Parliamentary Counsel Office submission (8 May 2014) on the New Zealand Productivity Commission Draft Report *Regulatory Institutions and practices* (March 2014)

Introduction

We welcome the Productivity Commission's inquiry and draft report as a timely study of the issues facing the design and operation of regulatory regimes in New Zealand. It would be of great benefit to New Zealand to have an agreed and co-ordinated approach that could result in better outcomes. The Parliamentary Counsel Office (PCO) would, with others, support the Commission in developing findings and recommendations in the draft report (if confirmed in the final report) into workable guidelines and revised procedures that are agreed with all of the other stakeholders in this field, and that are integrated with existing procedures, guidelines and jurisprudence.

PCO brings a unique perspective to the debate, in that PCO has been grappling with some of the issues raised in the draft report for many years, with varying success, as a gatekeeper of some of the current guidance on the establishment of regulatory regimes. PCO often finds that it is in an impossible position, to the extent that the current guidance is unclear or is predicated on different approaches to regulation. Therefore, PCO strongly agrees that there is a need to take stock, and also to avoid duplication of guidance.

A summary of PCO's perspective is that PCO works at a coal face where laws are often designed to scratch an itch and where laws are generally made to pass (certainly as regards government bills and delegated legislation). The mechanisms by which PCO can influence outcomes have become increasingly limited. However, the Commission's recommendations in the draft report could help to refocus regulation on the outcomes sought and the needs of the communities that are served and regulated. The Commission's report, to be of lasting benefit, needs to set in place some common expectations that cannot be eroded by the vagaries of time and convenience. It also needs to build on the best features of New Zealand's regulatory practice (like the Cabinet, RIS, and subject select committee processes) and to avoid extending its less workable features. The Commission's report, to achieve this, will itself need to avoid the pitfalls that befall much less-than optimal regulation. These pitfalls include insufficient time and insufficient attention to changing some of the cultures that characterise the New Zealand regulatory landscape.

PCO's submissions on the specific questions, findings and recommendations in the draft report that relate most to PCO's role and our expertise in regulatory practice are set out below.

Chapter 3 – Understanding the regulatory system

F3.3/3.4

The lack of regular and detailed reporting on the state of New Zealand regulators and regulation is a key gap in the current regulatory management system. The lack of data on regulatory activity compares poorly with fiscal management processes. Those processes promote informed and focused public debate on fiscal policy, encourage governments to focus their actions, and enable comparisons between different areas of the public sector.

More comprehensive and comparable information should be collected on the activities and impacts of New Zealand regulators. Such information could help offset barriers to identifying and making systemic improvements to regulatory practice. In particular, it could:

- *help designers of regulation compare and contrast regulatory approaches and features;*
- *help regulators identify better practice among their peers that might be adopted in their own operations; and*
- *be used to identify trends or patterns in implementing regulation or the performance of regulators.*

We agree with the need for information collection and reporting.

Chapter 4- Role clarity

F4.3

Legislative frameworks that keep the number of objectives and conflicts to the lowest possible number and provide a clear hierarchy of objectives help to support regulators in making consistent and predictable decisions.

We agree that solutions need to be found for conflicting objectives, while noting that the need for an independent regulator that can strike a balance between them is often one of the drivers for regulatory regimes.

F4.6

Creating separate bodies so that one body is responsible for making rules and the other for enforcing them can have benefits, such as greater transparency, probity and good decisions. Even so, whether structural separation creates net benefits will depend very much on the details of the regulatory regime. Combinations of other regulatory design options (such as clearer regulatory objectives, stronger reporting and consultation obligations) may provide equivalent benefits, with lower costs and less disruption.

We agree that issues can arise with rule-making regulators that have sole or main policy/enforcement/reviewing responsibilities especially where arrangements (either within the legislation or administratively within the regulator) are not made to clearly identify and separate those different functions.

F4.8 Regulatory exemptions

Regulatory exemptions can help manage overlaps between regimes, and allow regimes to adapt to changing business practice and circumstances. Principles or criteria guiding the use of exemptions should be included in legislation, and regulators should publish their reasons for granting exemptions.

We note that principles or criteria guiding the use of exemptions, and a requirement to publish reasons, should generally be, and are usually, included in new legislation. This seems consistent with the analysis of powers of exemption in Carter, McHerron, and Malone *Subordinate Legislation in New Zealand* (LexisNexis, 2013) at [3.7].

A significant number of Acts confer a power to grant an exemption from the provisions of an Act or from regulations. The power may be conferred on a regulator (such as the FMA), on the Governor-General by Order in Council, or on a Minister. Examples of such powers include-

- subpart 2 of Part 9 of the Financial Markets Conduct Act 2013 (a power for the FMA)

- s 138(1)(a) of the Credit Contracts and Consumer Finance Act 2003 (which allows the Governor-General, by Order in Council, to make regulations exempting any class of credit contract from being a consumer credit contract)
- s 143 of the Crown Entities Act 2004 (which allows the Minister of Finance to exempt certain outputs).

When is it appropriate to use exemptions?

Exemptions are analogous to Henry VIII clauses and we deal in more detail with this general issue later. These are provisions that enable an Act to be amended, suspended, or overridden by delegated legislation. In practical terms there is often little to distinguish a Henry VIII clause from an exemption especially where the exemption applies to a broad class of cases since that approaches a more general legislative modification: in effect, both allow the practical scope or effect of an Act to be modified by delegated legislation.

In relation to Henry VIII provisions, the Regulations Review Committee has noted that:[1]

> *An empowering provision that enables legislation to be amended by regulation provides the Executive with the power to override Parliament. The committee believes that this power should be granted by Parliament rarely and with strict controls.*

In relation to exemption provisions, that committee has also noted that:[2]

> *In some cases it has seemed to us that exemptions from requirements have been so numerous and applied so broadly that the exemptions have supplanted the framework of rules to which they relate.*

In light of the above, caution should be exercised before including an exemption power in an Act. The PCO considers that exemption powers should only be included where there are good reasons for their use. They should not be used routinely in reforming legislation simply because they provide a convenient or expedient answer to questions which have not been fully thought through and resolved at the policy development stage of a new or reformed regulatory regime.

Some of the factors that may indicate that there are good reasons for the use of an exemption power are as follows:

Unforeseeability

- If an area is so complex or is rapidly changing and evolving, it can be difficult to design fixed and certain rules that will work well in all of the circumstances. Issues that were not reasonably foreseeable at the time of enactment can undermine the effectiveness of the legislation. In these areas, a mechanism for providing some flexibility, built into the legislation, can allow it to respond to changing circumstances and ensure that the underlying policy intent of the legislation is not frustrated.

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[1] Report on the Inquiry into the Resource Management (Transitional) Regulations 1994 and the principles that should apply to the use of empowering provisions allowing regulations to override primary legislation during a transitional period [1995] AJHR I16C.

[2] Inquiry into the use of instruments of exemption in primary legislation Report of the Regulations Review Committee September 2008 I.16Q.

Urgency

- The fact that an area involves unforeseeability is usually not enough on its own to justify an exemption power. In some cases, the most appropriate response to a new situation is to amend the legislation in question. However, in other cases the need for a flexible response within the policy intent of the regulatory legislation is urgent. In these cases, the ability to grant an exemption quickly is important. For example, the exemption regime in the Securities Act 1978 (to be replaced by the Financial Markets Conduct Act 2013) is essential in the context of rapidly changing financial markets.

Frequency of change

- An exemption power is more likely to be justified in regulated activities that change frequently. If an area changes infrequently, normal amendment legislation is likely to be the more appropriate response.

Unduly onerous or burdensome requirements

- An exemption power is more likely to be justified in areas where participants may be subject to overlapping or even inconsistent legal requirements (whether within New Zealand or overseas). For example, exemptions granted under section 35A of the Financial Reporting Act 1993 recognise that a requirement for an overseas issuer to prepare financial statements in accordance with New Zealand law may be unjustified where the overseas issuer is required to prepare appropriate equivalent financial statements under overseas law.

Matters of "high policy" or of technical detail

- If a matter involves a significant or controversial change to the law, the decision on the matter should be made by Parliament. If, however, the law needs to be modified in a technical or relatively trivial way (still within the broad policy parameters of the Act), there is a good case for arguing that a regulator should make the decision via an exemption. Examples include technical modifications made by way of exemptions under the Financial Markets Conduct Act 2013 or the Non-bank Deposit Takers Act 2013.

What are the appropriate checks and balances?

The Productivity Commission's Finding 4.8 suggests that principles or criteria guiding the use of exemptions should be included in legislation and regulators should publish their reasons for granting exemptions.

The PCO agrees with this finding in most cases (but not all). Some exemptions across the statute-book involve minor, mechanical kinds of exemptions in perhaps one or two relatively insignificant areas. If the exemption is really just a limited concession to an individual, the full range of checks and balances for exemptions is unnecessary. This is an important qualification on F 4.8.

Where principles or criteria are appropriate, we note that:

- the criteria should require the exemption to be for, or consistent with, the purposes of the Act. For example, under section 557 of the Financial Markets Conduct Act 2013 (the FMCA), the FMA must not grant an exemption unless it is satisfied that the exemption is necessary or desirable in order to promote either or both of the main purposes of the Act as specified in section 3 or any of the additional purposes specified in section 4. In this regard, it is important to ensure that the purposes of the Act are flexible enough to accommodate exemptions. The purposes of the FMCA were specifically designed to take exemptions into account (section 4(c) of the FMCA, for example, refers to avoiding unnecessary compliance costs, which is often a key concern in legislation which provides for exemptions):

- generally the criteria should include other, more specific, criteria. Common examples include: "the extent of the exemption is not broader than is reasonably necessary to address the matters that gave rise to the exemption"; "the exemption would not cause significant detriment to [a relevant group], having regard to [various relevant factors]"; and "compliance with the relevant provision would, in the circumstances, require [a relevant person] to comply with requirements that are unduly onerous or burdensome":

- a careful balance needs to be struck. On the one hand, the principles and criteria need to ensure that the exemption power is used in a manner that is consistent with Parliament's intent as reflected in the policy objectives of the Act. On the other hand, the principles and criteria need to be flexible enough to allow the regulator (or other decision-maker) to grant appropriate exemptions in situations that are unforeseeable at the time of enactment.

The requirement for an exempting body to give a statement of its reasons follows logically from the requirement for the Act to specify principles or criteria. In those reasons the exempting body needs to demonstrate how the criteria is met in the particular circumstances. The usefulness of this requirement goes beyond mere transparency. In our experience, the need for a regulator to expressly justify the exemption in terms of the criteria often results in significant changes being made to the scope, and other terms and conditions, of the exemption. The statement of reasons requirement is an important discipline for regulators.

Section 45A(2) of the Takeovers Act 1993 provides that the Takeovers Panel may defer publishing, and need not publish, the reasons for granting an exemption if it is "satisfied on reasonable grounds that it is proper to do so on the ground of commercial confidentiality". Such a provision is not common across the statute book and should only be included in special circumstances.

There are other potential important "checks and balances" that are currently not mentioned by the Productivity Commission in F4.8. These are as follows:

Disallowance

- exemption notices are, generally speaking, subject to disallowance under Part 3 of the Legislation Act 2012. This means that the notice must be presented to the House of Representatives under section 41 and becomes subject to the scrutiny of the Regulations Review Committee. If the exemption is objectionable, the exemption could be disallowed, which has the same effect as a revocation:

Publication

- if an exemption is of general application and relates to a class of persons or transactions, then the exemption can have a significant legislative effect. Generally "class exemptions" are legislative instruments under the Legislation Act 2012. This has two important practical effects. First, it means that the exemption will be published in the LI series under the Legislation Act 2012. Secondly, it will be drafted by the PCO. However, if the exemption is granted only to a particular person or transaction, the exemption is more limited in scope and more administrative in character. In these circumstances, it is usually unnecessary for the exemption to be a legislative instrument that is drafted by the PCO. However, even in this situation the exemption should be made publicly available in the interests of transparency.

Sunsetting

- some Acts contain a "sunsetting" provision under which a particular exemption notice may not continue in force for more than (say) 5 years. A provision of this sort is generally not intended to prevent a regulator from granting a new exemption in substantially the same terms. Rather, it is designed to put a discipline on a regulator to keep its stock of exemptions under regular review.

LAC Guidelines

In its report *"Inquiry into the use of instruments of exemption in primary legislation"* (September 2008 I.16Q), the RRC suggested that the LAC Guidelines should be amended to set out guidance relating to exemptions. The PCO agrees that it would be helpful to amend the guidelines in this manner and notes that the guidelines are currently being redrafted. Such revised guidelines would help promote consistency in the design of exemption regimes.

R4.1

The Cabinet Manual should be amended to set a general expectation that exposure drafts will be published and consulted on before introducing into Parliament legislation that creates new regulatory regimes or significantly amends existing regimes.

We support the use of the Cabinet Manual to drive consultation, rather than reliance just upon statutory provisions.

Although this recommendation is something that PCO would, in general, welcome, (subject to the Government's agreement to waiving legal professional privilege: Legislation Act 2012 s 61), it should not be considered to be a panacea for imperfectly considered and developed regulatory regimes. This kind of pre-legislative scrutiny tests and improves Bills before they are introduced to the House. It therefore streamlines House time and process costs of

enacting primary legislation. However, it has the potential to compromise timely delivery of the Government's legislative programme and responsiveness to pressing public policy problems. It comes therefore relatively late in the problem identification - policy response - regulatory design - legislative drafting process. Quite often, better results are delivered by carrying out more thorough consultation and engagement with stakeholders and other interested parties in those earlier stages. Concentrating too much on pre-legislative scrutiny means many options are already set in fairly concrete form and alternatives have already been ruled out. It can also mean that there is an undue focus on the mechanics and detail of the legislation and less on the policy intent and problem solution.

It is worth noting that for revision Bills on the Government's approved programme for each Parliament, it is quite likely to be fairly routine to help ensure these Bills re-enact existing legislation in clearer form. For more discussion of pre-legislative scrutiny, see, for example, J F Burrows QC and R I Carter *Statute Law in New Zealand* (4th ed, 2009) at pp 102-104.

Chapter 5- Regulatory independence and institutional form

F5.6, 5.7

There is inconsistent allocation of legislative provisions between primary legislation and types of secondary legislation in regulatory regimes. There is evidence that existing mechanisms to promote greater consistency are ineffective.

There is scope for the greater use of delegating authority to make secondary legislation to regulators, subject to appropriate controls, to ensure regulation can keep pace with technological and other developments. Designers of regulatory regimes need to consider what regulation-making powers can be delegated to the regulator, particularly in areas subject to technological or other changes, in order to future-proof the regime.

R 5.2, 5.3

The Minister for Regulatory Reform should coordinate a principle-based review of regulatory legislation to ensure greater consistency in allocation of legislation material between primary legislation and types of secondary legislation.

The Minister for Regulatory Reform should consider stronger mechanisms to ensure greater consistency in the allocating material between primary legislation and types of secondary legislation, either by elaborating departments' Disclosure requirements for government legislation, empowering Parliamentary Counsel to provide stronger guidance, or some other mechanism.

Background

Findings 5.6 and 5.7 and recommendations 5.2 and 5.3 deal with different aspects of one topic, that is, the appropriate divide between primary and secondary legislation. We respond to those findings and recommendations as a whole.

The question of what matters should be in an Act and what should be in regulations has received a great deal of attention over the years. There is much commentary and academic writing on the topic, some of which is referred to in the draft report. We will not canvas this literature in our response, but instead focus on the findings and recommendations in the draft report.

The division between primary and secondary legislation

We agree with the Commission's finding that there is inconsistent allocation of legislative provisions between primary legislation and types of secondary legislation (**F5.6**).

This inconsistency occurs for a number of reasons, including—

- the legislative history and drafting style of a country (eg those in F5.4 on page 99 of the report):
- legislative drafting trends:
- the particular subject area and its jurisprudential history (both in courts and legislation):
- the speed with which the primary legislation is required to be drafted for enactment:
- the level of policy development that has occurred before primary legislation is drafted:
- the need to follow Cabinet policy decisions that have been made.

We note that some of the reasons for the differences (eg part of the policy not developed until long after primary legislation is passed) will be difficult to overcome by ordinary mechanisms.

We also agree with the comments on page 102 of the draft report. There is a worrying trend for primary legislation to be overly-prescriptive and to address matters in increasing detail. This removes flexibility and results in more amendments being required over time.

For example, procedural processes should not be set out in detail in primary legislation. This would be better dealt with in regulations. The draft report gives a good example of the problems that can be caused in this regard, with the Real Estate Agents Act 2008.

In our view, a lot of this over-prescription is due to increasing pressure to achieve certainty, often in an attempt to ensure there is a "stable, predictable and effective regulatory environment that encourages investment" (to use the words from page 107 of the draft report). There is an increasing unwillingness to leave unsaid the things that don't need to be said. We are frequently pressured to cover-off things that are already provided for in the Interpretation Act 1999, or "for the avoidance of doubt", or that are simply not necessary.

We are also noticing a worrying trend emerging where we are being told to put non-legislative material into primary legislation. Accordingly, the issue is wider than simply whether material should be allocated to primary or secondary legislation. The first question to ask is, does the matter need to be dealt with by legislation at all? Could it be dealt with by other means? And if legislation (primary or secondary) is required, who is to ensure (and how) that only legislative material is included in legislation?

In our view, it would be useful if primary legislation was more focussed on matters of policy and principle, rather than the detail. We don't think greater consistency in allocating legislative provisions between primary legislation and the types of secondary legislation would reduce complexity (as stated on page 103 of the draft report), but we agree that it

will promote the efficient and effective administration of legislative regimes (as the draft report goes on to say).

Mechanisms to promote greater consistency

We agree with the Commission's finding that existing mechanisms to promote greater consistency of allocation of legislative provisions between primary legislation and types of secondary legislation are ineffective.

Having the Minister for Regulatory Reform provide leadership in this area and help ensure a consistent and agreed approach, as you recommend, could be useful. We envisage this occurring at a whole-of-government level rather than for each individual regulatory scheme that is proposed. This is mainly due to the scale of what would be required for the latter, and a concern that its success would depend almost entirely on the expertise of the individuals providing the advice, individual ministerial commitment and the willingness of Cabinet to follow recommendations made by the Minister for Regulatory Reform.

To that end, having the Minister undertake a principle-based review of regulatory legislation could be a useful exercise and would hopefully form a platform from which the Minister could provide stronger leadership and better mechanisms to ensure greater consistency in the approach that is required to be taken in allocating material between primary legislation and secondary legislation.

However, we caution against the search for a single, simple answer to this issue. As noted above, there is already a wealth of material that covers this topic, including some useful guidance in the LAC Guidelines (which all government agencies are meant to follow and indicate compliance with when submitting legislation to Cabinet Legislation Committee). As the Commission itself notes on page 95 of the draft report, "frameworks are a useful guide for the designers of regulatory regimes, but they need to be combined with careful analysis about the particular circumstances, rather than being applied in a rote way". We would add that guidance-materials and frameworks can only assist if people read and follow them in the first place.

Further, we do not believe there is a "one-size fits all" rule that can be applied. There are very good reasons why the same division between primary and secondary legislation is not used for civil aviation legislation versus walking access to the outdoors legislation.

In our view, it matters less where the divide between primary and secondary legislation takes place, and more that the overall regulatory scheme has been well designed. A regulatory scheme that is well designed should result in primary, secondary (and where necessary, tertiary) legislation—

- that is clear and well ordered:
- that is easy to use and understand:
- that provides better access to the law:
- that requires less frequent amendment over time.

The question of the appropriate divide between primary and secondary legislation should be considered as part of the design process, but it becomes less important if the overall regulatory scheme makes sense as a comprehensive whole. In our view, the design of the overall scheme is an area that is often neglected by departments and one that should be given far greater focus, much earlier in the process.

We agree with the comment in the draft report (at page 99) that the opportunity for revision of regulatory regimes often occurs only in the wake of high-profile regulatory failures at which point reform tends to occur too hastily. Both primary and secondary legislation is often made in circumstances that respond to political and media-driven pressures, particularly around time frames and the desire for piecemeal amendment in order to provide an immediate "fix" rather than comprehensive reviews. In these circumstances, there is usually not time (or patience) for thorough regulatory and legislative design work.

In our experience, decisions about the overall legislative scheme are usually made well before instructions are sent to the PCO, or, perversely, it is not considered until after a Bill has been enacted, resulting in legislation that is drafted in independent tiers (primary, secondary and tertiary). Either way, the PCO has limited input into the regulatory and legislative design phases.

The PCO would welcome the opportunity to have greater input into the legislative design process to try to ensure there is greater thought about the overall structure of each legislative proposal, at a primary, secondary, and tertiary level. However, empowering the PCO in this way will not work unless we can provide our input at the beginning of the legislation design phase, and there is understanding and agreement by Ministers, government agencies, the RRC, the LAC, and other stakeholders to the approach that is to be taken to the divide between primary secondary and tertiary legislation. We would not want our involvement in this area to be an adversarial one, but rather, a truly collaborative one.

It could be that setting out a mandatory approach that is to be taken when determining the divide between primary and secondary legislation, at a whole-of-government level, is a role that the Minister for Regulatory Reform could usefully perform.

For example, a framework could be developed that government agencies must be able to demonstrate they have used as part of their legislative design process. Such a framework could entail something like—

- an evidence-based assessment of the current regulatory scheme;
- a problem analysis;
- an examination of alternatives to the use of legislation;
- evidence that legislation is actually required;
- a diagram setting out what each level of legislation will cover and what the overall scheme will look like; and
- consultation with the PCO about the overall legislative design before policy approvals are sought.

Following a framework like this is very likely to result in better legislative outcomes.

Delegating authority to make secondary legislation to regulators

There is scope for greater delegation of authority to regulators to make tertiary legislation and to exercise other discretions, subject to—

- consideration first being given to delegations other than regulation making powers;
- appropriate controls such as sound processes and consultation requirements being placed on the regulators; and
- Standing Order 315(2)(f) being amended.

There is a dichotomy, however. There is no sense in shifting legislative provisions from primary legislation to secondary legislation by delegating more to regulators if the result is primary legislation that is cluttered with the processes and consultation requirements that are placed on the regulators as a consequence.

Further, simply delegating authority to regulators to make rules is not, in itself, the answer. While it will allow urgent rule changes to be made swiftly, it will not necessarily produce a better result. Regulators may not have sufficient appropriately qualified and competent personnel to draft delegated legislation and there is a noticeable tendency for such legislation to proliferate in an ad hoc manner.

For example, the Ministry of Primary Industries estimates there are around 439 tertiary instruments under the 4 food-related Acts (the Animal Products Act 199, the Food Act 1981, the Wine Act 2003, and the Agricultural Compounds and Veterinary Medicines Act 1997) and the regulations made under those Acts. The instruments range in size from 1 page to 237 pages. The empowering provisions require different instruments to be created by different people and in different ways. They include notices, standards, guidelines, standard criteria, requirements, and so on. Some have pre-conditions that have to be met, or processes that need to be followed; some do not. Different instruments need to be made publicly available in different ways.

In pure legislative design terms, there is no rationale for this multiplicity of different tertiary instruments and associated processes. In our view, this is evidence of bad regulatory and legislative design. In this case, a design that enables or requires regulators to create an enormously complex and convoluted spider's-web of tertiary instruments. Put simply, there is something wrong with the design if the outcome is 439 tertiary instruments.

There are also wider issues around the quality and accessibility of tertiary instruments that could potentially be addressed by the Minster for Regulatory Responsibility. It would be reasonably straightforward to develop a set of simple rules of general application for the creation, maintenance, accessibility, and publication of all tertiary instruments in order to make the management and control of tertiary instruments simpler and easier for government agencies, as well as increasing accessibility for industry and the public. The PCO is well placed to provide leadership, guidance or co-ordination on these matters, for

example, on a proposal being explored for the publication of disallowable instruments that are not legislative instruments on a national register based on the Australian Commonwealth model.

We agree that legislative regimes should always be drafted with sufficient (future-proofing) flexibility to allow for and take advantage of ongoing technological and other developments, such as inflationary changes. Widening delegations might be desirable also for other reasons, (eg lightening and focussing the House's legislative workload on matters of key significance).

Henry VIII clauses

(*Also discussed on pages 3-4 of this submission.*)

Secondary legislation can usually be amended or replaced quickly when compared with primary legislation. It is possible for secondary legislation to amend primary legislation, provided appropriate authority is provided in the primary legislation. However, in New Zealand, such Henry VIII clauses are usually frowned upon and used with great caution. They are not so much a part of New Zealand's legislative drafting style or culture as in the UK or other Westminster-style democracies (although they have grown in number over the years). The New Zealand Parliament may be more wary of these type of provisions due to past events when the Government used its delegated legislative powers widely, for example, during the economic stabilisation period in the 1970s.

Greater use could be made of Henry VIII clauses, although, as noted above, the RRC and select committees which consider these provisions in bills would not necessarily support that proposition. It is also worth noting that the need for a Henry VIII clause does tend to raise the question, would the matter that is to be amended have been better placed in secondary legislation to begin?

Disallowance

We note, in relation to Finding 5.7 (on page 106), the comment "To date, the disallowance procedure has only been used once successfully." This comment does not account for the 2008 amendment (by resolution of the House) of the Nurses Scope of Practice (an amendment notified at SR 2008/362). That 2008 amendment shows the procedure also allows for effects short of disallowance, which is discussed by Carter, McHerron, and Malone *Subordinate Legislation in New Zealand* (LexisNexis, 2013) at [11.0.8]. See also page 315 of the draft report Box 13.4. The comment also presumes that the only success in relation to the disallowance regime and the role of the RRC is when the powers result in disallowance of an instrument. This is to miss the more subtle point that the mere existence of the disallowance regime - and the wider role of the RRC in advising select committees on empowering provisions in Bills - ensures there is greater restraint over the making of delegated legislation than is implied. Consideration for disallowance, even if disallowance does not result, is by itself both searching, and highly beneficial, scrutiny. It often by itself results in changes, or at least better understanding of law and principles.

Q5.1

How can the role of the Regulations Review Committee be strengthened, if regulators are delegated greater regulation-making powers?

We note your comments about the RRC on page 103 of the draft report. In particular, the advice you were given by officials who provide support to the RRC who told the Commission that the RRC's advice to other select committees on Bills is rarely accepted. We do not know if there is any empirical evidence to support this contention. But in our view, there are a number of factors that may lead to this outcome, including—

- the RRC is, by its nature, a political committee and its advice is considered in this light;
- the RRC tends to provide its advice quite late in the select committee process, often after the time for submissions on the Bill has closed. It is difficult for a select committee to reflect the concerns of the RRC when it has all but finished its consideration of a Bill;
- the RRC tends to focus on technical legal or drafting points rather than matters of substance (possibly as a reflection of its legal background and expertise of its advisers) ;
- the RRC is widely viewed by government departments (and possibly ministers?) as a "problem finding" entity rather than a "solution finding" one. As a result, government departments try to avoid having to engage with the RRC (not least given the late engagement with Select Committees when advising upon empowering provisions); and
- the RRC has not been inclined to engage informally with government agencies to resolve issues in a mutually satisfactory way, preferring instead to engage through the formal and publicised exchange of correspondence and submissions. This can lead to a rather adversarial climate, and can be contrasted with the approach of subject select committees and their departmental advisers.

PCO is not convinced that the RRC, as currently constituted and advised, is the appropriate body to provide parliamentary oversight of regulations made by agencies in the manner suggested in the draft report. A fundamental re-think of the role of the RRC and the support it would need would be required in order for it to undertake merit based inquiries on the content of secondary legislation and to be truly effective in providing timely advice to subject select committees on secondary legislative regulatory regimes. It would need to adopt a radically different approach with more support staff with wider policy as well as legal expertise, and it would need to operate in a more genuinely non-political manner. Superficial change like amending the RRC's terms of reference would not suffice. Rather than adapt it, it would likely be easier to completely review and re-launch it.

Before contemplating such an exercise however, we recommend that a cost/benefit analysis of any expanded role for the RRC be undertaken, particularly if the advisers to the committee, as well as the RRC members themselves (reflecting Parliament's view generally perhaps), were to continue to have significant reservations about greater delegation of authority to regulators. The current form-based scrutiny of delegated legislation

undertaken by the RRC results in considerable resources of government agencies and the PCO being used for limited or no particular gain.

For information about how the RRC developed, and how it conceives of its role in respect of policy, see Carter, McHerron, and Malone *Subordinate Legislation in New Zealand* (LexisNexis, 2013) at chapter 9 and especially [9.3.4]. The RRC is a select committee of the House, so any changes to its role require changes to Standing Orders that are agreeable to the House acting (usually) on the basis of a review and report by the Standing Orders Committee (SOC). The Commission's final Report should set out the extent to which it has engaged or consulted with the RRC, the SOC, or the House generally. This is significant because the SOC conventionally acts on the basis of broad consensus. Also, the composition, role and expertise of members of a RRC with an enhanced group of functions would affect members and their parties. More advisory capacity and resources (from OOC, departments, the Minister for Regulatory Reform or specialist advisers) would also be required for an RRC with enhanced and significantly more extensive functions to operate as the Commission appears to envisage.

Chapter 8 – consultation and engagement

We agree that more consultation and engagement would be beneficial, and would align with proposed developments to give increased certainty to our overseas trading partners about upcoming regulatory change.

F8.7,Q8.1, Q8.2

Statutory consultation requirements are potentially most useful when:

- *there is a likelihood that failure to consult would breach natural justice principles –for example regulation involves a significant use of the State's coercive powers that could impair the civil liberty, livelihood or property rights of individuals;*
- *regulators have wide discretionary rule-making powers that involve making judgements about what is in the public interest;*
- *there are social equity reasons for specifying the consultation processes that should be followed for a specific group -for example where the affected group may not have the resources or capacity to effectively participate in a conventional consultation process;*
- *the affected community holds information on trade-offs and technical issues necessary for the regulator to make sound decisions*

Are there any examples of legislative rigidity that may prevent regulators from using participatory processes and/or making decisions that would benefit both consumers and regulated parties? What evidence is there of this? What lessons could be learnt from these examples?

Are there examples of consultation provisions that are working well, or alternatively, not as well as they should? What factors contribute to a consultation provisions working well/poorly?

Our comments here focus on legislated requirements to consult. It is important to remember that consultation need not be, but sometimes is, authorised by legislation.

Consultation is *recommended* in developing policy and legislation, and in operating legislation. See, eg, *LAC Guidelines* (2001 ed as updated) Chapter 1 Parts 3 and 4: http://www2.justice.govt.nz/lac/pubs/2001/legislative_guide_2000/chapter_1.html and Cabinet Manual (2008) at [7.24]-[7.45] and [7.86]: http://www.cabinetmanual.cabinetoffice.govt.nz/7

What natural justice requires by law can be a difficult question despite legislated processes, as *Dotcom v USA* [2014] NZSC 24 at [119] and [120] per McGrath and Blanchard JJ shows: "The starting point in any common law analysis of natural justice principles is the classic [(*Cooper v Wandsworth Board of Works* (1863) 14 CBNS 180 at 194)] statement that: '... although there are no positive words in a statute requiring that the party shall be heard, yet the justice of the common law will supply the omission of the legislature.' The content of the right to natural justice, however, is always contextual. The question is what form of procedure is necessary to achieve justice without frustrating the apparent purpose of the legislation."

Relevant in this connection are whether the matter relates to individuated rights, obligations, or interests protected or recognised by law, or just broad policy issues, and legitimate expectations of a procedure being followed (but not of its outcome).

Given the broad range of decision-making affected, it is hard to be categorical about guiding principles, but legislated consultation requirements are procedural minima – much depends on the subject-matter, context, and significance and likely effects.

Procedures for enacting Bills include provision for written submissions and oral evidence, as well as provision of expert advice, and natural justice procedures. But despite the individual legal rights at issue, parliamentary privilege means procedures followed (except for manner and form requirements) are not judicially enforceable.

On subordinate legislation, the LAC Guidelines Chapter 10 (2001 ed as updated in 2003) at [10.2.2]-[10.2.3] says about making "traditional regulations" subordinate legislation: "There is usually no requirement in the empowering statute for notice and consultation. The Cabinet Manual specifies requirements in relation to the process for making regulations. Those requirements include – consultation ... If the empowering statute is to provide that the delegated legislation may be made other than by regulations, consideration should be given as to whether the empowering Act should specify - any consultation procedure for that delegated legislation.....For examples of empowering provisions requiring consultation, see section 29(3) of the Fair Trading Act 1986 and section 41A(3) of the Weights and Measures Act 1987. See Chapter 1, Part 4 and Chapter 10A, Part 1 for further information concerning consultation. Consideration should be given when providing for delegated legislation as to whether any requirements for notice and consultation .....".

The *LAC Guidelines* (2001 ed as updated in 2003) Ch 10A at [10A.1.2] says "Some statutes that contain a consultation requirement contain an additional provision, that specifies that a failure to comply with the consultation requirement does not invalidate the delegated legislation. The purpose of the provision is to save delegated legislation where someone was missed out in the course of a genuine consultation process. It is not intended to protect against a deliberate decision not to consult." *See also* Carter, McHerron, and Malone *Subordinate Legislation in New Zealand* (LexisNexis, 2013) at [4.0.4], [4.0.18], and [12.1.1]. Practical questions raised by enacted requirements to consult include the following:

- what is the purpose of the legally-required consultation, ie, what information or views is the process to elicit, and from whom (including confirming no required

consent, or recommendation, or advice, or disallowance, or affirmative resolution commencement, or confirmation by Act, should be required instead) and what precisely (eg, key details of, not settled draft of, regulations) must be consulted on:

- is the Act to specify what exactly is required, or merely to require a decision-maker (eg, a Minister of the Crown) to decide that case-by-case;
- what methods and timeframes are allowed or required, how rigid should they be;
- what exceptions should exist (eg, for emergencies or minor changes or non-substantive re-making, such as to consolidate without substantive changes);
- should pre-commencement consultation be expressly recognised (even if, as a matter of law, that recognition is most probably unnecessary);
- how does the proposed requirement fit with others in the same or similar Acts.

If legislation is required to meet New Zealand's international legal obligations, domestic consultation is likely to be accompanied by binding treaty parliamentary examination and consultation processes, and to focus on not whether to legislate domestically but on what must or should be done to perform those obligations. And some subordinate legislation is required by domestic law.

Chapter 9 The Treaty of Waitangi in regulatory design and practice

Q9.1

Would an overarching Treaty clause in an appropriate statute (separate from the jurisdiction the Treaty of Waitangi Act 1975 confers on the Waitangi Tribunal to investigate actions inconsistent with Treaty principles), that signals the Crown's intent with respect to the principles of the Treaty of Waitangi, improve the operation of regulatory regimes in New Zealand?

Background

Chapter 9 usefully documents the practice of the Legislature over the 3+ decades since the Legislature first provided for the concept of compliance with "the principles of the Treaty of Waitangi" as the basis of the jurisdiction of the Waitangi Tribunal and subsequently incorporated the Treaty of Waitangi or its "principles" in statutes of general application.

By way of background to the question posed in relation to chapter 9, comments are included on certain findings in that chapter.

Definition of "the Crown"

In relation to F9.1, the report notes that a question has arisen in the context of the review of the Interpretation Act 1999 as to whether the term "the Crown" should be comprehensively defined in any revised Interpretation Act. The term is problematic.[3] It may refer to the reigning Sovereign as a natural person, acting in His or Her own right; or acting in right of a nation that recognises the Sovereign as the titular head of State; or it may refer to His or Her

[3] The scope and nature of "the Crown" has been discussed by Rt Hon Sir Kenneth Keith, "On the Constitution of New Zealand: An Introduction to the Foundations of the Current Form of Government" in the foreword to the Cabinet Manual (2008) and examined in the New Zealand context by Janet McLean, "Crown Him with Many Crowns": the Crown and the Treaty of Waitangi" (2008) 6 NZJIPL, 35.

representative in a sovereign State, such as the Governor-General in New Zealand; or more generally as a metaphor for, or a symbol of, the Executive arm of government (as stated at F9.1). The Law Commission's recent proposal for a revised Crown Proceedings Bill proposes a definition of the Crown that elucidates "the Executive" as "Ministers of the Crown and departments".

However, as the machinery of government has created a more complex set of arrangements by way of State-owned enterprises, Crown entities, and mixed-ownership model companies, the need has arisen to clarify what agencies lie within and what are outside the scope of the term "the Crown". Thus, in the Public Finance Act 1989, the definition clarifies the scope of "the Crown" by expressly excluding a number of types of organisation separately established under various statutes (but strongly linked to the Crown in certain respects). That definition is applied in Treaty settlement legislation, but the term "Crown body", separately defined, is also required so as to include some of the organisations excluded by the Public Finance Act definition for the particular purpose of establishing what "Crown" property becomes subject to a right of first refusal to an iwi under a settlement Act.

It is apparent that no single definition of the Crown can be posited as adequate for all cases, However, on one level, in the interests of ensuring that the basic scope of the term is not in doubt, there may be a case for including in any revised Interpretation Act the fundamental concept behind the term, such as the generally understood meaning proposed in the chapter or the definition suggested by the Law Commission. Against that consideration, however, the present convention of treating the term as a statutory term of art and providing a definition on a case by case basis avoids an inadvertent use of a default definition when that would be inappropriate.

The cautious approach of the New Zealand Law Society's submission on the Interpretation Act 1999 is therefore the preferred approach.

Principles and weighting

In discussing the Treaty and its principles, chapter 9 at F9.2 to F9.4 relates to both the statutory jurisdiction of the Waitangi Tribunal and the wording of Treaty of Waitangi clauses included in legislation of general application. These are very different contexts and serve different purposes which the chapter does not make clear.

The jurisdiction conferred on the Waitangi Tribunal enables findings of fact, requires judgments about prejudice suffered, and anticipates recommendations to the Crown for restoration of rights, but does not provide for enforcement (except in limited circumstances). In short, it promotes a means for a restoration of the Treaty relationship by means of agreement through a political process.

On the other hand, the inclusion of Treaty clauses in legislation, setting out legal requirements on the Crown, provides a form of enforcement by means of judicial review.

(a) Treaty of Waitangi Act 1975

In addition to establishing the Waitangi Tribunal "to provide for the observance and confirmation of the principles of the Treaty of Waitangi" and its recommendatory jurisdiction on the "practical application of the principles of the Treaty", the Act requires determination as to "whether certain matters are consistent with the principles of the Treaty" (Long Title).

The jurisdiction of the Tribunal is to determine claims of Maori who are or likely to be "prejudicially affected" by, inter alia, any Act, regulation, policy, practice, act, or omission of the Crown that was or is "inconsistent with the principles of the Treaty" (s 6). A similar jurisdiction is conferred in respect of legislation before Parliament that is referred to the Tribunal by resolution of the House (s 8), and in relation to land that is subject to the special "claw-back" jurisdiction of the Tribunal (ss 8A, 8HB).

Thus, without giving any guidance as to the content of the principles, the Act empowers the Tribunal to consider Crown-Maori dealings from 1840 to the present day in light of the meaning and effect of the Treaty and its principles.

(b) Treaty clauses in Acts of general application

The Legislature has included references to the Treaty or the principles of the Treaty in statutes of general application at least since 1986. This statutory approach has been accepted by the courts as appropriate for incorporating the Treaty into domestic legislation in line with orthodox international law and for the purpose of making the Treaty justiciable, in addition to the justiciability of customary rights at common law.

In the earliest statutes to "incorporate" the Treaty, it is "the principles of the Treaty" that are invoked as the yardstick for administrative conduct (eg s 9 State-Owned Enterprises Act 1986, s 4 Conservation Act 1987, s 8 Resource Management Act 1991).[4] The first of those Acts in particular has given rise to litigation across a significant swathe of Crown business, requiring the courts to determine the principles at stake (as set out in Box 9.2).

In passing, it should be noted that a number of the examples given in Table 9.1 misquote the relevant clause, leading to a somewhat slanted conclusion as to "Parliament's preference for referencing principles rather than the Treaty itself.[5]

The chapter seems to overstate the value of including the "principles" in the drafting formulation. It is said that they are "better able to cope with the historical nature of the agreement" and "better able to cope with change". This appraisal overlooks the ambulatory nature of the Treaty, adapting to change, "always speaking", and of itself the source of

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[4] it is thought most likely that the wording in the 1975 Act was the source of the drafting in these enactments.

[5] Eg s 4 Environmental Protection Authority Act 2011, s6 New Zealand Geographic Board (Nga Pou Taunaha o Aotearoa) Act 2008, s 7 Public Records Act 2005.

"constitutional innovation".[6] The uncertainty created by the references to the "principles" complicates the situation. The fact that the Crown and Maori are, and have been for nearly 200 years, parties to the Treaty is of itself the context that is relevant in the conduct of business involving both parties. That fact sets up the important relationship within which both parties must operate. Thus, under the Public Records Act 2005 or the Environmental Protection Authority Act 2011 (to cite 2 examples), the Crown's responsibility to take appropriate account of the Treaty is set out in terms of certain functions and powers enacted for the purpose. Omitting "the principles" from the drafting of these clauses removes at least part of the need for interpretation (as distinct from application) of possible principles and casts us back to recognising and respecting the fact that Maori and the Crown are bound together by the Treaty, which "legitimised the Crown's assumption of sovereignty"[7], requiring the parties to act in a way that best gives effect to that relationship, while also respecting the right and duty of the government to govern.

As the chapter acknowledges, the "principles" have given rise to uncertainty as to what is intended by the directives to persons exercising functions under an enactment "to give effect to the principles of the Treaty", "to have regard to the principles of the Treaty" or not to act "in a manner that is inconsistent with the principles of the Treaty".[8] In these formulations, not only are the "principles" unclear, but the exact weight to be accorded to the principles is uncertain.

The chapter mentions that the requirement "take into account" is stronger than "to have particular regard to". That is not the interpretation given to those weightings where they are used in the Resource Management Act 1991, but the jurisprudence around these phrases is certainly varied.

The analysis in chapter 9 does not engage with the change in the drafting of Treaty clauses that has prevailed since the drafting of s 4 of the New Zealand Public Health and Disability Act 2000. The distinctive feature here is that the clause states expressly what aspects of the legislation are included "in order to recognise and respect" the principles of the Treaty, "with a view to improving health outcomes for Maori". Matthew Palmer, in his 2001 article cited in chapter 9, suggests that this formulation has the effect of providing substance to a generic reference to the Treaty (or its principles). This approach has not so far been the subject of judicial interpretation.

Why Treaty clauses are included in legislation

The finding (F9.8) on this issue states that both Maori and officials have incentives to include a Treaty clause in a particular piece of legislation, with the incentive for officials being to minimise the risk which the Crown is exposed to by the inclusion of a Treaty clause, with a

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[6] Joseph op cit, p 38.

[7] Joseph p 48.

[8] See s 4 Conservation Act 1987, s 4 Crown Minerals Act 1991, and s 9 State-Owned Enterprises Act as quoted in Table 9.1.

resulting legalistic approach. That is a harsh judgment to make against officials and the Legislature.

Experience indicates that Maori seek such a clause as a sanction against a policy or operational failure and for the Crown it is an important statement of intent, as it were, and a clear indication that the directions from the Cabinet Office and the Legislative Advisory Committee have been heeded.

The benefit of including a Treaty clause in a statute that deals with a matter in which Maori have a Treaty-based interest, such as natural resources and other taonga, is that the statute is clear on its face as to what is required. But as the chapter notes, even without any reference to the Treaty the courts will, in the appropriate context, read a requirement for compliance with the Treaty or its principles into a statute. The lack of a Treaty clause is no barrier to finding a Treaty-based duty on the Crown.[9]

Overarching Treaty clause: an alternative approach

Q9.1 asks the question: Would an overarching Treaty clause in an appropriate statute (separate from the jurisdiction the Treaty of Waitangi Act 1975 confers on the Waitangi Tribunal to investigate actions inconsistent with Treaty principles), that signals the Crown's intent with respect to the principles of the Treaty of Waitangi, improve the operation of regulatory regimes in New Zealand?

The genesis of this question appears to be in 2 findings in chapter 9:

- the finding in F9.6 that there is not a consistent application of Treaty principles in statutes in which "Maori have strong iwi and hapu relationships" such as natural resources or where the Crown has been found to have a duty of active protection, as in relation to health and language; and
- the finding in F9.7 that there is variability in the onus or priority placed on decision makers in relation to the Treaty or Treaty principles, ranging from "to give effect to", "recognise and provide" "have particular regard", to "take into account".

Given the variability, the perceived opportunity to be selective under the current case by case approach, and the accompanying difficulties in interpretation, the report seeks feedback on an alternative approach by way of an "overarching Treaty clause" in an "appropriate statute".

It is not clear what kind of statute would be appropriate for such a "chapeau" provision. The suggestion that the New Zealand Bill of Rights Act 1990 could be a suitable repository suggests a constitutional context and constitutional implications. The other suggestion, of including such a clause in the State Sector Act 1988 suggests that the clause would serve a largely administrative purpose. There is a question as to whether either would meet Maori

9 This point has been made by the High Court in the *Huakina Valley Authority case*, in the absence of any reference to the Treaty in the Water and Soil Conservation Act 1966, and in *Barton-Prescott v Director-General of Social Welfare* in relation to Crown action under the Guardianship Act 1968.

interests as in both cases such a clause would be divorced from the contexts in which Maori have the strongest interests.

For a clause to be applicable in all contexts it would necessarily be drafted in broad non-contextual language, exposing decision makers to litigation risk. The existence of an enhanced risk could have the unlooked for outcome of straitjacketing the consideration given by decision makers to purely legalistic concerns and provide grounds for an inchoate justiciable right, significantly heightened expectations, and litigation risks. None of those outcomes would be conducive to a healthy and co-operative relationship between the Treaty parties.[10]

It is therefore difficult to envisage how a chapeau clause could improve certainty for either party to the Treaty or substantive outcomes.

The report indicates that use of an overarching Treaty clause would not preclude inclusion of a tailor-made "guidance" provision in particular legislation.[11] In that situation, the courts may have to determine the balance between the chapeau clause and the guidance clause. The comments from Dame Margaret Bazley (as reported in section 9.4) appear to indicate that the greater the legalism imported into dealings that involve both the Crown and Maori, the less constructive is the relationship.

Chapter 10- Decision review

F 10.1, F 10.2, F 10.12

In New Zealand there is significant overlap between the scope of judicial review and appeal in practice. Judicial review in New Zealand is much wider in scope than in Australia, and can include greater scrutiny of the merits of decisions.
The broad scope of judicial review in New Zealand means that the availability of merits review would not provide significantly stronger incentives on regulators to make correct decisions than is provided by access to judicial review alone.

Finding 10.12 says: "The broad scope of judicial review in New Zealand means that the availability of merits review would not provide significantly stronger incentives on regulators to make correct decisions than is provided by access to judicial review alone." This could well be overstating the consequences of judicial review or appeals based on errors of law involving points that affect the merits. There still seems a significant difference between High Court (1) reassessment on the merits generally (especially if the primary decision-maker is a specialist) and (2) review or appeal only for error of law. Some would think the cost and outcome of the Commerce Act 1986 input methodologies appeals – as discussed in

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[10] On the relationship between the Treaty parties as a way forward in New Zealand, see Matthew Palmer, "The International Practice" in Recognising the Rights of Indigenous Peoples ed Alison Quentin-Baxter (Wellington, Institute of Policy Studies 1998), pp87-103 and "Constitutional Realism about Constitutional Protection: Indigenous Rights under a Judicialized and a Politicized Constitution" (2007) 29 Dalhousie Law Journal, 1.

[11] There appears to be some helpful non-legislative guidance for the legislature and Executive, as given in Question 3.2 of the disclosure guidelines, NZ Treasury (2013), pp 37-38 and other guideline documents analysed in Chapter 9, setting out the norms for Treaty compliance in a number of contexts

Box 10.4 and on pages 239 to 242 of the Commission's draft report – raise very serious questions about merits review. But judicial review for error of law is a significant basic control and check for lawfulness.

Q 10.2

How effective are the Legislation Advisory Committee's guidelines on appeal and review in influencing policy-makers in the design of new regulatory regimes?

The Commission makes the point (p. 239) in relation to this question (but it could be applied more generally), that *"Despite the requirement for papers to Cabinet Legislation Committee to assess proposals for compliance against the LAC guidelines, it is not clear how influential the guidelines are:"*

One empirical measure of their effectiveness might be to examine the number of submissions on individual bills that the LAC has made over a set period which refer to inadequate or inappropriate appeal and review provisions. This is something the secretariat of the LAC may be able to assist with. It would also be helpful to have greater clarity and understanding of how Departments and Agencies arrange for the confirmation of compliance with the LAC guidelines in their internal processes when preparing papers for Cabinet Legislation Committee. This may indicate that the risk inherent in such a "tick-box" approach (that little substantive examination is undertaken before the "tick" is given) has, or has not, happened.

From PCO's point of view, the current LAC Guidelines continue to provide points of reference and control during the instructing and drafting process with departments and agencies. We do remind instructors, when necessary, of the existence of the guidelines generally, and in particular cases such as appeal and review provisions, the relevant guidelines, but PCO has no role in "certifying" compliance with the LAC Guidelines. That role is performed wholly within the responsible agency or department. This can be contrasted with the practice in respect of delegated legislation (regulations etc.) drafted by PCO where legislative instruments are "certified" by Parliamentary Counsel for the Minister to then submit them to Cabinet (see paragraph 7.89 of the Cabinet Manual).

It is also worth noting that the current Appeal and Review Chapter (Ch. 13) of the LAC Guidelines dates from 2003. As noted before, the LAC Guidelines as a whole are in the process of being rewritten in a revised format which is aimed initially at policy advisers in departments with responsibility for the development of policy into legislation. As part of this process, therefore, Chapter 13 will be revised and, it is hoped, will be of more direct and clear assistance to departments when preparing legislation. Although the guidelines will remain as guidance, in some areas the recommendations may also be strengthened. PCO anticipates that the reformulated guidelines with strengthened recommendations where appropriate will increase both their accessibility and effectiveness.

In addition, the Legislation Amendment Bill (which the Government intends to introduce into Parliament in 2014) contains new provisions providing for an Order in Council to identify legislative guidelines that chief executives of departments must have regard to when making disclosures in respect of Government Bills which:

- create or amend, for example, powers by delegated legislation to amend an Act or define a term in an Act, or grant an exemption from an Act or modify or suspend the operation or effect of an Act; or
- contain any other provisions that are unusual or involve matters that call for special comment.

By this means, if the LAC Guidelines are the specified guidelines, further force will be given to those Guidelines, including the specific guidance in relation to appeals and review.

In passing PCO notes that the problem of poor legislative design for regulatory regimes would not be improved, by the production of yet another set of competing (and possibly contradictory) guidance on "better legislation" and cautions the Commission from inadvertently adding to the body of guidance already existing.

General comment
Greater consistency and coherence in designing review and appeal provisions is a fair and important goal. Achieving it requires better understandings of review and appeal provisions, and how best to design new schemes in a principled, simple, and coherent way. Rationalisation will however require considerable resources and amendment. There are links to other complex issues such as—

- how general and special appeal provisions relate,
- use of specialist appeal bodies,
- whether specialist internal review can properly replace or limit very considerably general judicial review (eg, as per *Tannadyce Investments Limited v CIR* [2011] NZSC 158), and
- whether a second appeal is or should be allowed.

The Ministry of Justice and Judiciary have expert views on these matters.

As to issues arising from how general and special appeal provisions relate, *see*, for example, *Vodafone New Zealand Ltd v Telecom New Zealand* Ltd [2009] NZCA 565 at paras [25]–[28] per William Young P: "The legislation is untidy and I see the interpretation issue as closely balanced." The Telecommunications Act 2001 provides for an appeal to the High Court on a question of law from certain decisions of the Commerce Commission. The Commerce Act 1986 s 97 requirement for leave for an appeal to the Court of Appeal under the Judicature Act 1908 from a decision of the High Court on an appeal against the Commission applies only to appeals against determinations under the Commerce Act 1986 and not also determinations under the Telecommunications Act 2001. (Arnold J at [58] and Glazebrook J at [139] apparently agreed.) William Young J at [27] says: The most plausible interpretation of the Telecommunications Act is that Parliament intended to create stand-alone appeal rights [under the Judicature Act 1908 s 66] and pathways and did not intend to adopt the Commerce Act model [which requires leave for an appeal to the Court of Appeal].

Compare *A-G v Howard* [2010] NZCA 58 [2011] 1 NZLR 58 (Human Rights Act 1993 ss 123 and 124 and Judicature Act 1908 s 66): An appeal to the Court of Appeal from decisions of the High Court in relation to an appeal from the Human Rights Review Tribunal had to be brought under s 124 of the Human Rights Act. An appeal of an interlocutory decision could not be brought as of right under s 66 of the Judicature Act because that would be

inconsistent with the requirement to obtain leave to appeal a substantive decision. An appeal could not be brought under s 67 of the Judicature Act, even with leave, because that would be inconsistent with the limitation of such appeals to questions of law.

In *Siemer v Heron* [2011] NZSC 133, [2012] 1 NZLR 309, the Supreme Court held that section 66 gives an appeal as of right against interlocutory decisions of all kinds made in the High Court unless the Judicature Act 1908 or a rule or order made under that Act creates a restriction. Clause 57 of the Judicature Modernisation Bill is to change the effect of section 66 in so far as it applies to appeals against interlocutory orders. Appeals against interlocutory orders of the High Court will require leave, just like appeals under section 24G of the [Judicature] Act (appeals from an interlocutory decision of the High Court in respect of any proceeding entered on a commercial list). If the High Court refuses leave to appeal, the Court of Appeal may grant leave to appeal. Compare also the complex review and appeal position in respect of Associate Judges' decisions or orders in chambers or in [open] court and that is to be simplified by cl 26 of the Judicature Modernisation Bill. That position is discussed, for example, in *Siemer v Heron* [2014] NZSC 35.

As to second appeals in various contexts, see, for example, *Osborne v Auckland City Council* [2012] NZCA 199 (2012) 21 PRNZ 76 at [59] per White J: "Mr and Mrs Osborne's claim against the Council under the WHRS Act was finally determined by the High Court judgment of Woolford J delivered on 9 September 2011. They have no second appeal to this Court against that judgment because the specific provisions of s 95(2)(b) of the WHRS Act prevail over the general provisions of s 66 and s 67 of the Judicature Act."

See also *R O J v T E J* [2013] NZCA 323 at [25] per O'Regan P: Appeal rights position is "puzzling" and an "anomaly" but Court must decline leave to appeal as it lacks jurisdiction: "We respectfully suggest a reconsideration of the limitations on rights of appeal in relation to orders under [Care of Children Act 2004] s 44, at least those which have far reaching impact on the families involved.". At [21], O'Regan P said: "We conclude that the present case involves an attempt to appeal to this Court from a High Court decision that was dealing with an appeal against an order made under s 44, and that s 145(1)(a) provides an absolute bar to such an appeal."

Chapter 13 – funding regulators

Q13.1

Are there clear and legally accepted definitions of fees and levies in New Zealand? If not, does this matter? Are there issues that are specific to either fees or levies that the Commission needs to consider?

We agree there is a need for improved clarity about the funding of regulators and definitions of fees and levies. The LAC Guidelines contain material about the principles and issues to consider in relation to the charging of fees.

R 13.1 – 13.8

The Government should publish its cost recovery policy, covering issues such as:

- *policy objectives;*
- *guidance about how to make trade-offs should objectives conflict;*
- *when cost recovery may be appropriate;*

- *consultation requirements before implementation;*
- *how and when arrangements are to be reviewed and by whom; and*
- *responsibility for ensuring compliance with the policy.*

Portfolio ministers should be responsible for ensuring that agencies within their portfolio have complied with the Government's cost recovery policy. Chief executives of agencies proposing a new or amended fee or levy for regulatory services should be required to certify through an appropriate mechanism that their agency has made adequate use of the Treasury guidelines.

The grounds on which the Regulations Review Committee can disallow a regulation should include that the regulator in developing and implementing a fee or levy has had inadequate regard for the economic framework set out in the Government's guidelines for setting charges in the public sector.

The Auditor-General should introduce an enhanced programme of audits of regulators' compliance with Government cost-recovery guidelines.

Portfolio reviews undertaken within the Performance Improvement Framework, and/or the Regulatory Systems Reports prepared under the expectations for regulatory stewardship, should review and report on the adequacy of the approaches to cost recovery of regulators within each portfolio.

The Government and Auditor-General should review the Treasury's Guidelines for Setting Charges in the Public Sector and the Auditor-General's Charging Fees for public sector goods and services, to ensure that the guidelines reflect current knowledge about when and how to implement cost recovery.

Users of the guidelines (whether the two sets of guidelines continue or are combined) should:

- *only have to go to one place for advice on any issue;*
- *not receive conflicting advice from the guidelines; and*
- *be clearly informed about the scope of the entities and charges that the guidelines cover.*

The Government, when it reviews New Zealand's cost recovery guidelines, should seek to collaborate with the review of the cost recovery guidelines currently being undertaken in Australia.

That the Government consider whether those agencies that set or amend fees or levies can access adequate advice and experience from other agencies and departments.

PCO's comments focus on legislated powers to recover costs or to impose taxes. There is an important conceptual distinction between charges to recover, and taxes or levies not linked directly to recovering, costs of providing goods or services.

For any new legislation, it should be clear in policy terms which option is proposed.

Legislative terminology may well vary unhelpfully (eg, what is called a "fee" may be in substance a tax, or what is called a levy may be in substance a charge for goods supplied) but the key question is what, in substance, does the legislation authorise?

A general obligation to consult before imposing fees or charges is likely to be overbroad and unhelpfully rigid – but tailored requirements are likely to add value – consultation is likely as a matter of practice anyway.

It is a basic question of principle and policy what should be subject to cost-recovery, or to taxes, and to what extent. But cost recovery is fairly, and increasingly, common.

Cost-recovery can be self-selecting based on conduct (if not basic public good, eg, Defence, most NZ Police functions, access to justice), but public interest requires regulation (eg, for safety)—so it is not "bought" at the discretion of the regulated. *See also* Carter, McHerron, and Malone *Subordinate Legislation in New Zealand* (LexisNexis, 2013) at [3.5] and [4.0.12].

The principle that only Parliament can impose taxes is of long-standing: Carter, McHerron, and Malone *Subordinate Legislation in New Zealand* at [3.2.8].

Some levies are effectively self-imposed (eg, Commodity Levies).

Structuring, setting, monitoring, collecting and using cost-recovery fees all raise very significant issues. Updating and combining Treasury and OAG guidance would help, and it is vital every fee setting process involves accessing, fairly easily, adequate advice and experience.

New Zealand should also look to learn from comparable experience in Australia.

Asymmetric memorandum accounts are evidence fee-setting has misfired and should be reassessed (with refunding or credits so far as fees have over-recovered).

In terms of R13.3, the RRC does not itself disallow a regulation imposing fees, but only draws it to the House's special attention. The Legislation Act 2012 empowers the House by resolution (a motion for which can usually be moved only on notice) to revoke, amend, or revoke and replace a disallowable instrument. Automatic disallowance is triggered only if a RRC member seeks disallowance. For discussion, see Carter, McHerron, and Malone *Subordinate Legislation in New Zealand* at ch 11.

Also in terms of R13.3, since fees appear to have been able to have been scrutinised adequately under the existing grounds specified in SO 315(2) (2011), non-compliance with fees guidance or fees frameworks may anyway be clear evidence of infringing existing grounds, and so may not justify being a new ground in its own right.

Chapter 15 – System-wide regulatory review

Q15.1

What would be the advantages and disadvantages of increasing the role of Parliament in scrutinising how the stock of regulation[12] *is managed? If Parliament's role should increase, what approach should be used to achieve it?*

Background

Initiatives to review and update the stock of regulation are a recurring feature of the governmental system. A chronology of some of these initiatives is set out in Appendix A. These initiatives, which share the goals of eliminating obsolete, redundant, and inconsistent law, fall into one of two categories—

- enhancing the accessibility of the law generally (first category); or

[12] **Stock of regulation** means all public Acts (excludes local, private, provincial, and imperial Acts) and legislative instruments (includes orders, regulations, rules, notices, determinations, proclamations, and warrants). See Regulatory institutions and practices: Draft report (March 2014) at 367; see also http://www.productivity.govt.nz/sites/default/files/regulatory-institutions-and-practices-draft-report.pdf

- reducing or simplifying the rules governing economic activity specifically (second category).

Most of the initiatives have drawn on the expertise of the Parliamentary Counsel Office (PCO) but without providing it with additional resources to carry out the work involved. Nearly all of the initiatives have failed to give on-going responsibility for systematically reviewing and revising the stock of regulation to any particular agency. The exceptions are—

- the Law Commission's recently enacted revision proposal (2012), which falls into the first category, and which gives this responsibility to the PCO;[13] and
- the Treasury's role managing and monitoring the regulatory management system (since 2008), which falls into the second category.[14]

Parliament may increase its role in scrutinising how the stock of regulation is managed in several ways. Each has its pluses and minuses.

Possibility 1: Increasing the role of Parliament

Second category

If the primary aim is to reduce or simplify the rules governing economic activity, Parliament could give responsibility for regularly examining the Treasury's managing and monitoring role to one of its select committees. As the Treasury reports on this role to the Minister of Finance and the Minister for Regulatory Reform, the Finance and Expenditure Committee or the Commerce Committee are logical candidates. The RRC is another possibility (but see the concerns about an enhanced role for the RRC above). Initially, however, the RRC would need to rely on the expertise of select committees (and their advisers) that specialise in the regulation of economic activity, since the RRC's current speciality lies in assessing whether regulations comply with established norms. Another possibility is to establish a new select committee, but this would entail initial reliance on the expertise of specialist select committees and a significant increase in the resources needed for servicing select committees.

Alternatively, the chosen select committee could duplicate, if not displace, the Treasury's role. In practice, this would require increasing the resources available to the select committee, especially the secretariat support that the Office of the Clerk (OOC) provides, to manage the increased interaction with reporting agencies.

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[13] See Legislation Act 2012, subpart 3 of Part 2 (revision bills).

[14] See Regulatory System Report 2013: Guidance for Departments (2013), Appendix 1 at 11; for an online version, see http://www.treasury.govt.nz/publications/guidance/regulatory/systemreport/rsr-guide-apr13.pdf

First category

If the primary aim is to enhance the accessibility of the law generally, Parliament could give responsibility to each select committee to carry out regular reviews of the stock of regulation relevant to its area, which would draw on each committee's particular expertise. While this possibility may give rise to divergent approaches, those approaches are likely to be well-tailored.

As an alternative, Parliament could give this responsibility to one select committee (new or existing), but, given the scope of its work, this would mean that the committee would become a general (rather than a select) committee. To be effective, a committee with this responsibility would need to proceed by way of a systematic, continuous, and sector-by-sector review of the entire stock of regulation, and to produce sector reports on a regular basis that provide recommendations for amendments, consolidations, rationalisations, enhancements, and modernisations, and that address the appropriate balance between primary and delegated rules.

Both categories

To carry out this work well, the responsible select committee(s) must be well-resourced. Given the experience of the RRC when it carried out its reviews of existing regulations in 1988 and 2007, the select committee(s) will require, at a minimum, the support of the OOC, the PCO, the relevant administering agencies, and subject matter specialists. In addition, its membership needs to be engaged and should be drawn from across the House, with no one party in the majority (as is currently the case with the Standing Orders Committee), to help ensure that the focus remains on eliminating obsolete, redundant, and inconsistent law. Any recommendations to the government of the day regarding substantive matters should be based on an examination of the what-is-or-is-not-working-or-needed evidence provided by the public, sector specialists, regulators, and the regulated (merit assessments).

Increasing the role of Parliament in this area is attractive in terms of parliamentary sovereignty and democratic control. As the approver of primary legislation, and as the delegator of regulation-making power to the Executive, Parliament has an inherent interest in examining the stock of regulation to ensure that it is relevant, effective, coherent, and accessible, and that the division between primary and delegate legislation is principled, sensible, and efficacious.

In practice, however, Parliament will need to rely heavily on the Executive, particularly its administering agencies, to perform this role well as it requires knowledge of the relevant rules, the use of these rules, and their effect on the regulated in particular and the country in general. Developing and maintaining the requisite institutional knowledge to carry out this role over the long-term is also a challenge for Parliament as its membership and legislative focus changes regularly.

Possibility 2: Building on Existing Initiatives

An alternative approach would be to provide time for some of the initiatives outlined in Appendix A to take root, and to adjust them as needed, before (or instead of) implementing possibility 1.

Assess Treasury role

The Treasury has been managing and monitoring the regulatory management system since 2008. Sufficient time may have gone by to enable a useful review of this role, one that assesses whether the role or the system should be adjusted.

Revision programme

The revision programme required under the Legislation Act 2012 is due to start after the 2014 election. This initiative is aimed at eliminating obsolete, redundant, and inconsistent law but has a restricted scope in terms of re-stating law not reforming badly designed underlying legislative and regulatory regimes. It draws on the PCO's independence, institutional knowledge, existing legislative design and drafting expertise, and familiarity with the statute book as a whole and should provide small but not insignificant improvements to the quality and size of the legislative stock. The Act also requires a review of the operation and effectiveness of the revision programme provisions in 6 years (2020). This will allow an evidence-based assessment of the programme, which can be used to adjust its requirements and supporting powers.[15]

New drafting practices

As part of its new role of publishing enactments online, the PCO has adopted a range of changes to its drafting practices that are designed to eliminate the accumulation of deadwood and to increase the accessibility of the law.

Possibility 3: Implementing new initiatives system

Another possibility is to take a few new quiet steps that may enhance the system that is currently in place.

Regular agency reviews

Aside from maintaining up-to-date and online lists of the enactments they administer, each administering agency could regularly review those enactments with a view toward improving the stock of regulation. They could use this work to inform ministerial decisions and drafting instructions. Consideration could also be given to requiring agencies to report regularly on their reviews to Parliament.

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[15] For another example of a requirement for review, refer to the Evidence Act 2006 s 202 (5-yearly periodic review of operation of Act), as for example shown by *The 2013 Review of the Evidence Act 2006* (NZLC R127) available at http://www.lawcom.govt.nz/project/review-evidence-act-2006?quicktabs_23=report

Clarify authority to draft

The Cabinet Office Manual could include a provision that states that the authority to draft a particular Bill or regulation implicitly includes the authority to revise the relevant enactment(s). This would provide notice throughout the Executive that the PCO is to undertake revision work that is relevant to any instructions that it receives (whether or not addressed in the instructions or their supporting papers). This would reduce, if not eliminate, any unjustified resistance to remedial work that would improve the stock of regulation (for example, by allowing the PCO to address the technical matters that it routinely records in its queries database). Again, this would be a small but useful improvement to the quality of the stock of regulatory legislation.

Resourcing

Some consideration might be given to determining whether the agencies involved in improving the stock of regulation are adequately resourced (for example, ensuring that the PCO's resources are sufficient to carry out the revision programme without reducing its capacity to produce new legislation).

APPENDIX A

Some Initiatives to Scrutinise Stock of Regulation

1908	Parliament (Liberal Government) re-enacts entire collection of Acts in a more orderly form, reducing their number from 800 to 208. A small commission, assisted by the Law Draftsman, carried out the revision work by working systematically through the Acts.[16]
15 Aug 1987	**Election**: Fourth Labour Government (second term).
Nov 1988	The RRC publishes its *Inquiry into all regulations in force as at 14 November 1988*. The RRC notes a lack of systematic consideration of all regulations in force and identifies ones that are obsolete or unnecessary. Drawing on the advice of administering agencies and the PCO, it recommends the revocation of 506 out of 3,945 regulations (13%). It also recommends that— • a general review of regulations should be taken at least every five years; and • revocation orders should be removed five years after being made.
12 Oct 1996	**Election**: National Government (second term)
10 Feb 1998	The short paper *Reversing Regulatory Creep* is released. It notes several initiatives to reduce compliance costs and improve regulatory intervention, including a proposed *Regulatory Responsibility Bill*. The paper suggests rationalising and simplifying enactments by adopting a rule that requires removing a number of existing provisions for every new provision that is created.[17]
Oct 1998	*Regulatory Creep Revisited*, a reply to the short paper above, is published. It suggests that the nature of rules, not their number, determines whether they are proper or unduly interventionist (for example, rules that erode legal norms, unnecessarily displace adequate general rules, undermine reliance on common principles, or, in the economic arena, rules that distort rather than define (i.e., apply restraints to some rather than to all)).[18]
17 Sept 2005	**Election**: Fifth Labour Government (third term)

16 Law Commission, *Presentation of New Zealand Statute Law*, Report 104 (October 2008) at 6.

17 For this paper, see Parliamentary Library (No: 610379; Class: 351.931028; Loc S 558); for an edited published version, see J Shirtcliffe and C English, "Reversing Regulatory Creep" (July 1998) New Zealand Law Journal 259.

18 B Pardy, "Regulatory Creep Revised" (October 1998 New Zealand Law Journal 352.

2 Aug 2006	The *Regulatory Responsibility Bill* (Member's Bill; Hide, ACT) is introduced. The Bill aims to improve enactments by specifying principles of responsible regulatory management and requiring the Crown to report on its compliance with these principles (a task to be carried out by the State Services Commissioner). The principles are a mix of some existing conventions and several new requirements (which focus on property rights and the impact of rules on economic activity).[19]
12 Oct 2006	The Minister of Justice (Burton, Lab) refers to the Law Commission (and the PCO) the task of investigating and recommending methods of making statute law more accessible (including indexing).[20]
28 Nov 2006	The RRC sends letters to agencies to identify the regulations that they administer and are in force, how often and for what purpose they have been used in the past 5 years, the last time the regulations were reviewed to determine their effectiveness, which may be revoked, and those regulations that are still required and the reasons why.
9 Mar 2007	The paper *In Search of International Standards and Obligations relevant to New Zealand Acts* recommends that each agency should maintain and publish online up-to-date lists of the Acts they administer (and note any linkages to relevant international obligations).[21]
Sept 2007	The Law Commission (with the aid of the PCO) publishes its issues paper on the *Presentation of New Statute Law*, which discusses problems accessing statute law (including obsolete and redundant Acts, Acts in need of updating, and inconsistencies between Acts), the merits of indexing, revising, and codifying Acts, and the need for a new Legislation Act.[22]
12 Nov 2007	The submission period closes for the Law Commission's issues paper on the *Presentation of New Statute Law*.
12 Dec 2007	The RRC publishes its report on its *Inquiry into the ongoing requirement for individual regulations and their impact*. Drawing on the advice of administering agencies and the PCO, it recommends the revocation of 547 out of 2,943 regulations (19%); 63 were revocation instruments, 77 were commencement orders, and another 31 were

19 For the Regulatory Responsibility Bill as introduced, see http://www.parliament.nz/resource/0002005133
20 For the terms of reference, see
http://www.lawcom.govt.nz/sites/default/files/publications/2006/10/Publication_132_348_TOR%20ACL.pdf
21 M Gobbi, "In Search of International Standards and Obligations relevant to New Zealand Acts" (2007) 4 New Zealand Yearbook of International Law 349 at 364-365
22 For a copy of the Law Commission issues paper, see
http://www.lawcom.govt.nz/sites/default/files/publications/2007/09/Publication_132_373_IP02.pdf

regulations that the RRC had identified as spent in its 1988 report. It also recommended that—

- agencies produce and maintain publicly available lists of the regulations that they administer; and
- any Cabinet paper proposing a bill should list the regulations that could be revoked by the bill; and
- the Law Commission develop a statutory sunsetting system that is applicable to all regulations.[23]

7 Mar 2008

The Government publishes the *Government Response to the Report of the Regulations Review Committee on Inquiry into the ongoing requirement for individual regulations and their impact.* The Government agrees to revoke the 547 regulations that the RRC earmarked for revocation. The Government supports undertaking more work—

- to investigate the desirability and feasibility of requiring agencies to produce and maintain publicly available lists of the regulations that they administer; and
- to determine the practical implications of requiring any Cabinet paper proposing a bill to list the regulations that could be revoked by the bill; and
- to evaluate the proposal for a statutory sunsetting system that is applicable to all regulations.

The Government directs the Ministry of Justice, in consultation with the PCO and other appropriate agencies and in collaboration with the Law Commission, to provide advice to Cabinet (by 31 December 2008) on—

- the inclusion of a statutory sunsetting system that is applicable to all regulations; and
- its implications on agency resources and PCO law drafting resources.[24]

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[23] For the RRC report on its inquiry into the ongoing requirement for individual regulations and their impact, see http://www.parliament.nz/resource/0000030985. For more information about sunsetting in respect of subordinate legislation, see Carter, McHerron, and Malone *Subordinate Legislation in New Zealand* (LexisNexis, 2013) at [13.2.1]. Sunsetting is required by law in selected areas, but has the potential to operate arbitrarily, and mechanically to divert resources to areas of low priority or importance for little practical benefit.

[24] For the Government Response to the Report of the Regulations Review Committee on Inquiry into the ongoing requirement for individual regulations and their impact, see http://www.parliament.nz/resource/0000056209

17 Mar 2008 — The paper *In Search of International Standards and Obligations relevant to New Zealand Regulations* recommends that each agency should maintain and publish online up-to-date lists of the regulations they administer (and note any linkages to relevant international obligations).[25]

30 May 2008 — The Commerce Committee publishes its report on the *Regulatory Responsibility Bill* (Member's Bill; Hide, ACT). It recommends that—

- the bill not be passed as more work is needed to access the possible consequences of legislation in this area (although supportive of improving regulatory review and decision-making processes); and
- the establishment of a high-level expert taskforce to develop a legislative or Standing Orders option, or both, to improve regulatory review and decision-making (by 1 December 2008).[26]

9 Sept 2008 — The Minister of Commerce introduces the omnibus *Regulatory Improvement Bill* (Dalziel, Lab). It amends 9 Acts to address regulatory duplication, gaps, administrative errors, and inconsistencies between different pieces of legislation, and to target poor implementation and administration of various regulatory frameworks.[27]

8 Nov 2008 — **Election:** National Government (first term)

16 Dec 2008 — The Law Commission publishes its report on the *Presentation of New Zealand Statute Law*. It recommends the adoption of a systematic triennial revision programme of all Acts to get them into a more coherent state (that is, made more accessible, readable, and easier to understand, and rationalised and arranged more logically with inconsistencies and overlaps removed, and obsolete and redundant provisions repealed, and expression, style, and format modernised and made consistent). It also recommends that the Government should—

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25 M Gobbi, "In Search of International Standards and Obligations relevant to New Zealand Acts" (2007-2008) 5 New Zealand Yearbook of International Law 327 at 343

26 For the Commerce Committee report on the Regulatory Responsibility Bill, see http://www.parliament.nz/resource/0000049696

27 For the Regulatory Improvement Bill as introduced, see http://www.legislation.govt.nz/bill/government/2008/0298/4.0/DLM1594701.html (amending the following: Companies Act 1993, Conservation Act 1987, Designs Act 1953, Fisheries Act 1996, Gas Act 1992, Hazardous Substances and New Organisms Act 1996, Ministry of Agriculture and Fisheries (Restructuring) Act 1995, Reserves Act 1977, and Weights and Measures Act 1987).

- arrange for the production of an index to Acts (which the PCO should update continually in e-form and every 2 years in hard copy); and

- seek the enactment of an Act that combines the provisions of the Interpretation Act 1999, the Acts and Regulations Publication Act 1989, Regulations (Disallowance) Act 1989, and the Statutes Drafting and Compilation Act 1920 and contains new provisions that—
    - provides the PCO with enhanced powers to correct errors and make certain editorial changes; and
    - requires the PCO to undertake a triennial programme of statute revision (with the aim of making them more accessible without substantive change); and
    - empowers the PCO to alter the wording, order, and placement of provisions subject to revision; and
    - requires revisions to be certified as substantively the same by a committee comprising the Chief Parliamentary Council, the Solicitor-General, the President of the Law Commission, and a retired judge appointed by the Attorney-General, and then enacted by a streamlined process (revisions containing substantive changes would be subject to the normal enacting process); and

- seeks the repeal of provisions found to be obsolete through the medium of an omnibus Statutes (Repeal) Bill; and

- seeks to replace (rather than amend) Acts that are to be subjected to substantial or far-reaching changes; and

- considers codifying extant Acts once the revision programme is completed or nearly completed.[28]

9 Mar 2009 — The Minister of Finance (English, Nat) releases the terms of reference for the *Regulatory Responsibility Taskforce* (RRT), which were agreed

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[28] For the Law Commission Report on Presentation of New Zealand Statute Law, see http://www.lawcom.govt.nz/sites/default/files/publications/2008/12/Publication_132_421_Part_1_R104%20part%201.pdf (Part 1) and http://www.lawcom.govt.nz/sites/default/files/publications/2008/12/Publication_132_421_Part_2_R104%20part%202.pdf (Part 2).

with ACT. The terms direct the RRT to assess the *Regulatory Responsibility Bill*, to consider what amendments and supporting arrangements might be desirable, to recommend a draft bill, and to build a consensus for its proposals (by giving full consideration to objections to the bill and ensuring its recommendations are principled and practical from both a constitutional and operational perspective).[29]

29 Oct 2009 — The Minister for Regulatory Reform (Hide, ACT) releases the *Report of the Regulatory Responsibility Taskforce*. RRT recommends that the Government seek enactment of a substantially modified version of the *Regulatory Responsibility Bill* (drafted by the PCO). It also recommends—

- amending the Standing Orders to enable parliamentary review of proposed or existing legislation against the Bill's principles; and
- giving the RRC an oversight role in relation to all legislation; and
- giving Treasury the role of co-ordinating inter-agency work to ensure consistent advances in regulatory quality and compliance with the Bill's principles; and
- establishing a permanent group responsible for reviewing the existing body of legislation and proposed legislation against the Bill's principles and any guidelines issued under the Bill; and
- carrying out further work into the appropriateness of extending the provisions of the Public Works Act 1981 to provide compensation for takings and impairments of real and personal property.[30]

30 Mar 2010 — The *Regulatory Improvement Bill* is divided into nine Acts,[31] which are enacted on 19 April 2010 (all but one in force on 20 April 2010).

25 Jun 2010 — The Attorney-General introduces the *Legislation Bill* (Finlayson, Nat). The Bill implements the majority of the recommendations that the

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[29] For the terms of reference for the RRT, see http://www.treasury.govt.nz/economy/regulation/rrb/tor-reg-taskforce-v2.pdf

[30] For the Report of the RRT, see http://www.treasury.govt.nz/economy/regulation/rrb/taskforcereport/rrt-report-sep09.pdf

[31] For the legislative history of the Regulatory Improvement Bill, see http://www.parliament.nz/en-nz/pb/legislation/bills/00DBHOH_BILL8761_1/regulatory-improvement-bill (producing the following: Companies Amendment Act 2010, Conservation Amendment Act 2010, Designs Amendment Act 2010, Fisheries Amendment Act 2010, Gas Amendment Act 2010, Hazardous Substances and New Organisms Amendment Act 2010, Ministry of Agriculture and Fisheries (Restructuring) Amendment Act 2010, Reserves Amendment Act 2010, Weights and Measures Amendment Act 2010)

Law Commission made in its report *Presentation of New Zealand Statute Law* (see above), including the establishment of—

- a triennial revision programme; and
- powers to alter the wording, order, and placement of provisions being revised; and
- a certification committee to vet revision bills.[32]

16 Jul 2010

The Minister of Finance introduces the *New Zealand Productivity Commission Bill* (English, Nat). The Bill proposes establishing an independent Crown entity to improve productivity in the public and private sectors. On the basis of terms of reference issued by the Minister of Finance (in conjunction with the relevant portfolio Ministers), the Commission is to—

- hold inquiries into productivity related matters; and
- conduct *ex post* reviews of regulatory regimes; and
- conduct reviews of the efficiency and effectiveness of regulatory agencies; and
- undertake ex ante regulatory impact analyses of specified regulatory proposals.[33]

15 Nov 2010

The Commerce Committee recommends enacting the *New Zealand Productivity Commission Bill* with several changes, including requiring—

- the Commission to have regard to a wide range of communities of interest and population groups in New Zealand society; and
- the relevant Ministers to consult with the Commission about the terms of reference for each inquiry.[34]

25 Nov 2010

The Minister for Regulatory Reform introduces the omnibus *Regulatory Reform (Repeals) Bill* (Hide, ACT). The Bill proposes repealing 31 Acts that no longer have any effect (as they are spent,

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[32] Legislation Bill (162-1), explanatory note (no copy of Bill as introduced online)

[33] New Zealand Productivity Commission Bill (179-1), explanatory note (no copy of Bill as introduced online)

[34] For the see New Zealand Productivity Commission Bill as reported from the Commerce Committee see http://www.parliament.nz/resource/0000143124

have been superseded, or seek regulatory outcomes that no longer apply).[35]

1 Dec 2010 — The RRC publishes its *Report on the Legislation Bill*. It recommends that it be enacted with the addition of a new clause that clarifies that revision bills, as introduced, must not contain any proposed change to the effect of the law (but may be amended by the House to do so).[36]

16 Dec 2010 — The Minister for Regulatory Reform introduces the omnibus *Regulatory Reform Bill* (Hide, ACT). The Bill amends 13 Acts to reduce the compliance burden on business. The Bill is part of the Government's *regulatory reform programme*, which aims to identify and remove requirements that are unnecessary, ineffective, or excessively costly for business.[37]

20 Dec 2010 — Parliament enacts the *New Zealand Productivity Commission Bill* (in force on 21 December 2010).

15 Mar 2011 — The Minister for Regulatory Reform introduces the *Regulatory Standards Bill* (Hide, ACT). The Bill is the result of the RRT's work in 2009 on the *Regulatory Responsibility Bill* (see above). The Bill aims to improve the quality of regulation by increasing the transparency of regulation-making and the accountability of regulation makers through the establishment of—

- a set of regulatory principles with which all regulations should comply; and

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[35] For the Regulatory Reform (Repeals) Bill as reported from the Commerce Committee, see http://www.legislation.govt.nz/bill/government/2010/0249/latest/DLM3387102.html (repealing the following: Aid to Water-power Works Act 1910, Air Facilitation Act 1993, Air Facilitation (Domestic Passengers and Cargo) Act 1994, Apple and Pear Industry Restructuring Act Repeal Act 2001, Appropriation (Parliamentary Expenditure Validation) Act 2006, Banking Act Repeal Act 1995, Business Development Boards Act Repeal Act 2003, Chateau Companies Act 1977, Clerks of Works Act Repeal Act 1992, Companies (Bondholders Incorporation) Act 1934–35, Cornish Companies Management Act Repeal Act 199, Development Finance Corporation of New Zealand Act 1986, District Railways Purchasing Act 1885, Economic Stabilisation Act Repeal Act 1987, Electoral Referendum Act 1993, Export Guarantee Act 1964, Ministry of Transport Act Repeal Act 1990, New Zealand Institute of Journalists Act 1895, New Zealand Planning Council Dissolution Act 1991, New Zealand Shipping Company (Limited) Empowering Act 1884, Petroleum Demand Restraint (Regulations Validation and Revocation) Act 1981, Petroleum Sector Reform Act 1988, Phosphate Commission of New Zealand Dissolution Act 1989, Potato Industry Act Repeal Act 1988, Poultry Board Act Repeal Act 1989, Private Savings Banks (Transfer of Undertakings) Act 1992, Public Contracts Act Repeal Act 1994, Quantity Surveyors Act Repeal Act 1992, Shipping Corporation of New Zealand Act Repeal Act 1988, Synthetic Fuels Plant (Effluent Disposal) Empowering Act 1983, Treasurer (Statutory References) Act 1997)

[36] For the RRC Report on the Legislation Bill, see http://www.parliament.nz/resource/0000242305

[37] For the Regulatory Reform Bill as introduced, see http://www.legislation.govt.nz/bill/government/2010/0269/5.0/whole.html#DLM3453016 (amending the following: Agricultural Compounds and Veterinary Medicines Act 1997, Animal Products Act 1999, Companies Act 1993, Conservation Act 1987, Films, Videos, and Publications Classification Act 1993, Fisheries Act 1996, Friendly Societies and Credit Unions Act 1982, Radiocommunications Act 1989, Registered Architects Act 2005, Statistics Act 1975, Takeovers Act 1993, Unit Trusts Act 1960, Wine Act 2003)

- a compliance certification process that gives the courts a declaratory role; and

- a rule that requires every agency to review regularly the legislation it administers for compatibility with the principles.[38]

7 Apr 2011 — The RRC writes to the Standing Orders Committee regarding a proposal from the Minister for Regulatory Reform (Hide, ACT) that Standing Order 310 [now 315] (which sets out the grounds that require the RRC to draw attention to disallowable instruments) be amended to include a proportionality principle. The RRC suggests that the proposal should be considered in the light of the recently introduced *Regulatory Standards Bill*, the unspecified scope the principle, and the resource implications that the proposal poses for the RRC and the Office of the Clerk.[39]

26 Jul 2011 — The Commerce Committee recommends enacting the *Regulatory Reform Bill*. It also recommends enacting the *Regulatory Reform (Repeals) Bill* with the addition of the consequential revocation of three regulations (as this Bill proposes to repeal the Acts under which these regulations were made).[40]

30 Sep 2011 — The Commerce Committee publishes its *Interim report on the Regulatory Standards Bill*. The report sets out concerns that the RRC has raised regarding the Bill, including the following:

- the principles in the Bill overlap existing principles but they do not include some important ones that the RRC uses in its review of regulations; and

- delegated legislation would be subject to two reviews with varying standards (once by the RRC under the Standing Orders and the other by the courts under the Bill); and

- making greater use of explanatory notes to enable Parliament to better monitor compliance with legislative quality criteria appears to be a cost-effective alternative; and

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[38] For the Regulatory Standards Bill as introduced, see http://www.legislation.govt.nz/bill/government/2011/0277/latest/DLM3601205.html

[39] For the RRC letter, see http://www.parliament.nz/resource/en-nz/49SCSO_EVI_00DBSCH_INQ_10324_1_A181077/39d31c199ce16c1885a5e6acf790ec9f3308ba76

[40] For the Commerce Committee Report on the Regulatory Reform Bill and the Regulatory Reform (Repeals) Bill, see http://www.parliament.nz/resource/0000166335 (adding the following for revocation: Development Finance Corporation of New Zealand Act Commencement Order 1987, Export Guarantee Amendment Act Commencement Order 1990, New Zealand Planning Council Dissolution Act Commencement Order 1991)

- the *Legislation Bill*, which is awaiting its second reading, proposes a structured process for the ongoing revision of legislation that addresses some of the concerns that gave rise to the Bill.[41]

26 Nov 2011 — **Election**: National Government (second term)

July 2012 — The Treasury releases its paper *The Best Practice Regulation Model: Principles and Assessments.* It sets out best practice principles and their intended use for assessing regulatory regimes.[42]

22 Aug 2012 — The *Regulatory Reform Bill* is divided into 13 Bills, which are enacted on 30 August 2012 (all but two in force on 31 August 2012).

30 Aug 2012 — Parliament enacts the *Regulatory Reform (Repeals) Bill* (in force on 31 August 2012).

11 Dec 2012 — Parliament enacts the *Legislation Bill* (most in force on 5 August 2013, including the revision programme provisions). The Act requires—

- the Attorney-General to prepare a triennial revision programme for each new Parliament (starting at the end of 2014); and
- the Chief Parliamentary Counsel to prepare bills in accordance with the approved programme.

As the purpose of revision is to re-enact, in an up-to-date and accessible form, the law previously contained in all or part of one or more Acts (without changing the effect of the law being revised), the Standing Orders Committee is, as part of its next triennial review of the Standing Orders, likely to consider the adoption of a sessional order that sets out a streamlined process for enacting these Bills (to ensure their timely passage through the House).[43]

1 Jan 2013 — The PCO implements a number of initiatives to reduce the accumulation of deadwood in enactments, including—

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[41] For the Commerce Committee interim report on the Regulatory Standards Bill, see http://www.parliament.nz/resource/0000172110

[42] For the Treasury paper, see http://www.treasury.govt.nz/economy/regulation/bestpractice/bpregmodel-jul12.pdf

[43] See Report of the Standing Orders Committee on Review of Standing Orders (Sept 2011) at 37-39 (recommending the adoption of a sessional order setting out a streamlined procedure for the consideration of revision bills). For this report, see http://www.parliament.nz/resource/0000171978 (noting that the Law Commission, as outlined in the text above, suggested the inclusion of a streamlined legislative process in its proposed Legislation Bill; however, the Legislation Bill, as introduced, did not include this procedure, a position that the RRC appears to have endorsed).

- any amendment Acts relating to a principal Act are to be treated as repealed when the principal Act is repealed and removed from the statute book;[44] and
- commencement orders relating to an enactment are to be expressly repealed on the repeal of the principal enactment; and
- self-repeal or self-revocation provisions are to be included in every repeal Act and revocation order; and
- expiry provisions are to be avoided (enactments are to be repealed or revoked); and
- expired enactments that are being superseded are to be revoked by their replacements; and
- expired enactments are to be treated as revoked for the purposes of publishing legislation online; and
- all principal subordinate legislation made under a principal enactment that is being repealed are to be expressly saved or revoked (as the case may be); and
- all purpose, application, transitional, and savings provisions in amendment Acts are to be inserted into the principal Act to avoid the need to reprint skeleton Acts and regulations; and
- all Acts that repeal other Acts while saving provisions of those Acts are to save any subordinate legislation relating to the saved provisions.

Apr 2013

The Treasury releases its *Regulatory System Report: Guidance for Departments*. The report notes that the Treasury is (since 2008) responsible for managing and monitoring the regulatory management system and reports to the Minister of Finance (English, Nat) and the Minister for Regulatory Reform (Banks, ACT) who share ministerial responsibility for the regulatory reform portfolio. The management system now consists of the following tools—

- regulatory impact statements; and
- best practice regulation assessments of key regulatory agencies; and

[44] See Interpretation Act 1999, s 23

- regulatory scanning of existing legislative instruments on an ongoing basis; and
- annual regulatory plans of expected new regulation or review of existing regulations; and
- the *regulatory review programme*;[45] and
- Omnibus Reform Bills; and
- disclosure statements; and
- the annual regulatory system reports of agencies; and
- the Regulatory Impact Analysis Handbook[46] (as updated by Treasury).[47]

Jul 2013 — The Minister of Finance (English, Nat) asks the Productivity Commission to investigate how to make overall improvements in the design and operation of regulatory regimes.[48]

29 Jul 2013 — The Government introduces a regime that requires nearly all government bills to have disclosure statements (in addition to their still required regulatory impact statements). They must include—

- a statement about the objectives that the legislation seeks to achieve, and how it goes about trying to meet those objectives; and
- important background material and policy analysis that can throw further light on the underlying policy issues addressed by the legislation; and
- information about the quality assurance work undertaken to test the content of the legislation; and

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[45] For Cabinet papers regarding the regulatory review programme, see
http://www.treasury.govt.nz/economy/regulation/programme/pdfs/egi-09-5.pdf
http://www.treasury.govt.nz/economy/regulation/programme/pdfs/reg-2596910.pdf
http://www.treasury.govt.nz/economy/regulation/programme/pdfs/egi-09-7.pdf
http://www.treasury.govt.nz/economy/regulation/statement/cab-09-414.pdf
http://www.treasury.govt.nz/economy/regulation/inforeleases/pdfs/reg-2597298.pdf

[46] For the Regulatory Impact Analysis Handbook (July 2013), see
http://www.treasury.govt.nz/publications/guidance/regulatory/impactanalysis/ria-handbk-jul13.pdf

[47] For the Regulatory System Report 2013, see
http://www.treasury.govt.nz/publications/guidance/regulatory/systemreport/rsr-guide-apr13.pdf

[48] For the relevant brief, see http://www.productivity.govt.nz/inquiry-content/1788?stage=1 . This is the Productivity Commission's sixth inquiry since is its 21 December 2010 inception, four of which are completed (local government regulation, Trans-Tasman joint study, housing affordability, and international freight transport services) and two of which are in progress (boosting services sector productivity and regulatory institutions and practices).

- information about significant or unusual provisions that the legislation may contain.[49]

The Government agreed in March 2013 to trial the regime first administratively before implementing it in legislation and extending it to disallowable instruments drafted by PCO.

Aug 2013 — The Productivity Commission releases an issues paper for its inquiry into how to make overall improvements in the design and operation of regulatory regimes.[50]

13 Mar 2014 — The Productivity Commission releases its *draft* report on its inquiry into how to make overall improvements in the design and operation of regulatory regimes. Among other things, the draft report asks for comment on the following questions: [51]

What would be the advantages and disadvantages of increasing the role of Parliament in scrutinising how the stock of regulation is managed? If Parliament's role should increase, what approach should be used to achieve it?

21 Mar 2014 — A former banking lawyer gives a presentation to the PCO entitled *Legislation drafting: a search for what?* The presentation mooted the idea that the aim of legislative drafting is order and certainty rather than simplicity. A 92-page banking contract precedent (one refined through use over time) used in the presentation shows that drafting complexity is prized in the banking world as it avoids the costs that arise out of rules that invite litigation to enforce and recourse to extrinsic evidence to interpret and apply.

8 May 2014 — The Commerce Committee is yet to report back the *Regulatory Standards Bill* (due 15 December 2014). The Bill's initial promoter is now outside of Parliament.

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[49] For the disclosure requirements for government legislation, see http://www.dpmc.govt.nz/cabinet/circulars/co13/3

[50] For the relevant brief, see http://www.productivity.govt.nz/inquiry-content/1788?stage=2

[51] For the relevant brief, see http://www.productivity.govt.nz/inquiry-content/1788?stage=3