



Investigation into deemed regulations that are not presented to the House of Representatives

Report of the Regulations Review Committee

Forty-eighth Parliament
(Dr Richard Worth, Chairperson)
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Presented to the House of Representatives

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Investigation into Unpresented Deemed Regulations

Recommendation

The Regulations Review Committee recommends to the Government that it

- adopt a new formulation for legislation empowering deemed regulations, which includes the requirement to present deemed regulations to the House
- review existing legislation empowering deemed regulations for compliance with the standard printing and publication requirements described in this report
- continue to ensure future legislation meets the standard printing and publication requirements described in this report.

Deemed regulations and the Regulations (Disallowance Act) 1989

The term “deemed regulations” refers to instruments that are “deemed” by statute to be regulations for the purposes of the Regulations (Disallowance) Act 1989. Such instruments are generally excluded from the application of the Acts and Regulations Publication Act 1989. This means that they are not published in the statutory regulations series and are not drafted by the Parliamentary Counsel Office. Deemed regulations are nevertheless made under lawmaking powers that have been delegated by Parliament, and need to be subject to the same parliamentary oversight as statutory regulations.

The Regulations (Disallowance) Act 1989 provides for parliamentary scrutiny of delegated law-making. The Act provides an important constitutional safeguard to ensure that the law-making powers delegated to the Executive are exercised in the manner Parliament intended.

To enable Parliamentary scrutiny, section 4 of the Act requires all regulations to be laid before the House not later than the sixteenth sitting day of the House after the day on which they are made. The Act then empowers Parliament to disallow regulations by resolution or through a notice of motion procedure by a member of the committee. Disallowance of regulations has the same effect as revocation.

This function of the committee serves the objects of the Regulations (Disallowance) Act 1989. The committee is a specialist committee appointed to monitor the use of regulation-making powers in accordance with the Standing Orders of the House.

Failure to present deemed regulations to the House

Failure to present deemed regulations to the House undermines Parliament’s ability to monitor the use of delegated regulation-making power. While most statutory deemed-

regulation-making powers require notification in the *Gazette*, this is not always the case and the committee should be able to rely on the tabling requirement under the Regulations (Disallowance) Act 1989 to enable it to conduct its business.

The ramifications of failure to present deemed regulations to the House as required by the Regulations (Disallowance) Act 1989 have also been considered in the High Court. In *Haliburton v Broadcasting Commission* [1999] NZAR 233, the regulations in question were tabled on the 18th sitting day after they were made.

Since no prejudice resulted from the delay, Justice Morris held that it was unlikely that Parliament intended the regulations to become null and void because of the failure to table within the prescribed period. The decision also referred to a number of other circumstances, including the fact that the regulations had been in effect for 10 years and had been used to collect in excess of \$750 million in fees, that the delay in question was only a few days, and that the regulations had been revoked and replaced.

In different circumstances, however, the courts may be less willing to uphold the validity of regulations that are not presented in accordance with the requirements of the Regulations (Disallowance) Act 1989.

Investigation into unpresented deemed regulations

In this context we noted with concern that a number of deemed regulations made in 2006 had not been presented to the House as required by section 4 of the Regulations (Disallowance) Act 1989. Through independent checking of notices in the *Gazette* we ascertained that the following persons and organisations had made deemed regulations but failed to present them to the House:

- Dental Council of New Zealand
- Secretary for Internal Affairs
- Minister of Economic Development
- New Zealand Chiropractic Board
- New Zealand Harness Racing
- New Zealand Psychologists Board
- New Zealand Social Workers Registration Board
- New Zealand Thoroughbred Racing
- Nursing Council of New Zealand
- Occupational Therapy Board of New Zealand
- Veterinary Council of New Zealand.

We wrote to the persons and organisations advising them of the requirements of the Act and the potential risks of non-compliance. We requested an explanation and suggested that the regulations be remade and tabled in accordance with the Act. All responded, and most accepted the advice of the committee.

It was clear from the responses of the defaulting organisations that the main obstacles to the presentation of deemed regulations to the House are lack of knowledge of the requirements of the Regulations (Disallowance) Act 1989 and lack of knowledge of the procedure for presenting non-parliamentary papers to the House.

Action already taken

In addition to undertaking the investigation outlined above, the committee has written to all Ministers noting the concern that some deemed regulations have not been tabled as required. The letters advised of the presentation requirements of the Regulations (Disallowance) Act 1989 and referred Ministers to the Office of the Clerk circular dealing with the process for presenting papers to the House.

The circular on presenting papers to the House describes the following procedure for deemed regulations:

1. The agency administering the regulations must arrange for the responsible Minister to present the regulations to the House.
2. Two copies of the deemed regulation should be forwarded to the responsible Minister.
3. The Minister's office should then follow the established procedure for the presentation of non-parliamentary papers, which requires that the Minister's office must advise the Bills Office to present the deemed regulation.
4. Sixty copies of the deemed regulation must be delivered to the Bills Office on the morning of the day on which the deemed regulation is due to be presented to the House (within 16 sitting days of the making of the regulation).

Further action recommended

Specifying requirement to present in authorising statute

It was apparent from the responses of the defaulting agencies that they were all aware of the need to notify the making of deemed regulations in the *Gazette*, but that many were not aware of the requirement to present to the House. The *Gazette* notification requirement is typically contained in the legislation that empowers the making of a deemed regulation. The requirement to present to the House on the other hand is imposed by virtue of an instrument being deemed a regulation for the purposes of the Regulations (Disallowance) Act 1989.

It is our view that such deeming provisions do not alert organisations sufficiently to their obligations. While the responsibility to comply with clear legislative requirements rests firmly with the agencies making deemed regulations, the extent of recent non-compliance indicates that more assistance is required. Consequently we recommend that in future, provisions that deem instruments to be regulations for the purposes of the Regulations (Disallowance) Act 1989 should have an additional descriptive paragraph requiring presentation to the House in accordance with the Regulations (Disallowance) Act 1989.

This approach would provide a sign post to agencies who may not look beyond their own legislation that they are required to present their deemed regulations to the House.

The need to require notification in the *Gazette*

In the course of our investigation, we came across a small number of Acts which authorise the making of deemed regulations and do not require the making of such regulations to be notified in the *Gazette*.

- Airport Authorities Act 1966
- Anzac Day Act 1966
- Building Act 2004
- Institute of Chartered Accountants of New Zealand Act 1996
- Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003
- Taratahi Agricultural Training Centre (Wairarapa) Act 1969

Standards for the notification and publication of deemed regulations were considered by the committee in its 1999 *Inquiry into Instruments Deemed to be Regulations – An Examination of Delegated Legislation*. The committee was conscious of the fact that deemed regulations are not subject to the Acts and Regulations Publication Act 1989. Therefore each statute empowering deemed regulations must deal individually with notice and publication requirements.

The report of the 1999 inquiry recommended that Acts (both new and existing) which empower the making of deemed regulations be amended to comply with standard printing and publication requirements.

The object of this recommendation was to ensure that law is generally accessible to the public. In addition, without general public notification of the making of deemed regulations it is difficult for third parties (including the Committee) to follow up on compliance with the requirements for presentation. There may simply be no generally accessible way of knowing that a deemed regulation has been made. This is clearly undesirable.

The committee recommended that the following constitute standard printing and publication requirements:

- Notice must be given in the *Gazette* and any other publication relevant to the individuals or organisation affected.
- The deemed regulations must be available for inspection free of charge and for purchase at a reasonable price (wherever possible).
- Notice must be given of the places where the deemed regulations can be inspected or purchased.

The Government response to the report of the committee accepted these recommendations in respect of future Bills. In general they have been observed, with the exception of the Building Act 2004 and the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003.

We recommend that new and existing legislation empowering the making of deemed regulations be reviewed for compliance with the standard printing and publication requirements described in this report.

Recommendation

The Regulations Review Committee recommends to the Government that it

- adopt a new formulation for legislation empowering deemed regulations, which includes the requirement to present deemed regulations to the House
- review existing legislation empowering deemed regulations for compliance with the standard printing and publication requirements described in this report
- continue to ensure future legislation meets the standard printing and publication requirements described in this report.

Appendix A**Committee members**

Dr Richard Worth (Chairperson)

Hon Marian Hobbs

Eric Roy

Dr Pita Sharples

Maryan Street

Kate Wilkinson

Hon George Hawkins

Charles Chauvel (replaced Hon George Hawkins on 2 August 2006)

Committee staff

Claire Coleman, Clerk of Committee

Tim Workman, Legislative Counsel

Appendix B**Standing Orders relevant to the Regulations Review Committee****314 Functions of Regulations Review Committee**

- (1) The Regulations Review Committee examines all regulations.
- (2) A Minister may refer draft regulations to the committee for consideration and the committee may report on the draft regulations to the Minister.
- (3) In respect of a bill before another committee, the committee may consider—
 - (a) any regulation-making power,
 - (b) any provision that contains a delegated power to make instruments of a legislative character, and
 - (c) any matter relating to regulations,—and report on it to the committee that is considering the bill.
- (4) The committee may consider any matter relating to regulations and report on it to the House.
- (5) The committee investigates complaints about the operation of regulations, in accordance with Standing Order 379, and may report on the complaints to the House.

315 Drawing attention to a regulation

- (1) In examining a regulation, the committee considers whether it ought to be drawn to the special attention of the House on one or more of the grounds set out in paragraph (2).
- (2) The grounds are, that the regulation—
 - (a) is not in accordance with the general objects and intentions of the statute under which it is made:
 - (b) trespasses unduly on personal rights and liberties:
 - (c) appears to make some unusual or unexpected use of the powers conferred by the statute under which it is made:

- (d) unduly makes the rights and liberties of persons dependent upon administrative decisions which are not subject to review on their merits by a judicial or other independent tribunal:
- (e) excludes the jurisdiction of the courts without explicit authorisation in the enabling statute:
- (f) contains matter more appropriate for parliamentary enactment:
- (g) is retrospective where this is not expressly authorised by the empowering statute:
- (h) was not made in compliance with particular notice and consultation procedures prescribed by statute:
- (i) for any other reason concerning its form or purport, calls for elucidation.

316 Procedure where complaint made concerning regulation

- (1) Where a complaint is made to the committee or to the chairperson of the committee by a person or organisation aggrieved at the operation of a regulation, the complaint must be placed before the committee at its next meeting for the committee to consider whether, on the face of it, the complaint relates to one of the grounds on which the committee may draw a regulation to the special attention of the House.
- (2) The person or organisation making the complaint is given an opportunity to address the committee on the regulation unless the committee agrees by unanimous resolution not to proceed with the complaint.