesirable power": DC Pearce *Delegated Legislation in Australia and New Zealand* (Butterworths, Sydney, 1977) at [60].

32 For a discussion of the definitions of "means" and "includes", see JF Burrows and RI Carter *Statute Law in New Zealand* (4th ed, LexisNexis, Wellington, 2009) at 419-421.

33 Compare the Legislative Instruments Act 2003 (Cth), ss 10-11, providing for the Attorney-General to certify whether or not an instrument is a legislative instrument. In practice, this mechanism is not practicable because of the quantities of instruments made both before and after commencement of the 2003 Act. Anthony Blunn, Ian Govey and John McMillan *2008 Review of the Legislative Instruments Act 2003* (Legislative Instruments Act Review Committee, 31 March 2009) at [1.4] recommend that it be repealed. The discretion in s 14 of the Acts and Regulations Publication Act 1989 is also exercisable by the Chief Parliamentary Counsel. In 1989, it was accepted that in principle it is for the courts to make final decisions about the meaning and application of legislation: Regulations Review Committee "Report on Proposals for a Regulations Bill" [1986] I AJHR 16B at [16.1]. See also Gordon Cain *Regulation-making Powers and Procedures of the Executive of New Zealand* (Legal Research Foundation, University of Auckland, 1973) at [5.122] ("the other jurisdictions mentioned ... confer no power on a delegate to decide what is a regulation ... the subject is better protected if this decision is left to the Court").

under s 6 of the Regulations Act 1936 (NZ),³⁴ complied with sufficiently by and on publication of "a notice in the *Gazette* of the regulations having been made and of the place where copies of them can be purchased".³⁵

Under ss 5 and 7(4) of the Regulations Act 1936 (NZ), prima facie evidence of any regulations, or of a reprint under the Act of regulations and of amendments to them incorporated in the reprint, could be given in all courts and in all legal proceedings by producing a copy, purporting to be printed under the Act, of the regulations or reprint.³⁶

The first "regulations" in the SR series, with the serial number "SR 1/1936",³⁷ amended licensing fees in principal regulations made in 1927 for trout-fishing in the Waimarino Acclimatization District and its waters.³⁸ The first s 6 *Gazette* notice, of the making of SR 1/1936, was on page 1585 of the 13 August 1936 *Gazette* (No 54 of 1936), and advised that "[c]opies can be purchased at the Government Printing and Stationery Office, Lambton Quay, Wellington. ... Copies

34 Compare Acts and Regulations Publication Act 1989 (NZ), s 13.

35 But "regulations" under s 2(1)(b) could, in the relevant empowering Act, confusingly be stated to be instruments styled as, or made by way of, a "notice in the *Gazette*".

36 Cain, above n 33, at [5.125] noted that reprints under the 1936 Act of regulations not wholly published in the SR series were rare (for example, Immigration Restriction Regulations 1930 (Reprint) SR 1949/44, Moneylenders Regulations 1934 (Reprint) SR 1962/42, Weights and Measures Regulations 1926–1951 (Reprint) SR 1967/34, Mining Regulations 1926 (Reprint) SR 1968/28) and called for an early official reprint of all regulations in force, whether in the *Gazette* or in the SR series. See also Parliamentary Counsel Office *Public Access to Legislation – A Discussion Paper for Public Comment* (Parliamentary Counsel Office, September 1998) at [5.1.4]. Geoff Lawn "Improving Public Access to Legislation: the New Zealand Experience (So Far)" (2005) 6 UTS Law Review 49 notes that in the 66 years from 1936–2002, the New Zealand Law Drafting Office (LDO) or Parliamentary Counsel Office compiled only 220 hard copy official reprints of statutory regulations. Section 3 of the Acts and Regulations Publication Amendment Act 1999 repealed s 15 of the principal Act (based on s 7(1)–(3) of the Regulations Act 1936) because, as the Law Commission recommended in *Legislation and its Interpretation*, above n 23, at 12, it was unnecessary. Reprints of regulations after 31 December 1999 thus include no Attorney-General's certification (compare, for example, Electoral Regulations 1996 (Reprint) SR 2002/202 with Water Power Regulations 1934 (Reprint) SR 1954/205).

37 SR numbering changed, so the year of making precedes the serial number, with and after The Electrical Wiring Regulations 1935, Amendment No 1 SR 1938/1. The Law Commission suggested no statutory basis was needed for numbering in Law Commission *Legislation and its Interpretation*, above n 23, at 12, cl 5 and footnote 5.

38 The principal regulations are published in (29 September 1927) *New Zealand Gazette* at 2937.

may be ordered by quoting above serial number."³⁹ On the first page of that edition of the *Gazette*, the Government Printer, George H Loney, described as follows the effect of the Regulations Act 1936 (NZ):⁴⁰

Statutory Regulations, 1936–37

Under the Regulations Act, 1936, statutory regulations of general legislative force are (subject to special exceptions) no longer to be published in the *New Zealand Gazette*, but will, for greater public convenience, be issued as a separate series by the Government Printer.

It is recognised that the written law is not contained in the statute-book alone. The regulations made under authority of Acts of Parliament have themselves the force of law, and in many cases no statement of the law is complete that overlooks the regulations for the time being in force. Many persons are more intimately concerned with the details of the regulations than with the general provisions of the statutes.

Regulations will be available under any one or more of the following arrangements :—

- (i) All regulations serially as issued.
- (ii) In periodical bound volumes, as completed.
- (iii) All regulations serially as issued and a periodical bound volume as in (i) and (ii) above on a combined subscription basis.
- (iv) Separate regulations, as ordered.

All regulations will be forwarded to subscribers promptly on the day following notification of the making thereof in the *Gazette*, suitably punched for interim filing. A binder for filing the punched regulations will be available at any early date.

The separate price of each set of regulations will appear thereon, facilitating the purchase of extra copies.

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- 39 Under the Regulations Act 1936 (NZ), s 6 notices (of the making of "regulations") were at first given separately for each item of subordinate legislation. An early (possibly even the earliest) example of a combined notice in tabular form (of the making of 11 items) is published in (12 September 1940) *New Zealand Gazette* at 2316. Notices under s 6 (and its successor, s 12 of the Acts and Regulations Publication Act 1989) were importantly linked to s 46 of the Evidence Act 1908, which ensured that the notice of the making of the regulations gave rise to presumptions not only that they were made but that they were lawfully made. An example is *Buller Hospital Board v Attorney-General* [1959] NZLR 1259 (CA). The Law Commission said of s 46 that "a presumption of lawfulness, as opposed to a presumption that the act was in fact done, is unnecessary. It does not add anything to the common law presumption of the regularity of official acts and is best considered as a matter of substantive administrative law": Law Commission *Evidence. Volume 2: Evidence Code and Commentary* (NZLC R55, 1999) at 275. See now the Evidence Act 2006, s 142(1) and (2). For an example of a second s 12 notice being given because "copies of the rules made available at the date of [the initial s 12] notice were not correct copies of the rules that were made", see (14 March 2002) *New Zealand Gazette* at 661.
- 40 No 54 (13 August 1936) *New Zealand Gazette* at 1579. George H Loney succeeded George Skinner as Government Printer on 1 June 1933. Loney had been Superintendent for 11 years – from June 1922. A "comp" or "compositor" by trade, he had a flair for the business side of Printing Office administration and was remembered by some as a "hard" businessman: Wilbur Glue *The History of the Government Printing Office* (Government Printer, Wellington, 1966).

There will be issued monthly a brief cumulative index, and on completion of each volume a title-page, table of contents, index, table of statutes, and table of previous regulations revoked or amended by the year's regulations.

The Act applies to all regulations made on or after 1st August, 1936. It is proposed, therefore, that the first period of subscription and the first periodical volume should be for the rest of 1936 and the whole of 1937.

From the outset of the SR series, a considerable number of regulations were directed to be omitted from it "in every case because", as Table No 6 of the first volume of the series explained, "it was considered that to include them ... would detract from rather than increase the convenience of that publication".⁴¹ The last such "exempted instruments" list appeared in 1950 and included 179 exempted instruments published in full ("*in extenso*") in the *Gazette*.⁴²

IV Drafting: Transfer in 1950 to the Law Drafting Office (renamed Parliamentary Counsel Office in 1973) of the Drafting of Regulations

James Christie, Counsel to the Law Drafting Office (LDO), said in 1939 that:⁴³

... the drafting of regulations is a matter that oftentimes does not receive the attention that its importance warrants. In New Zealand, at any rate, regulations are frequently drafted by the Department charged with the administration of the Act under which they are made, and are merely revised by the Law Officers. An effort has been made at times to have the first set of regulations under a new Act of major importance drafted by the draftsman of the Act itself. This secures a certain degree of uniformity of language and arrangement in the Act and the regulations, and it is a practice that could well be extended; there is always, however, the practical difficulty that as soon as the drafting staff has finished with the work of one session it is fully engaged in preparing for the next.

41 *Statutory Regulations 1936–1937* SR 1936–37, Table No 6, at preliminary page li.

42 Regulations Review Committee "Report on Proposals for a Regulations Bill" [1986] I.5 AJHR 16B at [20.1]. Exemptions after 1950 were not made by reference to the 1936 Act since s 3(1) of that Act was regarded as "directory" not "mandatory". Compare *Victoria University of Wellington Students Association Inc v Shearer* [1973] 2 NZLR 21 (SC) at 25 per Wild CJ [*Victoria University of Wellington Students Association Inc v Shearer* (SC)] ("the Legislature expressly imposes on the Government Printer by name a duty to number, print and sell regulations").

43 J Christie "Review of Legislation, 1937: British Empire: New Zealand" (1939) 21(1) J Comp Leg 304. The Law Drafting Office (LDO) was established on 5 November 1920 by s 2(1) of the Statutes Drafting and Compilation Act 1920 and on 21 November 1973 renamed (by s 2 of the Statutes Drafting and Compilation Amendment Act 1973) the Parliamentary Counsel Office. In 1944, Dr O C Mazengarb (KC, 1947) urged that "regulations should not be drafted in departmental offices ... many... regulations contain internal evidence ... that they have been drafted by laymen." OC Mazengarb *Evening Post* (vol CXXXVII, issue 15, Wellington, 28 June 1944) at 6. See also the response in *Evening Post* (vol CXXXVIII, issue 10, Wellington, 12 July 1944) at 6.

Dartrey Adams, Law Draftsman, said in a 1947 lecture on "the handling of draft legislation" that some regulations were drafted in the LDO, and others were drafted in the Department concerned and settled in the Crown Law Office. Adams said that, in 1947, the LDO drafted:

- all regulations under the Emergency Regulations Act 1939; and
- first regulations under a new statute; and
- other regulations as arranged.

He added that, if regulations had been drafted in a Department, and then settled by the Crown Law Office, the relevant explanatory memorandum for Ministers was required to state those facts.

EJ Haughey advised in 1961:⁴⁴

Up to 1950 the Crown Law Office attended to the compilation of [reprints, under the Regulations Act 1936, of regulations] as well as to the revision of new regulations promoted and drafted by Government Departments, but in that year the drafting of all regulations and the compilation of the reprints was taken over by the Law Drafting Office.

This "transfer" is supposed to have been by way of a direction (assigning the duty of drafting regulations to the LDO's Bill Drafting Department to perform) given by Attorney-General, the Hon Thomas Clifton Webb under s 4(1)(e) of the Statutes Drafting and Compilation Act 1920 (NZ).⁴⁵ No formal written direction of that kind is available today. But documents from 1950 that do remain available today suggest that regulations were at first to be "vetted", rather than required to be drafted, by the LDO.

A 19 January 1950 memo to the Prime Minister, the Rt Hon Sidney Holland, from the Attorney-General, the Hon Thomas Clifton Webb, refers to a Cabinet decision on 21 December 1949 that "all regulations which are to go before Cabinet should first be 'vetted' [by or on behalf of the

44 Edward Haughey *Crown Law Practice in New Zealand* (Crown Law Office, Wellington, 1961) at 35.

45 Walter Iles CMG QC "The Departmental Solicitor and the Parliamentary Counsel Office", extracts from which are reproduced in Legislation Advisory Committee *Legislative Change: Guidelines on Process and Content* (revised ed, December 1991) LAC Report No 6 Appendix B at 61 ("In the 1950s the then Attorney-General became dissatisfied with the variety of styles and he directed that no regulations were to be submitted to Cabinet unless they had been drafted in the Parliamentary Counsel Office"). See also Iles (1991) 12 Stat LR 16 at 21 ("The Attorney-General ... dissatisfied with the variety of styles and standards ... directed that no regulations were to be submitted to Cabinet unless they had been drafted in the PCO. That direction is still being observed"). Orr and Bradshaw in 1986 recommended that to avoid backlogs drafting of all regulations "other than those having far-reaching effect" should be transferred from PCO to a "Regulations Branch" of the proposed new Attorney-General's Department: GS Orr and DJ Bradshaw *A Review of Government Legal Services* (State Services Commission, Wellington, 1986) at R31, 7 and ch 7. Geoffrey Palmer later re-proposed this as a unified "Law Department": Geoffrey Palmer "The Provision of Legal Services to Government" (2000) 31 VUWLR 65.

Attorney-General]]. A few days earlier, on 13 January 1950, a memo for Permanent Heads on explanatory notes for Regulations said:⁴⁶

A draft of what is proposed should be submitted for legal revision, together with the draft of the enactment, and should not be brought before Cabinet unless approved in the same way as the text.

On 22 March 1950, Secretary of the Cabinet, Foss Shanahan, recorded in Cabinet Office Circular CO (51) 2 that:⁴⁷

Cabinet have directed that all draft Regulations shall be submitted to the Law Draftsman for his consideration and approval as to form before they are submitted to Cabinet. ... It is requested that all Permanent Heads will note accordingly and arrange that when proposals for Regulations are approved by the Minister they are referred to the Law Draftsman.

And on 24 May 1950, the Attorney-General sent the Solicitor-General, Herbert Evans QC, a memo in the following terms on the drafting and "vetting" of regulations:⁴⁸

I understand that as a result of a rule of practice that I have instituted, some doubt has arisen as to who now has the responsibility for the drafting of Regulations.

I understand that the practice in the past has been for the various departments to have the Regulations drafted by the Crown Law Office, and I emphasise that I do not wish this practice to be altered in any way.

All I desire is that, for the sake of uniformity of draftsmanship – on which I have always laid emphasis – the Regulations (by whomsoever drafted) should be checked by the Law Drafting Office. This can be done when the Regulations are submitted by the appropriate Minister to me for approval.

Perhaps the arrangements for "vetting" by the LDO crystallised rapidly into a formal written direction for drafting by the LDO. In any case, a snapshot of the position in 1958 shows that, by then, the LDO had clear responsibility for the drafting of regulations and "other instruments of a legislative character". Rule 6 of the Cabinet Rules for the Conduct of Crown Legal Business 1958 made it clear that instruments dealt with in the LDO need not be referred in draft form to the Solicitor-General.⁴⁹ It stated that instruments dealt with in the LDO were:⁵⁰

46 (DIA Circular No 1950/1, 13 January 1950).

47 Cabinet Office Circular (22 March 1950) CO 51/2.

48 Memo from Attorney-General to Solicitor-General regarding the procedure relating to the promulgation of regulations under the Regulations Act 1936 (24 May 1950): Archives New Zealand A8117663, W3990, 36 9/1/1.

49 See now No 63 (6 May 1993) *New Zealand Gazette* at 1166; Cabinet Office *Cabinet Manual 2008* Appendix C <www.cabinetmanual.cabinetoffice.govt.nz>.

... those generally or particularly assigned to that Office by the Prime Minister or the Attorney-General, and include all regulations and other instruments of a legislative character, including those intended for publication in the *Gazette*.

V *Tabling: Regulations Amendment Act 1959*

As first enacted, the Regulations Act 1936 (NZ) contained no provision on "regulations" being laid before, or presented to, the House of Representatives. Various Acts required items of subordinate legislation to be so laid or presented, usually within a stated period.⁵¹ However, in 1959, the Regulations Act 1936 (NZ) was amended by the addition of a new s 8 on "Laying of regulations before Parliament".⁵² Section 8 required tabling within 28 days of making if Parliament was in session, or otherwise within 28 days after commencement of the next session, but only if another Act required certain "regulations" to be laid before Parliament, and did not "expressly provide" some other time within which those "regulations" were required to be tabled. On 1 January 1987, a new s 8 of the Regulations Act 1936 was substituted by an Act divided from the Bill for the Constitution Act 1986. The new s 8 required regulations to be laid before the House of Representatives not later than the 16th sitting day of the House of Representatives after the day on which they are made. The omission of the reference to Parliament and substitution of a reference to the House of Representatives were consequential on terminological changes made by the Constitution Act 1986.⁵³ The omission of the references to sessions and substitution of a reference

50 Cabinet Rules for the Conduct of Crown Legal Business 1958 SR 1958/105, r 6.

51 Examples include the Post Office Act 1900 (NZ), s 116(1) (within 14 days of gazettal if Parliament sitting, otherwise within 14 days of commencement of next session); Mining Act 1905 (NZ), s 359(b) (28 days after gazettal if Parliament sitting, otherwise within 14 days of commencement of next session); Electoral Act 1927 (NZ), s 205(3) (within three weeks of making if Parliament sitting, otherwise within three weeks after the beginning of Parliament's next session); and Primary Products Marketing Act 1953 (NZ), s 3(6) (16th sitting day after making). See also the tabling provisions referred to in cls 26(2) and 27(a) and (b) of the Statutory Publications Bill 1989 (164–1) and those repealed by s 11 and the schedule of the Regulations (Disallowance) Act 1989. Section 15(2) of the Utilities Access Act 2010 requires tabling not within "16 sitting days of the House", but instead within "16 days", after making. See also footnote 92 below.

52 See Regulations Amendment Act 1959 (NZ), s 2, divided out of the Statutes Amendment Bill 1959.

53 Under s 4A of the Acts Interpretation Act 1924, inserted on 1 January 1987 by an Act divided from the Bill for the Constitution Act 1986 (and also consequential on the Constitution Bill's rationalisation of the terms "Parliament" and "House of Representatives"), "[a]ny requirement imposed by or under any enactment to lay before or table in Parliament any Order in Council, regulation, notice, report, accounts, or other instrument shall be deemed to be a requirement to lay such Order in Council, regulation, notice, report, accounts, or other instrument before the House of Representatives." David McGee says "[s]ome statutes speak of documents being 'laid' before the House, rather than 'presented' to it. In modern parliamentary practice there is no difference between laying a document before the House and presenting it to the House [*R v Immigration Appeal Tribunal, ex parte Joyles* [1972] 1 WLR 1390 (QB)]. The current preference is generally to refer to 'presenting' a document to the House. A more colloquial term, with the same meaning, is 'tabling' it." David McGee *Parliamentary Practice in New Zealand* (3rd ed, Dunmore Publishing Ltd, Wellington, 2005) at 530.

to sitting days were designed to eliminate problems caused by a time limit defined by reference to sessions. These problems could arise where regulations were made late in a session (such as on the last day) or where there was a one-day session.

The 1959 tabling requirement was soon applied more widely. On 29 June 1961 the House by order appointed a five-member select committee, chaired by the Speaker, Hon Ronald Macmillan Algie, "to consider the desirability of introducing an effective form of parliamentary control of delegated legislation".⁵⁴ The Committee supported tabling because it helped to ensure that the House and the public were aware that regulations have been made, and made them available for debate in the House. The Committee thus considered, and recommended, that the provisions requiring regulations to be laid on the Table should be extended to cover all regulations within the meaning of, and issued pursuant to, the Regulations Act 1936.⁵⁵ The recommendation was implemented by the Regulations Amendment Act 1962 (NZ), which for that purpose on 30 October 1962 substituted a new s 8 of the Regulations Act 1936 (NZ). It was also recommended that the Statutes Revision Committee, on a reference for the purpose, consider (and, if necessary on all or any of three stated grounds,⁵⁶ draw the House's special attention to) "any regulation within the

54 Ronald Macmillan Algie, Auckland's first professor of law in 1920, won the Remuera seat in 1943, became Minister of Education in 1949 and added other portfolios in 1951. He drove the 1952 Constitutional Reform Committee's report on alternatives after abolition in 1950 of the Legislative Council (Upper House). He accepted the Speakership reluctantly in 1960 aged 72, but on retiring in 1966 was lauded as "an outstanding Speaker": Hugh Templeton "Algie, Ronald Macmillan 1888 – 1978" *Dictionary of New Zealand Biography* <www.dnzb.govt.nz>. See also John E Martin *The House: New Zealand's House of Representatives* (Dunmore Press, Palmerston North, 2004) at 258; Harshan Kumarasingham *Onward with Executive Power* (Institute of Policy Studies, Victoria University of Wellington, 2010) at ch 4.

55 "Report of the Delegated Legislation Committee" [1962] I AJHR 18 at [18] and [28(3)]. John Kersell, a Canadian political scientist, who had done his LSE doctorate on the topic, noted New Zealand lacked a general requirement of laying regulations before Parliament and recommended a comprehensive system of parliamentary scrutiny in John Kersell *Parliamentary Supervision of Delegated Legislation: The United Kingdom, Australia, New Zealand and Canada* (Stevens and Sons Ltd, London, 1960).

56 Alex Frame and Robert McLuskie "Review of Regulations under Standing Orders" (1978) NZLJ 423 at 425, referring to Clerk of the House Mr Charles Littlejohn. Note that the three grounds track closely ones used by the Australian Senate and United Kingdom House of Commons.

meaning of and published pursuant to the Regulations Act 1936". The House agreed, and adopted the recommended new Standing Orders.⁵⁷

Dennis Pearce, then a Reader in Law at Australian National University, noted in the 1977 first (and only trans-Tasman) edition of *Delegated Legislation in Australia and New Zealand*,⁵⁸ "no consequences are visited upon a failure to table the regulations and the provision [in s 8 of the Regulations Act 1936 (NZ)] is, in fact, treated as directory and not mandatory".⁵⁹ In *New Zealand on Air v Roberts*, the defendant was said to be liable for a fee under the Broadcasting (Public Broadcasting Fees) Regulations 1989.⁶⁰ A defence was raised that the regulations were void due to them not being laid before the House. The regulations were laid before the House two days after required pursuant to s 8 of the Regulations Act 1936 (NZ). The Auckland District Court held that s 8 of the Regulations Act 1936 (as substituted by s 26 of the Constitution Act 1986) did not provide for a sanction for non-compliance. A sanction would have made the duty to lay mandatory. Judge Kerr noted the change in the Regulations (Disallowance) Act 1989 direction by Parliament to make tabling of regulations mandatory as opposed to directory as it was under Regulation Act 1936. Thus the regulations were not void, but despite that the de minimis rule would apply in this case because tabling of regulations was only delayed by two days. In *Haliburton v Broadcasting Commission*, the

57 "Standing Orders of the House of Representatives" [1962] I AJHR 18 at [28]-[29]; Standing Orders (SOs) of the House of Representatives relating to Public Business (as reprinted and renumbered June 1963), SO 91(6)(a), SO 361, and SO 362. See also CC Aikman and RS Clark "Some Developments in Administrative Law" (1965) 27(2) NZJPA 45 at 60-64. DJ Hewitt argued for a parliamentary committee scrutinising regulations as an additional safeguard in New Zealand: DJ Hewitt "Rule by Regulation" (1944) 20 NZLJ 200. See also Ronald Algie MP "A Critical Examination of the Functioning of Parliament" (1946) 8 NZJPA 14 at 18-20. Aikman points out that s 429(b) of the Mining Act 1927 and s 42(6) of the Petroleum Act 1937, required specified items of delegated legislation to be referred to a parliamentary committee: Aikman, above n 11, at 138.

58 Dennis Pearce *Delegated Legislation in Australia and New Zealand* (Butterworths, Sydney, 1977) at [185]. Professor ATH Smith indicates that in searching for a satisfactory subject for his Cambridge PhD dissertation (on jurisdiction) Robin Cooke started with (and had in mind when he left New Zealand), but rejected, "Delegated Legislation": ATH Smith "Lord Cooke and Cambridge" (2008) 39 VUWLR 27 at 32.

59 See also Regulations Review Committee "Report on Proposals for a Regulations Bill" [1986] I AJHR 5.16B at [23.1] ("It has been generally accepted that s 8 is directory not mandatory. No sanction is attached to failure to lay"); Aikman, above n 11, at 140 ("there is no New Zealand authority that suggests that failure to lay the regulation on the Table ... renders the regulation invalid"). In *Whakatane DC v BoP DC* [2010] NZCA 346 at [21], Baragwanath J doubts the utility of the "mandatory" vs "directory" distinction.

60 *New Zealand on Air v Roberts* [1998] DCR 869 (DC).

High Court similarly declined to hold invalid regulations not presented to the House until the 20th sitting day of the House after the regulations were made.⁶¹ Morris J said:

... courts should not expect strict compliance with s 8 ... I think it is unlikely Parliament intended the regulations to become null and void. ... I can see no justification for holding the regulations invalid when the delay in question was only a few sitting days.

VI Power to Revoke Spent Instruments: Regulations Amendment Act 1966

On 20 October 1966, the Regulations Act 1936 (NZ) was amended by the addition of s 9, which gave "power to revoke spent regulations and other instruments". The explanatory note to the Statutes Amendment Bill 1966, which included the amendment, said:

The main purpose of this amendment is to enable the revocation, by one Order in Council, of a number of spent or obsolete regulations or other instruments, instead of each one having to be separately revoked under the authority of the enactment by virtue of which it was made. It will also enable the formal revocation (and consequent elimination from the printed volumes) of regulations and instruments that have ceased to have legal effect because of the repeal of the Acts under which they were made.

The power of revocation was "in addition to [(and not subject to any procedural preconditions in)] the provisions of any other enactment relating to the revocation of any regulations".⁶²

Interestingly, "regulations" revocable under s 9 included not only "regulations" within the meaning of s 2 of the Regulations Act 1936 (NZ), but also (under s 9(3)) an instrument that is,—

- (a) any Order in Council or Proclamation; or
- (b) any notice, warrant, order, direction, determination, rules, or other instrument of authority—made or given by the Governor-General or any Minister of the Crown or any person in the service of the Crown, or made or given under any Act of the United Kingdom Parliament.

VII Discretion to Publish "Non-Regulations": Regulations Amendment Act 1970

The Law Commission noted in 1989 that "[o]ver the years it has been found convenient to include in the statutory regulations series instruments which are not regulations within the definition

61 *Haliburton v Broadcasting Commission* [1999] NZAR 233 (HC). The point was not before the Court of Appeal: *Haliburton v Broadcasting Commission* CA14/99, 15 July 1999. "David Graham McGee, Clerk of the House of Representatives, swore when he makes the formal notes in the Journals to the House and on the House's Notice Paper (1989 Order Paper) the regulation is regarded as having been presented to the House. Counsel for the defendant submitted this is the procedure required under the Regulations Act 1936": *Haliburton v Broadcasting Corporation* [1999] NZAR 233 (HC) at 239.

62 Regulations Act 1936, s 9(2) (as added on 20 October 1966 by s 2 of Regulations Amendment Act 1966).

in s2 of the Regulations Act 1936".⁶³ Section 6A of the Regulations Act 1936 was inserted by the Regulations Amendment Act 1970 (assented to on 27 November 1970) with retrospective effect "as from the commencement" (on 1 August 1936) of the 1936 Act. Section 6A affected instruments (including *Gazette* notices) required to be (and reliant for their legal effectiveness on being) published or notified in the *Gazette*.⁶⁴ If these instruments were published validly in the SR series, that publication was (under s 6 of the 1936 Act) sufficient compliance with the requirement that these instruments be published or notified in the *Gazette*. But if these instruments were not published validly in the SR series, the requirement for publication or notification in the *Gazette* was not properly complied with and the validity of the instruments was accordingly doubtful, in particular because a court may have held that no valid reasonable steps had been taken to bring the purport of the instrument to the attention of those likely to be affected by it.⁶⁵ Hence the Regulations Amendment Act 1970 validated the discretionary inclusion in the SR series since 1936 of instruments possibly not "regulations" as defined because (in the words of the explanatory note to the Bill for the 1970 Amendment Act) "doubts have now arisen as to whether in some cases they were 'regulations', because there is some doubt as to whether they 'extend or vary the scope or provisions of any Act'".⁶⁶

63 Law Commission *Legislation and its Interpretation*, above n 23, at 11-12, Appendix A at [3] (commentary to cl 15 of the draft Bill).

64 Regulations Review Committee "Report on Proposals for a Regulations Bill" [1986] I AJHR 5.16B at [21.1] regarded s 6A as having 2 defects: Firstly, s 6A was limited to instruments required to be published or notified in the *Gazette*; secondly, s 6A did not make clear who exercised its discretion to publish in the SR series (a discretion in practice exercised by the Chief Parliamentary Counsel).

65 Contrary to the rule in *Johnson v Sargant & Sons* [1918] 1 KB 101, as discussed in Francis Bennion *Bennion on Statutory Interpretation* (5th ed, LexisNexis Butterworths, London, 2008) at code s 68 and at 273-274. See for example the unsuccessful argument in *Beattie v Ministry of Transport* [1973] 1 NZLR 20 (SC). The Full Court of the Supreme Court held that "[t]he *Gazette Notice* [(of the making of the notice that is The Transport (Breath Tests) Notice 1971 SR 1971/92)] in our opinion adequately complies with ss 4 and 6 of the Regulations Act 1936 and renders unnecessary a review of the retrospective amendment thereto introduced by s 2 of the Regulations Amendment Act 1970."

66 Statutes Amendment Bill 1970 (105-1) (explanatory note to cl 133), inserting new the s 6A of the Regulations Act 1936. In *Smitty's Industries Ltd v Attorney-General* [1980] 1 NZLR 355 (SC) at 358, Vautier J noted that a bylaw published in full in the No 37 (4 May 1978) *Gazette* at 1324 was later re-made with essentially identical wording and published in the SR series. See The National Roads Board Bylaw No 1 1978 SR 1978/172. His Honour added: "There is no explanation ... why a bylaw in exactly the same terms was re-made in this way and then promulgated in terms of the Regulations Act 1936 [(s 2(1)(b) or s 6A)]. It may well be that in this way the Board at least avoided the bylaw being attacked on the basis that it was unreasonable. (In *Kruse v Johnson* [1898] 2 QB 91 (Div Ct) it was established (at 108) that: '[A] bylaw to be valid must, among other conditions, have two properties – it must be certain, that is, must contain adequate information as to the duties of those who are to obey, and it must be reasonable.') I am not entirely sure that it did achieve even this but [counsel accepted] that the bylaw in this way acquired the force of a statutory regulation [and therefore did not argue] the question of unreasonableness or the effect of the Bylaws Act 1910." *Smitty's Industries Ltd v Attorney-General* [1980] 1 NZLR 355 (SC) at 365-366. A

VIII Rules Regulating Courts' Practice and Procedure

The case of *Victoria University of Wellington Students Association Inc v Shearer (Government Printer)* confirmed the anomalous position of the High Court Rules.⁶⁷ Those rules form part of (because they are set out in sch 2 of) the Judicature Act 1908 (NZ), so access to them was governed by s 13 of the Acts Interpretation Act 1924 (NZ), which provided that "[i]t shall not be necessary to gazette the Acts of the General Assembly, but copies of all such Acts shall be procurable by purchase at the office of the Government Printer." Wild CJ contrasted s 13 with s 3(1) of the Regulations Act 1936 (NZ) and said that:

... whereas in [s 3(1)] the Legislature expressly imposes on the Government Printer by name a duty to number, print and sell regulations, s 13 merely names the office of the Government Printer as the place where copies shall be procurable by purchase. In the light of that contrast and the statutory history of s 13 I think that responsibility under s 13 rests upon the Crown and that the reference to the office of Government Printer is merely in the nature of a signpost ... [s 13] falls short of designating the Government Printer to perform a duty which will be enforced by mandamus.

The students association sought mandamus because they could not access the (then) Code of Civil Procedure in up-to-date form. As Wild CJ noted in 1972:⁶⁸

When the Public Acts of New Zealand were reprinted in the 1931 Reprint the editors explained that 'The Second Schedule to the Judicature Act 1908 ... has not been reprinted owing to the many alterations that have been made therein from time to time: for the rules now in force reference should be made to Stout & Sim's *Supreme Court Practice*.' Substantially the same reason was given for the

regulation that is not a bylaw is invalid for unreasonableness only if ultra vires as "beyond the limits of reason": GDS Taylor and JK Gorman *Judicial Review: A New Zealand Perspective* (2nd ed, LexisNexis New Zealand Ltd, 2010) at [14.34].

67 *Victoria University of Wellington Students Association Inc v Shearer* (SC), above n 42; *Victoria University of Wellington Students Association Inc v Shearer* [1974] 2 NZLR 138 (CA) (CA affirmed Wild CJ's decision in SC). The Judicature (High Court Rules) Amendment Act 2008 (NZ) on 1 February 2009 re-enacted (after 46 sets of amendments made by amendment rules since 1 January 1986) the High Court Rules substituted on 1 January 1986 by the Judicature Amendment Act (No 2) 1985 (NZ). See "A New Code of Civil Procedure" [1978] NZLJ 431; Barker "Rules Committee Function" [1985] NZLJ 288; Nigel Wilson "The Evolution of the High Court Rules" (1988) 14 NZ Rec Law Rev 203; *Slebos v Antrone Holdings Ltd* HC Hamilton A71/98, 8 Feb 1999 at 34-35 per Penlington J.

68 *Victoria University of Wellington Students Association Inc v Shearer* (SC), above n 42, at 22-23 per Wild CJ. *Sim's Court Practice* (LexisNexis) is still available as a 2-looseleaf volume, online, or CD service updated regularly. *McGechan on Procedure* (Thomson Reuters, formerly Brookers) is another well-known online and hardcopy looseleaf civil procedure commentary also updated regularly. The Attorney-General (a contributing author) recounts its history in his 1 December 2008 preface. For the history of Stout and Sim, see Robert Stout and William Alexander Sim *The Practice of the Supreme Court and Court of Appeal of New Zealand* (James Horsburgh, Dunedin, 1891). For the history of *McGechan on Procedure*, see Adlam *Local to Global – The History of Brookers 1910–2010* (Brookers, Wellington, 2010) at 10, 43 and 54-56.

omission of the Code from the later New Zealand Statutes Reprint published in 1957... counsel, solicitors and indeed the Judges have for long relied entirely on Sim's *Practice and Procedure* (now in its 11th edition) in which the Code has been printed in its current form at the time of successive editions, with headings and notes to the rules, and for which a service showing amendments to the rules is made available by the publishers.

So why do the High Court Rules form part of the Judicature Act 1908? Schedule 2 of the Judicature Act 1908 (NZ) consolidated the "Code of Civil Procedure" in sch 2 of the Supreme Court Act 1882 (NZ), which replaced the "General Rules of Procedure" specified in sch 2 of the Supreme Court Act 1860 (NZ) (24 Vict No 17), which replaced the Schedule's *Regulae Generales* of the Supreme Court Procedure Act 1856 (NZ), which replaced the "rules for practice" settled by the Judges under s 25 of the Supreme Court Ordinance 1844 (NZ) (Sess 3 No 1) and confirmed by (and included in) the Supreme Court Rules Ordinances 1844 (NZ) (Sess 4 No 1) and 1846 (NZ) (Sess 7 No 12). By contrast to "the High Court Rules", s 9 of the Magistrates Courts Act 1893 (NZ) empowered the Governor by Order in Council to make, and required to be gazetted, rules "regulating the practice and forms of all proceedings" in such Courts.⁶⁹

Former High Court Judge based in Christchurch, and chair of the revision committee, Mr Nigel Wilson QC explains that then Chief Parliamentary Counsel, Mr Walter Iles, renamed the revision committee's proposed new 1985 code of civil procedure "the High Court Rules", and that Mr Iles' redraft of that new code was "superior in clarity and ease of understanding".⁷⁰ Mr Wilson adds that the 1985 rules (which began with the establishment in 1969 of a Rules Committee Rules Revision Subcommittee) were enacted by Bill despite Mr Iles' initial proposal:⁷¹

69 Magistrates' and District Courts Rules include those at Vol III (18 December 1928) *New Zealand Gazette* at 3535; the Magistrates' Courts Rules 1948 SR 1948/197; the District Courts Rules 1992 SR 1992/109; and the District Courts Rules 2009 SR 2009/257.

70 Nigel Wilson "The Evolution of the High Court Rules" (1988) 14(6) NZ Rec Law 203 at 213.

71 The Bill for the Judicature (High Court Rules) Amendment Act 2008 was introduced on 5 August 2008, read a first time and referred to Select Committee on 26 August 2008, and got Royal assent on 25 September 2008. In its 8 September 2008 report on the Bill, the Justice and Electoral Committee recommended a small number of amendments. In the Bill's second reading on 11 September 2008, Christopher Finlayson MP said the Bill "has had, by the standards of this House at least, a very speedy passage, but there was a very lengthy gestation period. As I said in my first reading speech, the [High Court Rules revision] project really started in 2002, and got under way properly in 2004." The Rules Committee was established by the Judicature Amendment Act 1930, but in 1999 absorbed the District Courts Rules Committee under the Judicature (Rules Committee and Technical Advisers) Amendment Act 1999 (NZ) and the District Courts Amendment Act (No 2) 1999 (NZ): Eichelbaum "The Courts: An Era of Change" in Ian Barker and G Wear (eds) *Law stories: Essays on the New Zealand Legal Profession 1969-2003* (LexisNexis, Wellington, 2003) at 5-6. The explanatory note to the Bill for the Judicature (High Court Rules) Amendment Act 2008 (NZ) said "there is a small number of provisions which cannot be made by order in council. These include attachment orders and service outside of jurisdiction provisions". In *CH and DL Properties Ltd v Christchurch District Licensing Agency*, Fogarty J said "[t]he High Court Rules are a

... to divorce the Rules altogether from the Judicature Act and to promulgate them simply as regulations under the Regulations Act. His first draft proceeded on the assumption that this would be done. There were attractions in this proposal. It would avoid the delay attending passage through Parliament and the risk of inept amendment in the Committee stage[s], and would facilitate re-publication with amendments from time to time; but to the Rules Committee these advantages were far outweighed by the risk of challenges of ultra vires which could stall the machinery of civil justice while they were pursued from the High Court to the Court of Appeal and even to the Privy Council. Argument over this question continued until, with the change of government in 1984, the new Attorney-General ruled in favour of the Rules Committee but included provision in the Amending Act to enable the Rules to be reprinted separately from the Act.

Since 1 January 1986, therefore, s 51A of the Judicature Act 1908 has permitted publication of the Rules under the Regulations Act 1936, and then the Acts and Regulations Publication Act 1989, as if they were regulations subject to, or within the meaning of, those Acts.⁷²

IX Changes around the 1980s: 14-day "Rule" and Regulations Review Committee

On 24 March 1980, Cabinet Office Circular (80)5 added safeguards to Cabinet processes for approving "regulations".⁷³ Submissions for approval of regulations were to include specified matters, for example, details of the empowering provisions and of any consultation done on the proposed regulations.⁷⁴

form of subordinate legislation, inferior to a statutory provision. They cannot be construed to override Parliament's intention as to the scope of appeal." *CH and DL Properties Ltd v Christchurch District Licensing Agency* HC Christchurch CIV 2009-409-002906, 30 April 2010 at [32]. But see also *Reefdale Investments Ltd v CIR* (2004) 21 NZTC 18,683 at [4]–[7] per MacKenzie J, quoted in *Siemer v Paragon Services Ltd (in Liq and Rec)* HC Auckland CIV-2003-404-5782 21 June 2010 at [20] per Rodney Hansen J on the Rules' status as "something of a hybrid between primary and secondary legislation". The first official hard copy reprint of the Judicature Act 1908 (including sch 2) after 1908 is of the Act as at 1 August 1988, and is in the (brown volumes) rolling reprint series which began in 1979 in RS Vol 22 at 107. A second, of the Act as on 31 December 1999, is in RS Vol 40 at 327. Third and fourth hard copy official reprints (loose leaf) are of the Act as on 28 May 2005 and 4 May 2007.

⁷² The new s 51A that was substituted, on 1 January 2000, by s 8 of the Acts and Regulations Publication Amendment Act 1999 replaced the existing s 51A which unnecessarily duplicated the Acts and Regulations Publication Act 1989 and Evidence Act 1908, and instead simply provided that the rules, and any reprint of them, may be printed and published under s 14 of the Acts and Regulations Publication Act 1989 as if the rules were regulations within the meaning of that Act.

⁷³ Cabinet Office Circular (24 March 1980) CO 80/5.

⁷⁴ Cabinet Office Circular (80)5 (24 March 1980) at [(g)]. A predecessor to the 14-day "rule" of practice was first stated in, but is said to have pre-dated, the first (1979) edition of the *Cabinet (Office) Manual*. See also Tony Black "Inter Alia" [1980] NZLJ 161 at 162-163.

... as a matter of *general practice at least 14 days* must be allowed between the probable date of the notification of [the making of] the regulations in the *Gazette* and the date on which they come into force. (Regulations approved on a Monday are normally notified in the *Gazette* on Thursday of the same week.) The elapse of at least 14 days is most important and must be allowed whenever possible as it gives the public the opportunity to secure copies of new regulations. The Public and Administrative Law Reform Committee has ascertained that it can be a week or more after the date of notification in the *Gazette* before regulations become available in places outside Wellington.

The Standing Orders procedure, adopted in 1962, for scrutiny of delegated legislation by the Statutes Revision Committee was, up to 1985, used rarely. The Attorney-General in 1987, Hon Geoffrey Palmer, noted that:⁷⁵

The procedure existed from 1962 until 1985 but it was used on only eleven occasions in all that time. In most of those cases the Statutes Revision Committee took a modest and cautious view of its power. Nevertheless, it was made clear that the power to report adversely to the House on a regulation was one which would be availed of on the appropriate occasion.

Attorney-General Palmer continued:⁷⁶

In 1985, as a result of policy pledges in Labour's Open Government Policy, big changes were made. The Statutes Revision Committee made recommendations on changes to Standing Orders to 'enable a more effective and comprehensive parliamentary scrutiny and control' of delegated legislation. ... Part of the problem was that the Statutes Revision Committee had not really concentrated on regulations, it had too much other work to do. To remedy the situation a special Regulations Review Committee was recommended.

The Attorney reported happily in 1987 that:⁷⁷

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- 75 Alex Frame and Robert McCluskie "Review of Regulations under Standing Orders" [1978] NZLJ 423 discuss two of the first three uses of the scrutiny procedure, used first in respect of the Food Hygiene Regulations 1952 SR 1952/74, second in respect of the Rock Lobster Regulations 1969, Amendment No 8 SR 1976/293, and third in respect of the Wanganui Computer Centre Act Commencement Order 1977 SR 1977/8, and point out possible ambiguity in the procedures for references to the Statutes Revision Committee. Palmer *Unbridled Power* (2nd ed, Oxford University Press, Auckland, 1987) at 173 notes that the Statutes Revision Committee also scrutinised the Remuneration (New Zealand Forest Products) Regulations 1980 SR 1980/29 (revoked on 27 March 1980 by the Dangerous Goods (Class 2–Gases) Regulations 1980 SR 1980/45, before the Committee concluded its deliberations) and The Civil Aviation Regulations 1953, Amendment No 22 (1979/18). See also Tony Black "Regulations" (1980) NZLJ 305.
- 76 Statutes Revision Committee *First Report on Delegated Legislation* [1985] I AJHR 5A. See also Public and Administrative Law Reform Committee's Eighteenth Report (May 1984) at 30, at [81]–[82]; Keith "Law Reform" in Barker and Wear, above n 71, at 357; and Keith "Muldoon and the Law" in Margaret Clark (ed) *Muldoon Revisited* (Dunmore Press, Palmerston North, 2004) at 219.
- 77 See Part 36 (SOs 388–390) of the SOs effective as of 1 August 1985 and amended 24 September 1985. The first Regulations Review Committee was appointed in October 1985: [2003] I AJHR 16A at 8-9.

The new system is now in operation under Parliament's new standing orders. All regulations stand automatically referred to the Committee for its investigation. The Committee can consider any regulation-making power contained in all bills under consideration by other select committees. And it can deal with any other matter relating to regulations. It is also empowered to consider draft regulations. Where a complaint is made to the Committee ... concerning a regulation, the complaint must be placed before the Committee. And the person must be given an opportunity to be heard 'unless the committee decides by unanimous resolution to proceed no further with the complaint'. ... These important new powers have given parliamentary control over delegated legislation in New Zealand a real shot in the arm. The Committee during its first year and a half has had an expert constitutional lawyer, Dr C.C. Aikman, as one of its advisers. In considering any regulation before it, the Committee is required to decide whether the regulation should be drawn to the attention of the House [on 9 stated grounds].

And Attorney-General Palmer added that:⁷⁸

Already the [Regulations Review] Committee in its 1986 report has made some important recommendations. ... Among the most important were: [that] the period required 'as a matter of general practice' between the probable date of notification of [the making of] regulations in the *Gazette* and the date of their coming into force should be increased from at least 14 days to at least 28 days. Early in 1987 the Regulations Review Committee tabled in Parliament its report on proposals for a Regulations Bill which would replace the Regulations Act 1936. The comprehensive report recommends extensive changes which ... will enhance the scrutiny and control of delegated legislation. The recommended approach will clarify the legal definition of 'regulation'. Other recommendations were aimed at improving the public notification, distribution and selling procedures. Legal provisions would be enacted to ensure that in most circumstances no civil or criminal liability could be imposed if the regulations had not been printed and made available for sale. The recommended Act will also allow the

78 The Committee's recommendation that the 14 days be doubled was adopted by CO (91) 2, and then in the *Cabinet Office Manual* (1991), as foreshadowed in "Government Response to the Report of Regulations Review Committee on Proposals for a Regulations Bill" [1987] I AJHR 20 at 16 [1987 Government Response]. See also Burrows and Carter *Statute Law in New Zealand* (4th ed, LexisNexis, Wellington 2009) at 562 footnote 9. The 1986 report referred to is "Regulation Making Powers in Legislation" [1986-1987] I AJHR 16A. "Report on Inquiry into Proposals for a Regulations Bill" [1987] I AJHR 16B. Palmer I AJHR 16H at 173-177. See also the alternative actual and potential "procedures for parliamentary control" in Regulations Review Committee "Report on Proposals for a Regulations Bill" [1986] I AJHR 16B at 33-35; in the "Government Response" [2002] AJHR A5 to the Regulations Review Committee report in [2002] I AJHR 16H, and in [2007] I AJHR 16I. See also Malone and Miller *Regulations Review Committee Digest* (3rd ed, New Zealand Centre for Public Law, 2009) at 9-11. Pre-Regulations (Disallowance) Act 1989 powers of the House to disallow or revoke specified regulations include those under the Civil Defence Act 1983, s 79(8); Customs Act 1966, s 131(4); Official Information Act 1982, s 43; and Public Safety Conservation Act 1932, s 3(5). Ministerial disallowance powers in the Meat Acts of 1939 and 1964 are noted by McMullin J in *Canterbury Bye-Products Co Ltd v Wiseman* [1980] 2 NZLR 458 (CA) at 472. "The fact that rules could have been disallowed, but were not, does not immunise them from a challenge in the Courts: *McEldowney v Forde* [1971] AC 632 [(HL)] at p 644": *Cropp v Judicial Committee* [2008] NZSC 48, 3 NZLR 774 at [1] per Blanchard J.

House of Representatives to disallow a regulation at any time. And where the Regulations Review Committee recommends that a regulation be disallowed that regulation would be automatically disallowed if the matter was not otherwise decided by the House within 12 sitting days of the Committee's report being tabled.

X The Statutory Publications Bill

The Government Response to [the] Report of [the] Regulations Review Committee on Proposals for a Regulations Bill was presented to the House, under SO 352, in April 1987.⁷⁹ The Government Response welcomed the Committee's report, and advised that "The Government has given a legislative drafting priority to a Regulations Bill which will implement the Committee's proposals for a Regulations Bill."

In its 23 June 1988 *Report on the Activities of the Committee During 1987*, the Regulations Review Committee noted that the Government Response "agreed to implement the Committee's proposals, subject to certain changes, including":⁸⁰

- (a) There should be no statutory procedure for exempting regulations from printing. The adoption of the proposed definition of 'regulation' would render it highly unlikely that there will be any regulations that call for exemption.
- (b) Any disallowance resolution of the House should effect [the revocation of or amendment to] the regulation concerned directly, and not be solely a direction to the Government to repeal or amend.

Under the heading "Progress on the Proposed Legislation", the report continued:⁸¹

On 10 November 1987 the Rt Hon Geoffrey Palmer, in an answer to a question in the House, stated that a Regulations Bill would be introduced '*fairly early in 1988*'. As at [23 June 1988], the Regulations Bill has not yet been introduced.

A Bill to implement the Committee's proposals – the Statutory Publications Bill – was in fact not introduced by Attorney-General Palmer and referred by the House to the Regulations Review Committee for consideration until 11 July 1989.⁸² "The instructions for the preparation of the bill

79 "Government Response to the Report of Regulations Review Committee on Proposals for a Regulations Bill" [1987] I AJHR 20.

80 [1988] I AJHR 16A.

81 Ibid.

82 "Legislation delays disrupt sale of Govt Print" *Evening Post* (Wellington, 29 April 1989) at 3 ("the Statutory Publications Bill has been deferred from its original introduction on May 5 until May 30 [1989]").

were given to the Chief Parliamentary Counsel in May 1989, and the bill was finally assented to on 19 December 1989. The introduction and passing of the bill took 6 months.⁸³

Key to the Bill's rapid enactment was the sale of the Government Printing Office (which, under the Bill, would cease to be a department of the Public Service). The Attorney-General told the House in introducing the Bill that:

Duties relating to the publication of legislation will be transferred from the Government Printer to the Attorney-General and the Chief Parliamentary Counsel. That transference will result in a more rational allocation of functions. The appropriate Minister answerable to the House for the publication of legislation is the Attorney-General, and not, as at present, the Minister in charge of the Government Printing Office. The Government Printing Office will be freed from the statutory and administrative restraints that at present fetter an excellent and competitive printing operation. The proposed sale of the Government Printing Office will combine this Government's determination to separate governmental functions from commercial undertakings.

In the same debate, the Associate Minister of Finance, Hon Peter Neilson, said:

The reasoning behind the timing of the Bill is that although the [Regulations Review Committee]'s recommendations have been around for a couple of years ... the sale of the Government Printing Office has given rise to an opportunity to bring legislative life to the proposals.

The Bill's explanatory note summarised the Bill as follows:⁸⁴

This Bill—

- (a) Provides for the printing and publication of—
 - (i) Copies of Acts of Parliament and statutory regulations; and
 - (ii) Reprints of Acts of Parliament and statutory regulations;
- (b) Provides for the disallowance of statutory regulations;
- (c) Ensures that copies of Acts of Parliament, Bills, and statutory regulations are available to the public;
- (d) Repeals the Regulations Act 1936;
- (e) Provides for the Government Printing Office to cease to be a department of the Public Service.

Part II, which relates to regulations, is based on the proposals for a Regulations Bill contained in the Regulations Review Committee 1986 (I.16B) and on the Government Response of April 1987 to that Report (I.20).

83 Government Administration Committee "Report on the Inquiry into the Sale of the Government Printing Office" [1992] I AJHR 6A at [2.7] and 10-12.

84 Statutory Publications Bill 1989 (164-1) at i.

The Bill was introduced and referred to the Regulations Review Committee on 11 July 1989, and its report on the Bill was presented and debated on 15 November 1989. The Regulations Review Committee's chairperson, Doug Graham MP, thanked all who had made submissions on the Bill, including committees of Australian national and state legislatures, and the New Zealand Law Commission, which on 7 September 1989 reported on the Bill to the Minister of Justice, and copied its Report to the Regulations Review Committee.⁸⁵ The Bill's second reading, committee of the whole House stage, and third reading all occurred under urgency on 5 December 1989. The Bills divided out of the Bill in committee of the whole, and read a third time, got Royal assent and commenced wholly or in part on 19 December 1989.

The Regulations Review Committee recommended a number of changes to the Bill. Division of the Bill was one recommended change. In introducing the Bill, the Attorney-General, the Hon Geoffrey Palmer, said: "In some respects the title of the Bill is a bit misleading because it provides for matters other than statutory publications." The Regulations Review Committee and Minister of Justice agreed with submissions from the Law Commission and others that the Bill be amended so it could be divided into a Bill on publication of Acts and regulations, and a Bill on disallowance of regulations.

Another recommended change affected the proposed protection from criminal and civil liability. Clause 17 of the Bill as introduced excused a person from criminal liability for a contravention of a regulation, and also from any other liability arising under a regulation, if, at the relevant time, the regulation was not printed, published, and made available under the Bill or the Regulations Act 1936, or was not otherwise reasonably made known to the public or those likely to be affected by it, and the person did not in fact know of it. The Regulations Review Committee recommended cl 17 be deleted. It had been recommended in the Regulations Review Committee's 1986 report, but was not favoured for two reasons. First, if subordinate legislation adjusts civil liability retrospectively then cl 17 would enable negation of this kind of backdating adjustment (the regulation would be neither made available nor known at the relevant time). Second, a criminal liability defence was best addressed by way of cl 26(3) of the Crimes Bill 1989 (then before the Justice and Law Reform Select Committee).⁸⁶ Clause 26(3) of the Crimes Bill 1989 provided that a

⁸⁵ Law Commission *Legislation and its Interpretation*, above n 23.

⁸⁶ The Crimes Bill 1989 was introduced and referred to the Justice and Law Reform Select Committee on 2 May 1989. The Committee called for and received public submissions. In October 1989, the Minister of Justice Hon Geoffrey Palmer referred the Bill for study to a Crimes Consultative Committee appointed on 28 November 1989 and chaired by the Rt Hon Mr Justice Casey, which in April 1991 reported to then Minister of Justice Hon Douglas Graham. The 1989 Bill was carried over into the next Parliament but was eventually withdrawn. In 1991 and 1994, the Minister said the Government would prepare a new Crimes Bill based broadly on the Casey Committee's recommendations. However, since then, governments have advanced only targeted amendments, for example, reforming property offences in 2003 and sexual offences in 2005. The Law Commission has recommended replacement of Part 8 "offences against the person": Law Commission *Review of Part 8 of The Crimes Act 1961: Crimes Against the Person* (NZLC R111, 2009).

person is not criminally responsible for an offence against any instrument made under any Act if, at the time of the act or omission, the instrument had not been published or otherwise reasonably made known to the public or persons likely to be affected by it, and the person did not know of it.

The publication of Bills also attracted a recommended change. Clause 6(1)(b) of the Bill as introduced required the Attorney-General, by notice in the *Gazette*, to designate places where Bills that, following their introduction into the House of Representatives, are under consideration by the House of Representatives, shall be available for purchase by members of the public. The Law Commission apparently regarded cl 6(1)(b) as only empowering (not requiring) Bills to be published, and so as unnecessary or undesirable, adding that "given the developed system for submissions and committee consideration, there will often be a practical and political imperative to make them available".⁸⁷ Clause 6(1)(b) did not appear in the Bill as reported from the Regulations Review Committee.⁸⁸

The Committee also recommended the deletion of the clauses providing for regulations to stand referred or be tabled. Clause 18 of the Bill as introduced provided for all regulations made after the Bill's commencement to stand referred, by virtue of that clause, both to the House of Representatives and to any committee of the House responsible for the investigation of regulations. Clauses 26 and 27 of the Bill as introduced would have abolished, with specified savings or exceptions, every existing requirement to lay before the House regulations made after the Bill's commencement. The exceptions were specified regulations or orders that could override Acts of Parliament (and most of which therefore lapsed unless confirmed by Act of Parliament).⁸⁹ Professor

The Casey Committee recommended retention of cl 26(3) and monitoring of common law development of any defence of "officially-induced error" as, for example, in the Canadian case of *Lévis* 2006 SCC 12, [2006] 1 SCR 420, discussed in Margaret Briggs "Officially-induced error of law" [2009] NZLJ 166.

87 Law Commission *Annual Report 1989* (NZLC R10, 1989) at [11].

88 On appropriations covering the costs of printing Bills and responsibility under Standing Orders for providing copies of printed Bills, see "Report of the PCO for year ended 30 June 1990" [1990] AJHR A9 at 9. Under new Sessional Orders and related arrangements adopted in December 2002 and related to the PCO's Public Access to Legislation (PAL) Project, responsibility for the printing of Bills shifted almost entirely to the PCO, and corresponding funding for the printing of Bills was appropriated to the PCO as from 1 February 2003. See the "Interim Report of the Standing Orders Committee on the Review of SOs: The publication of legislation and parliamentary information" [2002] I AJHR 18A, [2003] I AJHR 18B at 53-54; "Report of the PCO for the year ended 30 June 2003" [2003] AJHR A9 at 36. Compare SOs 263 and 308 (effective 4 October 2008) with SOs 268, 271, and 312 (effective 20 February 1996) and with SOs 202, 205, and 238 (effective 20 November 1986). McGee says: "Following [a bill's] introduction, copies of it are made available for sale to the public." McGee, above n 53, at 344.

89 See, on this matter, Regulations Review Committee "Inquiry Into Regulation-Making Powers That Authorise International Treaties To Override Any Provisions of New Zealand Enactments" [2002] I AJHR 16H; Legislation Advisory Committee *LAC Guidelines* (2001 ed, as amended) at [10.2.2] and Appendix 5: <www.justice.govt.nz>. See also J Christie "New Zealand Review of Legislation, 1934: British Empire" (1936) 18(2) J Comp Leg 109 on the Agriculture Emergency Regulations Confirmation Act 1935 (NZ).

Ken Keith, in a paper for the Statutes Revision Committee, had proposed such an automatic referral provision to replace s 8 of the Regulations Act 1936 and this proposal was supported by the Chief Parliamentary Counsel and the Secretary for Justice, as well as by the April 1987 Government Response to the Regulations Review Committee's 1986 Report, and the Law Commission.⁹⁰ However, in its 15 November 1989 report on the Bill, the Regulations Review Committee said it:⁹¹

... believed that existing Standing Orders make [cl 18] unnecessary. All regulations 'stand' referred to the House because the House has the inherent right to inquire into anything it wishes. The Committee has therefore recommended that cls 18 and 26 be deleted and that the existing requirement that regulations be laid before the House be retained.

The Regulations Review Committee made it quite clear that "[t]he House's jurisdiction re[lat]ing to regulations does not rest on tabling – it rests on the fact that a regulation has been made." A Regulations Review Committee report presented to the House in 2006 makes it clear that the Regulations Review Committee regards the tabling requirement in the current law not as directory but as mandatory.⁹²

The definition of "regulation" in cl 2 of the Bill as introduced re-enacted, but also changed as follows, the paragraphs of s 2(1) of the Regulations Act 1936:

- It narrowed para (a) by omitting reference to "any other authority empowered in that behalf".
- It narrowed para (b) by requiring "extending or varying" instruments to be made "by the Governor-General in Council or by a Minister of the Crown".

⁹⁰ Regulations Review Committee "Report on Proposals for a Regulations Bill" [1986] I AJHR 16B at 25-27 and recommendation [44.9(2)(b) and (c)]; 1987 Government Response, above n 78, at 13-14; Law Commission *Legislation and its Interpretation*, above n 23, appendix B at [8]-[9].

⁹¹ [1989] I AJHR 16 at [7.1]–[7.5]. Sections 15(3), 53A(3) and 167(3) of the Reserve Bank of New Zealand Act 1989 provide that specified statements and reports stand referred, by virtue of those sections, to the House of Representatives. McGee advises that those sections "effectively deem them to have been presented [to the House] without any further action": McGee, above n 53, at 533. As noted above, since SO 388(2), effective as of 24 September 1985, all regulations were automatically referred to the Regulations Review Committee for investigation by it. SO 309(1) (effective 4 October 2008) now says simply that the Regulations Review Committee "examines all regulations". In the Standing Orders, "regulation means a regulation within the meaning of the Regulations (Disallowance) Act 1989": SO 3(1) (effective 4 October 2008).

⁹² "Investigation into deemed regulations that are not presented to the House of Representatives" [2006] I AJHR 16E (presented 9 August 2006). The Government Response accepted that new legislation empowering deemed regulations, and amendments to existing legislation of that kind, should use new wording [(for example s 81(2)(a) of the Major Events Management Act 2007 and s 9C(a) of the Tariff Act 1988)] that describes the requirement to present those regulations to the House: "Government Response" [2006] AJHR J1.

- It added a new para (c) addressing commencement orders, and orders repealing or suspending Acts or provisions of Acts.
- It added a new para (e) addressing instruments deemed to be regulations for the purposes of the 1936 Act or the 1989 Bill.

Those changes, in the Bill as introduced, to the s 2(1) definition in the 1936 Act arose from of the Regulations Review Committee's Report,⁹³ the Government Response to which proposed only one change (omitting as unnecessary the specific exclusion of regulations made by local authorities).⁹⁴ However by using, for most of its provisions, a definition of regulations based on s 2(1) of the Regulations Act 1936 the Bill ensured its new disallowance provisions would also apply to prerogative instruments.⁹⁵

In the Bill as reported, the Regulations Review Committee recommended a few further changes to the definition. The recommendation that the Bill be divided into two Parts meant that the publication Part adopted by reference the definition in the disallowance Part, and the Regulations Review Committee also recommended adding to the publication Part a reference to resolutions of the House of Representatives that revoke, amend, or revoke and replace "regulations". For the definition in the disallowance Part, the main recommended Regulations Review Committee change was the addition of a new paragraph (enacted as para (b)) ensuring that "regulations" included "instruments, other than Acts of Parliament, which revoke regulations".

The Bill as reported by the Regulations Review Committee also continued to amend s 4 of the Acts Interpretation Act 1924 so that it would presumptively define "regulations" in the same way as the publication Part of the Bill, and not (as in the current s 4) as meaning only "regulations made by the Governor-General in Council". Cases such as *Phillips v Transport Department* had shown that difficulties could arise if an instrument is a regulation for publication and for only some (but not all) Acts Interpretation Act purposes.⁹⁶

The Regulations (Disallowance) Act 1989, when it commenced on 19 December 1989, required to be presented to ("laid before") the House of Representatives within 16 sitting days after the day of

93 Regulations Review Committee "Report on Proposals for a Regulations Bill" [1986] I AJHR 16B at [44.7].

94 1987 Government Response, above n 78, at 13.

95 As noted in Law Commission *Annual Report 1989* (NZLC R11, 1989) at 19.

96 *Phillips v Transport Department* [1972] NZLR 122 (SC).

their making,⁹⁷ and made disallowable under that Act by a motion for a resolution to disallow, "regulations" defined as follows:⁹⁸

regulations means—

- (a) regulations, rules, or bylaws made under the authority of any Act—
 - (i) by the Governor-General in Council; or
 - (ii) by any Minister of the Crown:
- (b) instruments, other than Acts of Parliament, which revoke regulations:
- (c) Orders in Council, Proclamations, notices, Warrants, and instruments of authority made under any Act by the Governor-General in Council or by any Minister of the Crown which extend or vary the scope or provisions of any Act:
- (d) Orders in Council bringing into force, or repealing, or suspending any Act or any provisions of any Act:
- (e) rules or regulations made under any Imperial Act or under the prerogative rights of the Crown and having force in New Zealand:
- (f) instruments deemed by any Act to be regulations for the purposes of the Regulations Act 1936 or this Act

The Acts and Regulations Publication Act 1989, at the commencement of most of its provisions on 19 December 1989, required to be forwarded to the Chief Parliamentary Counsel without delay ("forthwith") after their making, and required to be published in the SR series, "regulations" made after that commencement and defined as follows:⁹⁹

regulations means—

- (a) regulations as defined by section 2 of the Regulations (Disallowance) Act 1989; and
- (b) resolutions of the House of Representatives which—
 - (i) revoke any such regulations; or
 - (ii) amend any such regulations; or
 - (iii) revoke any such regulations, and substitute other regulations

Section 14 of the Acts and Regulations Publication Act 1989 re-enacted the discretion in s 6A of the Regulations Act 1936 to print and publish under the Acts and Regulations Publication Act 1989 (without making the instrument a regulation for all of the purposes of the Act) "any instrument that is not a regulation". Section 16 of the Acts and Regulations Publication Act 1989 also re-enacted the power, formerly in s 9 of the Regulations Act 1936, "to revoke spent regulations and other instruments".

⁹⁷ Specific tabling duties override. Under s 150(5) of the Biosecurity Act 1993, for example, biosecurity emergency regulations must be tabled "not later than the second sitting day after they are made".

⁹⁸ Regulations (Disallowance) Act 1989, s 2.

⁹⁹ Acts and Regulations Publication Act 1989, s 2.

Section 18 of the Acts and Regulations Publication Act 1989 also amended s 4 of the Acts Interpretation Act 1924 so that it presumptively defined "regulations" in the same way as s 2 of the Acts and Regulations Publication Act 1989. Ministerial notices and other legislative instruments were thus made "regulations" for interpretation. Glover has described the result as "clumsily expressed", using confusing "circularity by way of cross-referencing", and as creating "a definition of complexity, requiring reference to no fewer than three statutes".¹⁰⁰

Sections 9 and 10 of the Acts and Regulations Publication Act 1989 require the Attorney-General, from time to time by notice in the *Gazette*, to designate places where Acts of Parliament and regulations are required to be available, and to make them available at the currently-designated places (until their repeal, revocation, or expiry), for purchase by members of the public.¹⁰¹

The great haste with which the Statutory Publications Bill was enacted led to errors, and confusing complexity, in the Acts and Regulations Publication Act 1989 and the Regulations (Disallowance) Act 1989. That is shown amply by the Regulations (Miscellaneous Provisions) Bill introduced on 7 April 1992, which was divided into three Amendment Bills each of which became law on 21 August 1992.

One of those three Bills amended s 14(3) of the Acts and Regulations Publication Act 1989 as from the commencement of most of the Acts and Regulations Publication Act 1989's provisions (on 19 December 1989) so that publication in the SR series of an instrument that is not a regulation,¹⁰² together with notification in the *Gazette* that the instrument has been so published,¹⁰³ is sufficient

¹⁰⁰ RG Glover *Acts Interpretation* (Brookers, 2009) at [AI4.50.01].

¹⁰¹ These provisions arose from the Regulations Review Committee recommendation that notice of the making of regulations appear in the *Gazette* (and that the Regulations Act 1936, s 6 be re-enacted): in Regulations Review Committee "Report on Proposals for a Regulations Bill" [1986] I AJHR 16B at [26.1] and [44.9]. The Government Response preferred instead imposing on the Government Printer (not at that time anticipated to cease to be part of the Public Service) a duty "to publish in the *Gazette* a notice of the making of the regulations, indicating where copies can be purchased: 1987 Government Response, above n 78, at 13. This would bring the law into line with the existing practice". The Regulations Review Committee's *Report on the Statutory Publications Bill* [1987] I AJHR 16 at [5.1] and [5.3] noted legislation "should be as freely accessible as possible" and that the Bill as introduced, and also as reported by the Regulations Review Committee, "obliges the Attorney-General to designate places where copies of [Acts of Parliament and regulations] shall be available for purchase by members of the public" at a reasonable cost. The Attorney-General's "designation" under s 9 appears to be implicit and in the first Acts and Regulations Publication Act 1989, s 12 notice of making ("Regulation summary") after the commencement, on 19 December 1989, of most of the Acts and Regulations Publication Act 1989: see 20 December 1989 Supplement to No 224 (14 December 1989) *New Zealand Gazette* at 6366. For outlets that stock New Zealand legislation, see: "Retail outlets that stock New Zealand legislation" <www.pco.parliament.govt.nz>. See also the Legislation Bill 2010 (162–1), cl 72(5).

¹⁰² Acts and Regulations Publication Act 1989, s 14.

¹⁰³ Acts and Regulations Publication Act 1989, s 12.

compliance with any statutory requirement that the instrument be published in full in the *Gazette*. Section 14(3) of the Acts and Regulations Publication Act 1989, as first enacted, had unfortunately not applied the provision to that effect in s 13 of the Acts and Regulations Publication Act 1989 to any such instrument "that is not a regulation" for all of the purposes of the Acts and Regulations Publication Act 1989. This Amendment Bill was therefore similar to the Regulations Amendment Act 1970.

Another of those three Bills amended s 4 of the Regulations (Disallowance) Act 1989 (which requires regulations to be laid before the House of Representatives) to correct an error that occurred when the assent copy of the Act was prepared (but that also arose from the division of the Statutory Publications Bill into two Bills). The error was that s 4 of the Regulations (Disallowance) Act 1989 contemplated regulations being printed and published "under this Act", whereas they were (and are) in fact printed and published under the Acts and Regulations Publication Act 1989.

The last of those three Bills amended ss 97(6) and 158(5) of the Legal Services Act 1991 to ensure instructions under that Act were disallowable instruments under the Regulations (Disallowance) Act 1989 but not also SR series regulations under the Acts and Regulations Publication Act 1989. As first enacted, ss 97(6) and 158(5) of the Legal Services Act 1991 had supposed wrongly that making the instructions disallowable did not automatically make them also SR series regulations. This is but one, very early, example of classification confusion that not only continued but intensified.

XI Developments related to the Interpretation Act 1999

In its Report 17, *A New Interpretation Act*, the Law Commission recommended defining "regulation" in the same way as in s 2 of the Regulations (Disallowance) Act 1989 but adding a new provision covering resolutions of the House under the Regulations (Disallowance) Act 1989 that amend Acts: "[T]hose resolutions have the same significance and effect as regulations made in the usual way. They should be subject to the same interpretation law."¹⁰⁴

The Interpretation Bill as introduced on 25 November 1997 implemented those 1990 recommendations. The definition of "regulations" in cl 28 of the Bill (also to be inserted in s 2 of the Regulations (Disallowance) Act 1989) covered resolutions of the House (under the Regulations (Disallowance) Act 1989 or any other Act) revoking, amending, or revoking and substituting regulations.¹⁰⁵ That is because para (g) of the definition (ultimately enacted as para (e)) also made a

¹⁰⁴ Law Commission *A New Interpretation Act*, above n 16, at 137 and [378].

¹⁰⁵ Acts providing for resolutions amending instruments under Acts include the Customs and Excise Act 1996, s 80(3); Land Transport Act 1998, ss 168B(4) and 270(7); Tariff Act 1988, s 11(3). Compare resolutions disallowing immediate modification orders (Epidemic Preparedness Act 2006, s 21(4)), extending a declaration of a biosecurity emergency (Biosecurity Act 1993, s 146(2) and (3)), and compare Defence Act 1990, s 9(8)(a) and International Terrorism (Emergency Powers) Act 1987, s 7(2) and (3)), approving ("affirming") amending orders or other regulations (Misuse of Drugs Act 1975, s 4A(2), compare Dog

key change; it made an instrument a regulation for disallowance and interpretation if an enactment provides that the instrument is, or requires it to be treated as, a regulation for the purposes of the Acts and Regulations Publication Act 1989. Previously the provisions had been "one-way"; a disallowable regulation was presumptively an Acts and Regulations Publication Act 1989 regulation, but not vice-versa. One slight discrepancy between the Law Commission's 1990 recommendations and the definition of regulation in cl 28 of the Interpretation Bill was that that definition included "[r]egulations, rules, or an instrument made under ... the Royal prerogative and having the force of law in New Zealand."¹⁰⁶

In the Bill as introduced, the definition of "regulations" in cl 28 (also to be inserted in s 2 of the Regulations (Disallowance) Act 1989) also made one other key change, in para (c) (ultimately enacted as para (b)): an instrument made under an Act and varying or extending the scope or provisions of an Act was a regulation regardless of its maker, and not (as to date) only if made "by the Governor-General in Council or by any Minister of the Crown".¹⁰⁷ In its 4 December 1998 report on the Bill, the Justice and Law Reform Committee recommended two minor substantive changes to the regulations definition in what would become the new s 29 of the Interpretation Act 1999 (and in s 2 of the Regulations (Disallowance) Act 1989 and thus also in the

Control Act 1996, s 78B, and Public Finance Act 1989, s 82(5)), redefining "the parliamentary precincts" (Parliamentary Service Act 2000, s 25(4)), or disapplying directions or guidelines (Crown Entities Act 2004, s 109, Sentencing Council Act 2007, ss 18-19). The only example of a resolution of the House under the Regulations (Disallowance) Act 1989 amending a disallowable "regulation" is Notice of Scopes of Practice and Related Qualifications Amendment Notice 2008 SR 2008/362. The resolution substituted a new cl 4 of the Notice of Scopes of Practice and Related Qualifications Prescribed by the Nursing Council dated 18 August 2004 and published in a supplement to the *New Zealand Gazette* (15 September 2004) at 2958-2960. See also the Regulations Review Committee's report [2007] I AJHR 16J and the "Government Response" [2007] AJHR J1. In a 10 September 2008 statement, Minister of Health Hon David Cunliffe explained that the Nursing Council declined to act pending a wider review, but the delay was unfair to nurses and that the Regulations Review Committee's recommendations should be acted on. Notices of motion for amendment of regulations are subject to the financial veto: SO 316(3) (effective 4 October 2008); McGee, above n 53, at 411. The House's power under s 9 of the Act to amend regulations is noted in *Turners and Growers Ltd v Zespri Group Ltd* HC Auckland CIV-2009-404-004392, 13 August 2010 at [57] per White J.

¹⁰⁶ Section 2(1)(c) of the Regulations Act 1936 covered "regulations made under ... the prerogative rights of the Crown and having force in New Zealand". The Law Commission suggested that "having force in New Zealand" was to be equated with "is part of the law of New Zealand". In the end, the 1999 changes referred to an instrument "having the force of law in New Zealand": Law Commission *Legislation and its Interpretation*, above n 23, appendix B at [4]. Compare Judicature Amendment Act 1972, s 3(a): statutory power "to make any regulation, rule, bylaw, or order, or to give any notice or direction *having force as subordinate legislation*". The Law Commission definition omits any reference to prerogative instruments: Law Commission *A New Interpretation Act*, above n 16, at [376].

¹⁰⁷ This element of the definition thus reverted to wording like that in s 2(1)(b) of the Regulations Act 1936, in force on and after 1 August 1936 until the close of 18 December 1989.

definition in the Acts and Regulations Publication Act 1989). One change, which would become para (f), rationalised and gathered into one provision all references to instruments revoking other "regulations". The Committee was concerned not to limit the Regulations Review Committee's jurisdiction over these revocation instruments.

The other change that was recommended in the Committee's report on the Bill extended what would become para (c) to ensure that it covered orders bringing into force, repealing, or suspending not just "Acts", but all "enactments". The result, when the Interpretation Act 1999 commenced on 1 November 1999, was the following definition of "regulations" in s 29 of the new Interpretation Act 1999 (and in s 2 of the Regulations (Disallowance) Act 1989, and thus also in the definition in the Acts and s 2 of the Regulations Publication Act 1989):

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 [and] 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 [an enactment provides] is a regulation or that is required [by an enactment] to be treated as a regulation for the purposes of the Regulations Act 1936 or the 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)

XII Use of Disallowance Procedure

Only on five occasions since the Regulations (Disallowance) Act 1989 commenced on 19 December 1989 have members of Parliament given notices of motions that regulations be disallowed, and to date no regulations have ever been disallowed under the Regulations (Disallowance) Act 1989.¹⁰⁸ In March 2006, Sir Geoffrey Palmer, Chairperson of the Legislation Advisory Committee, suggested in a briefing to the Regulations Review Committee that the Act was underused, saying that:¹⁰⁹

¹⁰⁸ [2003] I AJHR 16A at 11-12; Caroline Morris and Ryan Malone "Regulations Review in the New Zealand Parliament" (2004) 4 Macquarie LJ 7; Malone and Miller, above n 78, at 11.

¹⁰⁹ *Select Committee News* (Parliamentary Library Edition, 1 April 2006). See also *Activities of the LAC During 2006 – Report of the LAC to the Attorney-General* (Legislation Advisory Committee Submission to the Regulations Review Committee, December 2006) at [33]–[36], raising matters including "failure to use the disallowance procedure" in the Regulations (Disallowance) Act 1989 (NZ).

The trap needed to be held over the head of the Executive government more than it is. ... The picture of the heavy weapon should be kept in front of officials, while the issue remains in front of select committee.

Yet the Act's value lies primarily in the existence of the power, rather than its use. The prospect of a member moving a disallowance motion is invariably a strong encouragement to makers of subordinate legislation to amend or revoke it to address Regulations Review Committee concerns.

Those five occasions, on which Regulations Review Committee members have given or lodged notices of motion that regulations be disallowed, are as follows:

- (1) Notice of a motion, to be moved by Douglas Graham, that the Civil Aviation Charges Regulations 1990 be disallowed.¹¹⁰ On 26 February 1991 Hon Doug Graham, Minister of Justice, said in the House:¹¹¹ "in September [1990] I moved ... the disallowance of the ... Regulations ... I and the committee [concluded] that they were defective. ... that motion ... which would have automatically disallowed ... if not ... dealt with by the House in 21 sitting days, lapsed because in September 1990 the outgoing Labour Government did not carry that motion forward ... Therefore it was not available to be debated."
- (2) Notice of a motion, to be moved by Jill White, that the Disputes Tribunals Amendment Rules 1998 be disallowed.¹¹² On 11 November 1998, the 16th sitting day after the day (8 September 1998) on which the disallowance motion was lodged, the disallowance motion was moved in the House on behalf of Jill White MP by the Chairperson of the Committee, the Rt Hon Jonathan Hunt MP, debated and lost by 58-62. However, the notice

110 Regulations Review Committee Report on its "Inquiry into the Civil Aviation Charges Regulations 1990" [1990] I AJHR 16B (lodged 4 September 1990, presented to the House 4 September 1990). On 26 February 1991, Hon Rob Storey (Minister of Transport) said in the House: "[T]he civil aviation charges are [under] review. As an interim measure ... new regulations provide for the revocation of the Civil Aviation Charges Regulations 1990 ... from the time air safety charges were introduced last year until the end of the current financial year ... there will be a 15 percent reduction in fees. Any organisation that has already paid ... will be entitled to a rebate of 15 percent ... There might be a slight delay in paying the rebates since separate legislation will be needed [(see s 10 of the Civil Aviation Amendment Act 1990, assented to on 28 November 1991), which the Government will introduce as soon as possible."

111 In speaking to the motion that the House note the contents of the Regulations Review Committee's "Inquiry into the Constitutional Principles to apply when Parliament Empowers the Crown to charge Fees by Regulation" [1989] I AJHR 16C and its "Inquiry into the Civil Aviation Charges Regulations 1990", above n 110.

112 Regulations Review Committee "Report on its Investigation into the Disputes Tribunals Amendment Rules 1997 and 1998" [1998] I AJHR 16L (lodged 8 September 1998, presented to the House 27 August 1998).

of motion prompted amendments to the rules to defer their commencement and reduce the lowest fee for claims to the Tribunals.¹¹³

- (3) Notice of a motion, to be moved by Rt Hon Jonathan Hunt, that Amendment No 11 of the New Zealand Food Standard 1996 be disallowed.¹¹⁴ The last sitting day in the 45th Parliament was 5 October 1999 (calendar 8 October 1999 since the House was sitting in urgency) and, by then, 14 sitting days had elapsed. The notice of motion was not included in the carry-over motion agreed on Thursday 7 October 1999 and, as a result, lapsed. The Government Response to the Regulations Review Committee's Report proposed that the Amendment not be revoked but be reconsidered, if necessary, once a report became available from an expert working group established by the Associate Minister of Health. Similar requirements seem to continue in Standards 1.1A.4 (Transitional Standard for the Labelling of Pollen and Royal Jelly) and 1.2.3 (Mandatory Warning and Advisory Statements and Declarations) of the Australia New Zealand Food Standards Code 2006 and in the New Zealand (Bee Product Warning Statements–Dietary Supplements) Food Standards 2002.
- (4) Notices of motions, to be moved by Dr Richard Worth, that the following be disallowed: Court of Appeal Fees Regulations 2001, High Court Fees Regulations 2001, District Courts Fees Regulations 2001, and regulation 5 of the District Court Fees Amendment Regulations (No 3) 2001. The notices were lodged on 8 and 13 November 2001, before the Regulations Review Committee reported on the matter to the House.¹¹⁵ On 21 February 2002, the House debated simultaneously, then negatived, the four motions. Dr Worth was criticised for giving the notices of motions before the Regulations Review Committee had completed its investigation of the relevant complaints (delayed while a Ministerial review was

113 See Disputes Tribunals Amendment Rules (No 2) 1998 SR 1998/248; Disputes Tribunals Amendment Rules (No 3) 1998 SR 1998/313.

114 New Zealand Food Standard 1996, Amendment No 11 (17 December 1998) *New Zealand Gazette*; Regulations Review Committee "Report on a Complaint relating to the New Zealand Food Standard 1996, Amendment No 11" [1999] I AJHR 16Q (lodged 13 July 1999, presented to the House in July 1999).

115 The Regulations Review Committee "Investigation and Complaints relating to Civil Court Fees Regulations" [2002] I AJHR 16M was presented to the House in June 2002.

conducted) and reported to the House.¹¹⁶ The Regulations Review Committee returned to these issues because of a complaint about further increases in court fees in 2004.¹¹⁷

- (5) Notice of a motion, to be moved by Moana Mackey (a member of the Regulations Review Committee), that the House disallow the New Zealand (Mandatory Fortification of Bread with Folic Acid) Amendment Food Standard 2009 (gazetted on 26 August 2009, and delaying mandatory fortification of bread with folic acid, and providing for voluntary fortification of that kind, until the end of 30 May 2012). The notice was lodged on 5 August 2010 despite the Regulations Review Committee by majority in its report (presented on 4 August 2010) on a complaint on the Standard concluding that it is in accordance with the general objects and intentions of the Food Act 1981, does not appear to make unusual or unexpected use of the powers conferred by the Food Act, and was made in compliance with particular notice and consultation procedures prescribed by the Food Act 1981. On 12 October 2010 the motion was debated by the House but (by 44-77) not agreed to.

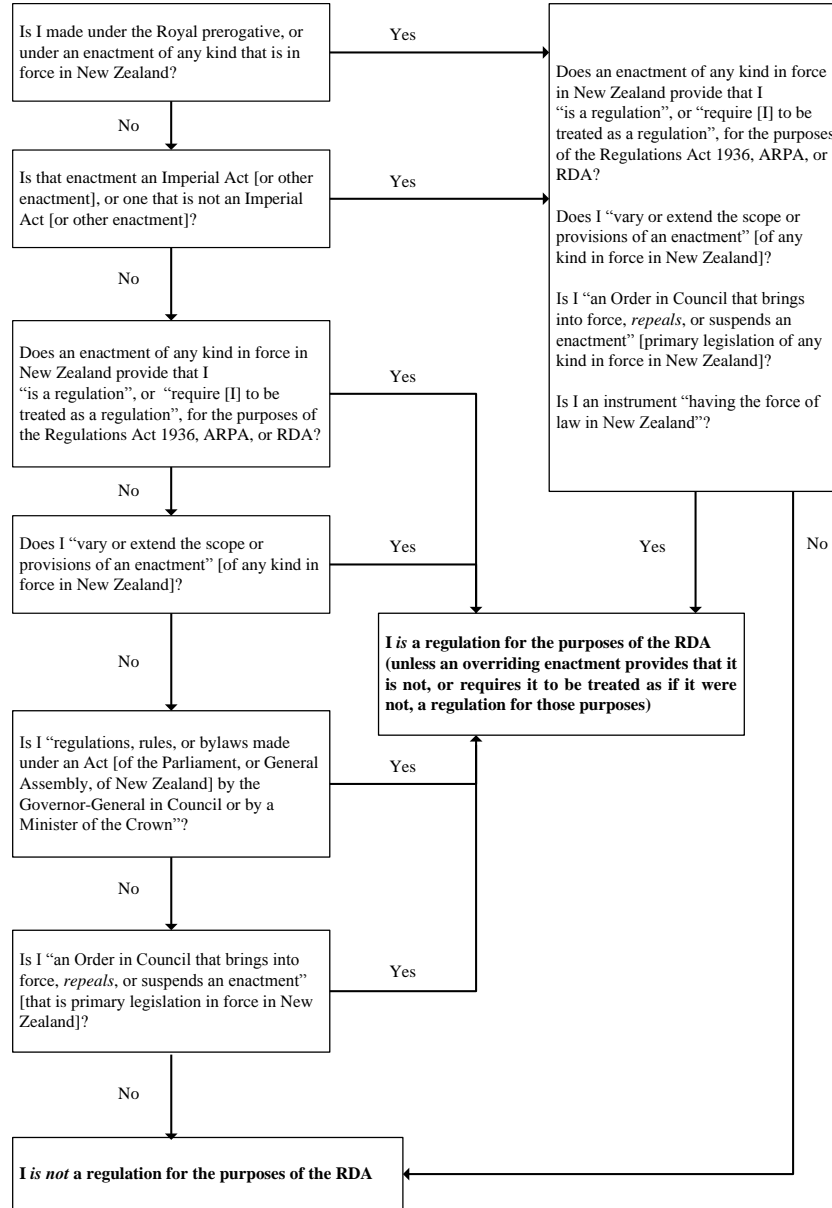
XIII Complexities, Assumptions, and Gaps in Current Definitions

Applying the s 2 definition of "regulation" in the Regulations (Disallowance) Act 1989 to determine whether a legislative instrument is disallowable under the Act involves complexities and assumptions. Those complexities and assumptions are traced in the following flowchart.

116 "The power to initiate the automatic disallowance procedure that is vested in each member of the Regulations Review Committee does not depend on the regulation concerned having been the subject of an adverse report from that committee. Nevertheless, it is assumed that those members would act in a manner that is consistent with the conventions attaching to that committee before initiating such a procedure." McGee, above n 53, at 415.

117 "Investigation and complaint about civil court fees regulations 2004" [2005] I AJHR 16H. The Government Response to the report agreed to review further the regulations concerned: [2005] AJHR A5.

**Determining whether a legislative instrument (I)
(whether or not it amends, revokes, or revokes and replaces a similar instrument)
is a disallowable “regulation” for the purposes of the RDA**



As that flowchart suggests, applying the s 2 definition of "regulations" in the Regulations (Disallowance) Act 1989 involves various assumptions. Some examples are as follows:

- Paragraphs (b) and (d) of the definition, each of which mentions both specified kinds of instruments (for example, "An Order in Council", or "rules") and "an instrument", each apply to any instrument (whether or not that instrument is, in terms of its description, contents, or effect, "a regulation"). "Any instrument" is assumed not to be limited by the more specific references.
- References in the definition to "an Act" are references to an Act that is not "an imperial Act", but references in it to "an enactment" are (at least usually) references to "any enactment" (as defined in the Interpretation Act 1999, s 29) – an exception is probably para (c) of that definition, as it refers to "repeal" of an enactment and so may well have been meant to cover only primary legislation.¹¹⁸ These two assumptions affect the meanings of two terms used.
- Paragraph (e) of the definition means not "an instrument that is" but "an instrument that [an enactment provides] is". As that text shows, this assumption involves reading in words.

The difficulties in defining "regulations" satisfactorily are notorious. They arise mainly from the elusive nature of the "unstable" distinction between "administrative" and "legislative" acts.¹¹⁹ The Regulations Review Committee said in 1986:¹²⁰

Whereas the exercise of a power to make delegated legislation involves the laying down of general rules of conduct, the administrative or executive process calls for an act involving a particular decision or case

¹¹⁸ Its original target: Regulations Review Committee "Report on Proposals for a Regulations Bill" [1986] I AJHR 16B at [13.8], [13.9] and [44.7].

¹¹⁹ *Braemar Power Project Pty Ltd v Chief Executive (Qld) Department of Mines and Energy* [2008] QSC 241 at [21] per McMurdo J. See Berry "When does an instrument made under primary legislation have 'legislative effect'?" in (March 1997) *The Loophole* <www.opc.gov.au>. See also the discussions of the Administrative Decisions (Judicial Review) Act 1977 (Cth) in *RG Capital Radio Ltd v Australian Broadcasting Authority* [2001] FCA 855 and *Roche Products Pty Ltd v National Drugs and Poisons Schedule Committee* (2007) 163 FCR 451. The *2008 Review of the Legislative Instruments Act 2003* (2009) at [1.3.2] says: "Occasional judicial rulings relating to the ADJR Act have held that an action is of a legislative rather than administrative character, and hence not reviewable under the ADJR Act. Many more decisions have recognised that the distinction between legislative and administrative actions is not clear-cut, and that many actions can be classified as either administrative or legislative for a particular purpose." See also *Schwennesen v Minister for Environment & Resource Management* [2010] QSC 81.

¹²⁰ Regulations Review Committee "Report on Proposals for a Regulations Bill" [1986] I AJHR 16B at [5.1]-[5.3], quoting from Stanley A de Smith, *Judicial Review of Administrative Action* (4th ed, Stevens and Son, London, 1980) at 71-73. See also John Mark Keyes *Executive Legislation* (2nd ed, LexisNexis, 2010) at ch 1.

... the test adopted for discriminating between the legislative and the executive often appears to be pragmatic (is it in the public interest that this order be published?) rather than conceptual. ... Since the general shades off into the particular, to discriminate between the legislative and the administrative by reference to these criteria may be a peculiarly difficult task, and it is often not surprising that the opinions of judges as to the proper categorisation of a statutory function are often at variance.

In *Pub Charity v Attorney-General*, the Court of Appeal noted the potential for "overlap" between lawful regulations imposing standard conditions on classes of licence-holders, on the one hand, and a series of tailored conditions imposed administratively on individual licences, on the other.¹²¹ Each might achieve, by different means, the same or a similar outcome. Securities Act exemption notices, the Regulations Review Committee in 1986 also noted, "all appear in the SR series ... even though some may exempt only a person as distinct from a class of persons".¹²²

The "varies or extends the scope or provisions of an enactment" test can be hard to apply.¹²³ Extending or varying "the provisions" of an enactment is often an easy test to apply,¹²⁴ but extending or varying "the scope" of an enactment is often not. However, not all "scope" cases are difficult. An Order in Council under s 7A(1)(b) of the Tariff Act 1988, even in formal terms only, varies "the scope" of the definition (in s 2(1) of that Act) of "specified TPA [Trans-Pacific Strategic Economic Partnership Agreement] party", and so countries' entitlements to preferential tariffs.

But other "scope" cases are less clear. An exemption from an enactment varies the scope of the enactment, but if the exemption relates only to an individual, is the exemption more administrative than legislative? Other cases raise the question whether provisions are merely applied or operated without any extension or variation of their scope.¹²⁵ In its 1986 report,¹²⁶ the Regulations Review

121 *Pub Charity v Attorney-General* CA 103-04, 7 December 2004 per Anderson P, McGrath and O'Regan JJ.

122 Regulations Review Committee "Report on Proposals for a Regulations Bill" [1986] I AJHR 16B at [9.3]. See also Regulations Review Committee "Inquiry into the use of instruments of exemption in primary legislation" [2008] I AJHR 16Q; "Government Response" [2008] AJHR J1; See also the submissions, to that Regulations Review Committee inquiry by the Legislation Advisory Committee and by Jason Karl, PhD candidate, University of Auckland.

123 Now in para (b) of the s 2 definition of "regulations" in the Regulations (Disallowance) Act 1989.

124 Orders under s 3(2) of the Reciprocal Enforcement of Judgments 17 Act 1934 may direct that Part 1 of that Act "shall extend" to a specified part of Her Majesty's dominions or to a specified foreign country. An order under s 74(4)(b) of the Maritime Security Act 2004 extending the application of that Act to a ship or port facility seems to have been considered (probably correctly) to be a "regulation" within the meaning of para (b) of the s 2 definition in the Regulations (Disallowance) Act 1989 (NZ). However, it is less clear whether orders under Part 2 of the Diplomatic Privileges and Immunities Act 1968 "extend or vary" the provisions of that Part, although they have traditionally been published in the SR series. The distinction between applying an enactment and extending it can, in practice, be a very fine one.

125 See in particular GE Tanner and M Chen *Delegated legislation* (NZLS Seminar, May 2002) at 7-8.

Committee instanced a 1979 order amending the Milk Marketing Order 1968. The 1979 amending order, authorising the Milk Board in cases of poor performance to reduce or withhold payments in respect of services, could be regarded as merely operating (rather than varying the scope of) s 25(6A) of the Milk Act 1967 (as inserted in 1978). It was therefore only an Attorney-General's determination under s 2(2) of the Regulations Act 1936 that made it clear that the order was, definitively, "a regulation". Further, in its 1986 report, the Regulations Review Committee apparently concluded that a primary enactment's "scope" did not include its temporal application, because the Regulations Review Committee recommended a new, separate provision to cover clearly commencement, repeal, or suspension orders.

The Court of Appeal has noted that:¹²⁷

An Order in Council bringing an Act into force is also included along with various delegated legislative instruments in [para (c) of] the definition of "Regulations" under [s 2 of] the Regulations (Disallowance) Act 1989, and is therefore amenable to disallowance, revocation or amendment by resolution of the House of Representatives along with the other instruments.

However, para (c) of that definition does not cover clearly all instruments determining or altering temporal application. It does not, for example, cover clearly orders that, like the Health (Deferral of General Application of Sections 69S to 69ZC) Order 2009,¹²⁸ do not vary or extend provisions but defer their application by appointing or prescribing application dates. Experience also shows that instruments made, not under an Act, but contractually and then adopted by an Act, are not (unless declared or deemed to be so) "regulations".¹²⁹

Even if an instrument made under an Act is styled as a *Gazette* notice and not as any kind of traditional regulation, and it seems not to fall within the s 2 of the Regulations (Disallowance) Act

126 Regulations Review Committee "Report on Proposals for a Regulations Bill" [1986] I AJHR 16B at [13.5]–[13.9].

127 *New Zealand Maori Council v Attorney-General* [1996] 3 NZLR 140 (CA) at 164 per Richardson P and Gault, McKay, Henry, Thomas, Keith, and Blanchard JJ.

128 Health (Deferral of General Application of Sections 69S to 69ZC) Order 2009 SR 2009/176. Under cls 4, 37 and 40 of the Legislation Bill (162—1), an order under s 69C of the Health Act 1956 would be a legislative order (and therefore both a disallowable instrument, and one to be tabled).

129 *New Zealand Racing Conference v Proceedings Commissioner* [2001] NZAR 659 (HC) at [43]–[44] per McGechan J; *Director of Human Rights Proceedings v New Zealand Racing Conference* [2002] 3 NZLR 333 (CA) at [13], [15] and [23] per Blanchard J, [32] per Keith J; *Cropp v Judicial Committee* [2008] 3 NZLR 774 (SC) at [1] per Blanchard J (Racing Act 2003, s 32).

1989 definition, deeming provisions may make it a regulation.¹³⁰ Other overriding provisions may also prevent disallowance of certain provisions of a generally disallowable instrument.¹³¹ Further, an instrument expressly declared not to be a regulation may still be published in the SR series, under s 14 of the Acts and Regulations Publication Act 1989 discretion, "as if it were a regulation".¹³²

XIV Regulations Review Committee's Calls for Reform informed by Legislative Instruments Act 2003 (Cth)

In 1986, the Regulations Review Committee noted that the "instruments ... under any Act which extend or vary the scope or provisions [of an Act]" wording of s 2(1)(b) of the Regulations Act 1936 had the advantage of being "an established formula", but was "not completely satisfactory" as it combined formal and substantive approaches to a definition, and "can create difficulties in its application to particular cases".¹³³

130 See for example Real Estate Agents Authority (Fees and Levies) Notice 2009 SR 2009/243 – a "Gazette notice" given by the Real Estate Agents Authority (and signed by its chair, a Queen's Counsel) under ss 20-22 of the Real Estate Agents Act 2008 and (despite s 23(2) of that Act and the Acts and s 13 of the Acts and Regulations Publication Act 1989) published in full both in the SR series and in No 152 (15 October 2009) *New Zealand Gazette* at 3687. Compare Framework for the Accredited Employers Programme, another instance of publication in full in both the SR series and the *Gazette*. Section 183(4) of the Injury Prevention, Rehabilitation and Compensation Act 2001 departs in a noticeable way from the text of its predecessor, s 326C(4) of the Accident Insurance Act 1998. Section 139AJ(5) of the Education Act 1989 ensures Teachers Council Rules are not only disallowable but also in the SR series.

131 See for example incorporation by reference provisions (for example, s 412 of the Building Act 2004) that make it clear that material incorporated by reference is not disallowable.

132 Under s 160(6) of the Land Transport Act 1998 "an ordinary rule ... is not a regulation for the purposes of" the Acts and Regulations Publication Act 1989, but even so some land transport rules are in the SR series by direction under the discretion under s 14 of the Acts and Regulations Publication Act 1989: [1999] I AJHR 16R at 22 ("We are pleased that the Chief Parliamentary Counsel's power to give directions under s 14 (1) was exercised on this occasion. However, we consider that compliance with the requirements of the Acts and Regulations Publication Act 1989 for a rule of very broad application should be mandatory rather than discretionary."). See for example the Land Transport (Driver Licensing) Rule 1999 SR 1999/100. See also *McInnes v Minister of Transport* HC Wellington CP 240-99, 3 Jul 2000 at [52] per McGechan J ("There was then something of a hiccup arising from the Attorney-General's (proper) view that publication should be as a statutory regulation, so advancing public accessibility. This required some stylistic changes.") Also published under s 14 of the Acts and Regulations Publication Act 1989 are orders under s 38 of the Corporations (Investigation and Management) Act 1989. See for example Corporations (Investigation and Management) Order 1989 SR 1989/72 and Corporations (Investigation and Management) Order 2007 SR 2007/344. See also the Misuse of Drugs (Prohibition of Cannabis Utensils) Notice 1999 SR 1999/215 and Telecommunications (Operational Separation) Determination 2007 SR 2007/302. Section 16B(1) and (2)(b) of the Acts and Regulations Publication Act 1989 require courts and persons acting judicially to take judicial notice of "any instrument that, under section 14 [of the Acts and Regulations Publication Act 1989], has been printed and published as if it were a regulation". Compare Evidence Act 1908, s 28A.

133 Regulations Review Committee "Report on Proposals for a Regulations Bill" [1986] I AJHR 16B at [15.4].

Later Regulations Review Committee reports on the s 2 definition of "regulations" in the Regulations (Disallowance) Act 1989 have recognised that it is unsatisfactory and should be revisited, perhaps along the lines of the Legislative Instruments Act 2003 (Cth).¹³⁴ The House, in 2003, adopted a new Standing Order, SO 377(3)(b) (effective 10 February 2004), ensuring that the Regulations Review Committee is authorised clearly to consider, and to report to other select committees on provisions in Bills before those committees that delegate powers to make instruments that are not "regulations" but are "of a legislative character".¹³⁵

On 1 August 2007, s 216 and sch 2 of the Evidence Act 2006 (and Evidence Act 2006 Commencement Order 2007) repealed ss 28A, 29(3) and 29A of the Evidence Act 1908, and re-enacted them in a new location as part of the Acts and Regulations Publication Act 1989:

- s 16B (judicial notice of regulations);
- s 16C(3) (copy of regulations printed as prescribed to be evidence); and
- s 16D (copy of reprint of regulations to be evidence).¹³⁶

The 31 March 2009 report on the statutorily-required 2008 review of Legislative Instruments Act 2003 (Cth) supported keeping a substantive definition of instruments of legislative character (supported by express inclusions and exclusions, both as part of the definition, and in express provisions in the empowering Act).¹³⁷ The review committee also recommended changes to limit circularity and improve clarity, so that the definition of "legislative instrument" in the Legislative Instruments Act 2003 (Cth) would read as follows:

134 "Inquiry into the Principles Determining whether Delegated Legislation is given the Status of Regulations" [2004] I AJHR 16E; "Activities of the Regulations Review Committee in 2007" [2008] I AJHR 16M at 5. The Regulations Review Committee's "Inquiry into the Use of Instruments of Exemption in Primary Legislation" [2008] I AJHR 16Q and "Government Response" [2008] AJHR J1 both emphasise that the "varies or extends the scope or provisions of an enactment" test is supported by consideration of the legislative character of the instrument of exemption. See also [2010] I AJHR 16E at 14-18.

135 [2003] I AJHR 18B at 74 (Regulations Review Committee: regulation-making powers in bills). For the current standing order, see SO 309(3)(b) (effective 4 October 2008).

136 Sections 29 and 29A of the Evidence Act 1908 were amended by the Evidence Amendment Act 1998 No 42 to ensure official versions of legislation are deemed correct unless the contrary is "shown" (not formally "proved"), and to make clear the status of reprints of imperial enactments. The Law Commission recommended that ss 28, 28A, 29 and 29A of the Evidence Act 1908 be replaced only by the single general provision enacted as s 141 of the Evidence Act 2006: *Evidence. Volume 2: Evidence Code and Commentary*, above n 39, at ch 18 and at 162.

137 Attorney-General's Department "Review of the Legislative Instruments Act 2003" Australian Government <www.ag.gov.au>.

- (1) Subject to [express inclusions and exclusions], a legislative instrument is an instrument in writing that:
- (a) is made in the exercise of a power delegated by the Parliament; and
 - (b) includes at least one provision that:
 - (i) determines the law or alters the content of the law, rather than determining cases or circumstances in relation to which the law set out in an Act or in another legislative instrument is to apply; and
 - (ii) has the direct or indirect effect of affecting a privilege or interest, imposing an obligation, creating a right, or varying or removing an obligation or right.

XV 2008 Cabinet Office Circular and Law Commission's 2008 and 2009 Reports

Cabinet Office Circular CO (08) 4 (14 March 2008) made it clear that in principle an instrument should be subject to disallowance and publication in the SR series if the instrument is legislative in nature because it:

- regulates the public generally or any class of the public (including an occupational class); and
- prescribes or imposes obligations, confers entitlements or creates benefits or privileges.

In October 2008, the Law Commission recommended a new Legislation Act combining the Interpretation Act 1999, Acts and Regulations Publication Act 1989, Regulations (Disallowance) Act 1989, and Statutes Drafting and Compilation Act 1920 (or its modern equivalent), and also containing new provisions implementing other recommendations (including on statute revision) made in its report.¹³⁸ That key recommendation was, except for re-enacting the Interpretation Act 1999, largely accepted by the final Government Response,¹³⁹ which said the Interpretation Act 1999 "is of a somewhat different character from the other Acts", "is not capable of a simple re-enactment, and should be subject to a review of the underlying policy".

¹³⁸ Law Commission *Presentation Of New Zealand Statute Law* (NZLC R104, 2008) at 11, R23. See also Law Commission *Presentation Of New Zealand Statute law* (NZLC IP2, 2007).

¹³⁹ The Government presented an interim response to Parliament on 29 July 2009, which confirmed that it would respond in full to Law Commission *Presentation Of New Zealand Statute Law* (NZLC R104, 2008), and also to the related Law Commission *Review of the Statutes Drafting and Compilation Act 1920* (NZLC R107, 2009), by 20 November 2009. The final Government Response (20 November 2009) is available at <www.pco.parliament.govt.nz>.

XVI Legislation Bill: "Disallowable Instruments", "Legislative Orders" and "Regulations"

The Legislation Bill was introduced into New Zealand's Parliament on 25 June 2010.¹⁴⁰ The Bill's explanatory note says that, in the Bill:¹⁴¹

The key new defined terms are—

- **disallowable instrument**, which has the meaning given in *clause 37*. This term is used primarily in *subpart 1 of Part 3* but is also used elsewhere in the Bill. The definition is intended to capture instruments that are legislative orders, are expressly stated by an Act to be disallowable instruments, or have a significant legislative effect (within the meaning of *clause 38*). [Legislative orders, and every instrument stated by an Act to be a disallowable instrument, will under *clause 40* have to be presented to the House of Representatives.] Where an existing Act applies the Regulations (Disallowance) Act 1989 to a particular kind of legislative instrument, it is intended that the *Schedule* of this Bill will update that provision by stating that legislative provisions of that kind are disallowable instruments under *subpart 1 of Part 3* of this Bill. So, the definition will need to be applied only if the empowering Act is silent about the status of the instrument for the purpose of disallowance:
- **legislative order**[, which] is a new term and is used primarily for the purpose of *Part 2* of the Bill. The definition is intended to capture most Orders in Council and Ministerial instruments (such as *Gazette* notices) that amend an Act or define a term used in an Act. Under *Part 2*, the PCO will publish legislative orders, reprints of legislative orders and regulations, and some class exemption notices under various Acts, but will not have to publish other subordinate legislative instruments. The term regulations is already defined in the Interpretation Act 1999 [s 29,] and that definition will usually apply where an enactment uses that term. [(Section 78(3) of the Goods and Services Tax Act 1985, for example, relates to "regulations" prescribing, or providing for the determination of, fees, charges, or other amounts that may be affected by changes in the rate of GST.)]

Section 29 of the Interpretation Act 1999 will therefore define "regulations" as follows:¹⁴²

¹⁴⁰ Legislation Bill (162–1). The Regulations Review Committee on 29 April 2010 received from the Parliamentary Counsel Office a briefing "on Legislation Bill matters relating to delegated legislation".

¹⁴¹ Legislation Bill (162–1) (explanatory note) at 4–5. Under the Legislation Bill, the Parliamentary Counsel Office will not publish individual exemptions, but will publish "class exemptions", under the following: Anti-Money Laundering and Countering Financing of Terrorism Act 2009, s 157; Financial Advisers Act 2008, s 148 (but see new s 148B substituted by Financial Advisers Amendment Act 2010); Financial Reporting Act 1993, ss 4B and 35A; Reserve Bank of New Zealand Act 1989, s 157G; Securities Act 1978, s 5(5); Securities Markets Act 1988, ss 36E and 48; and Takeovers Act 1993, s 45. Compare Gas (Safety and Measurement) Regulations 2010 SR 2010/76, r 85(8) and Gas Act 1992, s 54(1)(o).

¹⁴² In s 29, as amended by cl 72(3) of the Legislation Bill, which substitutes a new para (e).

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 [and] 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 legislative order or a disallowable instrument for the purposes of the Legislation Act 2010:
- (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)

Notably that change also affects the presumptive meaning of "enactment" as defined in s 29 of that Act and used, for example, in ss 92B(1)(b) and 92J of the Human Rights Act 1993.

Under cl 6 of the Bill (which replaces s 4 of the Acts and Regulations Publication Act 1989), the PCO will *not* continue to publish all new regulations. Instead, the PCO will publish, on the same basis as Acts, "legislative orders" (which will include most regulations but exclude individual exemption notices and similar instruments). "Legislative order" is defined as follows:¹⁴³

legislative order means—

- (a) an Order in Council other than—
 - (i) an Order in Council that the empowering Act requires to be published in the *Gazette*:
 - (ii) an Order in Council that relates exclusively to an individual:
- (b) an instrument made by a Minister that amends an Act or defines the meaning of a term used in an Act:
- (c) an instrument that an Act requires to be published under this Act:
- (d) resolutions of the House of Representatives that—
 - (i) revoke a disallowable instrument in whole or in part; or
 - (ii) amend a disallowable instrument; or
 - (iii) revoke and substitute a disallowable instrument

An example of an Order in Council that relates exclusively to an individual, as mentioned in para (a)(ii) of that definition, is an Order in Council under s 406(a) of the Crimes Act 1961 referring the question of the conviction or sentence of a person to be heard and determined by the Court to

¹⁴³ Legislation Bill (162–1), cl 4.

which that question is referred, as in the case of an appeal, by that person against conviction or sentence or both, as the case may require.¹⁴⁴

Clause 37 of the Bill defines "disallowable instrument". In general, an instrument will be disallowable under subpart 1 of Part 3 of the Bill if it:

- is a legislative order;
- is disallowable because of the operation of another enactment (for example, an Act may specifically state that an instrument is a disallowable instrument);
- has significant legislative effect as defined in cl 38.

Existing Acts that refer to the Regulations (Disallowance) Act 1989 are consequentially amended by cl 72(2) and the Schedule so that they state whether or not an instrument is disallowable.¹⁴⁵ So, the test in cl 38 will apply where an Act enables subordinate legislation to be made but is silent on the question of disallowance (as may occur if the instrument is clearly a legislative order, and so is also a disallowable instrument and to be tabled). Notably the Regulations Review Committee's jurisdiction is likely to be redefined by reference to whether an instrument is under the Bill a "disallowable instrument".¹⁴⁶

Clause 38 defines "significant legislative effect". To qualify under this definition, the effect of the instrument must be:

- to create, alter or remove rights or obligations, or to determine or alter the temporal application of rights or obligations (as illustrated in cl 39); and

¹⁴⁴ An example is the reference of the question of the conviction of Donald Mitchell Hedges in 24 September 2009 *New Zealand Gazette* at 3330 and *Hedges v New Zealand Police* HC Auckland CRI-2009-488-0049, 9 September 2010 per White J. The Legislation Bill is to amend s 406 of the Crimes Act 1961. Compare an Order in Council under s 163 of the Immigration Act 2009 (or s 72 of the Immigration Act 1987) ordering the deportation from New Zealand of a person who constitutes a threat or risk to security. Compare also a Ministerial order as to a suspected terrorist under s 73 of the Immigration Act 1987.

¹⁴⁵ Some instruments are not disallowable under the Regulations (Disallowance) Act 1989 (NZ) as they are subject to special disallowance procedures (Epidemic Preparedness Act 2006, s 22; Securities Markets Act 1988, s 36Q). Others are not disallowable under the Regulations (Disallowance) Act 1989 (NZ) for other reasons, for example, Civil List Act 1979, s 20A(8); District Courts Act 1947, s 11G(6); Remuneration Authority Act 1977, s 12B(9); Local Government Act 2002, sch 7, cl 6(4). Independence from parliamentary supervision may be why "controls" that regional councils specify in regional transport plans and impose under s 13 of the Public Transport Management Act 2008 on commercial public transport services are (under s 13(12) of that Act) not disallowable (despite imposing binding obligations by s 15(4)). Compare Local Government (Auckland Council) Act 2009, s 35(7)(b). See also the Civil Aviation Act 1990, new s 107(3) (to be inserted by Civil Aviation (Cape Town Convention and Other Matters) Amendment Bill 2010), cls 2(1) and 12, and the Patents Bill 2008 (235–2), cl 165B(6).

¹⁴⁶ SOs 3(1) ("regulation") and SOs 309-315.

- to determine or alter the content or temporal application of the law applying to the public or a class of the public.

Clause 39 gives some examples of how the temporal application of rights or obligations can be altered or determined. An example is an instrument that appoints a date on which specified statutory rights or obligations come into force. Clause 40 specifies instruments required to be tabled.

Clauses 37 to 40 are critical provisions, and are reproduced in full in the Appendix at the end of this paper (that also shows recommended amendments to them). Some comments on, and examples of instruments mentioned in, those clauses, are as follows. Clause 37(1)(a) is most probably over-inclusive in making all "legislative orders" also "disallowable instruments".¹⁴⁷ That view is suggested by the other instruments that are not to be "disallowable". An instrument that is made or approved by a resolution of the House of Representatives, for example, is not generally to be disallowable.¹⁴⁸ Nor is an instrument that the House of Representatives could, by resolution, prevent from coming into force or taking effect.¹⁴⁹ An instrument that is made by a court, Judge or person acting judicially is also not to be disallowable.¹⁵⁰

A bylaw that is subject to the Bylaws Act 1910 is also not a disallowable instrument for the purposes of the Bill.¹⁵¹ Section 2 of the Bylaws Act 1910 defines a bylaw as "any rule or regulation ... made by any local authority by virtue of any Act ... and ... termed a bylaw in the Act". Section 2(1) of the Regulations Act 1936 defined "regulations" as excluding "regulations made by

¹⁴⁷ House Resolutions disallowing or amending instruments should not be disallowable. Nor should legislative orders that are made, or that commence only if approved, by the House. See the Appendix at the end of this paper.

¹⁴⁸ Legislation Bill (162–1), cl 37(2)(a). For example, Regulations (Disallowance) Act 1989 (NZ), ss 5 and 9 (and cls 41 and 45 of the Bill); Biosecurity Act 1993, s 146(2) and (3); Customs and Excise Act 1996, s 80(3); Epidemic Preparedness Act 2006, s 21(4); Misuse of Drugs Act 1975, s 4A(2); Parliamentary Service Act 2000, s 25(4); Sentencing Council Act 2007, ss 18-19; Tariff Act 1988, s 11(3). See also the affirmative resolution schemes involving approval by resolution, for example: Dog Control Act 1996, s 78B(2); Misuse of Drugs Act 1975, s 4A(2); Misuse of Drugs Amendment Act 2005, s 34(2); Public Finance Act 1989, s 82(5).

¹⁴⁹ Legislation Bill (162–1), cl 37(2)(b). For example, Civil Defence Emergency Management Act 2002, ss 35 (civil defence emergency management strategy), 39, 41(1)(b), 42, and 43 (national civil defence emergency management plan); Crown Entities Act 2004, s 109 (House resolving to disapply whole of government direction). Notably SO 314 refers to a motion that the House "disallow, disapply, or otherwise not approve of" instruments.

¹⁵⁰ Legislation Bill (162–1), cl 37(2)(c). This does not exclude rules of court or other instruments made merely on the recommendation, or with the concurrence of, a court or person acting judicially. An example of a complaint to the Regulations Review Committee about a rule of Court is the complaint about r 89(2)(b) of the Family Courts Rules 2002: [2008] I AJHR 16M at 20. It led to Family Courts Amendment Rules 2008 SR 2008/207, rr 8-9 (revoking r 89(2)(b) and providing for litigation guardians for incapacitated people).

¹⁵¹ Legislation Bill (162–1), cl 37(3).

any local authority or by any authority or persons having jurisdiction limited to any district or locality". The Regulations Review Committee in [1986] I AJHR 16B at 13 thought that exclusion appropriate as "a local authority ... has its own elected representatives". The Government Response proposed omitting that exclusion as unnecessary.¹⁵² The s 2 definition of "regulation" in the Regulations (Disallowance) Act 1989 (NZ) covered bylaws only if "made under an Act by the Governor-General in Council or by a Minister of the Crown" (for example, National Parks Act 1980, s 56 and Reserves Act 1977, s 106). Bylaws approved by Order in Council (for example, Airport Authorities Act 1966, s 9(5) and (6)) may be deemed to be "regulations" for Regulations (Disallowance) Act 1989 (NZ) purposes and, as they are in Orders in Council, will be "legislative orders". Section 157 of the Local Government Act 2002 requires a local authority to give public notice of the making of, and make available copies of, its bylaws,¹⁵³ and under ss 158–160A bylaws under that Act and its 1974 predecessor are revoked automatically if not reviewed periodically. Some bylaws have special disallowance provisions.¹⁵⁴

Clause 37 is also subject to other enactments that limit or affect when, or the extent to which, a kind of instrument is a disallowable instrument for the purposes of the Bill.¹⁵⁵ Clause 38(1) ensures that an instrument has "significant legislative effect" if the effect of the instrument is to do both of the following:¹⁵⁶

152 1987 Government Response, above n 78, at 13

153 Compare Health Act 1956, s 68.

154 Examples of special disallowance provisions for bylaws include Hutt Valley Drainage Act 1967, s 49(g); Land Transport Act 1998, s 22AC; Transport Act 1962, ss 72(4) and 74; North Shore Drainage Act 1963, s 24(1)(g); and Wellington Regional Water Board Act 1972, s 63. Sections 3-11 of the Bylaws Act 1910 on the Minister of Internal Affairs confirming bylaws, were repealed on 3 June 1998 by the Bylaws Amendment Act 1998 No 29 as they "served only a limited purpose" and s 8(2) did not prevent courts' amending or quashing a bylaw for repugnancy, unreasonableness or for being ultra vires (but see *Harrison v Auckland City Council* [2008] NZAR 527 (HC) at [52(b)] per Stevens J on courts' scrutinising more closely bylaws not subject to confirmation). See also Kenneth Palmer "Local Government and Resource Management" [1998] 4 NZ Law Rev 625; Kenneth Palmer "Local Government and Resource Management" [2000] 4 NZ Law Rev 485; Dean Knight "Brothels, bylaws, prostitutes and proportionality" [2004] NZLJ 423; Kenneth Palmer "Local Government Law and Resource Management" [2004] 4 NZ Law Rev 751; Dean Knight "Power to make Bylaws" [2005] NZLJ 165; Fiona Wright "Sound Check: Bylaws, Busking and the Local Government Act 2002" (2005) 36 VUWLR 105; Kenneth Palmer "Local Government Law and Resource Management" [2006] 4 NZ Law Rev 737; Kenneth Palmer "*Carter Holt Harvey Ltd v North Shore City Council*" (2006) 6(14) Resource Management Bulletin 171; Kenneth Palmer "Bylaws" (2008) 7(9) Resource Management Bulletin 102; Kenneth Palmer "Local Government and Resource Management" [2009] 2 NZ Law Rev 341.

155 Legislation Bill (162–1), cl 37(4). For example, Building Act 2004, s 412; Civil Aviation Act 1990, s 77A(5). Compare Legislation Bill (162–1), cl 55.

156 The Legislation Bill's incorporation by reference provisions (in subpart 2 of Part 3) apply (cl 47(1)), by contrast, to an instrument (however styled) that is not a bylaw subject to the Bylaws Act 1910, but has (any) legislative effect, is authorised by an enactment and is made for a purpose in cl 48(2).

- (a) create, alter or remove rights or obligations; and
- (b) determine or alter the content of the law applying to the public or a class of the public.

In applying cl 38(1), the following must be disregarded:

- (a) the description, form and maker of the instrument:
- (b) whether a confirmation provision applies to 1 or more of its provisions.¹⁵⁷
- (c) whether it also contains provisions that are administrative.

Purely "status" instruments do not create, alter or remove rights or obligations.¹⁵⁸ An instrument also does not have a significant legislative effect if it explains or interprets rights or obligations in a non-binding way,¹⁵⁹ as long as the instrument does not do anything else that would bring it within cl 38(1). Clause 38(5) makes it clear that an instrument that is made in the exercise of a statutory power and imposes obligations in an individual case does not determine or alter the content of the law just because the statutory power applies generally or to a class of persons.

Clause 39 gives some examples of how the temporal application of rights or obligations can be altered or determined by an instrument. The example in cl 39(a) covers any instrument, not just an order, bringing an Act into force.¹⁶⁰ Clause 39(c) relates to an instrument that suspends,¹⁶¹ or in any

¹⁵⁷ "Confirmation provision", as defined by cl 36 of the Bill in relation to an instrument made under an enactment, means an enactment that provides that the instrument lapses, expires, or is [deemed to be] revoked at a stated time unless the instrument is confirmed, confirmed and validated, or validated by an Act passed or enacted before that time. An example of a confirmation provision is the Commodity Levies Act 1990, s 12(1)(b) and (2)(b) (but see also s 2(4)).

¹⁵⁸ Examples include declarations as to institutions (Corrections (Wanganui (Kaitoke) Prison) Notice 2008 SR 2008/164; Alcoholism and Drug Addiction Institution (The Bridge, Auckland) Order 2010 SR 2010/19), approvals of equipment (Land Transport (Approved Vehicle Surveillance Equipment) Notice 2008 SR 2008/117), and fixing dates for administrative purposes (Election Main Rolls Closing Order 2008 SR 2008/151). But the requirement that the law be determined or altered excludes appointments, including under s 2 of the Commissions of Inquiry Act 1908 (compare Inquiries Bill 2008 (283–2), cl 6(2)): Law Commission *A New Inquiries Act* (NZLC R102, 2008) at [2.27]. Compare class "delegations" of functions, for example, in Health Act 1956, s 69ZL(3).

¹⁵⁹ Compare a document issued by the chief executive of the Department of Building and Housing under s 22 of the Building Act 2004 by notice in the *Gazette* for use in establishing compliance with the building code. Section 412(2) of the Building Act 2004 ensures these compliance documents are not regulations for the purposes of the Regulations (Disallowance) Act 1989 (NZ)). Compare also binding rulings made by the Commissioner of Inland Revenue under ss 91D, 91E, 91F, or 91GA of the Tax Administration Act 1994 and notified by notice in the *Gazette* (and in Tax Information Bulletins), discussed by Adrian Sawyer "Binding Rules in New Zealand – an Assessment of the First Ten Years" (2006) 12 Canterbury LR 273. See also Customs and Excise Act 1996, s 120; Immigration Act 2009, s 22(8)(b).

¹⁶⁰ See for example Antarctica Act Commencement Order 1961 SR 1961/72. Compare Epidemic Preparedness Act 2006, s 8(1) notices that "activate" modification orders. See also the Diseased Cattle Act 1861, s XVII, noted in the discussion of New Zealand commencement clauses in Mark Gobbi "When to Begin: A Study of

way cancels,¹⁶² for a period or until a time, the application or operation of the enactments or other laws that directly or indirectly confer or impose rights or obligations. Clause 39(e) covers similarly an instrument that defers the date on which, or other time at which, rights or obligations are abolished, repealed, or revoked.¹⁶³

Clause 40 relates to instruments required to be presented to the House of Representatives. Clause 40 applies to:

- (a) legislative orders; and
- (b) every instrument stated by an Act to be a disallowable instrument.

Clause 40 requires all legislative orders, and those disallowable instruments, to be presented to the House of Representatives not later than the 16th sitting day of the House of Representatives after the day on which they are made.¹⁶⁴

The functions of the PCO, as stated in cl 58(1)(b) of the Bill, include the function (to replace that under s 4(1)(e) of the Statutes Drafting and Compilation Act 1920) of drafting of, and drafting amendments to, the instruments specified in cl 58(5),¹⁶⁵ which provides as follows:

New Zealand Commencement Clauses with Regard to those Used in the United Kingdom, Australia, and the United States" (2010) 31(3) Stat LR 153 at 205.

161 For example a notice under s 10 of the Petroleum Demand Restraint Act 1981 suspending provisions of petroleum demand restraint regulations. Compare Land Transport Act 1998, s 160(3) (Ministerial *Gazette* notices suspending ordinary land transport rules) and Crown Entities Act 2004, s 194(b).

162 See for example, Coinage Proclamation 1968 SR 1968/85, cl 3, ensuring that s 10(5) of the Decimal Currency Act 1964 (which enabled coins to continue to be made and issued under a repealed Act) ceased to be in force on 1 June 1968.

163 See for example, Medicines Act 1981, s 96J(2) and (3); Mental Health Commission Act 1998, s 13(2).

164 For regulations published in the SR (or LO or LI) series, the making of which is notified in the *Gazette*, presentation to the House is effected by the legislative printer forwarding copies to the Bills Office on behalf of the *Gazette* Officer in the Department of Internal Affairs. Where instruments are outside the SR (or LO or LI) series but are deemed regulations for disallowance (or are stated by an Act to be disallowable instruments), the agency responsible for the regulations must arrange for the responsible Minister to present those instruments to the House within the required 16-sitting-day timeframe: "Papers Presented" New Zealand Parliament <www.parliament.nz>.

165 The Parliamentary Counsel Office's certification role (recognised by the Cabinet Office *Cabinet Manual 2008* at [7.94]) in respect of "statutory regulations" will thus presumably become one of instead certifying "legislative instruments". See the Appendix.

- (5) The instruments to be drafted by the PCO are—
- (a) Orders in Council other than—
 - (i) Orders in Council that are required by their empowering Act to be published in the *Gazette*;
 - (ii) Orders in Council that relate exclusively to an individual;
 - (b) instruments made by a Minister that amend an Act or define the meaning of a term used in an Act;
 - (c) instruments that are required by an Act to be published under this Act (other than resolutions of the House of Representatives referred to in paragraph (d) of the definition of legislative order);
 - (d) other instruments that the Attorney-General or the Chief Parliamentary Counsel directs in writing be drafted by the PCO.

Clause 58 covers several matters, and so might helpfully be divided into several provisions. Instruments of the kind mentioned in cl 58(5)(b) – those made by a Minister that amend an Act or define the meaning of a term used in an Act – are unusual but not unprecedented.¹⁶⁶

The Bill would also replace the judicial notice requirements and evidentiary presumptions in ss 16B, 16C(3) and s 16D of the Acts and Regulations Publication Act 1989. The corresponding or replacement provisions are cl 16 (judicial notice of regulations, and legislative orders) and cl 18 (legal status of, or of a reprint of, official version of regulations or a legislative order).¹⁶⁷ Reprints of regulations provisions in ss 17A to 17F of the Acts and Regulations Publication Act 1989 would be replaced by subpart 2 of Part 2,¹⁶⁸ and by the PCO's function to undertake, and arrange for the printing and publication of, reprints (in electronic and printed form) of regulations and legislative orders.¹⁶⁹ The "additional" power to revoke spent instruments under s 16 of the Acts and Regulations Publication Act 1989 would be replaced by the power, in cl 15, to revoke "spent instruments" (including any regulations, any legislative order and any "other instrument" specified in s 16(3), and also in cl 16(4)(c), of the Acts and Regulations Publication Act 1989).¹⁷⁰

¹⁶⁶ See for example Sale of Liquor Act 1989, s 2A(2)(d) (meaning of term evidence of age document); Sale of Liquor (Evidence of Age Document) Notice 1999 SR 1999/364.

¹⁶⁷ See also the express savings provisions (as to ss 16C and 16D of the Acts and Regulations Publication Act 1989) in cl 72(6) and (7) of the Legislation Bill.

¹⁶⁸ "Legislation" that may be reprinted under subpart 2 of Part 2 of the Bill includes an instrument that (is not a legislative order but that) is published under cl 14 of the Bill (or is published under a corresponding provision in a previous enactment, such as s 14 of the Acts and Regulations Publication Act 1989).

¹⁶⁹ Legislation Bill, cl 58(1)(d) and (e).

¹⁷⁰ Used, for example, in Regulations Revocation Order 2008 SR 2008/367.

XVII Conclusion ("Legislative Orders" become "Legislative Instruments")

The Legislation Bill deliberately does not re-enact (with or without modification) the Interpretation Act 1999. It therefore leaves for the future whether and, if so how much, that Act's provisions should apply to instruments under an Act that are:

- legislative in character but not ("legislative orders/instruments" or other) regulations; or
- (wholly or in part) administrative, rather than legislative, in character.¹⁷¹

It also leaves for the future any revision of the s 29 definition of "regulations" in the Interpretation Act 1999 (and thus also the general definition in that section of "enactment").

Even so, the Legislation Bill's new definitions make important changes. The important changes can be seen, for example, by considering just one kind of instrument: approved codes of broadcasting standards under the Broadcasting Act 1989. Every broadcaster is responsible for maintaining, in its programmes and their presentation, standards that are consistent with these codes. Breaches of these codes do not, by themselves, give rise to civil liability, but may lead to complaints that must be considered, and that may result in orders by the Broadcasting Standards Authority (including orders for compensation for failures to maintain personal privacy).

These codes of broadcasting standards have been held not to be "enactments" for the purposes of (but to have to be not inconsistent with the Broadcasting Act 1989 interpreted in accordance with) s 6 the New Zealand Bill of Rights Act 1990.¹⁷²

However, if the effect of these codes is to create rights or obligations and to determine or alter the content of the law applying to the public then, under the Legislation Bill, these codes will be:

- "disallowable instruments"; and therefore also
- "regulations" and "enactments" for the purposes of the Interpretation Act 1999, Human Rights Act 1993 and New Zealand Bill of Rights Act 1990.

¹⁷¹ Compare for example Acts Interpretation Act 1924 (NZ), s 7; Interpretation Act 1999 (NZ), s 34; Acts Interpretation Act 1901 (Cth), s 46; Legislative Instruments Act 2003 (Cth), s 13; Interpretation Act 1978 (UK), s 11.

¹⁷² *TVNZ Ltd v KW HC Auckland CIV-2007-485-001609*, 18 Dec 2008 at [14] and [98] per Courtney J; *TVNZ v Viewers for Television Excellence Inc* [2005] NZAR 1 (HC) at [29]-[36] per Wild J. The making of the codes must be notified, and they must be published: Broadcasting Act 1989, s 22. The Act does not declare or deem approved codes of broadcasting standards, but does deem rules on retention of recordings of programmes, to be regulations for Regulations (Disallowance) Act 1989 (NZ) purposes: Broadcasting Act 1989, s 30(5).

The Legislation Bill as introduced is, of course, unlikely to be enacted unamended.¹⁷³ But if most of its proposals become law, the Bill will, most probably, be a "once-in-a-lifetime" reform of the law relating to subordinate legislative instruments in New Zealand. It is, to date, the ultimate step in that law's development. This paper has traced that law's development to try to show that different kinds of New Zealand subordinate legislation that have been, are, and will be relevant for the different purposes of drafting, publication, interpretation, and disallowance.

¹⁷³ See for example the suggestion in footnote 147 that only some (not all) "legislative orders" should be "disallowable instruments". Some also consider that the label "legislative orders" should, as it covers instruments that are not Orders in Council, be replaced with the label "legislative instruments". The Legislation Bill was read a first time on 3 August 2010 and referred to the Regulations Review Committee. It called for submissions on or before 23 September 2010, and was due to report back to the House on or before 3 February 2011. It reported on 1 December 2010, recommending the Bill be passed with amendments, some of which (for example, replacing the label "legislative order" with the label "legislative instrument") are set out in this paper's Appendix. The Committee was "satisfied that the bill would increase parliamentary oversight of the use of delegated powers by the Executive, and make it more difficult to avoid disallowance". It also emphasised the need for the House's Standing Orders to be revised in the light of the Bill, in particular to make certain and clear the Committee's jurisdiction to scrutinise all categories of disallowable instruments. The Bill's Schedule will also need updating before it is enacted.

*Appendix: Legislative Instruments Provisions in Legislation Bill (162—2):
Definitions for Publication, Disallowance, Tabling and Drafting*

4 Interpretation

In this Act, unless the context otherwise requires,—

...

disallowable instrument has the meaning given to it by section 37

...

legislative ~~order~~ instrument means—

- (a) an Order in Council other than—
 - (i) an Order in Council that the empowering Act requires to be published in the *Gazette*;
 - (ii) an Order in Council that relates exclusively to an individual;
- (b) an instrument made by a Minister of the Crown that amends an Act or defines the meaning of a term used in an Act;
- (c) an instrument that an Act requires to be published under this Act;
- (d) resolutions of the House of Representatives that—
 - (i) revoke a disallowable instrument in whole or in part; or
 - (ii) amend a disallowable instrument; or
 - (iii) revoke and substitute a disallowable instrument

37 Disallowable instruments

- (1) An instrument made under an enactment is a disallowable instrument for the purposes of this Act if 1 or more of the following applies:
 - (a) the instrument is a legislative ~~order~~ instrument; or
 - (b) the enactment or another enactment contains a provision (however expressed) that has the effect of making the instrument disallowable for the purposes of this Act; or
 - (c) the instrument has a significant legislative effect.
- (2) However, an instrument ~~that has a significant legislative effect~~ is not a disallowable instrument for the purposes of this Act if the instrument—
 - (a) is made or approved by a resolution of the House of Representatives; or
 - (b) is one that the House of Representatives could, by resolution, prevent from coming into force or taking effect; or
 - (c) is one made by a court, Judge, or person acting judicially.
- (3) A bylaw that is subject to the Bylaws Act 1910 is not a disallowable instrument for the purposes of this Act.
- (4) This section is subject to other enactments that limit or affect when, or the extent to which, a kind of instrument is a disallowable instrument for the purposes of this Act.

38 Instruments that have significant legislative effect

- (1) An instrument has a significant legislative effect if the effect of the instrument is to do both of the following:
 - (a) create, alter, or remove rights or obligations; and
 - (b) determine or alter the content of the law applying to the public or a class of the public.
- (2) For the purposes of subsection (1),—
 - (a) an instrument that determines or alters the temporal application of rights or obligations must be treated as having the effect described in paragraph (a) of that subsection; and
 - (b) an instrument that determines or alters the temporal application of the law applying to the public or a class of the public must be treated as having the effect described in paragraph (b) of that subsection.
- (3) In applying subsection (1), the following must be disregarded:
 - (a) the description, form, and maker of the instrument;
 - (b) whether a confirmation provision applies to 1 or more of its provisions;
 - (c) whether it also contains provisions that are administrative.
- (4) An instrument does not have a significant legislative effect if it explains or interprets rights or obligations in a non-binding way, as long as the instrument does not do anything else that would bring it within subsection (1).
- (5) An instrument that is made in the exercise of a statutory power and imposes obligations in an individual case does not determine or alter the content of the law just because the statutory power applies generally or to a class of persons.

39 Instruments that determine or alter temporal application

An instrument that determines or alters the temporal application of rights or obligations includes (without limitation) one that does 1 or more of the following to the enactments or other laws that directly or indirectly confer or impose those rights or obligations:

- (a) appoints or prescribes a date on which, or other time at which, they come into force;
- (b) defers the date on which, or other time at which, they apply or come into force;
- (c) suspends, or in any way cancels, for a period or until a time, their application or operation;
- (d) continues or extends (with or without a break) for a period or until a time their application or operation;
- (e) defers the date on which, or other time at which, they are abolished, repealed, or revoked;
- (f) on a date, or at any other time, abolishes, repeals, or revokes them.

Compare: Legislative Instruments Act 2003 ss 4–11 (Aust)

40 Legislative ~~orders~~ instruments and disallowable instruments to be presented to House of Representatives

- (1) This section applies to—
- (a) legislative ~~orders~~ instruments; and
 - (b) every instrument stated by an Act to be a disallowable instrument.
- (2) All legislative ~~orders~~ instruments and those disallowable instruments must be presented to the House of Representatives not later than the 16th sitting day of the House of Representatives after the day on which they are made.

Compare: 1989 No 143 s 4

Inserted new clause 58 of Bill (162—2), replacing struck out clause 58(1)(b) and (5) of Bill (162—1)

58 Functions of PCO

- (1) The functions of the PCO are—

...

- (b) to draft instruments specified in subsection (2) and amendments to them:

...

- (2) The instruments to be drafted by the PCO are—

- (a) Orders in Council other than—
 - (i) Orders in Council that are required by their empowering Act to be published in the *Gazette*;
 - (ii) Orders in Council that relate exclusively to an individual;
- (b) instruments made by a Minister that amend an Act or define the meaning of a term used in an Act;
- (c) instruments that are required by an Act to be published under this Act (other than resolutions of the House of Representatives referred to in paragraph (d) of the definition of legislative instrument);
- (d) other instruments that the Attorney-General or the Chief Parliamentary Counsel directs in writing be drafted by the PCO.

Compare: 1920 No 46 ss 4, 5

Section 4 of the Interpretation Act 1999 and the definition of **regulations** in s 29 (with new para (e) proposed to be substituted by cl 72(3) of the Legislation Bill (162—2)):

4 Application

- (1) This Act applies to an enactment that is part of the law of New Zealand and that is passed either before or after the commencement of this Act unless—
 - (a) the enactment provides otherwise; or
 - (b) the context of the enactment requires a different interpretation.
- (2) The provisions of this Act also apply to the interpretation of this Act.

Part 5

Meaning of terms and expressions in legislation

29 Definitions

In an enactment,—

Act means an Act of the Parliament of New Zealand or of the General Assembly; and includes an Imperial Act that is part of the law of New Zealand

...

enactment means the whole or a portion of an Act or regulations

...

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 [and] 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 legislative ~~order~~ instrument or a disallowable instrument for the purposes of the Legislation Act 2010;
- (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)