



# **Inquiry into the use of instruments of exemption in primary legislation**

Report of the Regulations Review  
Committee

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Forty-eighth Parliament  
(Dr Richard Worth, Chairperson)  
September 2008

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*Presented to the House of Representatives*



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## Inquiry into the use of instruments of exemption in primary legislation

### Summary of recommendations

The Regulations Review Committee makes the following recommendations to the Government:

- That the key principles and the recommendations of the Legislation Advisory Committee noted in this report be reflected in the Legislation Advisory Committee Guidelines, and the Guide to Cabinet and Cabinet Committee processes where applicable.
  - That, where the power to make an exemption is supplemented by a power to impose conditions, such conditions be required to be consistent with the objects of the empowering Act, and no more onerous than the requirements they replace.
  - That it note that the test for the application of the Regulations (Disallowance) Act 1989 to an instrument of exemption is determined by the definition of regulation in that Act, which includes any instrument that varies or extends the scope or provisions of an enactment, and that this test is supported by consideration of the legislative character of the instrument of exemption.
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# 1 Introduction

We regularly consider regulations that exempt individuals and classes of people and things from requirements in legislation. 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. For that reason, we thought it relevant to explore the principles for the appropriate use of exemption powers and of conditions attached to exemptions.

In reflecting on exemption-making powers it became apparent that issues considered in our inquiry into the status of regulations are also relevant to the use of these powers.<sup>1</sup> While we see many exemption notices in the form of statutory regulations, there appear to be many other exemption instruments that may fall within the definition of regulations established under the Regulations (Disallowance) Act 1989. We seldom see these other exemption instruments presented to the House in accordance with the requirements of that Act. Hence we were interested to consider the status of various types of instruments of exemption, and matters relating to their notification and publication.

We therefore agreed the following terms of reference at our meeting on 2 April 2008:

An inquiry to examine:

- principles for the appropriate use of instruments to exempt persons from requirements in statutory provisions
- principles for imposing conditions in relation to exemptions
- the status of exemption notices in relation to the definition of regulations
- concerns of fragmentation of the law through the use of exemptions, and the impact this may have on public access to the law
- principles for publication requirements for instruments of exemption.

## Discussion paper

A discussion paper<sup>2</sup> was developed and submissions were sought from interested persons<sup>3</sup> on the following questions:

1. Please identify any powers of exemption contained in the primary legislation that your organisation administers.
2. Are specific criteria listed for the grant of an exemption?

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<sup>1</sup> Report of the Regulations Review Committee, *Inquiry into the principles determining whether delegated legislation is given the status of regulations* 2004 AJHR I.16E.

<sup>2</sup> The text of the discussion paper is set out in Appendix B.

<sup>3</sup> A list of submitters is contained in Appendix C.

3. What is the nature of the instrument of exemption? Is it a regulation for the purposes of the Regulations (Disallowance) Act 1989?
4. Is the making of the exemption required to be notified? If so, how?
5. Are the instruments of exemption and the reasons for granting the exemption required to be published?
6. If the power to grant an exemption includes the power to impose terms and conditions, what statutory limits are there on the power to impose such terms and conditions?
7. Should all exemption instruments be regulations for the purpose of disallowance?
8. Do you agree that the principles relating to the delegation of lawmaking power should generally apply to provisions empowering exemptions?<sup>4</sup> Are there other more specific principles that should apply?
9. Should all instruments of exemption be required to be published? If not, what principles should guide the inclusion of a publication requirement in an exemption empowering provision?
10. What limits or safeguards should apply to the terms and conditions that may be imposed in relation to the grant of an exemption?

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<sup>4</sup> See chapter 10 of the Legislation Advisory Committee Guidelines, [http://www.justice.govt.nz/lac/pubs/2001/legislative\\_guide\\_2000/chapter\\_10.html](http://www.justice.govt.nz/lac/pubs/2001/legislative_guide_2000/chapter_10.html)

## 2 Summary of responses

### Existing exemption powers

The first set of questions (numbers 1 to 6) were aimed at departments administering primary legislation, and the Takeovers Panel and the Securities Commission, which have a particular interest in exemption regimes. The questions sought to gain a general picture of the exemption-making powers currently in use.

Responses were received from most departments, and those we received were thorough. The responses of most departments distinguished between exemptions applicable to specific individuals and exemptions applicable to the wider public. The answers to the questions were influenced by the class of exemptions the responding departments typically dealt with.

### Are specific criteria listed for the grant of an exemption?

The responses from departments showed some variation in their practice in specifying criteria for exercising exemption-making powers. To some extent the variation is accounted for by the different requirements from which exemptions are possible. Some exemption decisions regarding minor regulatory requirements are rudimentary, and require little guidance. For example, section 60Q(7) of the Social Security Act 1964 (exemption from the requirement for certain beneficiaries to have personal development and employment plans) provides that “The Chief Executive may, on the grounds of severe disability or sickness, exempt a person from the requirements of this section”.

Drafting practice has altered over time. Older ministerial exemption powers leave the Minister to decide the grounds and terms and conditions as he or she sees fit. See for example section 17(2) of the Marine Mammals Act 1972:

The Director-General may, from time to time by notice in the Gazette, grant, in respect of any person or class of persons, or any vessel, vehicle, aircraft, or hovercraft, or any fish, or any waters, exemption from the requirements of subsection (1) of this section, either wholly or partially and either with or without conditions; and may in like manner amend or revoke any such notice.

More recent legislation follows the better practice of stating specific criteria to guide the decision-maker in exemption decisions. A useful example is section 47 of the Maritime Transport Act 1994:

(1) The Director may, if he or she considers it appropriate and upon such conditions as he or she considers appropriate, exempt any person, ship, or maritime product from any specified requirement in any maritime rule.

(2) The Director shall not grant an exemption under subsection (1) of this section unless he or she is satisfied in the circumstances of each case that—

- (a) The granting of the exemption will not breach New Zealand's obligations under any convention; and
  - (b) Either—
    - (i) The requirement has been substantially complied with and that further compliance is unnecessary; or
    - (ii) The action taken or provision made in respect of the matter to which the requirement relates is as effective or more effective than actual compliance with the requirement; or
    - (iii) The prescribed requirements are clearly unreasonable or inappropriate in the particular case; or
    - (iv) Events have occurred that make the prescribed requirements unnecessary or inappropriate in the particular case; and
  - (c) The risk to safety will not be significantly increased by the granting of the exemption.
- (3) The number and nature of any exemptions granted under subsection (1) of this section shall be notified as soon as practicable in the Gazette.
- (4) Nothing in this section shall apply in any case where any maritime rule specifically provides that no exemptions are to be granted.

The LAC's submission proposes that an exemption power should set out clear criteria for the granting of exemptions. They should expressly include, at least, a requirement that granting the exemption be consistent with the objectives of the empowering Act, and should ideally provide further guidance.

The LAC also submits that the Cabinet paper supporting a proposed bill should specify exemption powers, and explain why they are necessary and the criteria and conditions that will apply to the granting of the exemption power.

#### **What is the nature of the instrument of exemption?**

This question sought to explore the extent to which regulations are used as instruments of exemption, and determine the extent of any ambiguity about the status of exemption instruments. Under paragraph (b) of the definition of regulation in the Regulations (Disallowance) Act 1989, an instrument that varies or extends the scope or provisions of an enactment is a regulation, whether or not it is made by Order in Council.

Departmental responses revealed various instruments of exemption. Several responses suggested that exemption letters to individuals were not instruments of exemption and therefore could not be considered regulations. This may be the case, especially where there is no formal requirement to notify the making of the exemption. We observed that the kind of instrument required by legislation tends to vary with the importance of the matter being dealt with and whether the regulation applies to a person or a class of persons.

A number of responses indicated either that particular instruments of exemption were regulations under paragraph (b) of the definition in the Regulations (Disallowance) Act 1989, or that it was not clear under the definition whether they were regulations or not.

### **Is the making of the exemption required to be notified or published?**

Responses to this question varied according to the nature of the exemption. Exemptions under the immigration framework, for example, are personal matters and are not notified on privacy grounds. Under the transport framework, exemptions may give certain commercial operators competitive advantage, and public notification is required to provide transparency to the process. Exemptions applicable to wider groups tend to be notified in the *Gazette* or published as statutory regulations.

### **Statutory restrictions on terms and conditions of exemptions**

Submissions on this question indicated a strong reliance on administrative law principles to restrict inappropriate imposition of terms and conditions on exemptions, rather than express limitations. Some submitters noted that no condition could go beyond the objects and intentions of the primary legislation. Others commented that judicial review was available as a means of limiting the terms and conditions of exemptions.

The Parliamentary Counsel Office noted that conditions can be positive and that exemptions may be acceptable only provided that conditions are imposed in conjunction with the grant of the exemption.

The Ministry of Transport proposed that a particular limitation should be placed on any conditions imposed: that they be no more onerous than the original requirement in legislation. We found this a useful standard and recommend it for general consideration. The Ministry also noted that unconditional dispensations were sometimes appropriate.

### **Should all exemption instruments be regulations for the purpose of disallowance?**

Few responses endorsed applying the Regulations (Disallowance) Act 1989 to all instruments of exemption. Most of them distinguished between different types of exemption.

The LAC noted that there is a sliding scale of exemptions, ranging from minor concessions to individuals to exemptions that are legislative in nature, and clearly and significantly extend or vary the scope of an Act. The LAC considers that minor concessions which do not extend or vary the scope of an Act should not be treated as regulations. Exemptions that extend or vary the scope of an Act, on the other hand, should be treated as regulations for the purposes of the Regulations (Disallowance) Act 1989.

Other submissions, including that of the New Zealand Law Society (NZLS), suggested that exemptions could be split into two classes—specific and general. The NZLS noted that specific exemptions usually relate to a particular transaction, event, or entity that does not fit the general law. General exemptions apply more widely to the general public. The NZLS considers there is a case for general exemptions to be made as regulations, particularly where they are made to remedy a defect or omission in legislation. The NZLS considers that such general exemptions should be subject to sunset provisions, but that they should

not be rolled over continuously. The NZLS considers that general exemptions should be replaced by legislation of general application when the opportunity arises.<sup>5</sup>

The LAC acknowledges that some exemptions may occupy a grey area between concessions and exemptions proper. The LAC suggests that criteria in the LAC guidelines are relevant to this issue: will the instrument affect a large group of people, and is it of a continuing nature? If the answer to these questions is affirmative the exemption power is more likely to be an exemption of legislative character, which should be treated as a regulation.

The LAC proposes that exemption-making powers should state whether the instrument of exemption is a regulation subject to disallowance. This would remove any ambiguity as to the status of the instrument of exemption, and the need to consider whether an instrument extended or varied the scope of an Act.

The LAC notes concern about the use of clauses that exclude exemptions from the application of the Regulations (Disallowance) Act 1989. The concern is that instruments of exemption that would otherwise by definition be regulations might be excluded from Parliamentary scrutiny. We agree that this is a concern, but where exemptions fall into the grey area between concessions and exemption, our view is that an exclusion clause may be desirable for certainty.

The Parliamentary Counsel Office considers that the test for treating instruments of exemption as regulations is whether or not they are of a legislative character. A test for legislative character has been promulgated in Cabinet Office Circular CO (08) 4. An instrument is of legislative character under that test if it fulfils two criteria:

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

### **Principles relating to the delegation of lawmaking power**

Most responses, including that from the LAC, endorsed the application to exemptions of the principles relating to the delegation of lawmaking power. The Chief Parliamentary Counsel considered that the principles relating to the delegation of law-making powers were relevant to exemption-making powers where the exemption was in practice an exercise in lawmaking. The principles should therefore apply to any exemptions that are of legislative character or that tend to rewrite or modify the law. They should not apply to exemptions that are administrative in character, applying the law to a particular case.

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<sup>5</sup> The NZLS cites the example of the Securities Act (Multiple Participants Superannuation Schemes) Exemption Notice 1998 (SR 1998/423) as an exemption of general application that has been extended three times. It also cites the Takeovers Code (Class Exemption) Notice (No 2) 2001 as being of ongoing general application. Such an exemption might more appropriately be incorporated into the Code or other legislative form.

**Should all instruments of exemption be required to be published?**

Most responses agreed that not all instruments of exemption needed to be published. The Chief Parliamentary Counsel observes that some categories of exemption are too trivial, too private, or too commercially sensitive to be published at all. The Chief Parliamentary Counsel also notes that there are options other than publication in the statutory regulations (SR) series. It is possible to have some exemptions published in the *Gazette*, or, where smaller audiences are involved, in industry publications or on the internet.

The LAC considers that as a general rule, exemptions of general application or of significant or wide-ranging effect should be published in the SR series. However exemptions applying to individuals should not normally be published as statutory regulations. The LAC argues that hard and fast rules are not appropriate and that the decision whether to publish in the SR series should be made case by case.

The LAC also notes that there are other options for publishing exemptions. The LAC suggests that its guidelines on how to publish deemed regulations may be equally applicable to the publication of exemptions that are not statutory regulations.

**What limits or safeguards should apply to the terms and conditions that may be imposed in relation to the grant of an exemption?**

The LAC submits that the following safeguards should apply to the exercise of all powers to make exemptions:

- a) An exemption empowering Act should set out clear purposes for the granting of exemptions
- b) An exemption empowering Act should set out clear criteria for the granting of exemptions. Those criteria should expressly include, at least, a requirement that granting the exemption is consistent with the objectives of the empowering Act, and ideally further guidance
- c) There should be a requirement to give reasons when an exemption is granted and to state them in the exemption instrument itself
- d) All exemption empowering provisions should state that exemption instruments granted under them should expire within 5 years. Exemption instruments should contain a sunset clause to that effect.

Mr Jason Karl, a PhD candidate from the University of Auckland Law Faculty, provided a detailed submission on the subject of exemptions generally. His analysis of limitations on conditions was particularly helpful. He says that conditions should relate to the rule which is the subject of exemption, and not introduce entirely new rules to the overall objects of an Act. Mr Karl notes the concern that the use of conditions should not subvert the legislation-making process.

Mr Karl cites section 35A of the Financial Reporting Act 1993 as a good general model for empowering exemptions. Section 35A provides clear criteria for the exercise of the power, and states that an exemption must be consistent with the legislative scheme. Section 35A includes the following provisions:

- (1) The Securities Commission may, by notice in the *Gazette*, exempt any directors of an issuer that is incorporated or constituted outside New Zealand, or any directors of a class of those issuers, from compliance with any provision of section 8 to 11, 13 to 16, 18, 36, 36A, or 38.

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- (2) The Securities Commission must not grant an exemption under this section unless it is satisfied that
- (a) the exemption would not cause significant detriment to subscribers for the securities of the issuer that are members of the public in New Zealand, having regard to the financial reporting requirements that must be complied with in relation to the issuer under the law in force in the country where the issuer is incorporated or constituted; and
  - (b) the extent of the exemption is not broader than what is reasonably necessary to address the matters that gave rise to the exemption.
- (3) The exemption may be granted on any terms and conditions that the Securities Commission thinks fit.
- (4) The Securities Commission may vary or revoke an exemption in the same way as an exemption may be granted under this section.
- (5) Each notice published in the Gazette under this section is a regulation for the purposes of the Regulations (Disallowance) Act 1989 and the Acts and Regulations Publication Act 1989.

As well as placing clear limits on the exemption-making power, we note the value of subsection (5) in clarifying the status of the exemption instrument.

Mr Karl agrees that exemptions should be time-bound and endorses a number of the LAC principles regarding the legitimate use of exemptions, as discussed in the following section.

### 3 Key principles

We found the submission of the LAC to be a detailed and practical study of the field of exemptions and their empowerment provisions. The submission captured most of the ideas presented in other submissions, in a clear framework. The LAC's key principles and recommendations therefore form the core of our recommendations.

#### LAC key principles

The LAC considered that the following key principles underlie the legitimate use of exemptions:

- The power to exempt from a statute or regulations should only be conferred where there is good reason.
- Exemptions may be appropriate to deal with unforeseen circumstances that cannot be envisaged by a statute when it was enacted.
- Exemptions may be appropriate where there is an urgent need to adapt the law to new circumstances, particularly where that need is urgent and it would not be possible to change the law by quickly amending legislation, or where it is not appropriate to amend a general provision to take account of a one-off, exceptional circumstance.
- Exemptions may be appropriate if an area of law must adapt to constantly or frequently changing circumstances.
- Exemptions may be appropriate to avoid having to comply with an obligation that would otherwise be impracticable or unreasonable or would cause hardship.
- Exemptions may be appropriate in dealing with departures from the legislative regime that are minor or inconsequential, as opposed to significant policy changes.

#### LAC recommendations

The LAC made the following recommendations:

1. Consistent terminology should be used in drafting exemption provisions.
2. Standardized provisions should be used by PCO in drafting exemption-authorising provisions in Acts.
3. If a proposed bill contains an exemption power
  - a) the Cabinet paper that accompanies it should note this, give reasons why inclusion of such powers is necessary, and set out conditions and criteria that will apply to the granting of exemptions under the power.
  - b) The bill's explanatory note should do the same.
4. If a proposed regulation contains an exemption power, the Cabinet paper that accompanies it should note this, give reasons why it is necessary, and set out conditions and criteria that will apply to the granting of exemptions under the power.

5. Provisions empowering the granting of exemptions should specify
  - a) What form the exemption instruments should take
  - b) Whether the exemption instruments will be regulations for the purposes of the Regulations (Disallowance) Act 1989
  - c) Whether the exemption instruments will be regulations for the purposes of the Acts and Regulations Publication Act 1989, and, if not, alternative publication requirements (if any) should be specified.
6. A number of safeguards should be applied to the use of exemption powers
  - a) An exemption empowering Act should set out clear purposes for the granting of exemptions
  - b) An exemption empowering Act should set out clear criteria for the granting of exemptions. Those criteria should expressly include, at least, a requirement that granting the exemption is consistent with the objectives of the empowering Act, and ideally further guidance.
  - c) There should be a requirement to give reasons when an exemption is granted and to state them in the exemption instrument itself.
  - d) All exemption-empowering provisions should state that exemption instruments granted under them should expire within five years. Exemption instruments should contain a sunset clause to that effect.

#### **Status of instruments of exemption**

It was clear from departmental submissions that the status of instruments of exemption in respect of the Regulations (Disallowance) Act 1989 is in need of clarification. The issue here is the grey area between concessions, and exemptions that are clearly regulations under the definition in the Act.

The definition of regulations in the Act includes an instrument that varies or extends the scope or provisions of an enactment, whether or not it is made by Order in Council. Departments acknowledged that many of their exemption instruments are covered by this definition, and yet we are aware of few that are tabled in the House as required by the Act.

A starting point is to ensure that all exemption-making powers that fall within the grey area clearly state whether or not the Regulations (Disallowance) Act 1989 applies or not.

Two tests were proposed by submitters for determining the application of the Act. The LAC suggested a test based on the definition of regulation as a starting point: does the exemption vary or extend the scope or provisions of an enactment? This initial question could be supplemented by questions considering the legislative character of the exemption. PCO prefers to go directly to the question of legislative character, using the test established by the Cabinet Office Circular to determine whether an instrument of exemption should be subject to the Act.

This is a difficult issue. In support of the LAC approach one can argue that an exemption that varies or extends the scope or provisions of an enactment is a matter deserving of parliamentary scrutiny. Our understanding is that the Cabinet Office Circular test is narrower, and would exclude exemptions for individuals or narrow classes of person even if they extend the scope or provisions of an enactment. The PCO's approach might result in some exemptions that vary or extend the scope or provisions of an enactment not being subject to parliamentary scrutiny.

Several departments argued that individual exemptions should not be subject to disallowance. They considered that individuals and departments that went through the exemption process in good faith and made commitments following the grant of the exemption should not be subject to parliamentary scrutiny. We are not certain that this argument applies in all cases. Exemption decisions are generally subject to review by the courts. They are therefore already subject to a degree of external scrutiny. Some individual exemptions deal with matters providing competitive advantage, and thus deserve the transparency that parliamentary scrutiny can provide. In general our view is that the LAC's is the more appropriate test. The LAC's approach is consistent with the definition of regulation in the Regulations (Disallowance) Act 1989 which defines the application of that Act, but also reflects relevant matters such as the legislative character test.

Once a decision is made on whether the instrument of exemption is subject to disallowance, the empowering provision should clearly state whether or not the instrument is so subject. This would hopefully make it clear that exempting agencies are then under an obligation to table the instrument of exemption in the House in accordance with the Regulations (Disallowance) Act 1989.

## 4 Conclusion

Instruments of exemption are unusual in that they waive legislative requirements but may not always themselves be of legislative character. In this respect they straddle the areas of administrative and legislative action. Exemption instruments dis-apply legal requirements and in some cases substitute new requirements in their place. In this way they can have a significant impact on the law as it affects individuals and the public generally. These factors justify special attention to provisions authorising instruments of exemption.

This inquiry has been a vehicle for the collation and development of useful principles to govern the use of exemption-making provisions. We wish to record our thanks to those who made submissions on this inquiry for their thoughtful contributions. The submissions form a valuable resource on this topic and will be made available on request from the Parliamentary Library.

### Recommendations

The Regulations Review Committee makes the following recommendations to the Government:

- That the key principles and the recommendations of the Legislation Advisory Committee noted in this report be reflected in the Legislation Advisory Committee Guidelines, and the Guide to Cabinet and Cabinet Committee processes where applicable.
- That, where the power to make an exemption is supplemented by a power to impose conditions, such conditions be required to be consistent with the objects of the empowering Act, and no more onerous than the requirements they replace.
- That it note that the test for the application of the Regulations (Disallowance) Act 1989 to an instrument of exemption is determined by the definition of regulation in that Act, which includes any instrument that varies or extends the scope or provisions of an enactment, and that this test is supported by consideration of the legislative character of the instrument of exemption.

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## Appendix A

### Committee personnel

#### Committee members

Dr Richard Worth (Chairperson)

Hon Mark Burton

Charles Chauvel (from 2 August 2006 until 7 November 2007)

Hon George Hawkins from (9 November 2005 until 2 August 2006)

Hon Marian Hobbs

Lesley Soper

Eric Roy

Dr Pita Sharples

Maryan Street (from 9 November 2005 until 7 November 2007)

Lindsay Tisch

Hon Tariana Turia (from 16 November 2005 until 22 February 2006)

Kate Wilkinson (from 9 November 2005 until 6 December 2006)

#### Committee staff

Andy Gardner, Clerk of Committee (from 8 September 2008)

Tim Workman, Clerk-Assistant Legal Services

## Appendix B

### Discussion paper

The Regulations Review Committee has recently resolved to commence an inquiry into the use of instruments of exemption in legislation. The terms of reference for the inquiry are to examine

- a) principles for the appropriate use of instruments to exempt persons from requirements in statutory provisions:
- b) principles for imposing conditions in relation to exemptions:
- c) the status of exemption notices in relation to the definition of regulations:
- d) concerns of fragmentation of the law through the use of exemptions, and the impact this may have on public access to the law:
- e) principles for publication requirements for instruments of exemption.

Provisions that grant persons the power to exempt persons from legislative requirements are commonplace in legislation. They are generally provisions with a pragmatic purpose that provide flexibility in any regulatory regime. However their use raises a number of concerns that we have noted when reviewing regulations, and bills that empower the making of delegated legislation.<sup>6</sup>

GC Thornton observes<sup>7</sup>

The practical effect of a power to exempt a person from some provision of primary legislation may be as serious as those resulting from a power to amend primary legislation. The effect may also be discriminatory, and consideration should therefore be given to the desirability of requiring that the form of any exemption be of a legislative character and therefore made public and subject to the other safeguards available with respect to delegated legislation.

Hence provisions empowering exemptions may be considered a form of Henry VIII clause where, in some cases, persons delegated the power of exemption are empowered to override the provisions of primary legislation. This committee has commented on constitutional concerns with such clauses in the past<sup>8</sup> and seeks to establish principles for the appropriate use of exemption provisions that affect the scope of primary legislation.

The legislative character of exemption instruments is also reflected on by the former Chief Parliamentary Counsel, George Tanner, when considering the definition of regulations in the Regulations (Disallowance) Act 1989:<sup>9</sup>

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<sup>6</sup> A recent example of an innovative exemption making provision is found in clause 11 of the Reserve Bank of New Zealand Amendment Bill (No 3).

<sup>7</sup> *Legislative Drafting, Fourth Edition* GC Thornton, Butterworths 1996, p 346

<sup>8</sup> Most recently in *Inquiry into the Affirmative Resolution Procedure* Report of the Regulations Review Committee, AJHR I.16I May 2007, <http://www.parliament.nz/en-NZ/PB/Presented/SCReports/>

<sup>9</sup> *Delegated Legislation* Mai Chen, George Tanner, NZLS Seminar May 2002, p 8.

The purpose of para (b) [*of the definition of regulations: instruments that vary or extend the scope or provisions of legislation*] is to catch instruments that, in effect, alter legislation. Instruments that exempt persons or classes of persons from the operation of an Act or regulations may be regarded as varying the scope or provisions of the Act or regulations and so fall within para (b). Examples are exemptions granted under the Securities Act 1978, the Securities Amendment Act 1988, the Overseas Investment Regulations 1995, and the Takeovers Act 1993. An instrument that extends the meaning of an existing definition would also be covered.

Most exemption making powers in legislation do not specify whether the instrument of exemption is a regulation or not. Following the above analysis many typical exemption notices published in the *Gazette* would be regulations for the purposes of Regulations (Disallowance) Act 1989 and should be tabled in the House of Representatives.

The committee is concerned that these issues may not be dealt with consistently across the statute book and that departments may not be aware of the ramifications of exemption instruments being regulations for the purposes of the Regulations (Disallowance) Act 1989.

A further issue that has been brought to our attention relates to public notification of exemption requirements and public access to exemption instruments. Exemptions from legislative requirements are of legislative character and should be accessible by the public. Once again there is a concern that this matter is not dealt with consistently across the statute book. A related concern is that exemption regimes tend to fragment the presentation and organisation of the law and make public access to the law generally more difficult.<sup>10</sup> Comments are invited on these issues.

Finally we are concerned that provisions authorising the making of terms and conditions in relation to exemptions delegate a legislative power and should be subject to strict limits and safeguards. We are seeking views on the principles that should inform those limits. For example should terms and conditions be limited to the purpose of achieving an alternative means of compliance? Should terms and conditions always be subject to parliamentary scrutiny?

You are invited to comment on the foregoing matters and the following questions.

#### *Existing exemption powers*

1. Please identify any powers of exemption contained in the primary legislation that your organisation administers.
2. Are specific criteria listed for the grant of an exemption?
3. What is the nature of the instrument of exemption? Is it a regulation for the purposes of the Regulations (Disallowance) Act 1989?
4. Is the making of the exemption required to be notified? If so, how?
5. Are the instruments of exemption and the reasons for granting the exemption required to be published?

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<sup>10</sup> Ibid; p.18.

6. If the power to grant an exemption includes the power to impose terms and conditions, what statutory limits are there on the power to impose such terms and conditions?

*Broader issues*

7. Should all exemption instruments be regulations for the purpose of disallowance?
8. Do you agree that the principles relating to the delegation of lawmaking power should generally apply to provisions empowering exemptions?<sup>11</sup> Are there other more specific principles that should apply?
9. Should all instruments of exemption be required to be published? If not, what principles should guide the inclusion of a publication requirement in an exemption empowering provision?
10. What limits or safeguards should apply to the terms and conditions that may be imposed in relation to the grant of an exemption?

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<sup>11</sup> See chapter 10 of the Legislation Advisory Committee Guidelines, [http://www.justice.govt.nz/lac/pubs/2001/legislative\\_guide\\_2000/chapter\\_10.html](http://www.justice.govt.nz/lac/pubs/2001/legislative_guide_2000/chapter_10.html)

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## Appendix C

### List of submitters

Archives New Zealand  
Crown Law  
Department of Building and Housing  
Department of Conservation  
Department of Corrections  
Department of Internal Affairs  
Department of Labour  
Department of the Prime Minister and Cabinet  
Inland Revenue Department  
Mr Jason Karl  
Land Information New Zealand  
Law Commission  
Legislation Advisory Committee  
Ministry for Culture and Heritage  
Ministry for the Environment  
Ministry of Agriculture and Forestry  
Ministry of Defence  
Ministry of Economic Development  
Ministry of Education  
Ministry of Foreign Affairs and Trade  
Ministry of Health  
Ministry of Justice  
Ministry of Research, Science and Technology  
Ministry of Social Development  
Ministry of Transport  
National Library of New Zealand  
New Zealand Customs Service  
New Zealand Food Safety Authority  
New Zealand Law Society  
New Zealand Police  
Parliamentary Counsel Office  
Reserve Bank of New Zealand  
Securities Commission  
Serious Fraud Office  
Statistics New Zealand  
Takeovers Panel  
The Treasury