New Zealand – Specifying the corpus of secondary legislation subject to publication, presentation and disallowance

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New Zealand has had pretty robust processes for the publication, presentation and disallowance of secondary legislation for some time.[1] However, one aspect has proved vexing and flimsy: the definition of secondary legislation that must be published and presented to the House of Representatives or that is subject to disallowance through parliamentary procedures. The Legislation Act 2019 and, its soon to be passed companion, the Secondary Legislation Bill 2019 plug this gap. Rather than relying on woolly and complicated definitions, the new regime relies on specification of secondary legislation as such in all legislation empowering secondary legislation – thereby requiring a massive project to amend almost every Act on the statute book.

Parliamentary scrutiny of secondary legislation grew out of the oversight of regulations by the Regulations Review Committee (and its predecessor, from 1962, the Statutes Revision Committee). This committee wields a careful and powerful eye, vetting regulations and other instruments against quality and

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1 Dean R Knight and Edward Clark, *Regulations Review Committee Digest* (NZ Centre for Public Law, 2016), available at <www.wgtn.ac.nz/nzcpl/regsreview> and Ross Carter, *Burrows and Carter on Statute Law in New Zealand* (5th ed, LexisNexis, 2015).

prudential grounds set out in standing orders.[2] Importantly, the committee may draw problematic regulations and other instruments to the attention of the House and, as necessary, trigger disallowance processes (although much of the committee's force and effectiveness comes from the soft power it wields and its recommendations are usually followed by the executive and other bodies.[3]

The definition of what secondary legislation is subject to different publication, presentation and disallowance processes has been drawn differently over time originally turning on the meaning of regulations but later disallowable instruments.[4] Most recently, the definition of 'disallowable instruments' was a mess. An instrument made under an enactment was disallowable if it was a 'legislative instrument' (as per a further complicated definition), had 'significant legislative effect' or was specified in the empowering enactment as disallowable; exceptions included resolutions made by the House, instruments made by the judiciary and local authority bylaws. This definition created significant uncertainty about the instruments subject to the different obligations.[5]

In order to address this, the Legislation Act, when it comes into force after its companion Bill is passed, establishes a single category of 'secondary legislation', namely, 'an instrument (whatever it is called) that … is made under an Act if the Act (or any other legislation) states that the instrument is secondary legislation'.[6] Instruments made under the Royal prerogative that have legislative effect are also defined to be secondary legislation. Thus, the definition of secondary legislation for the purpose of presentation to the House and disallowance is clear and certain. The definition also clarifies the extent of the obligation to publish secondary legislation.[7] Significantly, the Legislation (Repeals and Amendments) Act 2019 will, at some time in the future, amend the Legislation Act 2019 to provide that, subject to a few exceptions, secondary

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2 Standing Orders of the House of Representatives, SO 319 and the related jurisprudence catalogued in Knight and Clark, *Regulations Review Committee Digest* (n 1).

3 Legislation Act 2012, ss 42, 43 and 46 (to be soon superseded by Legislation Act 2019, ss 116, 117 and 119).

4 In the recent era, the Regulations (Disallowance) Act 1989, Legislation Act 2012 and Standing Orders 2017.

5 Regulations Review Committee, *Inquiry into the oversight of disallowable instruments that are not legislative instruments* (2014).

6 Legislation Act 2019, s 5.

7 Legislation Act 2019, Part 3.

legislation does not commence until published electronically on a central legislation website.[8]

The new specification approach has necessitated a massive revision project for the Parliamentary Counsel Office, who have examined all the empowering provisions in each and every statute to determine whether or not instruments made under those provisions should be specified as secondary legislation. When making that assessment, a test of whether instruments are likely to have legislative effect has been applied; in other words, in general terms, whether the instruments 'make legal rules that apply generally', 'apply to the public or class of the public' or ' create a framework to be applied again and again'.[9] The Secondary Legislation Bill is the output of that process and amends over 2,500 existing empowering provisions in more than 550 Acts.

This updating of the definition, while technical, is important because it brings clarity and certainty to the oversight of secondary legislation. This reform package, which also carries over updated rules for the interpretation of legislation and codifies legislative disclosure requirements, is thoroughly welcomed.

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8 Legislation (Repeals and Amendments) Act 2019, sch 2, which will amend Legislation Act 2019, s 73; for the central legislation website, see www.legislation.govt.nz

9 Attorney-General, *Access to secondary legislation: policy approvals for the Secondary Legislation (Access) Bill* (Paper for Cabinet Legislation Committee, March 2019).