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Activities of the Regulations Review Committee in 2012

Report of the Regulations Review Committee

Fiftieth Parliament
(Hon Maryan Street, Chairperson)
March 2014

Presented to the House of Representatives
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1 Introduction

Recommendation

The Regulations Review Committee recommends that the House take note of this report.

Purpose of this report

Each year, by convention, the Regulations Review Committee produces a report on those of its activities that it has not reported separately to the House. This report is about the work completed by the Regulations Review Committee of the 50th Parliament between February and December 2012.

The presentation of this report draws the House’s attention to our work and demonstrates our approach to the scrutiny of delegated legislation.

Functions of the committee

The Standing Orders of the House of Representatives set out the powers and functions of the committee, and allow us to bring matters within our mandate to the special attention of the House.1 The committee

- scrutinises all regulations
- considers draft regulations referred by Ministers of the Crown and reports back to them
- examines regulation-making powers in bills
- investigates complaints about the operation of regulations
- conducts inquiries into matters related to regulations.

We met 25 times from February to December 2012, and presented three reports to the House. These reports are printed separately and will be included in the Appendices to the Journals of the House of Representatives. They are listed in Appendix D. In 2012 we made thirteen reports to other committees about regulation-making powers in bills, and dealt with many other matters that did not culminate in separate reports to the House.

Acknowledgment of staff

We wish to acknowledge the vital role of committee staff in ensuring we can complete our scrutiny functions. We particularly value their clear, professional advice on all aspects of our business.

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1 The relevant Standing Orders are attached as Appendix B.
2 Examination of regulations

Standing Order 314(1) empowers us to examine all regulations. In 2012, Standing Order 3(1) defined “regulations” in terms of the Regulations (Disallowance) Act 1989. When examining a regulation, we consider whether it should be drawn to the special attention of the House on any of the grounds set out in Standing Order 315(2).

In 2012, most regulations were published in the annual Statutory Regulations (SR) series, but some were exempt from the requirements of the Acts and Regulations Publication Act 1989. These instruments, then known as “deemed regulations”, are generally publicly notified in the New Zealand Gazette, and must be presented to the House in the same way as other regulations. In this chapter, we deal with regulations published in the SR series; deemed regulations are dealt with in Chapter 3.

Our scrutiny process

Examination of regulations is the backbone of our work. We examine each regulation as soon as possible after it has been published. In the year from 16 February 2012 until 6 December 2012 we scrutinised 557 regulations: SR 2011/299–2011/307, SR 2011/310, SR 2011/312–2011/433 and SR 2012/1–2012/425.

We raised any issues with the responsible Ministers, departments, or agencies. After receiving their responses we decided whether to proceed further. A list of the regulations about which we sought information is in Appendix E.

Routine scrutiny

In 2012, we continued to seek explanations as to why regulations did not comply with the Cabinet Manual’s “28-day rule”. The principle underlying this rule is that the law should be available and capable of being understood before it comes into force. Non-compliance with the 28-day rule is the issue that arises most frequently in our routine scrutiny work. Although we are almost always satisfied with the explanation we receive from the responsible agency, we consider that this work continues to be important, because it demonstrates that Parliament takes an active interest in ensuring the accessibility of subordinate legislation. To support this work, we recommend that the Government encourage all agencies with responsibility for instruments that do not comply with the 28-day rule to proactively advise the committee of the reasons for non-compliance and whether and when a waiver was obtained. We continued to seek explanations for any regulations with a retrospective effect, also on the basis of the principle that the law should be available and capable of being understood before it comes into force. This is particularly important where requirements are imposed on the general public.

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2 The definition of “regulations” is attached as Appendix C. The Regulations (Disallowance) Act 1989 was repealed in August 2013 by the Legislation Act 2012.

3 The Acts and Regulations Publication Act 1989 was repealed in August 2013 by the Legislation Act 2012.

4 No later than 16 sitting days after the day on which they are made, pursuant to section 4 of the Regulations (Disallowance) Act 1989.

5 The rule states that regulations should not come into force until 28 days after they are notified in the Gazette.
We examined a number of fees regulations, and in some cases asked the agencies concerned to demonstrate that fees were calculated in accordance with the Controller and Auditor-General's good-practice guide, *Charging fees for public sector goods and services*, and the Treasury’s *Guidelines for Setting Charges in the Public Sector*. We referred them to the constitutional principles for fee-setting set out in previous reports of the Regulations Review Committee. Where the regulations concerned levies, we sometimes asked how the levies were calculated and what consultation was undertaken.

Less often we queried whether the regulations were considered to be authorised by the empowering provision in the primary legislation.

This work is routine scrutiny, and typically we are satisfied with the responses we receive. However, in some instances the regulations or the responses necessitate further investigation.

**Issues of current concern**

We found three key areas of concern in our scrutiny in 2012:

- a need for explanatory notes to be clarified and improved
- the appropriateness of regulations having retrospective effect
- the need for statutory prerequisites to be noted in regulations’ enacting formulae.

We generally sought further information on regulations that appeared to raise any of these issues. We have explained the issues below, with examples of regulations regarding which further information was sought. We also note one instance in which the boundary between primary and delegated legislation seemed to have been blurred.

**Improving explanatory notes**

An explanatory note accompanies every regulation published in the SR series. The Parliamentary Counsel Office (PCO) is responsible for drafting SR series regulations, including explanatory notes.

We consider it important that explanatory notes explain satisfactorily the effect of the regulations that they accompany. The effect of a regulation will not always be clear from its wording, particularly to those without specialist knowledge. Members of Parliament, as well as members of the public, ought to be able to treat the explanatory note as a helpful and reliable explanation of the effect of the regulations.

**Canterbury Earthquake (Tax Administration Act) Order (No 2) 2011 (SR 2011/375)**

This order authorises the Commissioner of Inland Revenue to disclose to government agencies information held by the Inland Revenue Department (IRD) about a person in order to assist a person affected by the Canterbury earthquakes. The explanatory note did not make clear when it was envisaged the IRD might disclose such information. We raised the matter with the IRD, asking for hypothetical examples of situations where the power under this order might be used, and for examples of when the preceding order (the Canterbury Earthquake (Tax Administration Act) Order 2011 (SR 2011/27)) had been used.

The examples provided by the IRD included employment data given to the Ministry of Social Development to manage the earthquake support subsidy and earthquake job loss cover applications; contact information on businesses provided to the Canterbury
Earthquake Recovery Authority, and information provided to the Ministry of Economic Development on the functioning of Canterbury businesses to support Canterbury’s rebuilding.

We considered the clarification satisfactory, and did not take any further action.

**Social Security (Childcare Assistance) Amendment Regulations (No 2) 2012 (SR 2012/206)**

We considered that the explanatory note accompanying these regulations did not explain their effect or purpose, but merely described the changes being made to the principal regulations. We raised the matter with the Ministry of Social Development. The ministry considered that its role regarding the explanatory note did not extend beyond checking for errors of fact. We did not find this satisfactory. We wrote to the ministry saying that, given the importance of explanatory notes in understanding legislation, we expected departments to take responsibility for their content and to issue guidance to the Parliamentary Counsel Office on drafting them.

We also undertook to ensure that the PCO was notified of any concerns we might have about the adequacy of any explanatory note.

**Social Security (Youth Support—Authorised Agencies) Order 2012 (SR 2012/209)**

We considered that the legal effect of this order did not match the description in the explanatory note, so asked the Ministry of Social Development for an explanation. The ministry explained that the discrepancy had arisen as a result of an error. As a consequence of our drawing this matter to the ministry’s attention, an amendment to the order was made to rectify the drafting error and eliminate the discrepancy.

**Civil Aviation (Safety) Levies Amendment Order 2012 (SR 2012/306)**

This order was made under section 42A of the Civil Aviation Act 1990. Section 42C(2) of the 1990 Act requires that an order made under section 42A expire shortly after it is made unless it is previously validated or confirmed by an Act of Parliament.

The explanatory note to this order did not state that the order would expire on 31 December 2013 if it were not previously validated or confirmed by Act of Parliament. We asked the Ministry of Transport and PCO why such a statement had not been included in the explanatory note.

The PCO told us that at the time in question, their internal documentation had not required such a statement to be included. However, the Chief Parliamentary Counsel considered that it would be useful to include such a statement in explanatory notes accompanying orders subject to confirmation or validation, and had since issued an instruction to Parliamentary Counsel to that effect. We look forward to seeing any legal requirement for confirmation or validation mentioned in future explanatory notes.

**Investigating regulations that have retrospective effect**

It is well established that retrospective changes to the law should not be made by delegated legislation. The Legislation Advisory Committee guidelines state that such changes should ordinarily be included in primary legislation. Standing Order 315(2)(g) provides that we may draw a regulation to the special attention of the House on the ground that it is retrospective where this is not expressly authorised by the empowering statute.
We consider it important to ensure that bodies empowered to make regulations are aware of the general principle that retrospective changes to the law should not be made by delegated legislation. If a particular empowering provision authorises the making of legislation with retrospective effect, and a regulation made under this provision in fact has retrospective effect, then this should be mentioned in the explanatory note.

**Parliamentary Salaries and Allowances Determination 2011 (SR 2011/410)**

**Judicial Salaries and Allowances Determination 2011 (SR 2011/433)**

**Parliamentary Salaries and Allowances Determination 2012 (SR 2012/422)**


**Judicial Salaries and Allowances Determination 2012 (SR 2012/424)**

We wrote to the Remuneration Authority about these determinations, all of which have retrospective effect. Retrospectivity is authorised by section 19 of the Remuneration Authority Act 1977, but the fact of retrospectivity and the reasons for it were not included in the explanatory memorandum for these determinations. Some of the determinations also had problems in the enacting formulae: for example they did not make reference to section 19 where it was relied on, or did not state whether the statutory requirements had been complied with.

We asked the Remuneration Authority why these regulations were retrospective, whether determinations by the Remuneration Authority could in future be prospective in character, and whether the explanatory notes could explain the retrospectivity and the purpose of and need for an amendment.

The authority explained that the regulations were retrospective because the Authority considers market movements when making its determinations, so as to ensure they are fair, and the relevant data may not be made available for some time after it is collected. Changes in remuneration are often backdated so as to be fair to the people concerned and to taxpayers. The authority did not see merit in the suggestion that the explanatory notes accompanying such determinations should include reference to the retrospective nature of the determinations. After further correspondence between the Authority and the committee, the authority agreed to include more detail in future regulations. We were pleased to see that the explanatory note to the Local Government Elected Members (2012/13) (Certain Local Authorities) Determination 2012 Amendment Determination 2012 (SR 2012/423) provided a much fuller explanation of the purpose of and need for the amending determination.

**Real Estate Agents Act (Continuing Education) Practice Rules 2011 Notice (SR 2012/272)**

The notice was made by the Real Estate Agents Authority on 17 November 2011 under section 15 of the Real Estate Agents Act 2008, and notified in the *Gazette*. It was not published in the SR series until 13 September 2012, despite having come into force on 1 January 2012. The notice therefore appeared to be retrospective without explicit authorisation in the enabling statute. At that time, section 19(2) of the Act provided that a notice made under section 15 was a regulation for the purposes of the Regulations (Disallowance) Act 1989 and the Acts and Regulations Publication Act 1989. Therefore, in accordance with section 4 of the Regulations (Disallowance) Act, the notice should have
been laid before the House no later than the 16th sitting day after the day on which it was made.

In October 2012, we raised these matters with the Real Estate Agents Authority. The authority explained the practice rules were published a long time after they were made because its staff were not fully aware of the implications of the fact that these rules were regulations for the purposes of the Regulations (Disallowance) Act and the Acts and Regulations Publication Act. The notice was not tabled in the House in November 2011. Instead, it was drafted by authority staff and published in the Gazette.

When the authority became aware of its failure to comply with statutory requirements, it contacted the Ministry of Justice and the PCO, seeking to rectify the error. With the PCO, the authority drafted the notice for publication in the SR series, and the PCO published a notification of the notice in the Gazette on 13 September 2012. The earlier date of the notice in the Gazette is mentioned in the explanatory note.

The authority did not accept that the notice had retrospective effect. It considered the September notice a re-publication, and therefore thought it unnecessary to alter the commencement date. It argued that it was impractical for the notice to commence prospectively.

The authority said it considered the rules to be valid, on the basis of independent legal advice and advice from the PCO. It acknowledged a clear failure to comply with the presentation and printing requirements of the Regulations (Disallowance) Act and the Acts and Regulations Publication Act. However, it considered that this failure had not adversely affected the industry, because it had publicised the November 2011 rules widely. On the strength of independent legal advice, the authority believed that presentation was a compliance obligation rather than a condition of the notice’s validity, and therefore did not affect its coming into force, which is determined under section 19(1) of the Real Estate Agents Act 2008. The authority had updated its internal documentation in order to ensure that the PCO would draft all future practice rules.

Commonwealth Countries (Membership) Order 2012 (SR 2012/317)

This order, made under section 2 of Schedule 1 to the Commonwealth Countries Act 1977, updated the list of Commonwealth countries in the Act. No previous order updating Schedule 1 had been made since 1982, despite the fact that the membership of the Commonwealth had changed during the intervening period; the order was therefore decidedly retrospective in effect. Although such retrospectivity was authorised under section 2 of the 1977 Act, we asked the Ministry of Foreign Affairs and Trade why the section 2 regulation-making power had fallen into disuse, and why it was now being resurrected. We also asked the ministry about its assessment of the practical effects of the retrospective provisions.

The ministry explained that, in 2009, Cabinet had directed agencies to seek opportunities for regulatory reform and review. The ministry recognised the outdated list as a problem, and undertook to solve it by means of this order. The ministry said the Act empowers the Secretary of Foreign Affairs and Trade to certify whether a country is a Commonwealth member to help maintain the operation of New Zealand law regarding Commonwealth countries; the list in Schedule 1 was an alternative source of information on Commonwealth membership.
The ministry was confident that the order would have no practical effect on past law and practice. It had recently introduced a regulatory scanning system, so lengthy delays in updating legislation by way of regulation should be avoided in future.

**Noting statutory prerequisites in enacting formulae**

The enacting formula is the form of words that precedes the contents of the regulation. It generally cites the empowering provision pursuant to which the regulation is being made, and specifies the person who is making the regulation—generally, the Governor-General or a Minister of the Crown.

Section 24(1) of the Interpretation Act 1999 provides that the enacting formula is not essential to the validity of the regulation:

> It is not necessary for an enactment, Proclamation, Order in Council, Warrant, or other instrument made under an enactment to refer to facts, circumstances, or preconditions that must exist or be satisfied before the enactment, Proclamation, Order in Council, Warrant, or other instrument can be made.

We nevertheless consider that the enacting formula is an important aid to understanding the effect of a regulation, and we follow up issues regarding enacting formulae with the responsible agencies.

In particular, in 2012 we followed up enacting formulae that did not specify whether statutory prerequisites had been met. For example, an empowering Act may require that, before recommending that the Governor-General make an Order in Council, the responsible Minister must first comply with specified consultation requirements, or give due consideration to specified matters. It is helpful if enacting formulae state that these requirements have been met. Otherwise, we have found that it can be difficult and time-consuming to establish whether, in fact, they have been. If we have difficulty ascertaining compliance, interested members of the public could well struggle to do so. Therefore, despite section 24(1) of the Interpretation Act 1999, we have strongly encouraged the PCO to ensure that the enacting formula preceding a regulation specifies whether statutory prerequisites were met.

**Land Transport (Alcohol Interlock Devices) Notice 2012 (SR 2012/215)**

The statutory prerequisite for making notice, which is consultation with the Minister of Science, is not mentioned in the enacting formula. In response to our query, the Ministry of Transport confirmed that the Minister of Science and Innovation had in fact been consulted.

**Fisheries (Kaikoura–Wakatu Quay Temporary Closure) Notice 2012 (SR 2012/216)**

Again, the statutory prerequisite for making notice, in this instance consultation and participation in decision-making, is not mentioned in the enacting formula. The Ministry for Primary Industries confirmed that it had in fact complied, providing details of the consultation and participation. It said that the omission was the result of an error, which would not be repeated.

**Land Transport (Driver Licensing) Amendment Rules 2012 (SR 2012/302) and Land Transport (Road User) Amendment Rule 2012 (SR 2012/303)**
The enacting formulae of these rules did not state whether the rule-maker (the Associate Minister of Transport) had regard to the matters required by section 164 of the empowering Act, the Land Transport Act 1998, when making or recommending rules.

We raised this matter with the Ministry of Transport in October 2012. The Parliamentary Counsel Office, who drafted the rules, responded. The PCO said that under section 24(1) of the Interpretation Act there is no requirement for any instrument made under an enactment to refer to anything that must exist before it can be made. A very few Acts expressly require such reference, but the Land Transport Act is not one of them. Since the Act does not expressly require compliance with preconditions to be cited, whether it is practical or useful to do so is a question for the drafter.

The Associate Minister of Transport assured us that he had due regard to section 164 when exercising the power to make an ordinary land transport rule; he also saw the recording of compliance in the enacting formula as a matter for the drafter.

**Canterbury Earthquake (Rating Valuations Act—Waimakariri District Council) Amendment Order 2012 (SR 2012/323)**

This order was made under section 71 of the Canterbury Earthquake Recovery Act 2011 on 23 October 2012. Subsections 73(6) and (7) require the Minister for Canterbury Earthquake Recovery to publicly notify the Canterbury Earthquake Recovery Review Panel’s recommendations on a draft Order in Council and, as soon as practicable after receiving the recommendations, to present a copy to the House.

We asked Land Information New Zealand (LINZ) if these requirements had been complied with. LINZ confirmed that the panel had reviewed the order on 21 September 2012, before the Minister had recommended that the Governor-General make the order under section 71 of the 2011 Act. It said that the panel’s recommendations and the letter from the Minister for Land Information advising acceptance of them had been presented to the House on 16 November 2012, and that the order had been publicly notified on 22 November 2012.

We raised with LINZ the requirement in section 73(7) that the Minister present the panel’s recommendations to the House “as soon as practicable” after receiving them. LINZ consulted CERA regarding this requirement; CERA said the delay in presenting the panel’s recommendations to the House was an oversight, and the authority has reviewed its process to ensure it would not happen again. We pointed out that non-compliance with statutory prerequisites is a serious matter for a body involved in processes that make secondary legislation.

**Division between primary and delegated legislation**

**Building (Definition of Restricted Building Work) Order 2011 (SR 2011/317)**

The definition of “restricted building work” in the Building Act 2004 concerns the sort of work that must be carried out by a licensed practitioner. We queried the appropriateness of defining this term in the regulations rather than in the primary legislation.

We raised this matter first with the Department of Building and Housing, and then with the Minister. The Minister replied that he considered that the main definition of building work was in the primary legislation, and that the order merely expanded on it, without introducing new policy. We consider that the current definition of restricted building work includes no criteria for determining what is or is not restricted building work for the
purposes of the Act. The order therefore does not expand on, or provide more detail about, criteria set out in the current definition in primary legislation.

After a hearing of evidence with the Ministry of Business, Innovation and Employment, we remain of the view that it is desirable to confine definitions to primary legislation.

**Investigation reported to the House**

We reported to the House on the Road User Charges (Transitional Matters) Regulations 2012 on 8 November 2012.

We examined regulations 5(3), 5(4), and 8. The regulations were made under section 90 of the Road User Charges Act 2012. They came into force on 1 August 2012, the same date on which the Act came into force, and expired at the close of 31 July 2013. Section 90 authorised the making of regulations prescribing transitional provisions that added to or replaced the provisions of the 2012 Act. We classed section 90 as a Henry VIII power: that is, a power, granted in primary legislation, for delegated legislation to amend, suspend or override the empowering Act or any other Act. It is a well established principle that such powers are undesirable because they give the government of the day the power to override the will of Parliament, and thus have serious implications for Parliament’s ability in practice to control and oversee the delegation of its law-making powers.

Regulation 5(3) effectively removed unregistered vehicles operating under trade plates from the requirement for road user charges to be paid by amending the definition of “exempt vehicle” in section 5 of the Act. Regulation 5(4) amended the definition of “permit” in section 5 of the Act, so that only overweight vehicles were required to carry either an additional licence or a Type H licence. Regulation 8 provided for the exemption granted under the Road User Charges Act 1977 to farmers’ vehicles used on the road only in connection with agricultural operations to continue to apply.

We considered the regulations in respect of two grounds:

- that the regulation appears to make some unusual or unexpected use of the powers conferred by the statute under which it is made (Standing Order 315(2)(c))
- that the regulation contains matter more appropriate for parliamentary enactment (Standing Order 315(2)(f))

**Regulation 5(3)**

The ministry told us that the need to exempt unregistered vehicles operating under trade plates from the requirement to pay road user charges (RUC) was first raised during consultation. It acknowledged that regulation 5(3) dealt with a policy matter not addressed in the Act, as it allowed vehicles previously subject to time licences to become exempt from the requirement to pay RUC.

**Regulation 5(4)**

The ministry explained that regulation 5(4) temporarily corrected what it considered to be an error in the Act; a permanent correction was to be included in a Statutes Amendment Bill. Regulation 5(4) amended the definition of “permit” in section 5 of the Act to the effect that over-dimension vehicles were no longer required to carry either an additional licence or a Type H licence. The ministry considered that only overweight, and not over-dimension, vehicles should be required to carry an additional licence or a Type H licence,
because the costs that vehicles over 44 tonnes imposed on the road network varied primarily in proportion to their weight.

**Regulation 8**

The ministry told us that regulation 8 had been made to continue the existing exemption for farmers who operate light RUC vehicles for agricultural operations with limited on-road use. When the Act came into force, policy decisions on whether and how to implement an exemption for light RUC vehicles had not been made.

**Unusual or unexpected use**

We considered that the amendment to the Act by regulation 5(3) reversed a matter of substantive policy contained in that Act, by exempting unregistered vehicles operating under trade plates from the requirement to pay RUC. We considered it unusual or unexpected that regulations made under a delegated power to make transitional regulations should be used to reverse substantive policy in an Act of Parliament.

The amendment to the Act by regulation 5(4) appears to us to involve a matter of substantive policy, in that there may well have been sound policy reasons why over-dimension vehicles should be required to carry either an additional licence or a Type H licence. We found that regulation 5(4) made an unusual or unexpected use of the legislative power delegated in section 90 of the Act.

The ministry explained that regulation 8 preserved the current position of farmers who operated light RUC vehicles for agricultural operations with limited on-road use, “pending outstanding policy decisions on how best to manage such vehicles”. As at 1 August 2012, when the Act came into force, “policy decisions on whether and how to implement an exemption for light RUC vehicles under [sections 40 and 89 of] the 2012 Act had not been made”.

Regulation 8 appeared to us to subvert the commencement date specified by Parliament, as the ministry effectively used the section 90 power to make transitional regulations as a holding measure to support its delay in bringing section 40 into operation. We found it was unexpected that regulations made under a delegated power to make transitional regulations should be used to delay bringing a provision of an Act of Parliament into practical effect for operational reasons.

**Matters more appropriate for Parliamentary enactment**

Regulation 5(3) exempted unregistered vehicles operating under trade plates from the requirement to pay RUC. The ministry was considering seeking amendments to the Act that would permanently exempt such vehicles from the requirement. The fact that the ministry was considering amending the primary legislation strongly suggested to us that regulation 5(3) was dealing with policy more appropriate for parliamentary enactment.

The ministry also intended to change the section 5 definition of “permit” permanently through a Statutes Amendment Bill, after changing it temporarily through regulation 5(4). Again, the fact that the ministry intended to address this matter permanently by way of amendment to primary legislation strongly suggested to us that regulation 5(4) was dealing with policy more appropriate for parliamentary enactment, leading us to conclude that this ground was also made out in respect of regulation 5(4).

Regulation 8 continued an existing exemption from the requirement to pay RUC for farmers’ vehicles used on the road only in connection with agricultural operations. We
considered that the effect of regulation 8 was to frustrate the legislative intent that section 40 of the Act should commence on a specified date. A change to the commencement date of section 40 should have been made by amending the Act, rather than by using the regulation-making power to promulgate regulations to extend the date. To the extent that regulation 8 could have that effect, we found that it contained matter that would have been more appropriate for parliamentary enactment.

Conclusion

We found that regulations 5(3), 5(4) and 8 of the Road User Charges (Transitional Matters) Regulations 2012 appeared to make some unusual or unexpected use of the powers conferred by the statute under which they were made, and contained matter more appropriate for parliamentary enactment. On this basis we recommended that the House disallow regulations 5(3), 5(4) and 8 of the regulations.

On 13 November 2012, Charles Chauvel, who was then chairperson of the committee, gave a notice of motion in the House, moving that regulations 5(3), 5(4), and 8 be disallowed. In accordance with section 6 of the Regulations (Disallowance) Act 1989, the House was required to deal with Mr Chauvel's notice of motion within 21 sitting days—in other words, by the close of 27 February 2013. We will discuss what happened to the notice of motion in our 2013 Activities Report.

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6 Section 6 of the Regulations (Disallowance) Act 1989 was replaced on 5 August 2013 by section 43 of the Legislation Act 2012.
3 Deemed regulations

In 2012, the term “deemed regulations” was still current. It referred to instruments that were “deemed” by statute to be regulations for the purposes of the Regulations (Disallowance) Act 1989. These instruments were often specifically excluded from the application of the Acts and Regulations Publication Act 1989. This meant that, although they were subject to scrutiny by the Regulations Review Committee and to disallowance, they were not published in the Statutory Regulation series or drafted by the Parliamentary Counsel Office.

The term “deemed regulations” is no longer used since the coming into force of certain provisions of the Legislation Act 2012 on 5 August 2013. The category of instruments formerly known as deemed regulations still exists; under the Legislation Act, they are disallowable instruments that are not legislative instruments. This category includes instruments such as standards and codes, and professional occupational rules and fees. The deemed regulations we considered in 2012 are listed in Appendix F.

Veterinary Council of New Zealand Fees Notice 2012

We raised with the Veterinary Council of New Zealand the fact that the council’s 2012 gazetted fees came into force only 13 days after publication, instead of the 28 days provided for in section 97 of the Veterinarians Act 2005.

The council told us that this was in error; failure to get the fees gazetted before the Christmas break disrupted the organisation’s timetable for annual practising certificate applications, as a result of which the statutory requirement was overlooked. The council assured us that subsequently fee notices regarding annual practising certificates for the following year would be gazetted before the Christmas break.

Social Workers Registration Board (Fees and Disciplinary Levy) Notice 2012

We wrote to the Social Workers Registration Board to ask why the board’s 2012 gazetted fees came into force 16 days after publication, instead of 28 as provided for under section 110(2) of the Social Workers Registration Act 2003.

The board told us that this was a result of the cancellation of the May board meeting at short notice. This meeting is usually when the fees and levy are approved, and the board ensures that the notice is published in accordance with the legislated time-frame. The board assured us this error would not recur.
4 Regulation-making powers in bills

Our scrutiny of regulation-making powers in bills is a central part of our work. In 2012 we made 13 reports on regulation-making powers to other committees. We encourage committees to advise us as to the outcome of their consideration of our advice.

We examine bills to determine whether the delegation of Parliament’s law-making power is appropriate and clearly defined. We are concerned with whether the regulation-making powers represent good legislative process, not with matters of policy, which are for the subject committees to address. In examining regulation-making powers in bills, we are not confined to the grounds for scrutiny set out in the Standing Orders, although the grounds nevertheless provide a useful test. We also look at whether the regulation-making powers infringe the well-established principles set out in the Legislation Advisory Committee’s *Guidelines on the Process and Content of Legislation*:

- that matters of policy and substance should not be delegated to regulations
- that Acts should not be amended by regulations (“Henry VIII powers”)
- that law-making powers should not be delegated without provision for adequate controls and independent scrutiny.

In April 2012 we wrote to committee chairpersons drawing attention to the issue of amendments proposed at select committee stage that affect regulation-making powers. We encouraged committees to refer such draft amendments to us for review, as we otherwise had no means of knowing an amendment was proposed and so could not scrutinise it.

**Bills reported on in 2012**

We produced reports on the following bills in 2012:

- Bail Amendment Bill
- Child Support Amendment Bill
- Crown Minerals (Permitting and Crown Land) Bill
- Dairy Industry Restructuring Amendment Bill
- Exclusive Economic Zone and Continental Shelf (Environmental Effects) Bill
- Land Transport Management Amendment Bill
- Local Government Act 2002 Amendment Bill
- Marine Legislation Bill
- National War Memorial Park (Pukeahu) Empowering Bill
- Natural Health Products Bill
- Prohibition of Gang Insignia in Government Premises Bill
- Social Security (Benefit Categories and Work Focus) Amendment Bill
- Social Security (Youth Support and Work Focus) Amendment Bill
Issues of current concern

We found three key areas of concern in our scrutiny in 2012:

- Henry VIII powers in bills
- the increasing use of regulation-making powers that authorise transitional regulations to override primary legislation
- substantive policy that would more appropriately be included in primary legislation.

Henry VIII powers

The issue of Henry VIII powers arose in relation to a number of bills in 2012. A Henry VIII provision is the granting in primary legislation of a power for delegated legislation to amend, suspend, or override primary legislation.

The established principle applying to the use of Henry VIII provisions, which we endeavour to uphold, is that such provisions should be avoided unless their use is “demonstrably essential”. One aspect of this test is whether the purpose of the Henry VIII provision can be achieved by other means. Our committee has previously expressed the view that a Henry VIII provision

- should be included in an Act only in exceptional circumstances
- should never be used routinely in reforming legislation
- should be drafted in “the most specific and limited terms possible”.

In 2012, we wrote to the Law and Order Committee about the Bail Amendment Bill because in our view it contained a Henry VIII power in clause 30B, and no reason was given in the explanatory note. We recommended that the committee seek advice about the need for subclause 30B(3) and the exceptional circumstances that would justify it in this case. If there were no exceptional circumstances justifying the Henry VIII power in question, we recommended that the committee consider removing the subclause. If flexibility were needed regarding the time-frame specified in subclause 30B(2)(c), we considered that a more appropriate means of providing it would be to refer to a prescribed time-frame in subclause 30B(2)(c), and provide for the time-frame to be set by regulations. The Law and Order Committee recommended to the House that this section be removed.

We expressed concern to the Primary Production Committee that the Dairy Industry Restructuring Amendment Bill contained a rare and unusual delegated power in section 148(4): it proposed granting the government of the day the power to disapply and reapply the will of Parliament. We were concerned about the existence of the power, and its possible effect as a precedent. The Primary Production Committee sought advice from Parliamentary Counsel. Parliamentary Counsel disagreed that there was in fact a Henry VIII power in the bill, on the basis that the power in question did not provide for a textual amendment to the legislation. We consider that a power to alter the effect or scope of primary legislation by regulations is a Henry VIII power even though a change to the text of primary legislation is not involved.

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7 Report of the Committee on Ministers’ Powers 1932, Cmnd 4060 [The Donoughmore Report].
8 Regulations Review Committee, 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, 1993–96, AJHR, I.16C, p. 16.
We were concerned that the National War Memorial Park (Pukeahu) Empowering Bill could set a precedent if Parliament were to grant significant Henry VIII powers in circumstances where no emergency was involved, and the powers were required to ensure that a building project (albeit one of national significance) could be completed within a set time. This concern was exacerbated by other features of the bill, such as provision for Orders in Council to have retrospective effect. We wrote to the Transport and Industrial Relations Committee advising them of these problems. The committee recommended changes to the bill accordingly, and reported this back to the House.

We raised a number of concerns with the Natural Health Products Bill including its containing a Henry VIII power. We wrote to the Health Committee asking it to address these concerns. They sent us a revision-tracked version of the bill for review, showing proposed changes which effectively addressed our concerns. They clarified the scope of the Henry VIII power, restricting it to adding, omitting, or amending in the Schedule a substance or class of substance that was safe to use in a natural health product.

**Regulation-making powers that authorise transitional regulations to override primary legislation**

These powers are a particular kind of Henry VIII power. In 2012, we reviewed a number of empowering provisions that authorised the making of transitional regulations which could amend or override primary legislation. In our view, such provisions present a number of risks if unchecked:

- Over time the provisions could come to be seen as an acceptable means of modifying or overriding primary legislation without reference to Parliament.
- The provisions could become an ordinary feature of legislation, rather than applying only in rare and exceptional circumstances.
- The growing prevalence of the provisions would compound their precedent effect.
- The language and scope of the provisions could become even broader, and might eventually extend beyond technical and machinery matters to substantive policy, and constitute an abuse of the power.
- Making regulations that allow for transitional and savings provisions to support the transition from one statutory regime to another could lead to a slipshod approach to policy development and drafting, with the regulations effectively providing for later use to “back-fill” undeveloped policy or legislative gaps.
- Increasingly, transitional issues could be relegated to regulations rather than dealt with in primary legislation; significant transitional arrangements (for the continuation of existing legal rights under a new statutory regime, for example) can be of critical interest to the public.

The Social Services Committee wrote to us to ask our advice about the Child Support Amendment Bill, and whether it raised any concerns about regulation-making powers. We advised that Clause 8 would create a Henry VIII power, because regulations made under it could modify primary legislation. It is also a broad clause, which makes the purpose of its creating secondary legislation unclear. We recommended that the committee ask the Minister and advisers to explain the reasons for the draft clause.
We wrote to the Transport and Industrial Relations Committee about the Land Transport Management Amendment Bill, saying that we were concerned that the regulation-making power in new section 156 of the bill, inserted by clause 69, would create a power to make transitional regulations that could amend, suspend, or override primary legislation. We said that as a matter of principle, such powers were undesirable because they allowed the government of the day to override the will of Parliament. The Transport and Industrial Relations Committee recommended that the bill be clarified, and recorded our advice in its report to the House.

We wrote to the Social Services Committee about clause 14(1) of the Social Security (Benefit Categories and Work Focus) Amendment Bill. New clause 14(1) would delegate a broad power to make regulations prescribing any application, transitional, or savings provisions “related to” the amendments in the bill. It appeared to be implicit in new clause 14 that such regulations could amend, suspend, or override the primary Act, as amended by the bill, where this was deemed to be “related to” the specified purposes. We considered that the “related to” test was very broad, and appeared to encompass any matter related to the subject-matter of the bill.

Substantive policy that would more appropriately be included in primary legislation

It is a well-established principle that matters of principle and policy are usually found in primary legislation, while detail and implementation are ordinarily the domain of delegated legislation.9 The Legislation Advisory Committee guideline 10.1.3 states that “matters of significant policy” should “ordinarily be included only in primary legislation and should rarely, if ever, be included in delegated legislation”. The guideline suggests it will be “very rare” to find objectively justifiable reasons for including matters of significant policy in delegated legislation. The guideline also explores what might constitute “significant” policy:

Although “significance” will vary from case to case, a policy will likely be significant if it has the potential to give rise to controversy (whether political or otherwise). … a matter that does not appear to be significant when the legislative scheme is being developed may well become significant over time (and vice versa): that factor should be carefully considered, as it may affect the decision as to whether it is placed in primary or delegated legislation.

We wrote to the Commerce Committee about the Crown Minerals (Permitting and Crown Land) Bill as the requirement in the bill for a minerals programme to be made available in draft and for a specified period to allow for public submissions raised a warning flag. If the content of a programme was such that it was an appropriate subject for public examination and debate, it might well include matters of principle and policy more appropriate for parliamentary enactment. The Commerce Committee recommended in its report to the House that clause 15 be amended to replace “policies” with “practices”. This would ensure that matters of principle and policy more appropriate for parliamentary enactment were not included in delegated regulations.

9 See, for example, the Legislation Advisory Committee guidelines, guideline 10.1.2.
We raised the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Bill with the Local Government and Environment Committee, saying that it seemed that key aspects of the law to be implemented by this bill (that is, classifying areas and activities) were to be set at the level of delegated legislation. We questioned whether this was appropriate. Our concern was that critical aspects of the law dealing with environmental effects on the exclusive economic zone and continental shelf would be provided for in delegated legislation, and thus would not be subject to parliamentary scrutiny and control. The Local Government and Environment Committee noted our concerns in its report to the House.

We also brought the Social Security (Benefit Categories and Work Focus) Amendment Bill to the attention of the Social Services Committee. We suggested that the committee should reconsider the regulation-making powers inserted by clause 54 (new sections 132L and 132M), to ensure that regulations made under them cannot address questions of substantive policy, which should be determined by Parliament. This would involve those questions of substantive policy instead being determined explicitly in the bill itself.
5 Complaints

Under Standing Order 316 any person or organisation aggrieved at the operation of a regulation may make a complaint to the Regulations Review Committee. In practice we determine first whether there is a prima facie case to answer before formally resolving to proceed or, by unanimous resolution, not to proceed, with the complaint. If we decide to proceed with an initial investigation, the complainants are given the opportunity to address us.\(^\text{10}\)

Although our mandate to investigate complaints is broad, our only remedy is to make recommendations by means of a report to the House or the Government. Under Standing Order 249 the Government must respond to any select committee recommendations within 60 working days after the report has been presented.

Complaints reported to the House

In 2012 we considered and reported to the House on one complaint:

**Complaint regarding the Legal Services Regulations 2011 (SR 2011/144)**

We reported to the House on the Legal Services Regulations 2011 complaint on 1 June 2012.

The complaint related to the introduction of a three-month time-frame under regulation 19 of the Legal Services Regulations. The complainant raised several Standing Orders grounds:

- Not being in accordance with the general objects and intentions of the Legal Services Act 2011 (SO 315(2)(a))
- Unduly trespasses on personal rights and liberties (SO 315(2)(b))
- Appears to make some unusual or unexpected use of the powers conferred by statute under which it was made (SO 315(2)(c)), and
- Contains matter more appropriate for parliamentary enactment (SO 315(2)(f)).

We received evidence from the complainant and the Ministry of Justice. We determined that the grounds of complaint under Standing Order 315(2)(b), (c), and (f) had not been made out, but that the complainant had grounds under Standing Order 315(2)(a). The complainant argued that the time-frame was not reasonable, and was inconsistent with the purpose of the Legal Services Act 2011—to promote access to justice by establishing a system for providing legal assistance to people of insufficient means, and to deliver the necessary services as effectively and efficiently as possible. On the evidence, we determined that this ground of the complaint had been made out.

In this case, we did not recommend the disallowance of the regulation on this ground. This was because the regulation was subsequently amended on 2 July 2012 by the Legal Services...
Amendment Regulations 2012 (SR 2012/95), which extended the time-frame to six months, with provision for a formal request to lodge a claim for payment within three months in particular circumstances. The regulation then complied with Standing Order 315(2)(a), and ceased to be of concern.

The complainant did not raise Standing Order 315(2)(d), that the regulation 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. Nevertheless, we considered that regulation 19 raised issues regarding a provider’s right to review or appeal a decision by the ministry on a claim for payment.

The right of review in the Legal Services Act 2000 was not carried over into the 2011 Act, leaving no statutory review mechanism available to legal aid providers dissatisfied with decisions of the ministry. Their only recourse was to seek a judicial review of the decision to decline payment, or to use the ministry’s internal review processes.

We concluded that although remedies were available for providers aggrieved at rejection of a claim for payment, there was no right to formal and independent review of decisions on merit, as envisaged by Standing Order 315(2)(d). We recommended that the Government review the lack of provision in the Legal Services Act 2011 for independent merit review of a decision to decline out-of-time payment following a grant of legal aid.

The Government subsequently proposed to amend the Act to allow legal aid providers to seek a reconsideration of decisions by the Legal Services Commissioner to decline claims that are out of time under the regulations. The amendment also sought to establish the right to an independent review of the commissioner’s reconsideration by the Legal Aid Tribunal, on the grounds that it is manifestly unreasonable and wrong in law. Providers would have a further right of appeal to the High Court on a question of law, and then to appellate courts. The Justice and Electoral Committee recommended that these amendments be incorporated into the Legal Assistance (Sustainability) Amendment Bill (now the Legal Assistance Amendment Bill). The bill is currently before the House, awaiting a third reading.

**Complaints not reported to the House**

In 2012 we considered one complaint which we did not report on to the House:

**Complaint regarding Road User Charges (Rates) Regulations 2012 (SR 2012/142)**

We decided not to progress this complaint as the regulations did not appear to transgress any of the grounds in Standing Order 315(2), meaning that the complaint did not fall within our jurisdiction. The issues the complainant attributed to the operation of the regulations were in fact about the effect of the Road User Charges Act 2012. The regulations provide the detail necessary for the implementation of the primary legislation under which they are made, which is the appropriate function of delegated legislation. We advised the complainant of this outcome.
6 Bills

In 2012 one bill, the Subordinate Legislation (Confirmation and Validation) Bill 2012, was referred to us. A similar confirmation and validation bill is generally referred to us every year. Its contents, our consideration of it, and our recommendations to the House are summarised below.

Subordinate Legislation (Confirmation and Validation) Bill 2012

The Subordinate Legislation (Confirmation and Validation) Bill 2012 was referred to us in September 2012. The purpose of the bill was to prevent the lapse, expiry, or deemed revocation of certain pieces of subordinate legislation which, by virtue of the Acts under which they are made, lapse at a stated time unless confirmed or validated by an Act of Parliament. The bill contained no policy matters and sought only to prevent the lapse of specified orders.

The following orders were confirmed:

- The Animal Products (Fees, Charges, and Levies) Amendment Regulations 2011 (SR 2011/270)
- Commodity Levies (Navel Oranges) Order 2012 (SR 2012/12)
- Commodity Levies (Kiwifruit) Order 2012 (SR 2012/24)
- Commodity Levies (Nashi Pears) Order 2012 (SR 2012/89)
- Commodity Levies (Arable Crops) Order 2012 (SR 2012/161)
- Commodity Levies (Cereal Silage) Order 2012 (SR 2012/162)
- Commodity Levies (Maize) Order 2012 (SR 2012/163)
- Commodity Levies (Asparagus) Order 2012 (SR 2012/186)
- Excise and Excise-equivalent Duties Table (Tobacco Products Indexation and Separate 10% Increase) Amendment Order 2011
- Excise and Excise-equivalent Duties Table (Alcoholic Beverages Indexation) Amendment Order 2012
- Excise and Excise-equivalent Duties Table (Motor Spirits) Amendment Order 2012 (SR 2012/135)
- Customs Export Prohibition (Toothfish) Amendment Order 2012 (SR 2012/64)
- Customs Import Prohibition (Toothfish) Amendment Order 2012 (SR 2012/65)
- The Road User Charges (Rates) Regulations 2012 (SR 2012/142).

Two other orders were validated and confirmed:

- The Social Security (Rates of Benefits and Allowances) Order 2012 (SR 2012/21)

Before recommending confirmation or validation of the orders and regulations in the bill, we asked the government departments with responsibility for administering the governing Acts to explain why confirmation or validation was warranted. We were satisfied with the
reasons provided. We reported the bill back to the House on 26 October 2012, recommending that it be passed without amendment.

**Improving the scrutiny of subordinate legislation**

Constraints on the ability to examine subordinate legislation bills have been raised in reports by the current Regulations Review Committee and its predecessors.\(^{11}\) We consider that the time allowed to consider such bills enjoints a low level of scrutiny. For example, if issues had arisen regarding this bill, we would have had four sitting weeks to examine them, when the usual time allowed for scrutiny of bills is six months.

To address this issue the House can refer the orders or regulations requiring confirmation or validation to the appropriate subject select committee. Alternatively, under Standing Order 289 the Regulations Review Committee can ask any other committee for its opinion on the orders or regulations in question. The subject committee may call for submissions and hear evidence, looking at the merits of the policy involved, and thus undertake a more robust examination of the bill.

The Standing Orders Committee has recommended a streamlined process for preparing revision bills, as follows.\(^{12}\) Following introduction, revision bills would be set down for first reading without debate, and immediately referred to a subject select committee for scrutiny. Revision bills would then be set down for second reading on the third sitting day after being reported back. The debate would take place on the second reading, and any select committee amendments would be adopted at this stage of consideration. If there were no further amendments, the bill would be set down for third reading forthwith, without debate. The revision bills would proceed for consideration in the whole House only if ministerial or member amendments were proposed.

We considered the principles proposed for revision bills to be easily transferable to bills seeking confirmation and/or validation of subordinate legislation. Adopting a similar procedure for subordinate legislation bills would abbreviate the legislative procedure, saving valuable House time, while allowing more intensive scrutiny by select committee. At the end of the condensed process the question before Parliament would be a relatively narrow one of whether to confirm and/or validate the delegated powers in a small number of legislative instruments.

In summary, we recommended

- that the Government examine the viability of introducing bills seeking confirmation and/or validation of subordinate legislation on 1 August, or as close to that date as possible
- that consideration be given to extending the streamlined procedure recommended for revision bills to bills seeking confirmation and/or validation of subordinate legislation.

\(^{11}\) Reports of the Regulations Review Committee, *Activities of the Regulations Review Committee in 2011*, p. 22 and *Subordinate Legislation (Confirmation and Validation) Bill*, p. 3.

Appendix A

Committee members
Hon Maryan Street (Chairperson)
Andrew Little
Ian McKelvie
Mike Sabin
Hon Chris Tremain

Committee members during 2012
Charles Chauvel (Chairperson)
Hon Lianne Dalziel
Ian McKelvie
Mike Sabin
Katrina Shanks
Appendix B

Standing Orders 181 and 314 to 316

181 Establishment and life of select committees

(1) The following select committees are established at the commencement of each Parliament:

(a) ……………

(b) the Officers of Parliament Committee, the Privileges Committee, the Regulations Review Committee and the Standing Orders 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 311, 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.
Appendix C

Regulations (Disallowance) Act 1989, definition of regulations

In 2012, the definition of regulations contained in the Regulations (Disallowance) Act 1989 was still current. The Act has since been repealed by section 77(2) of the Legislation Act 2012, which came into force on 5 August 2013.

2. Interpretation – In this Act, unless the context otherwise requires,—

Regulations means—

(a) Regulations, rules, or bylaws made under an Act by the Governor-General in Council or by a Minister of the Crown:

(b) An Order in Council, Proclamation, notice, Warrant, or instrument, made under an enactment that varies or extends the scope or provisions of an enactment:

(c) An Order in Council that brings into force, repeals, or suspends an enactment:

(d) Regulations, rules, or an instrument made under an Imperial Act or the Royal prerogative and having the force of law in New Zealand:

(e) An instrument that is a regulation or that is required to be treated as a regulation for the purposes of the Regulations Act 1936 or Acts and Regulations Publication Act 1989 or this Act:

(f) An instrument that revokes regulations, rules, bylaws, an Order in Council, a Proclamation, a notice, a Warrant, or an instrument, referred to in paragraphs (a) to (e). 13

13 This definition was replaced, as from 1 November 1999, by section 37 of the Interpretation Act 1999.
Appendix D

Regulations Review Committee reports published separately during 2012

Complaint regarding the Legal Services Regulations 2011 (SR 2011/144) (1 June 2012)

Subordinate Legislation (Confirmation and Validation) Bill (57—1) (26 October 2012)

Investigation into the Road User Charges (Transitional Matters) Regulations 2012 (SR 2012/145) (13 November 2012)
Appendix E

List of regulations where information was sought by the committee

The following is a list of statutory regulations where the committee sought particular information from the relevant government department or ministry.

Building (Definition of Restricted Building Work) Order 2011 (SR 2011/317)

Canterbury Earthquake (Rating Valuations Act-Waimakariri District Council) Amendment Order 2012 (SR 2012/323)

Canterbury Earthquake (Tax Administration Act) Order (No 2) 2011 (SR 2011/375)

Civil Aviation (Safety) Levies Amendment Order 2012 (SR 2012/306)

Commodities Levies (Paeonies) Order 2012 (SR 2012/273)

Commonwealth Countries (Membership) Order 2012 (SR 2012/317)

Community Magistrates (Remuneration and Allowances) Amendment Order 2012 (SR 2012/83)

Coroners (Salaries and Superannuation) Determination 2012 (SR 2012/67)

Education (Refund Requirements for International Students) Notice 2012 (SR 2012/312)

Fisheries (Kaikoura–Wakatu Quay Temporary Closure) Notice 2012 (SR 2012/216)

Judicial Salaries, Allowances, and Superannuation (Court Martial Appeal Court and Court Martial) Determination 2012 (SR2012/66)

Land Transport (Alcohol Interlock Devices) Notice 2012 (SR 2012/215)

Land Transport (Driver Licensing) Amendment Rule 2012 (SR 2012/302)

Land Transport (Road User) Amendment Rule 2012 (SR 2012/303)

Local Government Elected Members (2012/13) (Certain Local Authorities) Determination 2012 (SR 2012/270)

Local Government Elected Members (2011/12) (Certain Local Authorities) Determination 2011 Amendment Determination (No 2) 2012 (SR2012/72)


Local Government (Kaipara District Council – Cancellation of By-elections) Order 2012 (SR 2012/342)

Parliamentary Annuities Determination 2012 (SR2012/79)

Real Estate Agents Act (Continuing Education) Practice Rules 2011 Notice (SR 2012/272)

Road User Charges (Transitional Matters) Regulations 2012 (SR 2012/145)
Social Security (Childcare Assistance) Amendment Regulations (No 2) 2012 (SR 2012/206)
Social Security (Youth Support—Authorised Agencies) Order 2012 (SR 2012/209)
Trade Marks Amendment Regulations 2012 (SR 2012/336)
Trade Marks (International Registration) Regulations 2012 (SR 2012/337)
Valuers Amendment Regulations 2012 (SR 2012/324)
Appendix F

List of deemed regulations considered

The deemed regulations we considered have been sorted according to general subject areas: civil aviation rules, electricity governance, financial reporting and/or accountancy standards, food standards, gambling, insurers, land transport rules, maritime rules, medical boards, miscellaneous, racing, and registration boards.

Civil Aviation Rules

Rules Part 125 – Air Operations – Medium Aeroplanes
- Part 1 – Definitions and abbreviations
- Part 12 – Accidents, incidents and statistics
- Part 43 – General Maintenance Rules
- Part 61 – Pilot Licences and Ratings
- Part 91 – General Operating and Flight Rules
- Part 101 – Gyrogliders and parasails; and Unmanned Balloons, Kites, Rockets, and Model Aircraft – Operating Rules
- Part 103 – Microlight Aircraft – Operating Rules
- Part 105 – Parachuting – Operating Rules
- Part 115 – Initial issue Adventure Aviation - Certification and Operations

Direction Under Section 77B of the Civil Aviation Act 1990
- Notice of Direction to Require Screening and Reasonable Searches
- Notification of Ordinary Rules
- Part 115 – Adventure Aviation Certification and Operations Amendment 1
- Part 1 – Definitions and Abbreviations Amendment 46
- Part 105 – Parachuting – Operating Rules Amendment 6

Electricity governance

Electricity Industry Participation Code (Distributor Use-of-System Agreements and Distributor Tariffs) Amendment 2011
- Adoption of Replacement Emergency Management Policy
- Electricity Industry Participation Code (Spot Price Risk Disclosure) Amendment 2011
- Electricity Industry Participation Code (Metering Arrangements) Code Amendment 2011
- Electricity Industry Participation Code (High Spring Washer Price Situation) Code Amendment 2011
- Electricity Industry Participation Code (Scarcity Pricing) Code Amendment 2011
Electricity Industry Participation Code (Dispatchable Demand) Code Amendment 2011
Electricity Industry Participation Code (Demand-side Bidding and Forecasting) Code Amendment 2011
Electricity Industry Participation (Spot Price Risk Disclosure) Code) Amendment 2011
Electricity Industry Participation (Temporary Grid Reconfiguration) Code Amendment 2012
Electricity Industry Participation (HVDC Pole 3 Minor Amendments) Code Amendment 2012
Electricity Industry Participation (Demand-side Bidding and Forecasting) Code Amendment 2011, Amendment 2012
Electricity Industry Participation (Additional Registry Fields) Code Amendment 2012
Electricity Industry Participation (Minor Amendments Relating to Financial Transmission Rights) Code Amendment 2012
Electricity Industry Participation (HVDC Link Pole 3 Standing Data) Code Amendment 2012
Electricity Industry Participation (Part 13 Minor Amendments) Code Amendment 2012
Electricity Industry Participation (Financial Transmission Rights) Code Amendment 2012
Electricity Industry Participation (Force Majeure) Code Amendment 2012
Electricity Industry Participation Code Ancillary services procurement plan – 1 December 2013
Electricity Industry Participation (Supply Standards) Code Amendment 2012

**Financial reporting and/or accountancy standards**

Presentation of items of other Comprehensive Income (Amendments to NZ IAS 1)
New Zealand Equivalent to International Accounting Standard 19 – Employee Benefits (NZIAS 19)
New Zealand Equivalent to IFRIC Interpretation 20 – Stripping costs in the Productions Phase of a Surface Mine (NZ IRFIC 20)
Issued Accounting Standard: Amended External Reporting Board Standard A1 Application of Accounting Standards (Notice No. 6)
Approval of Assurance Standards (Notice No. 7)
Amended External Reporting Board Standard Au1 Application of Auditing and Assurance Standards (Notice No 17)
Notice Under Section 351C of the Financial Reporting Act 1993
Issued Accounting Standard: Disclosures – Offsetting Financial Assets and Financial Liabilities (Notice No. 11)
Issues Accounting Standard: Mandatory Effective Date and Transition Disclosures (Notice No. 12)

Notice Under Section 70C of the Securities Act 1978

Securities Act (Fundzi Limited Pre-paid Debit Cards) Exemption Notice 2012

Notice Under Section 70C of the Securities Act 1978 (Aurecon Australia Group Limited and Aurecon 37 Limited)

Notice Under Section 70C of the Securities Act 1978 (Fonterra Co-operative Group Limited)

Notice Under Section 70C of the Securities Act 1978 (ING Management Limited, Ingenia Communities Holdings Ltd and Ingenia Communities Ltd)

Notice Under Section 70C of the Securities Act 1978

Notice Under Section 351C of the Financial Reporting Act 1993

Notice Under Section 70C of the Securities Act 1978 (ProCare Health Limited)

Issued Accounting Standard: Annual Improvements to NZ IRFSs 2009–2011 Cycle (Notice No. 14)

Section 70C of the Securities Act 1978 (Fonterra Co-operative Group Limited) Exemption Notice (No 3) 2012

Application for Auditing and Assurance Standards (XRB Au1)

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Report of the Regulations Review Committee

Fiftieth Parliament
(Hon Maryan Street, Chairperson)
June 2014
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1 Introduction

Recommendation
The Regulations Review Committee recommends that the House take note of this report.

Purpose of this report
Each year, by convention, the Regulations Review Committee produces a report on the part of its work that it has not reported separately to the House. This report is about the work completed by the Regulations Review Committee of the 50th Parliament between February and December 2013.

The report demonstrates our approach to the scrutiny of delegated legislation.

Functions of the committee
The Standing Orders of the House of Representatives set out the powers and functions of the committee, and allow us to bring matters within our mandate to the special attention of the House.¹ The committee

- scrutinises all regulations
- considers draft regulations referred by Ministers of the Crown and reports back to them
- examines regulation-making powers in bills
- investigates complaints about the operation of regulations
- conducts inquiries into matters related to regulations.

We met 27 times from February to December 2013, and presented five reports to the House. These reports are printed separately and will be included in the Appendices to the Journals of the House of Representatives. They are listed in Appendix D. In 2013 we made 13 reports to other committees about regulation-making powers in bills, and dealt with many other matters that did not culminate in separate reports to the House.

Change in terminology
The terminology used to describe and classify delegated legislation changed in 2013. On 5 August 2013, provisions of the Legislation Act 2012 regarding delegated legislation came into force. Section 77(2) of the Act repealed the two key Acts applying to delegated legislation, the Regulations (Disallowance) Act 1989 and the Acts and Regulations Publication Act 1989.

We summarise the effect of the change in terminology, below. The summary is true of the vast majority of delegated legislative instruments; there are some exceptions, which, for the sake of simplicity, we have not included.

¹ The relevant Standing Orders are attached as Appendix B.
**Situation prior to 5 August 2013**

Before 5 August 2013, the portion of delegated legislation that could be disallowed by the House was in practice divided into two categories: statutory regulations (sometimes called traditional regulations) and deemed regulations. Both sets of regulations were regulations for the purposes of the Regulations (Disallowance) Act 1989, but deemed regulations were not regulations for the purposes of the Acts and Regulations Publication Act 1989.

The effect of this was that both statutory regulations and deemed regulations were required to be laid before the House, were subject to scrutiny by the Regulations Review Committee, and were capable of being disallowed by the House; but only statutory regulations were drafted by the Parliamentary Counsel Office, published in the SR series, and in most cases subject to review by Cabinet.

Deemed regulations were generally drafted by the bodies to whom the power to make particular instruments had been delegated, which also published them.

**Situation after 5 August 2013**

The Legislation Act repeats the substance of the law, as it was set out in the two 1989 Acts, but changes the terminology used. It introduces the terms “legislative instrument” and “disallowable instrument”. Broadly speaking

- instruments that were previously statutory regulations are now both legislative instruments and disallowable instruments
- instruments that were previously deemed regulations are now disallowable instruments but not legislative instruments.

The application of the Legislation Act to legislative and disallowable instruments is that both are required to be laid before the House, and subject to disallowance, but only legislative instruments are drafted and published by the Parliamentary Counsel Office.

Disallowable instruments that are not legislative instruments continue to be drafted and published by the bodies to whom the power to make particular instruments has been delegated.

**Terminology used in this report**

In this report, we use both the pre-5 August 2013 terminology and the post-5 August 2013 terminology, depending on when the instrument we are discussing was made.

We continue to use the term “regulations”, despite the fact that the definition of the term in the Regulations (Disallowance) Act 1989 has been repealed. “Regulations” remains in common use, and continues to be defined in section 29 of the Interpretation Act 1999.²

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² Before 5 August 2013, the Interpretation Act definition was identical to the definition in the Regulations (Disallowance) Act. The Interpretation Act definition was updated on 5 August to refer to legislative and disallowable instruments but remains otherwise unaltered. The Legislation Amendment Bill currently before the House proposes to enact a new definition of “regulations”.

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2 Statutory regulations and legislative instruments

Standing Order 314(1) empowers us to examine all regulations. Standing Order 3(1) defines “regulation” in terms of the Regulations (Disallowance) Act 1989. When examining a regulation, we consider whether it should be drawn to the special attention of the House on any of the grounds set out in Standing Order 315(2).

In this chapter, we deal with the category of regulations previously known as statutory regulations, now generally called legislative instruments. Chapter 3 discusses the category of regulations previously known as deemed regulations, which we now call disallowable instruments that are not legislative instruments.

Our scrutiny process

Examination of statutory regulations and legislative instruments is the mainstay of our work. We examine each regulation at our weekly meetings as soon as possible after it has been published. In the year from 14 February 2013 to 5 December 2013 we scrutinised 462 such regulations: SR 2013/1–SR 2013/462.

We raised any issues with the responsible Ministers, departments, or agencies. After receiving their responses we decided whether to proceed further. A list of the regulations about which we sought information is in Appendix E.

Routine scrutiny

In 2013, we continued to seek explanations as to why some regulations did not comply with the Cabinet’s “28-day rule”. The rule states that regulations should not come into force until 28 days after they are notified in the Gazette. The principle underlying this rule is that the law should be available so it can be understood before it comes into force.

Non-compliance with the 28-day rule is the issue that arises most frequently in our routine scrutiny work. Although we are almost always satisfied with the explanation we receive from the responsible agency, we consider that this work continues to be important, because it demonstrates that Parliament takes an active interest in ensuring the accessibility of delegated legislation. In our 2012 Activities Report, we recommended that the Government encourage all agencies with responsibility for instruments that do not comply with the 28-day rule to proactively advise the committee of the reasons for non-compliance and whether or when a waiver was obtained. We repeat this recommendation.

We examined a number of fees regulations, and routinely asked the agencies concerned to demonstrate that the fees were calculated in accordance with the Auditor-General’s good-practice guide, Charging fees for public sector goods and services, and the Treasury’s Guidelines for...
Setting Charges in the Public Sector. We referred them to the constitutional principles for fee-setting set out in previous reports of the Regulations Review Committee.

This work is routine scrutiny, and we are usually satisfied with the responses we receive. However, in some instances the regulations or the responses necessitate further investigation.

**Issues of current concern**

We found four key areas of concern in our scrutiny in 2013, the first three of which also arose in 2012:

- ensuring that regulations, including their explanatory notes, are accessible
- the appropriateness of regulations having retrospective effect
- the need for statutory prerequisites to be noted in regulations’ enacting formulae
- the possible use of regulations to amend, suspend, or override primary legislation.

We generally sought further information on regulations that appeared to raise any of these issues. We have explained these issues below, with examples of regulations regarding which further information was sought.

We also conducted three other significant investigations, which we discuss below.

**Ensuring regulations are accessible**

**Crown Minerals (Royalties for Petroleum) Amendment Regulations 2013 (SR 2013/151)**

**Crown Minerals (Petroleum) Amendment Regulations 2013 (SR 2013/152)**

Both these sets of regulations made extensive amendments to regulations that were not yet in force. The amendments were made as documents that were separate from the regulations they amended. It seemed to us that the way the amendments were made raised an issue of accessibility, because it required users of legislation to read the amendment regulations into the regulations being amended. For example, Cabinet ministers, when asked to approve the amendment regulations, would have had to read between the two documents.

In our view, the most straightforward and accessible approach would have been to revoke the regulations that required amendment and replace them with an amended set of regulations. This approach would have allowed users of legislation to read a consolidated version of the regulations, rather than having to read one document into another. We acknowledge that a consolidated version of the amended regulations was made available on the legislation.govt.nz website shortly after they came into force.

We raised our concerns initially with the Ministry of Business, Innovation and Employment and, subsequently, the Parliamentary Counsel Office. The ministry disagreed that the way the regulations were amended raised any accessibility issues, but said that it would prefer to take a different course of action in future, provided the circumstances permitted. We took oral evidence from both agencies on these regulations, canvassing both this issue and another discussed below, at page 12.

We subsequently wrote to the Minister of Energy and Resources, Hon Simon Bridges, saying that we would prefer the ministry to adopt a straightforward, accessible approach to making amendment regulations, revoking the regulations that required amendment and
replacing them with an amended set of regulations. The Minister replied that he was unconvinced by our suggestion that errors in regulations should always be corrected by complete revocation and replacement. He considered that, from an accessibility perspective, the right option was taken, given the minor nature of the changes, the level of understanding of users of the regulations that required amendment, and the availability of compiled amended regulations via the legislation.govt.nz website within a few days of the amendment regulations having been made.

We continue to prefer the approach that we suggested to the Minister.

**Energy Efficiency (Energy Using Products) Amendment Regulations 2013 (SR 2013/28)**

The regulations incorporate a number of New Zealand standards by reference. The term “incorporation by reference” describes a technique for giving legal effect to provisions in a document without repeating them in the text of the incorporating legislation.

We initially asked the Ministry of Business, Innovation and Employment (MBIE) to demonstrate how the regulations complied with the principles in the Legislation Advisory Committee guidelines relating to incorporating material by reference (guidelines 10.6.1 to 10.6.3 and Appendix 4).\(^5\) When we considered MBIE’s response, we became concerned that the regulations raised wider issues about the cost of accessing New Zealand standards which have been incorporated into the law. The standards were not accessible free of charge on a website, meaning that a user of the particular legislation would have to pay to access documents that form part of New Zealand’s law.

We wrote to MBIE about this question. The ministry told us that the regulations incorporated a long list of New Zealand standards by reference. Obtaining a standard cost money because Standards New Zealand received no government funding, and recovered its costs through the sale of standards. The price of purchasing one of the standards incorporated in the regulations varied from $23 to $217 for Standards New Zealand members and $23 to $272 for non-members. MBIE considered these prices reasonable because most industry participants would need to purchase only two standards, with the notable exception of those concerning industrial refrigerators, of which more would be required. The standards were also available to view at the Energy Efficiency and Conservation Authority’s head office.

Although we understood the limitations within which MBIE and Standards New Zealand were operating, we remained concerned that users of legislation would have to pay to access the standards, and thus the law. We therefore invited MBIE and Standards New Zealand to appear before us to discuss regulations that incorporate standards by reference, and arrangements for access to those standards. At the hearing of evidence we heard that, as at November 2013, Standards New Zealand had identified 1,186 individual New Zealand standards or joint Australia/New Zealand standards incorporated by reference in 238 different statutes, regulations, accredited codes of practice or other guidance documents by 19 different regulators. In addition to this, international standards and the national standards produced by other countries were sometimes incorporated by reference. Over recent years Standards New Zealand had observed a general increase in the number of incorporations.

\(^5\) The Legislation Advisory Committee guidelines are based on principles identified in a 1999 report of the Regulations Review Committee: see Inquiry into Instruments Deemed to be Regulations—An Examination of Delegated Legislation, (AJHR 1.16R), (July 1999). See also Regulations Review Committee, Inquiry into material incorporated by reference, (I.16G) (July 2004).
Incorporation by reference can be an efficient way of utilising already existing standards or guidelines, and it avoids the repetition of large volumes of technical material in legislation. We understand that the current funding model for Standards New Zealand means that New Zealand standards that have been incorporated into legislation by reference will continue to be charged for. We consider this situation to be less than ideal, although we accept that there is no obvious solution. We will continue to monitor this area of the law.

**Children, Young Persons, and Their Families (Minimum Rates of Payment for Board and Lodgings) Order 2013 (SR 2013/24)**

We noted that the minimum rates of payment to persons and organisations in whose charge a child or young person is placed under the Children, Young Persons, and Their Families Act 1989 were not set out in the text of the order. Instead, the operational clauses of the order referred to the rates by way of a reference in the explanatory note to a URL. We would ordinarily have expected the rates to be spelt out in the order itself, to ensure the certainty of the law. We therefore asked the Ministry of Social Development why the rates were not included in the order itself, in line with usual practice.

The ministry explained that the explanatory note referred to a URL because of the empowering Act. Section 363(1) of the 1989 Act authorises the Chief Executive of the Ministry of Social Development to set minimum rates of payment from time to time. Section 363(5) of the Act then requires that these minimum rates be adjusted by Order in Council as at 1 April each year so as to take account of any upwards movement in the consumers price index. The Parliamentary Council Office (PCO) had advised the ministry that it would not be appropriate to specify the minimum rates, set by the Chief Executive under section 363(1), in the Order in Council adjusting the rates, made under section 363(5). Setting the rates out in the order would mean that the Chief Executive would not be able to adjust the rates using his or her discretionary power under section 363(1) without a further Order in Council.

We accepted the ministry’s explanation. We have included this item in our report because section 363 of the 1989 Act appears to create an unusual situation: rates are set by the chief executive, in an instrument that is neither a legislative instrument nor a disallowable instrument for the purposes of the Legislation Act; but they must then be increased in line with the consumers price index by way of an Order in Council, which is both a legislative instrument and a disallowable instrument for the purposes of the Legislation Act.

**Improving explanatory notes**

An explanatory note accompanies every statutory regulation and legislative instrument. The Parliamentary Counsel Office is responsible for drafting statutory regulations and legislative instruments, including explanatory notes.

**Social Security (Rates of Benefits and Allowances) Order 2013 (SR 2013/19)**

We wrote to the PCO because the explanatory notes to each of these orders did not state that certain provisions in the orders would expire 12 months after the dates on which the orders were laid, if they were not previously validated and confirmed by an Act of Parliament. Such validation and confirmation is required by section 61H(3) of the Social Security Act 1964 and
• in respect of SR 2013/19, section 15(5) of the New Zealand Superannuation and Retirement Income Act 2001

• in respect of SR 2013/30, section 74C(6) of the War Pensions Act 1954

regarding the provisions in each order made under those sections. When we raised a similar point with the PCO in December 2012, the Acting Chief Parliamentary Counsel told us that an instruction to Parliamentary Counsel about this matter had been made, adopting our suggested approach. We were pleased to see that the explanatory notes accompanying other regulations made at about the same time included a statement to that effect.6

We reminded the PCO that, where a regulation will expire if not previously validated or confirmed by an Act of Parliament, we considered that it would be helpful for the explanatory note to include a statement to that effect as a matter of standard practice. The same issue arose again in 2014, and we raised it with the PCO in a similar way. The PCO assured us that the drafting direction for Orders in Council requiring confirmation or validation by Acts of Parliament continued in force. It instructs counsel to include the requisite statement in the explanatory note to Orders in Council, if confirmation is required under empowering provisions. The Deputy Chief Parliamentary Counsel immediately sent out a reminder about the direction, and the office reviewed its operating procedures.

Regulations that have retrospective effect

It is well established that retrospective changes to the law should not be made by delegated legislation. The Legislation Advisory Committee guidelines state that such changes should ordinarily be included in primary legislation. Standing Order 315(2)(g) provides for us to draw a regulation to the special attention of the House on the ground that it is retrospective where this is not expressly authorised by the empowering statute.

We consider it important to ensure that bodies empowered to make regulations are aware of the general principle that retrospective changes to the law should not be made by delegated legislation. If a particular empowering provision authorises the making of legislation with retrospective effect, and a regulation made under this provision in fact has retrospective effect, this should be mentioned in the explanatory note.

Coroners (Salaries and Superannuation) Determination 2013

Judicial Salaries, Allowances, and Superannuation (Court Martial Appeal Court and Court Martial) Determination 2013

We wrote to the Remuneration Authority about these determinations, which have retrospective effect. The determinations increased the salary of coroners and judges of the Court Martial and Court Martial Appeal Courts. We queried whether section 19 of the Remuneration Authority Act 1977 authorised these particular determinations to have retrospective effect, because section 19 does not apply to determinations about the superannuation rights and obligations of the judicial officers specified in section 12B(1) of the Act.

The authority explained that section 19 authorised these determinations to have retrospective effect because the determinations did not affect the superannuation rights and obligations of the judicial officers concerned. The determinations increased the salary of these judicial officers, which in turn increased the amount of superannuation available to

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6 SR 2013/25, 26 and 27.
those who had chosen to contribute to a registered superannuation scheme. The judicial
officers’ superannuation rights and obligations remained exactly as they were in the 2012
and earlier determinations.

The authority therefore considered that section 19 of the Act provided a valid legal basis
for the retrospective effect of the determinations. We accepted the authority’s analysis of
section 19, and were pleased to note that the authority will in future include an indication
of the reasons for a determination having retrospective effect in the explanatory notes
accompanying its determinations.

Lake Taupo (Crown Facilities, Permits and Fees) Amendment Regulations 2013
(SR 2013/393)

It is an accepted principle that laws should enter into force only after their publication.7
These regulations infringed that principle, in that they came into force before they were
publicly notified. The regulations came into force just after midnight on 26 September
2013, and were not notified in the Gazette until later on the same day.8

The regulations were also retrospective in effect in so far as they reduced the fees for the
use of Crown-owned boating facilities at Tokaanu Marina in Lake Taupo from 1 July 2013.
The regulations did confer a benefit, in that they reduced fees, but we were concerned that
there appeared to be no express statutory authority allowing them to have retrospective
effect.

We raised these matters with the Department of Internal Affairs. The department
acknowledged that there was a technical issue of retrospectivity in that the regulations came
into force on the same day that they were notified in the Gazette. It described this as an
oversight and said that it and the PCO would ensure that it did not recur.

Regarding the reduction in fees, the department did not consider that there was any
retrospectivity because the policy intention and the legal effect of the regulations was that
the reduced fees should apply from the date on which the Amendment Regulations came
into force—that is, from 26 September rather than 1 July. The department commented
that, even if there might be an appearance of retrospectivity, no practical issues arose
because it did not invoice Tokaanu Marina users for the 2013/14 year until after the
reduced fee came into force.

We were satisfied with this response.

Noting statutory prerequisites in enacting formulae

Gambling (Non-gambling Activities) Regulations 2013 (SR 2013/392)

Registered Architects Amendment Rules 2013 (SR 2013/150)

The enacting formula is the form of words that precedes the contents of the regulation. It
generally cites the empowering provision pursuant to which the regulation is being made,
and specifies the person who is making the regulation—generally, the Governor-General
or a Minister of the Crown.

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7 Cabinet Office Manual, paragraph 1.47.
8 Section 10(1) of the Interpretation Act 1999 provides that an enactment comes into force at the beginning of the day on
which it comes into force.
Section 24(1) of the Interpretation Act 1999 provides that references to background facts, circumstances, or related preconditions in the enacting formula are not essential to the validity of the regulation:

It is not necessary for an enactment, Proclamation, Order in Council, Warrant, or other instrument made under an enactment to refer to facts, circumstances, or preconditions that must exist or be satisfied before the enactment, Proclamation, Order in Council, Warrant, or other instrument can be made.

We nevertheless consider that the enacting formula is an important aid to understanding the effect of a regulation, and we follow up issues regarding enacting formulae with the responsible agencies.

In particular, in 2013 we followed up enacting formulae that did not specify whether statutory prerequisites had been met. For example, an empowering Act may require that, before recommending that the Governor-General make an Order in Council, the responsible Minister must first comply with specified consultation requirements, or give due consideration to specified matters. It is helpful if enacting formulae state that these requirements have been met; otherwise, we have found that it can be difficult and time-consuming to establish whether, in fact, they have been. If we have difficulty ascertaining compliance, interested members of the public could well struggle to do so. Therefore, despite section 24(1) of the Interpretation Act 1999, we have strongly encouraged the PCO to ensure that the enacting formula preceding a regulation specifies whether statutory prerequisites were met.

**Using regulations to amend, suspend, or override primary legislation**

**Maritime Transport (Oil Pollution Levies) Order 2013 (SR 2013/154)**

The order imposed oil pollution levies for the purposes of providing money for the New Zealand Oil Pollution Fund. Regulation 3(1) of the order used a term (contributing ship) that was defined in section 329 of the empowering Act, the Maritime Transport Act 1994, for the purposes of the regulation-making power, but modified the statutory definition. Under section 329 of the 1994 Act the term “contributing ship” is defined to mean a ship in excess of 100 gross tons, whose principal means of propulsion is mechanical for the purposes of Part 4 of the Act. Regulation 3(1) modified the section 329 definition of contributing ship as follows:

- contributing ship has the meaning given to it by section 329 of the Act, but does not include a ship that—
  - (a) is 24 metres or less in length; or
  - (b) operates exclusively in fresh water.

We asked the Ministry of Transport to explain this disparity between the primary legislation and the order, given that the order appeared to modify primary legislation without express legislative authority.

The ministry told us that the order did not purport to modify the definition of “contributing ship” for the purposes of the Act. Rather, it qualified the definition for the purpose of allowing the order to impose oil pollution levies at different rates. The effect of the order was that levies would be payable only by commercial ships of greater than a specified size, and would not be imposed on ships that operated exclusively in fresh water.
We accepted the ministry’s explanation.

**Social Welfare (Reciprocity with Malta) Order 2013 (SR 2013/373)**

The order was made pursuant to section 19 of the Social Welfare (Transitional Provisions) Act 1990. It gives effect to an agreement between the New Zealand Government and the Government of Malta, which is set out in the schedule to the order.

Section 19(1)(b) of the 1990 Act authorises an order made under section 19 to declare that the provisions of certain enactments shall have effect “subject to such modifications as may be required” for the purpose of giving effect to the agreement. These enactments include Part 6 of the War Pensions Act 1954.

We were concerned that regulation 4, when read with article 2.1 of the agreement, exceeded the authority of section 19(1)(b), in that it appeared to allow the modification of several parts of the 1954 Act, not just Part 6. We invited the Ministry of Social Development to comment.

The ministry considered that the order did not exceed the authority of section 19(1)(b) of 1990 Act, because the agreement, and therefore the order, modified only Part 6 of the 1954 Act. This is because of the definition of benefits in article 1 of the agreement, the effect of which is that the agreement affects the Act only in so far as the Act relates to the veteran’s pension. Therefore only eligibility for and entitlement to the pension are modified by the agreement.

We accepted the ministry’s analysis.

**Regulations coming into force prior to empowering provision**

**Crown Minerals (Royalties for Petroleum) Amendment Regulations 2013 (SR 2013/151)**

The regulations came into force before one of the empowering provisions under which they were made, section 105A of the Crown Minerals Act 1991, itself came into force. It was not clear to us that legal authority existed for the regulations to come into force when they did.

We raised the matter with the Ministry of Business, Innovation and Employment. The ministry told us that the regulations were made in reliance on section 11 of the Interpretation Act 1999, which reads in part as follows:

11 Exercise of powers between passing and commencement of legislation

(1) A power conferred by an enactment may be exercised before the enactment comes into force or takes effect to—

(a) make a regulation or rule or other instrument; or

[…]

(2) The power may be exercised only if the exercise of the power is necessary or desirable to bring, or in connection with bringing, an enactment into operation.

(3) The power may not be exercised if anything that results from exercising the power comes into force or takes effect before the enactment itself comes into force unless the exercise of the power is necessary or desirable to bring, or in connection with bringing, the enactment into operation.
(4) Subsection (1) applies as if the enactment under which the power is exercised and any other enactment that is not in force when the power is exercised were in force when the power is exercised.

We were unconvinced that section 11 provided the necessary legal authority, so raised the matter with the PCO. In response, the PCO submitted that it would be inconsistent and incorrect to interpret section 11 to mean that the principal regulations could validly be made under that section, but that the amendment regulations could not. This was because the sole purpose of the amendment regulations was to give proper effect to the intended purpose of the principal regulations, which were validly made under section 11.

We took oral evidence from both the ministry and the PCO on these regulations on 21 November 2013. The nub of the argument put forward by the witnesses was as summarised above: if the making of the principal regulations was authorised under section 11, then the making of the amendment regulations must be similarly authorised.

We subsequently wrote to the Minister of Energy and Resources, saying that it was not clear to us that legal authority existed for the regulations to come into force when they did. We considered the approach taken in the case of these regulations was undesirable and said that, in future, we would prefer not to see regulations come into force before their empowering provision. The minister responded, saying he agreed with the view of the PCO about the appropriateness of relying on section 11.

After careful consideration, we have concluded that section 11 does not provide the necessary legal authority to make the amendment regulations. We consider that the minister’s response does not take account of the key difference between the principal regulations and the amendment regulations: only the amendment regulations came into force before one of the empowering provisions under which they were made. The principal regulations came into force at the same time as the empowering provision in question. In our view, section 11 provides authority for regulations to come into force before the empowering provision under which they are made only where the regulations are necessary for bringing the empowering provision itself into force—in other words, commencement orders. A detailed explanation of our analysis of section 11 is attached as Appendix G. We have previously provided this analysis to the ministry and the PCO.

**Fee charged without legal authority**

**Land Transport (Driver Licensing and Driver Testing Fees) Amendment Regulations (No 2) 2013 (SR 2013/312)**

The regulations reinstate the fee for a limited licence. The explanatory note accompanying the regulations said that the fee was inadvertently revoked by a consequential amendment to the Land Transport (Driver Licensing and Driver Testing Fees) Regulations 1999 by the Land Transport (Road Safety and Other Matters) Amendment Act 2011.

We noted that the fee in question was revoked on 10 September 2012 and was not reinstated until 2 November 2012, eight weeks later. We therefore wrote to the Ministry of Transport, asking it to explain whether it had charged a fee for a limited licence during this eight-week period and, if so, whether it had since refunded the fee.

The ministry told us that the New Zealand Transport Agency, which administered the fee, had continued to charge the limited licence fee during the eight weeks, and that 544 limited licence applications had been processed in this period. In October 2012, the ministry informed the agency that it did not have legal authority to charge a limited licence fee, once
the ministry became aware that the agency was doing so. When we wrote to the ministry, the agency had not refunded the unauthorised fees.

In answer to further questions, the ministry told us that the agency did not become aware of the omission for over two weeks after it took effect. By the time it was finally established that the agency could not continue to charge the fee, it was apparent that the fee would be reinstated within a further three weeks. At that point, the agency assessed the cost of removing the fee from the application process as likely to have exceeded the cost of refunding the fee.

On 5 April 2013, the ministry told us that the agency planned to refund the fees charged. We were subsequently advised that the refunding of all of the limited licence fees charged between 10 September 2012 and 1 November 2012 had been completed.

**Appropriate level of fee**

**Legal Services Amendment Regulations 2013 (SR 2013/309)**

The regulations amend the Legal Services Regulations 2011 in order to provide for matters arising out of the Legal Services Amendment Act 2013. The regulations set at $50 including GST the amount of a user charge that must be paid by a legally aided person as a condition of every grant of legal aid for a civil matter. The regulations also prescribed the interest rate payable on unpaid legal aid debt.

We asked the Ministry of Justice what consideration it had given to whether the imposition of a user charge would discourage some people from seeking legal advice. We also asked what consultation the ministry had undertaken.

The ministry told us that the amount of the charge was arrived at by considering the best options to ensure that the likelihood of legal aid debt being recovered was high. It believed this amount would be affordable for the majority of legal aid users. In line with the purpose of the Legal Services Act 2011, access to justice was the primary consideration for the ministry in advising the Government on the appropriate level for the user charge. The ministry did not believe the imposition of a user charge would affect access to legal advice on whether and how to proceed with legal action, as the charge is payable only when a person has decided to proceed with litigation and the grant has been approved.

With regard to consultation, the ministry said that the amount of the user charge and the rate at which interest was to be charged had been considered in the public consultation undertaken in developing the 2013 Act. The changes resulted from a select committee process in which various submissions were made to the Justice and Electoral Committee, by members of the public, Community Law Centres, professional groups such as the New Zealand Law Society, and bodies such as the Human Rights Commission.

We accepted the ministry’s explanation. The effect of fees and charges on people’s ability to access the justice system continues to be a topic of interest to us.
3 Deemed regulations and disallowable instruments that are not legislative instruments

Standing Order 314(1) empowers us to examine all regulations. Standing Order 3(1) defines “regulation” in terms of the Regulations (Disallowance) Act 1989. When examining a regulation, we consider whether it should be drawn to the special attention of the House on any of the grounds set out in Standing Order 315(2).

In this chapter, we deal with that category of regulations previously known as deemed regulations, which we now call disallowable instruments that are not legislative instruments (DINLIs).

Our scrutiny process

We examine each regulation at our weekly meetings as soon as possible after it has been published. In practice, difficulties in identifying and accessing deemed regulations and DINLIs may cause a delay between the regulation being made and our scrutiny of it. In the year from 14 February 2013 until 5 December 2013 we raised concerns about 18 such regulations. These are listed in Appendix F.

We raised any issues with the responsible departments or agencies. We were generally satisfied with their responses. The issues we raise about deemed regulations and DINLIs often relate to the format of the instrument, its notification or presentation requirements, and its accessibility to Members of Parliament and the public. We find that most departments and agencies are grateful to have these matters drawn to their attention, and that we seldom need to proceed further.

Routine scrutiny

Our scrutiny of deemed regulations and DINLIs often finds the following problems:

- The instrument does not specify the date on which it was made.
- The instrument does not specify under which legal authority it was made—in other words, the empowering provision under which it was made.
- The instrument does not specify the date on which it comes into force.
- No mention is made of whether any relevant statutory prerequisites (for example, a consultation requirement) were complied with prior to the instrument being made.
- There are no explanatory notes accompanying the instrument.
- The instrument was not presented to the House within 16 sitting days, in accordance with the requirements of section 41 of the Legislation Act.
- The way the instrument is notified in the Gazette is unclear, perhaps because of unclear naming practice or inconsistent practices in notifying similar instruments.

9 The definition of “regulations” is attached as Appendix C. The Regulations (Disallowance) Act 1989 was repealed on 5 August 2013 by section 77(2) of the Legislation Act 2012.
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- The instrument is not available on the agency’s website.

We discuss examples of some of these issues below, together with another matter of note relating to the status of delegated legislative instruments.

At the end of 2013, we began examining wider issues arising from our scrutiny of DINLIs. At the time of this report, our inquiry is continuing. We expect to report our findings to the House in this Parliament.

Instruments raising multiple issues

We often find that a single instrument raises more than one of the problems listed above. We include the following instrument in our report as an example of an instrument that raised multiple issues.

Changes to Greyhound Racing New Zealand Rules10

We wrote to Greyhound Racing New Zealand to bring to their attention four matters about these amendment rules. The rules were missing the following information:

- the statutory authority under which they were made (although this was referred to in the Gazette notice announcing the change in rules)
- the date on which the rules were made
- an address or website from which a copy of the amendment rules might be purchased (as required by section 32(4)(b) of the Racing Act 2003).

Further, the rules were not clear as to what had been amended in the principal rules, since instead of using a repealing and inserting formula, the amendment rules printed the text of each of the amended rules in full. We recommended that the agency reconsider its approach to drafting amendments so the changes were clear upon reading the regulation.

We asked that they publish and furnish us with the missing information, and take steps to ensure that any future rules the agency might make were compliant. Greyhound Racing New Zealand replied to us with assurances that our recommendations would be adopted, and that they would adapt their administration documents accordingly.

Statutory commencement requirements

In some cases, the statute empowering the making of regulations requires that an instrument made under it does not come into force until 28 days after the date of notification in the Gazette.

Where a statutory commencement requirement was not met, we wrote to the agency or department responsible for administering the regulations. In 2013 we wrote concerning the following regulations. In each case, the agency concerned gave us an adequate explanation for the failure to comply and an assurance that such a failure would not recur.

Amended External Reporting Board Standard Au1 Application of Auditing and Assurance Standards (Notice No 17)11


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10 Notified in the Gazette on 29 November 2012.
11 Notified in the Gazette on 13 September 2012.
Statutory prerequisites

As we have discussed in the previous chapter, a statutory prerequisite is a procedural requirement that must be met before a regulation can be made. Statutory prerequisites will be specified in the regulation-making powers of the empowering Act concerned. Common statutory prerequisites are consultation, agreement of people or bodies concerned, publication, or preparation of a regulatory statement.

When a statutory prerequisite was not met, we wrote to the agency or department responsible for administering the regulations. In 2013 we wrote concerning the following:

Changes to Greyhound Racing New Zealand Rules

Chiropractic Qualification Notice 2012

Electricity Industry Participation (Supply Standards) Code Amendment 2012


New Zealand (Australia New Zealand Food Standards Code) Food Standards 2002 Amendment No. 48

New Zealand (Maximum Residue Limits of Agricultural Compounds) Food Standards 2012 Amendment No. 1 & 2

Notice of New Scope of Practice and Qualification Prescribed by the Medical Council of New Zealand

Sports Anti-Doping Rules (2013)

Temporary Class Drug Notice (STS—135 and JWH—018)

Incorporation by reference

Sports Anti-Doping Rules (2013)


In its 2004 report, Inquiry into material incorporated by reference, the committee said:

As a matter of course we will now be asking departments to demonstrate how regulations that incorporate material by reference comply with the principles in the Legislation Advisory Committee Guidelines. This will serve to highlight the importance of the Guidelines both in terms of our work in ensuring that delegated legislation has been appropriately constructed and does not raise issues under the grounds in Standing Order 378(2), and in alerting the mind of the relevant Government entity to the importance of the issue.

We wrote to Drug Free Sport NZ asking it to demonstrate how the rules comply with the Legislation Advisory Committee Guidelines.

Drug Free Sport NZ told us that it considers that the rules comply with the guidelines. The five standards the guidelines incorporate are mandatory under the World Anti-Doping Act.

12 Notified in the Gazette on 15 November 2012.
Code, in compliance with the International Convention against Doping in Sport, which New Zealand has ratified, and enacted in domestic legislation to give the code effect. It is a requirement of this legislation that Drug Free Sport NZ make rules to implement the code. Also, as the five standards concerned have been agreed by an international agency, they could not be easily drawn up as New Zealand legislation.

Drug Free Sport NZ told us it is developing a procedure statement for the generation, adoption and publication of the rules. The Legislation Advisory Committee Guidelines will be specifically addressed in that procedure statement.

**Status of delegated legislative instruments**

**Temporary Class Drug Notice (ban on NNE1)**

The notice was made under section 4C of the Misuse of Drugs Act 1975, which provides for the Minister of Health, by notice in the *Gazette*, to specify any substance, preparation, mixture, or article as a temporary class drug. It was made prior to the coming into force of relevant provisions of the Legislation Act on 5 August 2013.

At the time, section 4D(8) of the Act specified that

> Despite the Regulations (Disallowance) Act 1989, a temporary class drug notice is not to be treated as a regulation for the purposes of the Acts and Regulations Publication Act 1989.

This provision was unusually worded. A regulation-making power that authorised the making of deemed regulations would ordinarily have read as follows:

> A notice/rule/etc. made under section X is a regulation for the purposes of the Regulations (Disallowance) Act 1989 but not for the purposes of the Acts and Regulations Publication Act 1989.

We wrote to the Ministry of Health asking it to clarify the status of the notice, since the meaning and intended effect of section 4D(8) seemed to us to be unclear. It could be read two ways, to mean that a temporary class drug notice either was or was not a regulation for the purposes of the Regulations (Disallowance) Act.

Before the ministry responded to us, sections 4C and 4D had been repealed by the Psychoactive Substances Act 2013. The ministry accepted that section 4D(8) could have been drafted more clearly, and said the unusual wording in section 4D(8) did not appear to reflect any underlying policy distinction.

**Registered Bank Disclosure Statements**

This order is made by the Reserve Bank under section 81 of the Reserve Bank of New Zealand Act 1989, section 81(5) of which provides that the Regulations (Disallowance) Act 1989 applies to an order made under section 81:

> as if the order were a regulation within the meaning of section 2 of [the RDA]".

The effect of this is that all the relevant provisions of the Regulations (Disallowance) Act apply to an order made under section 81. An instrument that is a regulation for the purposes of the Regulations (Disallowance) Act will also be a regulation for the purposes of the Acts and Regulations Publication Act 1989, unless it is specifically excluded from the application of the Act.
We considered that there are sound reasons for applying the requirements of the Acts and Regulations Publication Act to orders made under section 81 of the Reserve Bank of New Zealand Act 1989, based on the combined effect of section 81(5) of the Act and the definition of “regulations” in section 2. Therefore, orders made under section 81 would appear to have been properly categorised as statutory regulations, not deemed regulations.

We asked the Reserve Bank to reassess its treatment of section 81 orders as exempt from the requirements of the Acts and Regulations Publication Act. We asked for the bank’s comments on our assessment of the effect of section 81(5).

The bank told us that the effect of applying the Act would be that Parliamentary Counsel rather than the bank would draft the orders, and they would be published in statutory regulations. Both the bank and Parliamentary Counsel had previously interpreted the requirements of the Acts to mean that section 81 orders would not need to be drafted by PCO or included in the SR series; the orders were deemed regulations and the Act did not apply.

We told the bank we adhered to our original view, but since the legislative framework had changed with the Legislation Act 2012, which replaced the Regulations (Disallowance) Act and the Acts and Regulations Publication Act, we recognised that this issue no longer had any practical implications.
4 Regulation-making powers in bills

Our scrutiny of regulation-making powers in bills is a central part of our work. In 2013 we made 12 reports to other committees on regulation-making powers in bills. We encourage committees to advise us as to the outcome of their consideration of our advice.

We examine bills to determine whether the delegation of Parliament's law-making power is appropriate and clearly defined. We are concerned with whether the regulation-making powers represent good legislative process. We do not consider matters of policy, which are for the subject committees to address. In examining regulation-making powers in bills, we are not confined to the grounds for scrutiny set out in the Standing Orders, although they provide a useful test. We also look at whether the regulation-making powers infringe the well-established principles set out in the Legislation Advisory Committee’s Guidelines on the Process and Content of Legislation

- that matters of policy and substance should not be delegated to regulations
- that Acts should not be amended by regulations (“Henry VIII powers”)
- that law-making powers should not be delegated without provision for adequate controls and independent scrutiny.

Bills reported on in 2013

We provided advice on the following bills in 2013:

- Education Amendment Bill
- Family Court Proceedings Bill
- Financial Reporting Bill
- Government Communications Security Bureau and Related Legislation Amendment Bill
- Health and Safety (Pike River Implementation) Bill
- Housing Accords and Special Housing Areas Bill
- Ngā Mana Whenua o Tāmaki Makarau Collective Redress Bill
- Plumbers, Gasfitters, and Drainlayers Amendment Bill
- Psychoactive Substances Bill
- Resource Management Reform Bill
- Social Housing Reform (Housing Restructuring and Tenancy Matters Amendment) Bill
- Telecommunications (Interception Capability and Security) Bill

We discuss our reports on some of these bills below. Legislative Counsel also advised Parliamentary Counsel on a regulation-making power in the Student Loan Scheme.

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13 Available at www.justice.govt.nz
Amendment Bill (No 2) during the summer period when the committee was not scheduled to meet. The bill was before the Finance and Expenditure Committee, which had authorised Parliamentary Counsel to discuss possible amendments to the bill with Legislative Counsel. Legislative Counsel informed us of the substance of this advice at our first meeting in 2013. The Finance and Expenditure Committee reported the bill back to the House on 5 February 2013, recommending the insertion of a new regulation-making power.

**Issues of current concern**

We found four key areas of concern in our scrutiny in 2013:

- Henry VIII provisions
- regulation-making powers that authorise transitional regulations to override primary legislation
- modifying definitions in Acts by way of regulations
- broad, open-ended powers.

We illustrate our approach to consideration of each of these areas below with particular examples.

**Henry VIII provisions**

The issue of Henry VIII provisions arose in relation to a number of bills in 2013. A Henry VIII provision is the granting in primary legislation of a power for delegated legislation to amend, suspend, or override primary legislation.

The established principle applying to the use of Henry VIII provisions, which we endeavour to uphold, is that they should be avoided unless “demonstrably essential”.14 One aspect of this test is whether the purpose of the Henry VIII provision can be achieved by other means. The committee has previously expressed the view that a Henry VIII provision

- should be included in an Act only in exceptional circumstances
- should never be used routinely in reforming legislation
- should be drafted in “the most specific and limited terms possible”.15

**Housing Accords and Special Housing Areas Bill**

This bill has since been enacted as the Housing Accords and Special Housing Areas Act 2013. We reported to the Social Services Committee on five issues, including the use of Henry VIII provisions in clauses 9(1) and 88(b). Clause 9 delegated authority to amend Schedule 1 by Order in Council. Clause 88 delegated authority to make Orders in Council changing the application of the Act by providing that specified provisions of the Resource Management Act 1991 or the regulations made under it applied to matters under the Act.

We recommended that, if the Social Services Committee did not consider the powers delegated in clauses 9(1) and 88(b) were “demonstrably essential”, it consider

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15 Regulations Review Committee, 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, 1993–96, AJHR, I.16C, p. 16.
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recommending their removal from the bill. If the committee favoured retaining the clauses, we suggested various safeguards that might accompany them.

The Social Services Committee did not discuss our advice on these particular recommendations in its commentary on the bill, and recommended no consequential changes to these clauses, although it did recommend expanding the criteria that must be considered by the Minister in applying them.

**Telecommunications (Interception Capability and Security) Bill**

This bill has since been enacted as the Telecommunications (Interception Capability and Security) Act 2013. We reported to the Law and Order Committee on seven issues, including a Henry VIII provision in clause 3. The clause included a definition of “law enforcement agency” that could be extended by way of Order in Council to include any government department. The definition of law enforcement agency was in turn a key part of the definition of “surveillance agency”, meaning that the clause 3 regulation-making power allowed the definition of a surveillance agency to be expanded. A surveillance agency had important powers under the bill.

We were concerned that the regulation-making power was open-ended, in that the bill did not impose any limitations or constraints upon its use, and the purpose for which regulations might be made under the power was not stated.

We recommended that, if the Law and Order Committee did not consider that the power delegated in clause 3 was “demonstrably essential”, it consider recommending removing it from the bill. Otherwise, we recommended that it ensure that the clause 3 regulation-making power was drafted in the most specific and limited terms possible, perhaps by specifying explicitly in the legislation itself which departments might be specified by an Order in Council made under that provision.

The Law and Order Committee recommended amending the definition of law enforcement agency by removing the regulation-making power. Instead, it recommended defining a law enforcement agency as a specified law enforcement agency within the meaning of section 50 of the Search and Surveillance Act 2012 which is approved by an Order in Council under that section to use interception devices. This would have the effect of limiting the agencies that might become a law enforcement agency to the Department of Internal Affairs or the New Zealand Customs Service. The definition of law enforcement agency was eventually enacted in the form recommended by the committee.

**Psychoactive Substances Bill**

This bill has since been enacted as the Psychoactive Substances Act 2013. We reported to the Health Committee on three issues, including the use of a Henry VIII provision in clause 81. Clause 81 would have allowed the making of regulations declaring a substance to be, or not to be, a psychoactive substance, for the purposes of the definition of psychoactive substances in clause 9.

We were concerned that clause 81 would allow the making of regulations declaring a substance that fell outside the clause 9(a) definition to nevertheless be a psychoactive substance. Regulations made under clause 81 could therefore have modified the effect of the primary legislation.

We recommended that the committee consider whether clause 81(1) could be justified in the circumstances, and whether its purposes could be achieved without authorising
regulations that might modify the effect of the primary legislation. We also recommended that they recommend amending clause 81(2) to require the Minister to have regard to the advice of the Psychoactive Substances Expert Advisory Committee on the particular substance or class of substances at issue before recommending the making of regulations under clause 81(1).

The Health Committee did not recommend any changes to clause 81(1). It considered that the ability to make regulations declaring products inadvertently caught by the clause 9(1) definition not to be psychoactive substances for the purposes of the bill was appropriate given the breadth of the clause 9(1) definition. The committee accepted the recommendation that the Psychoactive Substances Advisory Committee should provide advice to the Minister before he or she recommended the making of regulations under clause 81, and inserted new paragraph 81(2)(b) into the bill to provide for this. Clause 81 was eventually enacted in the form recommended by the committee, as section 99.

**Transitional regulations that override primary legislation**

These powers are a particular kind of Henry VIII provision. We expressed concern about these provisions in our 2012 activities report, and saw continued use of them in 2013. We reviewed a number of empowering provisions that authorised the making of transitional regulations that could amend or override primary legislation. We remain concerned that such provisions present a number of risks if unchecked:

- Over time they could come to be seen as an acceptable means of modifying or overriding primary legislation without reference to Parliament.
- They could become an ordinary feature of legislation, rather than applying only in rare and exceptional circumstances.
- Their growing prevalence would compound their precedent effect.
- The language and scope of the provisions could become even broader, eventually even extending beyond technical and machinery matters to substantive policy, and thus constituting an abuse of the power.
- Making regulations that allow for transitional and savings provisions in the transition between statutory regimes could lead to a slipshod approach to policy development and drafting, with the regulations effectively providing for “back-filling” undeveloped policy or legislative gaps.
- Increasingly, transitional issues could be relegated to regulations rather than dealt with in primary legislation; important transitional arrangements (for the continuation of existing legal rights under a new statutory regime, for example) can be of critical interest to the public.

**Housing Accords and Special Housing Areas Bill**

We reported to the Social Services Committee on five issues, including a regulation-making power authorising the making of transitional regulations that could override primary legislation in clause 4 of Schedule 2. Clause 4(1) of Schedule 2 defined “transition” to mean both the period when the Act came into effect and the period when it was repealed, on 30 June 2017. Clause 4(2) and 4(3) would authorise the making of regulations repealing, amending, or reinstating provisions of the empowering Act and of other primary legislation, including
specifying new transitional provisions or substituting transitional provisions for those already in Schedule 2

- repealing or amending any provision of the Act
- reinstating any provision repealed by regulations made under any Act or by the Act itself, with or without modifications or additions
- in respect of an application made under the Act, providing that any provision of the Resource Management Act 1991 does not apply, or applies with modifications or additions.

We were concerned that clause 4 of Schedule 2 would create a wide-ranging Henry VIII power. We considered that the clause 4(1) definition of “transition” was very broadly drawn, unclear and open-ended, and might effectively allow a government to use regulations made under clause 4(2) to manage the application of the Act throughout its lifetime, since it was not clear that at a certain point in time between the Act coming into force and its repeal, the definition would cease to apply.

We recommended that, if the Social Services Committee did not consider that the powers delegated in clause 4(2) were “demonstrably essential”, it consider recommending their removal from the bill. If the committee favoured retaining the clause, we suggested various potential safeguards.

The Social Services Committee agreed that the drafting of clause 4 of Schedule 2 was wider than necessary, and recommended amending it to confine the breadth and scope of the regulation-making power more specifically to dealing with unfinished processes following the bill’s repeal. It recommended amending the definition of “transition” in clause 4(1) to apply only to the period when the Act was repealed. Clause 4 of Schedule 2 was eventually enacted in the form recommended by the committee, as clause 4 of Schedule 3.

**Resource Management Reform Bill**

This was an omnibus bill. Part 2 of the bill has since been enacted as the Local Government (Auckland Transitional Provisions) Amendment Act 2013 and amends the Local Government (Auckland Transitional Provisions) Act 2010.

We reported to the Local Government and Environment Committee on clause 124 in Part 2 of the bill, which proposed to amend section 5 of the 2010 Act. At that stage, section 5 already contained a broad power to make transitional regulations that could override primary legislation. The section was due to expire on 31 October 2013. Clause 124(4) proposed to add a new regulation-making power to section 5 by inserting new subsections (4) to (7). The new power would authorise the making of regulations regarding the application of new Part 4, to be inserted into the 2010 Act by clause 125 of the bill. New Part 4 provided for the development of the first integrated planning instrument for the Auckland Council, the Auckland combined plan.

We were concerned that the new regulation-making power to be inserted by clause 124 was broad and relatively unconstrained. We considered that, in effect, Parliament was being asked to determine the process for developing the Auckland combined plan whilst at the same time delegating authority to the executive to make wide-ranging additions, modifications, and suspensions to it. It was not clear how the regulation-making power would be implemented in practice because clause 124 allowed for a wide range of possibilities.
We recommended that, if the Local Government and Environment Committee did not consider the power delegated in clause 124 “demonstrably essential”, it consider recommending its removal from the bill. If the committee favoured retaining the power, we recommended either removing the power to modify primary legislation or adding safeguards, including a provision stating the purposes for which regulations might be made, that is, prescribing transitional provisions to facilitate or ensure an orderly transition.

The Local Government and Environment Committee recommended amending clause 124 to require the responsible Minister to consult the Auckland Council and the Hearings Panel before recommending the making of regulations under new section 5(4). The committee also recommended inserting a requirement that the Minister be satisfied that any proposed regulations would address unforeseen issues arising in the preparation of the Auckland combined plan. Clause 124 was eventually enacted in the form recommended by the committee, as section 5 of the 2013 Act.

**Modifying definitions in an Act by way of regulations**

Powers that modify definitions in primary legislation by regulation are a particular kind of a Henry VIII provision. Where the definition of a key term is left in part to be determined by regulations, resulting regulations may have the effect of modifying or altering an Act. This in turn may mean that matters are being left to be determined by regulations that would more appropriately be the subject of primary legislation.

**Health and Safety (Pike River Implementation) Bill**

This was an omnibus bill. Part 2 has since been enacted as the Health and Safety in Employment Amendment Act 2013 and amends the Health and Safety in Employment Act 1992. We reported to the Transport and Industrial Relations Committee on five issues, including a regulation-making power in clause 27 of Part 2 of the bill that would authorise regulations with the effect of modifying definitions in the bill.

Clause 27 proposed to insert new sections 19N, 19O, and 19P into the 1992 Act. New sections 19N and 19O defined the terms “quarrying operation” and “tunnelling operation” for the purposes of Part 2 of the bill. New section 19P delegated power to make regulations, on the recommendation of the Minister, exempting certain operations from these definitions. The definition of “mining operation”, in new section 19M, was central to the operation of the Act and was defined to mean both “quarrying operation” and “tunnelling operation”, amongst other things.

We were concerned that regulations made under new section 19P, by excluding certain operations from the definition of quarrying or tunnelling operation, might effectively exclude these operations from the operation of the Act, which it would thus narrow. We considered that, at the extreme, there was nothing to stop regulations made under new section 19P from excluding all quarrying and tunnelling operations from the application of the Act.

We recommended that the Transport and Industrial Relations Committee determine whether the policy intention was that all quarrying and tunnelling operations could be excluded from the application of Part 2 of the bill by way of regulations made under new section 19P. We also suggested that the committee recommend amending new section 19P to specify criteria as to which the Minister must be reasonably satisfied before recommending the making of regulations.
The Transport and Industrial Relations Committee recommended that new section 19P be amended to authorise the making of regulations exempting certain operations from the definition of “tunnelling operation” only—it recommended removing the power to exempt certain operations from the definition of “quarrying operation”. This was because the committee recommended amending the bill to expressly exclude quarrying operations from the new section 19M definition of “mining operation”. New section 19P was eventually enacted in the form recommended by the committee, as section 11 of the 2013 Act.

**Housing Accords and Special Housing Areas Bill**

We reported to the Social Services Committee on five issues, including two regulation-making powers in clauses 15, 17, and 18 that would authorise regulations with the effect of modifying a definition in the bill.

Clause 14 of the bill defined a “qualifying development”. The policy intention underlying the bill was allowing more permissive resource consent and planning powers to apply to qualifying developments. Much of the definition was left to be specified by regulations made under clauses 15, 17, and 18.

We were concerned about the overall effect of clauses 15, 17, and 18. For example, clause 15(1) would have authorised regulations specifying only the maximum height of buildings forming part of a qualifying development, without setting an upper limit to the number of storeys. There is nothing to require the maximum height to be limited to 6 storeys, despite this being the stated policy intention of the bill. The effect of clauses 17(3) and 18(1) was that Parliament was being asked to delegate authority to make regulations that might specify any criteria defining a qualifying development within a special housing area, contrary to the stated policy intention of the bill.

The Social Services Committee recommended extensive amendments to clauses 14 to 17 and the removal of clause 18. The committee considered that its recommendations would clarify the meaning of “qualifying development” and the kind of the criteria that might be prescribed for a qualifying development—in particular, the criterion that a building over six storeys could not be consented under the bill. Clauses 14 to 17 were eventually enacted, with further amendments at the committee of the whole House stage.

**Broad, open-ended powers**

The issue of regulation-making powers that are drawn unduly broadly arises regularly in our work. It is a clearly established principle that regulation-making powers should be drafted so as to specify the limits of the delegated legislative power as clearly and precisely as possible. The delegated power should not be drawn more broadly than necessary, lest it be used for purposes that were not intended by Parliament. A delegated power that is broad and open-ended may also authorise the making of regulations likely to contain matters of substantial policy that would more appropriately be included in primary legislation.

**Housing Accords and Special Housing Areas Bill**

We reported to the Social Services Committee on five issues, including clause 88(a)(ii), which authorised the making of regulations for the broad purpose of “authorising the rectification of irregularities in procedure”.

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16 Legislation Advisory Committee guidelines, guideline 10.1.7.
We were concerned that regulations made under clause 88(a)(ii) could be wide-ranging and uncertain in their effect, and undermine the openness and transparency of the processes established by the Act. We considered it was arguable that the regulation-making power would authorise regulations made under it to have a retrospective effect. We recommended that the Social Services Committee recommend removing the power to make regulations “authorising the rectification of irregularities in procedure” from the bill.

The Social Services Committee recommended that this phrase be struck out of the bill. It explained that the provision had been intended to address potential conflict between the bill and the Resource Management Act 1991. The committee considered any potential conflict could be addressed by reference to the relevant process in the Resource Management Act or its regulations, without the need to provide for the power to make regulations rectifying irregularities in procedure. The phrase was not included in what became section 91 of the Act.

**Health and Safety (Pike River Implementation) Bill**

We reported to the Transport and Industrial Relations Committee on five issues, including broad and open-ended powers in new section 21(1)(h) and clause 54.

New section 21(1)(h) delegated power to make regulations, on the recommendation of the Minister, prescribing functions of the New Zealand Mining Board of Examiners for the purpose of new section 20E(d), as inserted by clause 28. New section 20E specified the functions of the board of examiners.

We recommended that the Transport and Industrial Relations Committee propose amending new section 21(1)(h), as inserted by clause 29 of the bill, to include appropriate checks and balances on the delegated power to make regulations prescribing new functions for the board of examiners by

- specifying the purpose for which the board is being established, and requiring that any new functions prescribed for it be consistent with this purpose; or
- specifying criteria with which any new functions prescribed for the board must comply.

The Transport and Industrial Relations Committee recommended amending section 20E(d) to make it clear that the functions to be conferred by regulations would relate only to training and competency requirements in the extractives industry. It commented that the provision as introduced was rather open-ended. New section 20E was eventually enacted in the form recommended by the committee, as section 12 of the Health and Safety in Employment Amendment Act 2013.

We also reported on a regulation-making power under clause 54 in Part 3 of the bill. Clause 54 would delegate a broad power to make regulations imposing obligations on mine operators to make mine workers available to be members of mine rescue brigades. We were concerned that these obligations could be wide-ranging.

The wording of clause 54 suggested this clause may have been intended to delegate power to make regulations with a much narrower application:

the number of mine workers a mine operator must make available and the extent to which the mine workers must be made available.
We recommended that the Transport and Industrial Relations Committee recommend amending clause 54 to limit the limits of the delegated legislative power more narrowly. The Transport and Industrial Relations Committee recommended amending clause 54 to narrow the scope of the proposed regulation-making power. As amended, clause 54 would authorise the making of regulations prescribing the number of workers to be made available for mines rescue brigades, the extent to which they must be made available, and any other related matters. Clause 54 was enacted in the form recommended by the committee, as section 18 of the Mines Rescue Act.

**Family Court Proceedings Reform Bill**

This was an omnibus bill. Part 3 has since been enacted as the Family Dispute Resolution Act 2013. We reported to the Justice and Electoral Committee on three issues in Part 3 of the bill, including clause 64, which proposed to insert new section 16AA into the Family Courts Act 1980. The issues all related to the proposal to replace the then-current system of free counselling with a new system of dispute resolution.

The first issue we raised was a broad power which would be delegated by new section 16AA(c) to make regulations prescribing the criteria the Secretary for Justice must apply when making decisions as to the approval of a person or entity as a family dispute resolution provider. The bill set no limits on what the criteria might be.

We considered that these criteria should be included in the bill rather than left to regulation, noting the evidence of the Auckland District Law Society that the details of the process would be crucial to the quality of family dispute resolution.

The Justice and Electoral Committee recommended completely rewriting Part 3 of the bill, including among other things more detail about family dispute resolution; specifically it recommended including explicit high-level criteria for the appointment of family dispute resolution providers, to be applied along with more detailed criteria prescribed in regulations. The provisions in question were enacted in the form recommended by the committee, as sections 9 and 15 of the 2013 Act.

We also raised an issue about new section 16AA(e) and (f), which would delegate an open-ended power to make regulations as to the minimum and maximum number of hours to be spent on resolving a family dispute, with no limits. We were concerned that such regulations would determine the duration and therefore the scope of the family dispute resolution process. We encouraged the Justice and Electoral Committee to recommend amending the bill to specify explicit principles or criteria regarding the purpose of the family dispute resolution process, to be applied when determining the number of hours to be spent on a dispute.

The Justice and Electoral Committee recommended an amendment removing provisions as to the time to be spent on dispute resolution. No such powers were included in the 2013 Act.

**Social Housing Reform (Housing Restructuring and Tenancy Matters Amendment) Bill**

This bill has since been enacted as the Social Housing Reform (Housing Restructuring and Tenancy Matters Amendment) Act 2013, which amends the Housing Restructuring and Tenancy Matters Act 1992. We reported to the Social Services Committee on three issues, including one issue related to new sections 65AC, 90, and 139. Each of these provisions would delegate comparable powers to make regulations authorising a government agency
to obtain specified information. Each of these new sections corresponded with a related power set out in the bill itself, in new sections 59AA, 82, and 125, which would confer on agencies very broad powers to require information for a very broad range of purposes.

We were concerned that the relationship between the regulation-making powers in new sections 65AC, 90, and 139 and the powers to obtain information in new sections 59AA, 82 and 125 was unclear. The regulation-making powers appeared in effect to repeat what was already provided for in the proposed primary legislation. Given the comprehensive nature of these powers, we considered that there would be no need to make regulations to authorise the agencies in question to obtain information. We recommended that the Social Services Committee recommend deleting the regulation-making powers from the bill unless they concluded that they served a meaningful purpose.

The Social Services Committee acknowledged that the bill itself proposed broad information-gathering powers. However, the committee recommended no consequent changes to either these provisions or the regulation-making powers in sections 65AC, 90, and 139. It considered that these last sections should not be amended because they were modelled on similar provisions in the Social Security Act 1964. It noted that the proposed regulation-making powers were constrained by a requirement to consult the Privacy Commissioner before their exercise.
5 Complaints

Under Standing Order 316 any person or organisation aggrieved at the operation of a regulation may make a complaint to the Regulations Review Committee. In practice we determine first whether there is a prima facie case to answer before formally resolving to proceed or, by unanimous resolution, not to proceed, with the complaint. If we decide to proceed with an initial investigation the complainants are given the opportunity to address us.17

Although our mandate to investigate complaints is broad, our only remedy is to make recommendations by means of a report to the House. The Government must respond to any select committee recommendations not more than 60 working days after the report has been presented.18

Complaints reported to the House

In 2013 we considered and reported to the House on the complaints described below. References to the reports can be found in Appendix D.

Complaints about two notices made by the Plumbers, Gasfitters and Drainlayers Board

We reported to the House on 30 September 2013 about two separate complaints from the Plumbers, Gasfitters and Drainlayers Federation of New Zealand and from Mr Allan Day about the offences fee prescribed in two notices made by the Plumbers, Gasfitters and Drainlayers Board.

The complainants submitted that the 2011 amendment notice triggered a number of the grounds for complaint set out in Standing Order 315(2)

We took oral evidence on the complaints from the complainants, the board, the Office of the Auditor-General, and Master Plumbers, Gasfitters and Drainlayers New Zealand Inc, in November and December 2012. Following these hearings, we received further written evidence.

We concluded that the offences fees imposed by the two notices were not authorised under section 142(1)(i) of the Plumbers, Gasfitters, and Drainlayers Act 2006. We found that the offences fee was effectively an industry-wide levy; it was not a fee. Section 142(1)(i) did not empower the board to charge a levy to fund the cost of prosecutions. We therefore concluded that certain provisions in the notices

- appeared to make an unusual or unexpected use of the delegated power in section 142(1)(i) of the Plumbers, Gasfitters, and Drainlayers Act 2006 (Standing Order g 315(2)(c)); and
- contained matter more appropriate for parliamentary enactment (Standing Order 315(2)(f)).

17 The Office of the Clerk produces a booklet, Making a Complaint to the Regulations Review Committee, to assist potential complainants. It is available online at New Zealand Parliament – Making a complaint to the Regulations Review Committee.

18 Standing Order 249.
In the course of our consideration, the Plumbers, Gasfitters, and Drainlayers Amendment Bill was introduced to the House and enacted as the Plumbers, Gasfitters, and Drainlayers Amendment Act 2013. We considered that the Act had effectively addressed the substance of the complaints by

- retrospectively validating any offences fee payable under the notices in question
- inserting a specific provision into the 2006 Act authorising the board to impose a disciplinary and prosecution levy to fund the costs arising out of its prosecution function.

**Complaint regarding the New Zealand Teachers Council (Conduct) Rules 2004 (SR 2004/143)**

In February 2013, we received complaints from Graeme Edgeler and the Herald on Sunday newspaper about rule 32(1) of the New Zealand Teachers Council (Conduct) Rules 2004. The complainants’ concern was essentially that rules 31 and 32 of the 2004 rules imposed a blanket rule, making all of the tribunal’s proceedings private unless the tribunal itself expressly ordered that any or all proceedings relating to a particular hearing be made public.

Mr Edgeler submitted that rule 32(1) triggered a number of the grounds set out in Standing Order 315(2).

We concluded that rules 31, 32, and 33 of the New Zealand Teachers Council (Conduct) Rules 2004

- appeared to make an unusual or unexpected use of the delegated power in section 139AJ of the Education Act 1989 (Standing Order 315(2)(c)); and
- contained matter more appropriate for parliamentary enactment (Standing Order 315(2)(f)).

At the root of our concerns about the 2004 rules was a lack of any explicit requirement in Part 10A of the Education Act 1989 for the proceedings of the Teachers Council Disciplinary Tribunal to be open and transparent, unless there were reasonable grounds for the proceedings to be private or suppressed. We recommended that the Government consider introducing amending legislation to specify, in the Education Act 1989, that the proceedings of the tribunal are open to the public unless the tribunal makes an order to the contrary on specified statutory grounds. We note that the Education Amendment Bill (No 2) currently before the House would address our recommendation by inserting a new section 405 into the Education Act, and commend this provision to the House.19 We noted that it was within the Teachers Council’s power to change its own rules, and recommended that the council change rules 31, 32, and 33 to ensure the proceedings of the Teachers Council Disciplinary Tribunal were open to the public unless the disciplinary tribunal made an order to the contrary.

**Complaints not reported to the House**

In 2013 we considered four complaints that we did not report to the House. The complaints were about

- the approval of variation A1073 to Food Standard 1.5.2, from GE-Free New Zealand in food and environment Inc.

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19 New section 405 as inserted by clause 38 of the Education Amendment Bill (No 2).
• the approval of variation A1073 to Food Standard 1.5.2, at the point at which the approval was not yet part of New Zealand domestic law, also from GE Free New Zealand
• the Family Courts Fees Amendment Regulations 2012 (SR 2012/101), from Metiria Turei MP, and

Issues of particular note arose in relation to two of these complaints, and are discussed below.

**Complaint regarding the approval of variation A1073 to Food Standard 1.5.2**

In February 2013, GE-Free New Zealand in food and environment Inc wrote to the committee about the Food Standards Australia New Zealand regulations regarding decisions governing food produced using genetic technology. The complainant alleged that the approval process for variation A1073 to Standard 1.5.2 had not followed requirements in intergovernmental agreements and regulations made under the Food Standards Australia New Zealand Act 1981.

We concluded that, because the primary legislation under which the regulations were made was Australian Commonwealth legislation, the standards were not regulations for the purposes of New Zealand law. Section 29 of the Interpretation Act 1999 defines a regulation as having been made under an Act which is “an Act of the Parliament of New Zealand….” We therefore found that we did not have jurisdiction to consider the complaint. We notified the complainant of this, and did not report to the House.

**Complaint regarding the operation of the Family Courts Fees Amendment Regulations 2012 (SR 2012/101)**

In June 2012, the committee received a complaint from Metiria Turei MP about the Family Courts Fees Amendment Regulations 2012. The regulations prescribed fees for filing and hearing certain applications under the Care of Children Act 2004 and the Property (Relationships) Act 1976.

The complainant submitted that the regulations transgressed Standing Order 315(2)(a), in that they were not in accordance with the general objects and intentions of the statute under which they were made. She argued that the amendment regulations did not take into account the objects of the Care of Children Act 2004 and the Property (Relationships) Act 1976 as they were

- not in the interests of the children involved in Family Court cases. Children will be unduly affected if their parents are prevented from accessing the court because of this financial barrier. These fees will prevent women who are exiting violent relationships from taking a case to court and getting a satisfactory resolution around custody arrangements and property divisions for them and their children.

The complainant submitted that the fees imposed by the regulations were not in line with those imposed in other court proceedings, and recommended that the amendment
regulations be disallowed and that other options for reducing the workload of the Family Court be investigated.

We forwarded the complainant’s submission to the Ministry of Justice, inviting it to comment. We then heard oral evidence from the complainant’s representatives and the ministry. We subsequently wrote to the Law Society and the Bar Association, asking them whether any of their members had observed any effect of the fees on the ability of potential users to access the Family Court.

The Law Society told us that it had received evidence from its members that the July 2012 fees might be affecting access to justice. The evidence suggested that the fees had affected access to justice by people who did not qualify for legal aid because their income was just over the threshold of eligibility. Some clients had hesitated to issue proceedings or had delayed applying until they were able to afford the filing or hearing fee. A reasonable number of people had been unable to pay the fee, and had not been granted a fee waiver. The Bar Association told us that reliable statistics were not yet available to determine whether the imposition of fees had affected the number of applications filed, so it was not possible to objectively assess the effect, if any, the fee had yet had on access to justice.

In February 2013, we concluded that the introduction of filing fees in Family Court proceedings raised potential access to justice issues, but that there was insufficient evidence as yet to conclude whether the fees prescribed in July 2012 had in practice limited access to the Family Courts. We therefore declined the complaint. We notified the complainant and the other submitters of our decision, and did not report to the House.
In 2013 one bill, the Subordinate Legislation (Confirmation and Validation) Bill (No 2) 2013, was referred to us. A similar confirmation and validation bill is generally referred to us every year. Its contents, our consideration of it, and our recommendations to the House are summarised below.

**Subordinate Legislation (Confirmation and Validation) Bill (No 2) 2013**

The Subordinate Legislation (Confirmation and Validation) Bill (No 2) 2013 was referred to us on 6 August 2013. The purpose of the bill was to prevent the lapse, expiry, or deemed revocation of certain pieces of subordinate legislation which, by virtue of the Acts under which they are made, lapse at a stated time unless confirmed or validated by an Act of Parliament. The bill contained no policy matters and sought only to prevent the lapse of specified orders.

The following orders were confirmed:

- Biosecurity (Psa-V—Kiwifruit Levy) Order 2013 (SR 2013/140)
- Biosecurity (Bovine Tuberculosis—Cattle Levy) Amendment Order 2013 (SR 2013/200)
- Biosecurity (Bovine Tuberculosis—Otago Land Levy) Amendment Order 2013 (SR 2013/201)
- Biosecurity (System Entry Levy) Amendment Order 2013 (SR 2013/273)
- Civil Aviation (Safety) Levies Amendment Order 2012 (SR 2012/306)
- Commodity Levies (Paeonies) Order 2012 (SR 2012/273)
- Commodity Levies (Pipfruit) Order 2012 (SR 2012/330)
- Commodity Levies (Foveaux Strait Dredge Oysters) Order 2013 (SR 2013/25)
- Commodity Levies (Paua) Order 2013 (SR 2013/26)
- Commodity Levies (Rock Lobster) Order 2013 (SR 2013/27)
- Commodity Levies (Onions) Order 2013 (SR 2013/141)
- Commodity Levies (Potatoes) Order 2013 (SR 2013/142)
- Commodity Levies (Vegetables and Fruit) Order 2013 (SR 2013/143)
- Commodity Levies (Avocados) Order 2013 (SR 2013/258)
- Commodity Levies (Mussels, Oysters, and Salmon) Order 2013 (SR 2013/274)
- Customs Import Prohibition (Trout) Amendment Order 2012 (SR 2012/311)
- Excise and Excise-equivalent Duties Table (Alcoholic Beverages Indexation) Amendment Order 2013
• Excise and Excise-equivalent Duties Table (Tobacco Products Indexation and Separate 10% Increase) Amendment Order 2012
• Gambling (Problem Gambling Levy) Regulations 2013 (SR 2013/190)
• Land Transport (Motor Vehicle Registration and Licensing) Amendment Regulations 2012 (SR 2012/227)
• Road User Charges (Rates) Regulations 2013 (SR 2013/135).

Three other orders are validated and confirmed
• Social Security (Rate of Young Parent Payment) Order 2012 (SR 2012/418)
• Social Security (Rates of Benefits and Allowances) Order 2013 (SR 2013/19)

Before recommending confirmation or validation of the orders and regulations in the bill, we asked the government departments with responsibility for administering the governing Acts to explain why confirmation or validation was warranted. After considering their responses, we found no reason that the orders and regulations should not be confirmed and validated. We reported the bill back to the House on 27 September 2013, recommending that it be passed without amendment.

Process for scrutiny

We repeated the views we had stated in our October 2012 report to the House on the Subordinate Legislation (Confirmation and Validation) Bill, where we discussed the process for scrutinising this type of bill.

In the 2012 report, we recommended that the Government examine the viability of introducing bills seeking confirmation and validation of subordinate legislation earlier in the calendar year than had become usual—preferably on 1 August, or as close to it as possible. We argued that earlier introduction would allow us more time to consider the bill, and particularly to refer specific policy issues to subject select committees. In 2013, we were pleased to see that the Government had acted on our recommendation by introducing the bill on 29 July 2013, one month earlier than the equivalent bill in 2012.

In the 2012 report, we also encouraged the House to consider carefully whether the streamlined procedure recommended by the Standing Orders Committee for revision bills might appropriately be extended to bills seeking confirmation and validation of subordinate legislation. The procedure is discussed in detail in our October 2012 report.

In 2013, we continued to believe that the procedure we put forward in 2012 would make the scrutiny of bills seeking validation and confirmation of subordinate legislation more effective. In September 2013, we wrote to the Standing Orders Committee drawing the discussion in our 2012 and 2013 reports to their attention. We await the committee’s forthcoming report on its periodic review of the Standing Orders.
Appendix A

Committee members
Hon Maryan Street (Chairperson)
Andrew Little
Ian McKelvie
Mike Sabin
Hon Chris Tremain
Appendix B

Standing Orders 181 and 314 to 316

181 Establishment and life of select committees
(1) The following select committees are established at the commencement of each Parliament:
   (a) ................
   (b) the Officers of Parliament Committee, the Privileges Committee, the Regulations Review Committee and the Standing Orders 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 311, 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.
Appendix C

Definitions of regulations

On 5 August 2013, the definition of regulations contained in the Regulations (Disallowance) Act 1989 was repealed by section 77(2) of the Legislation Act 2012. It was replaced by the definitions of disallowable instrument in section 38 of the Act and of legislative instruments in section 4 of the same Act. In addition, regulations continue to be defined in section 29 of the Interpretation Act 1999.

Definition of regulations prior to 5 August 2013 contained in the Regulations (Disallowance) Act 1989

2. Interpretation – In this Act, unless the context otherwise requires,—

... regulations means—

(a) regulations, rules, or bylaws made under an Act by the Governor-General in Council or by a Minister of the Crown:

(b) an Order in Council, Proclamation, notice, Warrant, or instrument, made under an enactment that varies or extends the scope or provisions of an enactment:

(c) an Order in Council that brings into force, repeals, or suspends an enactment:

(d) regulations, rules, or an instrument made under an Imperial Act or the Royal prerogative and having the force of law in New Zealand:

(e) an instrument that is a regulation or that is required to be treated as a regulation for the purposes of the Regulations Act 1936 or Acts and Regulations Publication Act 1989 or this Act:

(f) an instrument that revokes regulations, rules, bylaws, an Order in Council, a Proclamation, a notice, a Warrant, or an instrument, referred to in paragraphs (a) to (e).

Definition of disallowable instruments on and after 5 August 2013 contained in section 38 of the Legislation Act 2012

38 Disallowable instruments

(1) An instrument made under an enactment is a disallowable instrument for the purposes of this Act if 1 or more of the following applies:

(a) the instrument is a legislative instrument:

(b) that enactment or another enactment contains a provision (however expressed) that has the effect of making the instrument disallowable for the purposes of this Act:

(c) the instrument has a significant legislative effect.

(2) However, an instrument is not a disallowable instrument for the purposes of this Act if the instrument—
(a) is made or approved by a resolution of the House of Representatives; or
(b) is one that the House of Representatives could, by resolution, prevent from coming into force or taking effect; or
(c) is one made by a court, Judge, or person acting judicially.

(3) A bylaw that is subject to the Bylaws Act 1910 is not a disallowable instrument for the purposes of this Act.

(4) This section is subject to other enactments that limit or affect when, or the extent to which, a kind of instrument is a disallowable instrument for the purposes of this Act.

Definition of legislative instrument on and after 5 August 2013 contained in section 4 of the Legislation Act 2012

4 Interpretation

In this Act, unless the context otherwise requires,—

... legislative instrument means—

(a) an Order in Council other than—

(i) an Order in Council that the empowering Act requires to be published in the Gazette.

(ii) an Order in Council that relates exclusively to an individual:

(b) an instrument made by a Minister of the Crown that amends an Act or defines the meaning of a term used in an Act:

(c) an instrument that an Act requires to be published under this Act:

(d) resolutions of the House of Representatives that—

(i) revoke a disallowable instrument in whole or in part; or

(ii) amend a disallowable instrument; or

(iii) revoke and substitute a disallowable instrument

Definition of regulations in section 29 of the Interpretation Act 1999

29 Definitions

In an enactment,—

... regulations means—

(a) regulations, rules, or bylaws made under an Act by the Governor-General in Council or by a Minister of the Crown:

(b) an Order in Council, Proclamation, notice, Warrant, or instrument, made under an enactment that varies or extends the scope or provisions of an enactment:

(c) an Order in Council that brings into force, repeals, or suspends an enactment:

(d) regulations, rules, or an instrument made under an Imperial Act or the Royal prerogative and having the force of law in New Zealand:
(e) an instrument that is a legislative instrument or a disallowable instrument for the purposes of the Legislation Act 2012:

(f) an instrument that revokes regulations, rules, bylaws, an Order in Council, a Proclamation, a notice, a Warrant, or an instrument, referred to in paragraphs (a) to (e).
Appendix D

Regulations Review Committee reports published separately during 2013

Complaint regarding the New Zealand Teachers Council (Conduct) Rules 2004 (SR 2004/143) (12 August 2013)

Investigation into the Road User Charges (Transitional Exemption for Certain Farmers’ Vehicles) Regulations 2013 (SR 2013/10) (12 August 2013)

Subordinate Legislation (Confirmation and Validation) Bill (No 2) (142-1) (27 September 2013)

Complaint about two notices made by the Plumbers, Gasfitters, and Drainlayers Board relating to an offences fee and the Complaint regarding the Offences Fee contained in the Amendment to the Plumbers, Gasfitters and Drainlayers Board (Fees) Notice 2010 (30 September 2013)

Investigation into the Marine and Coastal Area (Takutai Moana) Reclamation Fees Regulations 2012 (SR 2012/363) (30 September 2013)
Appendix E

List of legislative instruments where information was sought by the committee

The following is a list of statutory regulations or legislative instruments where the committee sought particular information from the relevant government department or ministry. The list does not include regulations that did not comply with Cabinet’s 28-day rule, which we also followed up as a matter of course.

Accident Compensation (Liability to Pay or Contribute to Cost of Treatment) Amendment Regulations 2003 (SR 2013/138)

Biosecurity (National American Foulbrood Management Plan) Amendment Order 2013 (SR 2013/311)

Canterbury Earthquake (Education Legislation) Order 2013 (SR 2013/44)


Canterbury Earthquake (Local Government Act 2002—Retaining Walls) Order 2013 (SR 2013/33)


Chartered Professional Engineers of New Zealand Levy Amendment Regulations 2013 (SR 2013/50)

Children, Young Persons, and Their Families (Minimum Rates of Payment for Board and Lodgings) Order 2013 (SR 2013/24)

Civil Aviation Charges Regulations (No 2) 1991 Amendment Regulations 2013 (SR 2013/103)

Climate Change (Agriculture Sector) Amendment Regulations 2012 (SR 2012/315)

Climate Change (Eligible Industrial Activities) Amendment Regulations 2013 (SR 2013/45)

Coroners (Salaries and Superannuation) Determination 2013

Court of Appeal Fees Amendment Regulations 2013 (SR 2013/210)

Crown Minerals (Petroleum) Amendment Regulations 2013 (SR 2013/152)

Crown Minerals (Royalties for Petroleum) Amendment Regulations 2013 (SR 2013/151)

Customs and Excise (Customs Appeal Authority Fee) Amendment Regulations 2013 (SR 2013/211)

Customs and Excise Amendment Regulations 2013 (SR 2013/7)

Disputes Tribunals (Fees) Amendment 2013 (SR 2013/212)

District Courts (Civil Enforcement) Amendment Rules 2013 (SR 2013/411)

District Courts Fees Amendment Regulations 2013 (SR 2013/213)
Energy Efficient (Energy Using Products) Amendment Regulations 2013 (SR 2013/28)
Engineering Associates Fees Amendment Regulations 2013 (SR 2013/51)
Exclusive Economic Zone and Continental Shelf (Fees and Charges) Regulations 2013 (SR 2013/284)
Game Licences, Fees, and Forms Notice 2013 (SR 2013/97)
Health and Safety in Employment (Petroleum Exploration and Extraction) Regulations 2013 (SR 2013/208)
High Court Amendment Rules (No 2) 2013 (SR 2013/214)
High Court Fees (Trans-Tasman Proceedings Act 2010 – Australian Judgements) Amendment Regulations 2013 (SR 2013/349)
High Court Fees Regulations 2013 (SR 2013/226)
Immigration (Visa, Entry Permission, and Related Matters) Amendment Regulations 2013 (SR 2013/6)
Immigration (Visa, Entry Permission, and Related Matters) Amendment Regulations (No 3) 2013 (SR 2013/312)
Immigration and Protection Tribunal (Fees) Amendment Regulations 2013 (SR 2013/215)
Investigation into Road User Charges (Transitional Exemption for Certain Farmers’ Vehicles) Regulations 2013 (SR 2013/10)
Judicial Salaries, Allowances, and Superannuation (Court Martial Appeal Court and Court Martial) Determination 2013 (SR 2013/260)
Judicial Salaries and Allowances Determination 2013 (SR 2013/498)
Lake Taupo (Crown Facilities, Permits and Fees) Amendment Regulations 2013 (SR 2013/393)
Land Transport (Driver Licensing and Driver Testing Fees) Amendment Regulations (No 2) 2012 (SR 2012/326)
Land Transport (Offences and Penalties) Amendment Regulations 2013 (SR 2013/104)
Land Valuation Proceedings Fees Regulations Revocation Order 2013 (SR 2013/216)
Lawyers and Conveyancers Act (Disciplinary Tribunal) (Fees) Amendment Regulations 2013 (SR 2013/217)
Lawyers and Conveyancers Act (Legal Complaints Review Officer) Form and Fee Amendment Regulations 2013 (SR 2013/218)
Legal Services Amendment Regulations 2013 (SR 2013/309)
Maori Land Court Fees Regulations 2013 (SR 2013/219)
Marine and Coastal Area (Takutai Moana) Reclamation Fees Regulations 2012 (SR 2012/363)
Maritime Transport (Oil Pollution Levies) Order 2013 (SR 2013/154)
Motor Vehicle Sales (Fees) Amendment Regulations 2013 (SR 2013/220)
National Animal Identification and Tracing (Fees and Forms) Amendment Regulations (SR 2012/394)

Penal Institutions (Wellington Prison) Revocation Notice 2013 (SR 2013/288)


Prostitution (Operator Certificate) Amendment Regulations 2013 (SR 2013/221)

Registered Architects Amendment Rules 2013 (SR 2013/150)

Resource Management (Forms, Fees, and Procedure for Auckland Combined Plan) Regulations 2013 (SR 2013/386)

Road User Charges (Administration Fees) Amendment Regulations 2013 (SR 2013/108)

Road User Charges (Applications for Exemption for Certain Classes of Light RUC Vehicles) Regulations 2013 (SR 2013/107)

Road User Charges (Transitional Exemption for Certain Farmers’ Vehicles) Regulations 2013 (SR 2013/10)

Sale and Supply of Alcohol (Fees) Regulations 2013 (SR 2013/452)

Secondhand Dealers and Pawnbrokers (Fees) Amendment Regulations 2013 (SR 2013/222)

Shipping (Charges) Amendment Regulations 2013 (SR 2013/155)

Shipping Registration (Fees) Regulations 2013 (SR 2013/156)

Social Security (Rates of Benefits and Allowances) Order 2013 (SR 2013/19)

Social Welfare (Reciprocity with Malta) Order 2013 (SR 2013/373)

Submarine Cables and Pipelines Protection Order 2009 Amendment Order 2013 (SR 2013/297)

Superannuation (Court Martial Appeal Court and Court Martial) Determination 2013

Supreme Court Fees Amendment Regulations 2013 (SR 2013/223)

Taxation Review Authorities (Fee) Amendment Regulations 2013 (SR 2013/224)

Trans-Tasman Mutual Recognition (Occupations Tribunal) Amendment Regulations 2013 (SR 2013/225)

War Pensions (Rates of Pensions, Lump Sum Payments, and Allowances) Order 2013 (SR 2013/30)
Appendix F

List of disallowable instruments that are not legislative instruments where information was sought by the committee

The following is a list of deemed regulations or disallowable instruments that are not legislative instruments where the committee sought particular information from the responsible government department or agency.

**Electricity governance**
Electricity Industry Participation (Supply Standards) Code Amendment 2012*

**Food standards**
New Zealand (Australia New Zealand Food Standards Code) Food Standards 2002, Amendment No. 48*
New Zealand (Maximum Residue Limits of Agricultural Compounds) Food Standards 2012 Amendment No. 1 and 2*

**Financial reporting and/or accountancy standards**
Amended External Reporting Board Standard Au1 Application of Auditing and Assurance Standards (Notice No 17)*

**Gambling**
Amendments to the Rules of Casino Table Games-Division 17 Three Card Poker*
New and Amended Rules of Casino Table Games*

**Medical boards**
Chiropractic Qualification Notice 2012*
Dental Technician and Clinical Dental Technician Disciplinary Levy Notice 2012*
Notice of New Scope of Practice and Qualification Prescribed by the Medical Council of New Zealand*
Nurses (Fees) Notice January 2013*

**Miscellaneous**
Registered Bank Disclosure Statements*
Temporary Class Drug Notice (ban on NNE1)*
Temporary Class Drug Notice (STS-135 and JWH-018)*
Variation to the Retirement Villages Code of Practice 2008*

**Racing**
Changes to Greyhound Racing New Zealand Rules 2012
Registration boards

Social Workers Registration Board (Fees and Disciplinary Levy) Notice 2012*
Veterinary Council of New Zealand (Fees) Notice 2012*

Appendix G

Analysis of section 11 of the Interpretation Act 1999

This analysis applies to the Crown Minerals (Royalties for Petroleum) Amendment Regulations 2013 (the amendment regulations).

Section 11(3) of the Interpretation Act 1999 has two possible interpretations. The first interpretation is that the power conferred by section 105A to make regulations may not be exercised if the regulations commence before the portion of the Crown Minerals Amendment Act 2013 that deals with royalties comes into force, unless exercising it is desirable in connection with bringing into operation the portion of the Crown Minerals Amendment Act that deals with royalties.

The difficulty with this interpretation is that it says the same thing as the combination of section 11(1), (2), and (4) of the Interpretation Act. Read together, these subsections say that the power conferred by section 105A to make regulations may be exercised before section 105A commences, as if section 105A had commenced, but only if exercising the power is desirable in connection with bringing into operation the portion of the Crown Minerals Amendment Act that deals with royalties.

As can be seen from the underlined words in the previous two paragraphs, the former takes the “may not … unless” approach and the latter takes the “may … but only if” approach. However, both approaches get to the same place.

The second interpretation is that the power conferred by section 105A to make regulations may not be exercised if the regulations come into force before section 105A comes into force, unless exercising the power is desirable in connection with bringing section 105A itself into operation.

Parliament must be presumed not to repeat itself unless it makes it clear it is doing so. The consequence is that the first interpretation of section 11(3) should not be adopted if another viable interpretation exists.

The second interpretation is viable. Its purpose is to deal with provisions such as section 2 of the Sentencing Council Act 2007. Section 2 says “This Act comes into force on a day to be appointed by the Governor-General by Order in Council”. Section 11(3) permits the making of the Order in Council under section 2, even though section 2 itself is not in force until the Order in Council is made.

We concluded that the second interpretation is the appropriate interpretation to use.

Applying the second interpretation gives the result that section 11(3) does not authorise the amendment regulations commencing the day before the section 105A empowering provision. This is because the amendment regulations cannot be described as “necessary or desirable to bring, or in connection with bringing,” section 105A into operation. In its response to us, the Parliamentary Counsel Office agreed that the amendment regulations were not necessary in connection with bringing section 105A itself into operation.
Complaint regarding the Exclusive Economic Zone and Continental Shelf (Environmental Effects—Permitted Activities) Regulations 2013 (SR 2013/283)

Report of the Regulations Review Committee

Fiftieth Parliament
(Hon Maryan Street, Chairperson)
May 2014

Presented to the House of Representatives
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Complaint regarding the Exclusive Economic Zone and Continental Shelf (Environmental Effects—Permitted Activities) Regulations 2013 (SR 2013/283)

Recommendation

The Regulations Review Committee has considered a complaint regarding the Exclusive Economic Zone and Continental Shelf (Environmental Effects—Permitted Activities) Regulations. Having found that the grounds of the complaint are not made out, it recommends that the House take note of its report.

Introduction

On 13 September 2013 we received a complaint from Greenpeace New Zealand and Forest and Bird regarding the Exclusive Economic Zone and Continental Shelf Regulations (Environmental Effects—Permitted Activities) 2013 (SR 2013/283). The regulations specify activities that are permitted in New Zealand’s exclusive economic zone and on its continental shelf, and conditions that must be met by operators carrying out these activities to allow them to do so as of right.

The complainants objected to the regulations on two grounds specified in Standing Order 315(2), submitting that they are not in accordance with the general objects and intentions of the statute under which they are made (Standing Order 315(2)(a)), and appear to make unusual or unexpected use of the powers conferred by the statute under which they are made (Standing Order 315(2)(b)).

Relevant legislation

The regulations state that the following activities are permitted: marine scientific research; prospecting; exploration, except for drilling for petroleum; placement or removal of submarine cables; removal, alteration, maintenance, repair, and extension of permitted structures; and seismic surveys.

Operators may undertake these activities as of right, as long as they comply with the following conditions:

- For marine scientific research, prospecting, and exploration, they must notify the Environmental Protection Authority before the activity begins and provide an initial environmental assessment, a contingency plan, and a post-activity report.

- For submarine cables and the removal, alteration, and extension of permitted structures, they must notify the authority before the activity begins and provide a post-activity report.

- For seismic surveys, they must comply with the Department of Conservation’s 2013 Code of Conduct for Minimizing Acoustic Disturbance to Marine Mammals from Seismic Survey Operations.
The regulations are made under sections 27(1), 30(1), and 35 of the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 (the Act). The sections permit the making of regulations regarding the exclusive economic zone or continental shelf that

- designate a permitted activity
- prescribe requirements for activities and their effects, and for assessing the state of the environment
- require an operator to gather information and supply it to the Environmental Protection Authority.

Complainants’ concerns

Objects and intentions of the Act

The complainants submit that the regulations are not in accordance with the general objects and intentions outlined in sections 10 to 12 of the Act.

The complainants consider that the regulations are specifically not in accordance with section 11 of the Act:

11 International obligations

This Act continues or enables the implementation of New Zealand’s obligations under various international conventions relating to the marine environment, including—

(a) the United Nations Convention on the Law of the Sea 1982:

(b) the Convention on Biological Diversity 1992.

Section 11 thus provides for the continuation of New Zealand’s obligations under international conventions to which it is a party. In particular, the complainants point to New Zealand’s obligations under the United Nations Convention on the Law of the Sea 1982 (UNCLOS). Article 192 of the convention requires all parties to protect and preserve their marine environments (especially rare and fragile ecosystems), control energy pollution, and carry out environmental impact assessments when there is any risk of activities within their jurisdiction causing harm. Article 194 imposes an obligation for member states to take all measures necessary to prevent, reduce, and control all sources of marine pollution, including energy and sound. The complainants submit that, by allowing operators to monitor their own control of pollution, the regulations entail relinquishing New Zealand’s ability to take measures in accordance with article 194.

The complainants consider that the regulations do not meet New Zealand’s obligations under article 206 of UNCLOS, which requires New Zealand to “as far as practicable” assess the potential effects of planned activities if it has reasonable grounds for believing they may cause pollution or other harm, and to publish the results of the assessment. The complainants are concerned that the regulations require only a desktop survey by the operator as an initial environmental assessment, without any independent review.

The complainants submit that the suggested model breaches the precautionary principle, a principle of international law that is reflected in the Act (for example, in section 34(2)).
**Unusual or unexpected use of powers conferred by the statute**

The complainants suggest that the regulations breach this ground because they fail “to comply with their primary law”. Their argument appears to be that the regulations make an unusual or unexpected use of the regulation-making powers in the 2012 Act because they do not comply with New Zealand’s international obligations.

Section 34 of the Act requires the Minister to use the best possible information available when developing regulations under the Act. If information is uncertain or unavailable, the Minister must favour caution and environmental protection (the precautionary principle). The complainants consider that the regulations do not take a cautious approach, as operators are allowed to operate without oversight, which the complainants argue breaches New Zealand’s international obligations under section 11 of the Act as well as section 34.

The complainants are concerned about the regulations relying on the Department of Conservation’s *Code of Conduct for Minimising Acoustic Disturbance to Marine Mammals* as a guide to good practice for seismic surveying. They do not believe the code provides adequate protection for marine mammals, for whom noise pollution can even be fatal. They do not believe the measures taken to detect marine mammals during seismic surveying are thorough enough; nor do they consider that the suggested forms of mitigation are sufficient. The complainants argue that the approach taken in the regulations therefore does not amount to the precautionary approach required in section 34 of the Act.

**Evidence from the Ministry of Foreign Affairs and Trade and the Ministry for the Environment**

The Ministry of Foreign Affairs and Trade and the Ministry for the Environment gave evidence jointly. The ministries told us that they worked together and consulted a wide range of experts when drawing up the regulations, to ensure a sound, balanced policy framework and compliance with New Zealand’s international obligations.

**Objects and intentions of the Act**

The ministries consider that the regulations are consistent with international obligations, and therefore in accordance with the general objects and intentions of the Act. MFAT said that New Zealand “can stand up on the international stage and say we have undertaken due diligence, we are complying with our international obligations, by permitting activities that are of minor or less than minor significance on the marine environment”. The Ministry for the Environment took the same approach, endorsing MFAT’s point that it is up to particular states to determine how their international obligations are expressed in domestic law.

The complainants’ argument is based on article 192 of UNCLOS. The Ministry for the Environment referred us to article 56 of the convention, which states that member states have sovereign rights in their exclusive economic zones for the purpose of exploring, exploiting, conserving, and managing the resources in it. The ministries told us that article 56 balances the need to protect the environment with the right of a state to use its own resources, and that this balance is reflected in the Act, which both ministries worked on to ensure accordance with international obligations.

**Unusual or unexpected use of powers conferred by the statute**

The Ministry of Foreign Affairs and Trade was confident that the regulations complied with New Zealand’s international obligations by permitting activities that are of no more
than minor significance in their impact on the marine environment. It considered that the New Zealand Government had undertaken due diligence before making the regulations.

The ministries put forward three grounds on which they consider that the regulations cannot be said to make an unusual or unexpected use of the regulation-making powers in the Act.

First, the Ministry for the Environment told us that the Minister had taken New Zealand’s international obligations into account when recommending that the regulations be made, as she was required to do by section 33(3)(f) of the Act. Section 33 of the Act specifies matters the Minister must take into account when developing regulations for the purposes of section 27.

Secondly, the ministries said the policy approach adopted in the regulations complied with the requirements of section 29 of the Act. Under section 29(4) the Minister must not classify as “permitted” activities that have or are likely to have an adverse effect on the environment that is significant in the circumstances. The regulations address the requirements of section 29(4) by classifying activities as permitted only if their effects are minor or “less than minor”. This approach was based on a report from the National Institute of Water and Atmospheric Research, commissioned by the Ministry for the Environment.

Thirdly, the ministries consider it is appropriate for the regulations to rely on the Department of Conservation’s code of conduct for minimising acoustic disturbance to marine mammals. They told us that the code was developed with representatives from the scientific community, government agencies, professional observers, and iwi; it is kept up-to-date, and is considered by industry groups to represent best practice. The code prescribes various mitigation factors, including requirements to detect the presence of marine mammals and use independent observers.

**Our consideration**

**Objects and intentions of the Act**

The complainants argue that the regulations are not in accordance with the general objects and intentions of the Act in so far as they are set out in section 11 of the Act and relate to New Zealand’s international obligations. For this argument to be made out, we would need to be satisfied that an object of the Act is that regulations made under it must not breach international obligations.

We consider that section 11 does not provide such specific direction. Rather, it has the purpose of acknowledging two accepted legal principles. One is that international obligations do not become part of New Zealand law until they are adopted into domestic law. The other is that international obligations not adopted into domestic law are used to interpret domestic law only in cases of ambiguity or uncertainty.

We consider that it cannot be said that the regulations are not in accordance with the objects and intentions of the Act.

**Unusual or unexpected use of powers conferred by the statute**

The complainants argue that the regulations make an unusual or unexpected use of the powers conferred in the empowering Act on the basis that they do not comply with New

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1 Cabinet paper EGI (12) 291.
Zealand’s international obligations and do not take an appropriately cautious approach as required by the Act. We have not seen evidence to convince us that the regulations contravene New Zealand’s obligations under UNCLOS. We therefore accept the evidence of MFAT that the regulations comply with relevant international obligations, on the basis that MFAT is the body with the necessary expertise to make this assessment, and we find that the complainants’ argument on this front is not made out.

Similarly, we are not convinced by the argument that the policy approach taken in the regulations is not consistent with the precautionary principle set out in section 34(2) of the Act. It is not for us to assess whether the regulations could or should have adopted some other policy approach that reflected the requirements of section 34(2) more accurately. It is a clearly established practice that we do not comment on questions of policy. We do not concern ourselves with whether a particular policy is best implemented through regulations, rather than what the policy ought to be. We cannot say that, in recommending that the regulations be made, the Minister failed to favour caution and environmental protection, as required by section 34(2). We therefore find that the complainants’ argument on this front is not made out.

We do not consider that the regulations make an unusual or unexpected use of the powers conferred in sections 27(1), 30(1), and 35 of the Act.

**Conclusion**

We find that neither of the Standing Orders grounds raised by the complainants has been made out.
Appendix

Committee procedure
We met between 29 September 2013 and 8 May 2014 to consider this complaint. We received evidence from the complainants, Greenpeace New Zealand and Forest and Bird, and from the Ministry of Foreign Affairs and Trade and the Ministry for the Environment.

Committee members
Hon Maryan Street (Chairperson)
Andrew Little
Ian McKelvie
Mike Sabin
Hon Chris Tremain
Inquiry into the oversight of disallowable instruments that are not legislative instruments

Report of the Regulations Review Committee

Fiftieth Parliament
(Hon Maryan Street, Chairperson)
July 2014

Presented to the House of Representatives
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Inquiry into the oversight of disallowable instruments that are not legislative instruments

Summary of recommendations

The Regulations Review Committee recommends to the Government that it

- introduce legislation to the House to establish a register of delegated legislation similar to the Australian Federal Register of Legislative Instruments (page 11)
- designate an agency to be responsible for disallowable instruments that are not legislative instruments (DINLIs), as an area of law, and consider the resourcing needed by the agency to fulfil its new responsibility (page 13)
- introduce legislation to ensure that every empowering provision, whether in an Act or in delegated legislation and whether already made or being made, states which of the categories the instrument falls into (page 18)
- introduce legislation to remove the significant legislative effect test from the Legislation Act 2012, in conjunction with the work recommended immediately above (page 21)
- whether or not a register is established, require DINLIs presented to the House to include the words “disallowable instruments” and include the requirement for presentation explicitly (page 24)
- if a register is not established, amend the Legislation Act so that DINLIs must be notified in the Gazette and published in full on the relevant bodies’ website; a template be developed for Gazette notices; and a step-by-step guide be developed for the process of making DINLIs (page 28).
1 Introduction

Background
In February 2014 we initiated this inquiry into the oversight of DINLIs. Legislation sometimes includes provisions to delegate some of Parliament’s law-making power, naming the individual or organisation to which Parliament is delegating the power in question. Appendix B lists some individuals or organisations that are law-making bodies. Local authorities do not appear on this list, although they have power delegated by Parliament to make bylaws under the Local Government Act 2012.

The instruments (or documents) that result from the law-making bodies exercising their powers are known as delegated legislation, which can be divided into four categories. The terms “disallowable” and “legislative”, which describe the categories, come from the Legislation Act 2012. The categories are

1. Instruments that are disallowable and legislative.
2. Instruments that are not disallowable and are legislative.
3. Instruments that are disallowable and are not legislative.
4. Instruments that are not disallowable and not legislative.

Our inquiry began with the third category—instruments that are disallowable and are not legislative.

Reasons for the inquiry
One of our roles as the Regulations Review Committee is to examine delegated legislation. We undertake this on behalf of Parliament, because the rule of law requires it to check on the exercise of the law-making power it has delegated. Two components of the scrutiny infrastructure are the presentation of delegated legislation to the House, as required by provisions in Acts, and the examination of it by the Regulations Review Committee, as required by the Standing Orders.

We cannot say with certainty that every piece of delegated legislation that should be presented to the House is the subject of a provision in an Act requiring its presentation. However, this does not affect our scrutiny jurisdiction because Standing Order 314(1) requires us to examine all regulations.

We consider it clear that the term “regulations” is intended to encompass instruments in the first three categories. To examine these instruments we need to be able to identify them. Instruments in the first two categories can be identified by the year/number notation on the top right-hand corner of the document. Instruments in the third category have no identifying notation. Being unable to identify a DINLI easily is the main problem they present.

We have experienced the following problems when scrutinising DINLIs:

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1 A law-making body is an individual or organisation to whom a law-making power has been delegated.
Empowering provision

- An empowering provision that requires its DINLI to be published in full in the Gazette, whilst another empowering provision requires its DINLI only to be notified in the Gazette, with no reason given for the difference.

- An empowering provision that does not contain information about the availability of its DINLI.

Drafting

- A DINLI that does not state the date it was made.

Gazetting

- Little time allowed between the Gazette date of the DINLI and the date of commencement.

- A notice published in the Gazette about an Australian instrument without explanation of its relevance to New Zealand DINLIs.

- A DINLI published in full in the Gazette even though the empowering provision does not require it.

- A DINLI not notified or published in the Gazette, although its empowering provision requires notification or publication.

- A notice published in the Gazette about a DINLI which is also listed in the notice of delegated legislation published by the Parliamentary Counsel Office (PCO) in the Gazette under the Legislation Act.

Presentation

- A DINLI that is required to be presented to the House not being presented.

- A DINLI presented to the House outside of the 16 sitting days timeframe specified in section 41(2) of the Legislation Act.

- A DINLI presented to the House after its date of commencement.

- A DINLI presented to the House as a non-parliamentary paper without information identifying it as a DINLI.

- A Gazette notice of a DINLI presented to the House instead of the DINLI itself.

- A DINLI shown as having more than one date of presentation to the House.

- An instrument which qualifies as a DINLI because it is of significant legislative effect not being required to be presented to the House.

Publication

- A DINLI that could not be found on its law-making body’s website because the body had archived it.

- A DINLI lacking a date of making on the html version published on the website although the date of making was included on the copy signed by the Minister and sent to the law-making body as a pdf.
Many of the problems we have cited are minor. However, we consider their combined effect makes the parliamentary scrutiny process inefficient.

**Terms of reference**

We established the following terms of reference for our inquiry:

1. Difficulties with easily identifying instruments as DINLIs, including:
   a. Instruments which are not identified as DINLIs in the *Gazette*.
   b. Instruments which are not presented to the House in accordance with statutory requirements.
   c. Instruments presented to the House without being separately categorised as DINLIs on the Parliamentary website.

2. The guidance currently available to entities which have authority to make and notify DINLIs, and whether further guidance about good practice might be helpful.

3. Implications for the process of making and notifying DINLIs that arise from the repeal of the Regulations (Disallowance) Act 1989 and the coming into force of the Legislation Act 2012.

**Evidence**

In November 2013 we wrote to 27 government departments asking for information about the DINLIs for which they are responsible. In February 2014 we invited submissions from selected organisations on our inquiry. We received submissions from the following departments and organisations:

- Department of Internal Affairs (New Zealand Gazette)
- Human Rights Commission
- Legislation Advisory Committee
- Ministry for Primary Industries
- Ministry of Business, Innovation and Employment
- Ministry of Transport
- New Zealand Law Librarians’ Association
- New Zealand Law Society
- Parliamentary Counsel Office

We received careful and detailed responses from submitters which reflect the hard work that had gone into them; we express our gratitude for the help we received.

**Structure of our report**

We have addressed the terms of reference by covering the following issues in our report:

- The need for a register of delegated legislation similar to the Australian Federal Register of Legislative Instruments.
- The need for an agency in the executive branch of government to be responsible for DINLIs as an area of law.
The need for every empowering provision to state which of the categories it falls into.

The need to resolve the problem of DINLIs that qualify as such because they are of significant legislative effect.

The need to improve the DINLI process regardless of whether a register is established.
2 Register of delegated legislation

We discuss in this chapter the main problem we face in our scrutiny of regulations—the identification of DINLIs.

Evidence

We note the New Zealand Law Society said that our inquiry has constitutional significance, and the problems in identifying whether a particular instrument is a DINLI “undermine the checks and balances on delegated legislation-making powers” because instruments that are not identified as DINLIs will not be reviewed.

The society submitted that New Zealand should adopt the Australian approach of establishing a statutory register of delegated legislation. The Australian Act is called the Legislative Instruments Act 2003; the resultant register is called the Federal Register of Legislative Instruments, and is administered by the Attorney-General’s department.

The society said that the Federal Register of Legislative Instruments

… achieves, amongst other things, registration for purposes of notification and ensuring parliamentary oversight. More importantly there are very real consequences for failure to register: where the legislative instrument is made under delegation the body making the instrument is required to lodge the instrument for registration and, subject to limited exceptions, failure to do so results in the instrument not being enforceable.

The New Zealand Law Librarians’ Association submitted that the inquiry has practical significance. It said:

By their nature, DINLIs are also the Instruments that are perhaps the most frequently encountered by the public, who may not be accustomed to locating and using such materials. It is therefore important that these Instruments are … easy to find from various access points (e.g. internet searching, websites of the issuing authorities, public libraries).

The association also mentioned the Federal Register of Legislative Instruments with favour as a source for researchers, because it keeps repealed versions available for reference.

The submission of the PCO said that on 10 March 2014 Cabinet directed it to explore an amendment to the Legislation Act to require the Chief Parliamentary Counsel to maintain a register of DINLIs, based on similar or equivalent provisions relating to the Federal Register of Legislative Instruments under the Australian Legislative Instruments Act.

Discussion

In 2004 a previous Regulations Review Committee recommended the establishment of a register based on the Australian model, in its report Inquiry into the Principles Determining Whether Delegated Legislation is Given the Status of Regulations [2004] AJHR I.16E. The Government did not accept the recommendation, and stated that it would introduce new administrative requirements to address some of our concerns, and monitor the operation of the legislative solution adopted in Australia.
We observe that the problems relating to the oversight of DINLIs have not lessened over the last decade. We welcome the indication from the PCO's submission that the Government might consider it is an appropriate time to establish a register.

**Recommendation**

We recommend to the Government that it introduce legislation to the House to establish a register of delegated legislation similar to the Australian Federal Register of Legislative Instruments.
3 Responsibility for delegated legislation

Currently there is no agency in the executive branch of government which is responsible for DINLIs as an area of law. We consider that the establishment and maintenance of a register of delegated legislation should be the responsibility of such an agency. Regardless of whether a register is established, there is still work in the DINLI area that would be appropriate for an executive branch agency.

Our letter inviting submissions suggested improvements to the DINLI process, including
- a step-by-step guide
- a Gazette template
- an authoritative list of law-making bodies
- an authoritative list of departments responsible for law-making bodies.

Our letter did not suggest who might be responsible for undertaking this work.

Our letter was concerned with practical solutions to practical problems. However, as the inquiry has progressed, questions of a policy nature have emerged, which we have recorded in Appendix C as matters to be considered at a later date.

Evidence

The Ministry of Business, Innovation and Employment, in its submission, did not envisage any department undertaking this work, and questioned the “value and purpose” of authoritative lists of law-making bodies and the departments responsible. It suggested that such a list might not be kept up to date, “and so would not be very useful in practice”.

It was clear from the other submissions we received that most organisations assumed that the Regulations Review Committee or the PCO would undertake this work. We noted from the PCO’s submission, however, that it has limited responsibility for DINLIs. It has a statutory function under section 59(1)(g) of the Legislation Act to “advise departments and agencies on the drafting of disallowable instruments that are not drafted by the Parliamentary Counsel Office”.

The PCO also publishes links on the New Zealand Legislation website to DINLIs published on the law-making bodies’ websites.

Discussion

We consider that an agency in the executive branch of government needs to be responsible for this area of the law, regardless of whether our recommendation to establish a register of delegated legislation is accepted. We would continue to perform our supervisory role as the Regulations Review Committee in the legislative branch.

The PCO has been charged with investigating the establishment of a register but its functions, listed in section 59(1) of the Legislation Act, would require expansion before it could take responsibility for a register. We consider that other agencies which could possibly be responsible for DINLIs are the Crown Law Office, the Department of the Prime Minister and Cabinet, or the State Services Commission.
Whichever agency is chosen, we emphasise the need for it to be given adequate resources to do the job.

**Recommendations**

We recommend to the Government that it

- designate an agency to be responsible for DINLIs as an area of law
- consider the resourcing needed by the agency to fulfil its new responsibility.
4 Categorisation of instruments

We consider that every empowering provision, whether in an Act or in delegated legislation and whether already made or being made, should state which of the categories the instrument falls into.

The issue has arisen because of the drafting practice adopted by the PCO in response to the commencement of the Legislation Act’s provisions relating to delegated legislation in August 2013. We received written briefings (dated 20 August and 11 October 2013) from the PCO and heard oral evidence from the Office on 24 October 2013. From these briefings, we understand that the Office’s drafting practice is as follows:

<table>
<thead>
<tr>
<th>Category of instrument</th>
<th>Empowering provision in Act - already made</th>
<th>Empowering provision in delegated legislation - already made</th>
<th>Empowering provision in Act - being made</th>
<th>Empowering provision in delegated legislation - being made</th>
</tr>
</thead>
<tbody>
<tr>
<td>Disallowable and legislative because made by Order in Council</td>
<td>Category is not stated*</td>
<td>Category is not stated</td>
<td>Category is not stated</td>
<td>Category is not stated</td>
</tr>
<tr>
<td>—legislative because made another way</td>
<td>Category is stated*</td>
<td>Category is not stated</td>
<td>Category is stated</td>
<td>Category is not stated</td>
</tr>
<tr>
<td>Not disallowable and legislative</td>
<td>Category is stated*</td>
<td>Category is not stated</td>
<td>Category is stated</td>
<td>Category is not stated</td>
</tr>
<tr>
<td>Disallowable and not legislative</td>
<td>Category is stated*</td>
<td>Category is not stated</td>
<td>Category is stated</td>
<td>Category is not stated</td>
</tr>
<tr>
<td>Not disallowable and not legislative</td>
<td>Category is stated*</td>
<td>Category is not stated</td>
<td>Category is stated</td>
<td>Category is not stated</td>
</tr>
</tbody>
</table>

*Discussed below
Evidence

We note the reasons provided by the PCO for not stating the category of instruments that are disallowable and legislative because they are made by an Order in Council:

- All disallowable instruments that are legislative instruments are made by Order in Council. The practice adopted indicates when empowering provisions do and do not state (confirm or describe) an instrument’s status. That turns on whether the instrument made is an Order in Council (“traditional regulations”), or a non-Order in Council (“agency regulations”).
- The Legislation Act says that instruments made by Order in Council are disallowable and legislative.
- Readers of empowering provisions for instruments made by Order in Council are aware of the provisions of the Legislation Act and therefore do not need to be told the category of the instruments.
- To provide this information would clutter and lengthen the statute book.

We note the comments by PCO that amending every empowering provision would be a major undertaking. We draw attention however to the following point made by the Ministry for Primary Industries:

Instruments made under one Act can be identified as disallowable, or not, by a single provision of the Act along the lines of section 303 Fisheries Act 1996 so it is not necessary to lengthen each individual empowering provision with a statement as to whether instruments made under that section are disallowable.

Discussion

We consider that PCO’s drafting practice can create inconsistencies, as demonstrated in the above table, and that it is not consistently applied, as explained below.

The first asterisked guideline in the table is not followed in over 50 empowering provisions in Acts that the Legislation Act amended to state that

An [Order] is a legislative instrument and a disallowable instrument for the purposes of the Legislation Act 2012 and must be presented to the House of Representatives under section 41 of that Act.

The remaining asterisked rules in the table are followed in the empowering provisions in Acts that the Legislation Act expressly amended to state categories. However, we consider it likely that there are empowering provisions that do not state the categories of their instruments, because of the PCO’s statement that the Legislation Act “did not implement a standard set of changes made universally across the statute book”.

We were not persuaded by the PCO’s argument for not stating the category of instruments that are disallowable and legislative because they are made by an Order in Council for the following reasons:

- It is not the case that all DINLIs are made by Order in Council; the category of DINLI also includes an instrument made by a Minister that amends an Act, an instrument made by a Minister that defines the meaning of a term used in an Act, and an instrument that an Act requires to be published under section 6 of the Legislation Act.
The PCO suggested that the words “Order in Council” signal to the reader that the instrument is disallowable and legislative; we do not agree.

- It is correct that the Legislation Act says that instruments made by Order in Council are disallowable and legislative, but it also states categories for every other kind of delegated legislation.

The PCO said that the categories of the other kinds of delegated legislation have to be stated because the terminology of the categories is new, but Orders in Council are different. We consider that Orders in Council are not distinct, but are simply one means of making delegated legislation.

- We cannot assume that readers of empowering provisions for instruments made by Order in Council will know what the Legislation Act says. The responses to our letter of November 2013 to departments did not establish that officials are familiar with the Act’s contents.

We consider that the readers of empowering provisions should be assisted by being made aware of the categories of instruments.

- Giving readers the information should not clutter and lengthen the statute book. The Ministry for Primary Industries’ suggestion of a single provision in each enactment stating the category of all delegated legislation it empowers would avoid clutter and lengthen enactments by a single provision only.

We believe that the enactment of the Legislation Act began a process intended to bring order to the area of delegated legislation by clearing up inconsistencies. Some inconsistencies were described in our report: *Inquiry into the Principles Determining Whether Delegated Legislation is Given the Status of Regulations* [2004] AJHR I.16E. The report found that the classification of the instrument does not always reflect its nature, which creates anomalies. For example,

- Under section 5A of the Misuse of Drugs Act 1975, the Minister of Health may by notice approve laboratories for the purposes of the Act. Notices are deemed to be regulations for the purposes of publication and disallowance.
- By contrast, notices under section 22(1A) prohibiting the importation or supply of pipes or utensils related to controlled drugs are deemed to be regulations for the purposes of disallowance only.
- Under section 22(1) of the Act, the Minister may prohibit the … use of any specified controlled drug … These notices are not regulations for the purposes of publication or disallowance.

We understand that the Legislation Act was supposed to clear up these sorts of anomalies by applying the labels “legislative instrument” and “disallowable instrument” to delegated legislation in a consistent way. The label legislative instrument was intended to mean that the instrument was disallowable, under section 38(1)(a) of the Legislation Act, and was drafted and published by the PCO, under sections 6(1)(b) and (c), (3), (5), 10, 12, 15, 20(1)(c) and (d), 21, and 59(1)(d) of that Act. We consider the intention of the term disallowable instrument was that the instrument was disallowable and, if not a legislative instrument, was not drafted or published by the PCO.

However, we are concerned that the Legislation Act appears to have created further inconsistencies. The 2004 report of the Regulations Review Committee described
inconsistency in the sense of instruments of an apparently similar degree of importance having different consequences. That type of inconsistency still occurs, but the Legislation Act appears now to have added the inconsistency of labels not having the effects they are supposed to have. We give examples of both types of inconsistencies below.

On the first type of inconsistency, the contrast between two notices shows delegated legislation of an arguably similar degree of importance having different consequences:

- The Misuse of Drugs (Approved Laboratories and Analysts in Charge) Amendment Notice 2014, in which the Minister of Health gave a notice naming the analyst in charge of an approved laboratory, under section 31(1) of the Misuse of Drugs Act 1975; this instrument is stated to be disallowable and legislative.

- The Orphan’s and Unsupported Child’s Benefit (Additional Assistance) Programme, in which the Minister for Social Development gives a notice providing more money for the start of the school year to carers giving children home for life care, under section 124(1)(d) of the Social Security Act 1962; this notice is not stated to be either disallowable or legislative.

On the second type of inconsistency, we are aware of the following examples of the label “legislative instrument” not having the intended consequences:

- Rules made under section 100 of the Lawyers and Conveyancers Act 2006 are categorised as legislative instruments under section 106, but are not drafted or published by the PCO.

- Practice rules made under sections 14 or 15 of the Real Estate Agents Act 2008 are categorised as legislative instruments under section 19(2), but are not drafted or published by the PCO.

- Fees and levies notices made under any of sections 20 to 22 of the Real Estate Agents Act 2008 are categorised as legislative instruments under section 23(2), but are not drafted or published by the PCO.

- National Water Conservation Orders made under section 214, or amended under section 216, of the Resource Management Act 1991 are legislative instruments, and are drafted and published by the PCO.


If the Government accepts our recommendation to establish a register, every empowering provision will have to be amended to state clearly whether or not its instrument has to be registered. Even if a register is not established, we consider that this work on empowering provisions still needs to be undertaken. The process begun by the passage of the Legislation Act will not be completed until every piece of delegated legislation is categorised.

The examination of each empowering provision, for the purposes of either paragraph would identify the inconsistencies discussed above and enable their resolution.
Recommendation

We recommend to the Government that it introduce legislation to the House to ensure that every empowering provision, whether in an Act or in delegated legislation and whether already made or being made, states which of the categories the instrument falls into.
There are two types of DINLIs

1. an instrument that is a DINLI because
   a. a provision in an Act or in delegated legislation says that the instrument is a disallowable instrument and
   b. the instrument is not a legislative instrument (LI) because it does not fit the definition of a LI or a provision says it is not a LI.

2. an instrument that is a DINLI because
   a. the instrument has significant legislative effect and
   b. the instrument is not a LI because it does not fit the definition of a LI or a provision says it is not a LI.

In this chapter, we are concerned with the DINLI of the second type.

The “significant legislative effect” test was introduced by the Legislation Act which defines a disallowable instrument as a legislative instrument (section 38(1)(a)), or an instrument that a provision in an Act or in delegated legislation says is disallowable (section 38(1)(b)), or an instrument that has significant legislative effect (section 38(1)(c)). Sections 39 and 40 of the Act expand on the meaning of significant legislative effect.

The current position with presenting instruments to the House is:

- LIs must be presented to the House.
- DINLIs of the first kind described on page 14 must be presented to the House if their empowering provisions or other Acts say that they must.
- DINLIs of the second kind described on page 14 do not have to be presented to the House.

The fact that an instrument having significant legislative effect does not have to be presented to the House does not mean that we cannot examine it; presentation is not a prerequisite to examination. However, we have to be able to identify an instrument as having significant legislative effect before we can examine it, and if the instrument is not presented, there is no simple way to get the instrument before us.

**Evidence**

We note the examples provided by the Ministry for Primary Industries and the Law Society of the difficulty of applying the significant legislative effect test. The ministry said:

> The overall effect of the provisions describing disallowable instruments is that it can be difficult to determine whether an administrative decision that affects the interests of, say, an industry or a sector of an industry amounts to a “disallowable instrument”. For example a notice appointing named individuals as kaitiaki of a mataitai customary fishing reserve appears “administrative” in scope as its purpose is to give those individuals a role in managing fishing in that area and to recognise the special
relationship between tangata whenua and the area. On the other hand, the notice arguably has a “legislative” element as it prevents commercial fishing in that area (at least initially). … A significant area of uncertainty would be resolved if all empowering legislation expressly identified whether an instrument was disallowable.

The Law Society said:

the confusing definitions in the LA have the added effect of seemingly applying disallowance to instruments that apply the law in a particular case due to the definition of “significant legislative effect” in section 39 … An example of the difficulty is the power of the New Zealand Transport Agency under section 30ZA of the Land Transport Act 1998 to grant an exemption from requirements in the Act: the power could be described as altering or removing obligations and would therefore have significant legislative effect and be disallowable….

The Ministry of Business, Innovation and Employment and the PCO did not consider that the significant legislative effect test was a problem. The ministry stated:

We see the category of disallowable instruments under … section 38(1)(c) of the Legislation Act as a catch-all provision that will be mainly relevant to instruments made under existing empowering provisions and we do not think this is a problem as these instruments were never intended to be presented to the House.

The PCO said it could not find support for the suggestion … that the residual category or ISLEs test “raises questions of law that cannot be answered definitively without a court decision”. Disallowance, amendment, or replacement under the Legislation Act 2012 Part 3 subpart 1 is a parliamentary process the House entrusts mainly to its specialist Regulations Review Committee (with advice from that Committee’s specialist advisers). It is therefore mainly for that Committee, informed by any relevant incidental observations of the courts, to accumulate and develop experience and guidance about what instruments do, and do not, have a significant legislative effect.

Discussion

We are concerned about the constitutional implications of the ministry’s suggestion that instruments caught by the significant legislative effect test “were never intended to be presented to the House”.

In principle, all delegated legislation should be presented to the House because the House ought to supervise the power it has delegated. Similarly, we are not convinced by PCO’s argument that it is for us to decide whether instruments have significant legislative effect. Parliamentary committees do not have a mandate to issue guidance on the interpretation of legislation. The House passes the Act that contains the empowering provision delegating its power and the House should decide what category of instrument it is creating.

We recommend that each empowering provision be amended to state clearly which category its instrument falls into. The substance of the significant legislative effect test could guide decisions on categorisation. The test itself would need to be removed from the Legislation Act.
Recommendation

We recommend to the Government that it introduce legislation to the House to

- remove the significant legislative effect test from the Legislation Act
- require the amendment of each empowering provision to state clearly the category into which its instrument falls.
6 Improvement of DINLI process, whether or not a register is established

Our letter inviting submissions on the inquiry identified a number of problems with the process for making and checking DINLIs, and proposed solutions to them. We consider that two of the problems should be attended to, whether or not the Government accepts our recommendation to establish a register.

Application of 28-day rule

The Cabinet Manual says

> It is a requirement of Cabinet that legislative instruments must not come into force until at least 28 days after they have been notified in the *Gazette*.

We are concerned that this rule is not adhered to in practice.

Evidence

The PCO said in its submission:

> Indeed, strictly, the 28-day rule applies only to instruments that comply with these 3 requirements:

- they are LIs (as defined in s4 of the Legislation Act 2012) that must be published in the LI series, and whose making is notified in the *Gazette* under s12 of the Legislation Act 2012 (which excludes instruments published and notified ‘as if they were LIs’ under s14 of the Legislation Act 2012); and

- they are submitted to Cabinet for approval before being made in the Executive Council; and

- they are drafted by the PCO (under s59(1)(b) and (2) of the Legislation Act 2012), and so able to be certified by PCO, as is discussed in the PCO’s *Guide to working with the Parliamentary Counsel Office* (edition 3.6, August 2013) at [5.1] on p 21.

But LIs (under paragraphs (b) and (c) of the definition of LI in s4 of the Legislation Act 2012) include instruments made (with Parliament’s delegated authority) without reference to Cabinet and the Executive Council, either by individual Ministers or by other delegates of Parliament. These non-Executive Council instruments do not comply with the 3 requirements above, and so are not covered by the 28-day Cabinet Manual rule.

The Ministry of Transport explained how the Cabinet rule for legislative instruments came to apply to the ministry’s DINLIs:

> Originally, the Transport Acts each provided that a rule could come into force no earlier than the twenty-eighth day after notification in the *Gazette*. The difficulty with a statutory, mandatory, “28-day rule” was that this provided no ability to truncate the period in situations when there would have been grounds for a waiver under the Cabinet rule. In 2008 Cabinet agreed to revoke the statutory provisions (which were
revoke from the three Acts between 2010 and 2013) on the basis that the Cabinet rule would apply to ordinary transport rules and a waiver would have to be obtained for commencement to occur earlier than 28 days after notification in the \textit{Gazette}.

The ministry then made this point about the relationship between Cabinet’s 28-day rule and section 41 of the Legislation Act:

…in some cases, the legislative 16 sitting day period will elapse after the ending of the 28-day rule period. For example, a rule signed on 31 March 2014, could be gazetted on 3 April 2014 and come into force 1 May 2014, although the 16th sitting day would not occur until 27 May 2014.

\textbf{Discussion}

We believe it would be useful if the Cabinet Manual’s discussion of the 28-day rule recorded the complexities described above and any others that are discovered. To our knowledge, this information is not recorded in any other accessible place.

The Ministry of Transport’s comments raise questions as to why section 41 uses a sitting-day test and why the period is 16 sitting days. The 16 sitting days requirement is not straightforward to meet; a person trying to meet it has to have a calendar of the House’s sitting days for the current year and sometimes also for the last months of the previous year. We are of the view that the timeframes for commencement and presentation should be aligned and simplified.

\textbf{Identification of DINLIs on Parliamentary website}

DINLIs are currently presented to the House as non-parliamentary papers, without being identified as DINLIs. Our letter inviting submissions suggested that a possible solution could be to require a statement at the top of the first page that the instrument is a DINLI.

\textbf{Evidence}

We draw attention to the submissions of the Ministry of Business, Innovation and Employment, the Ministry of Transport, and the Ministry for Primary Industries, which broadly supported this suggestion.

\textbf{Discussion}

Our letter suggested a statement that the instrument is a DINLI because this type of instrument is the most difficult to identify. However, the full expression DINLI is not necessary. It would be sufficient if every DINLI that was required to be presented to the House had the words “disallowable instrument” on it at the top of the first page. These words and the absence of a year/number notation would make it clear that the instrument was a DINLI.

Law-making bodies would know which of their DINLIs have to be presented to the House because the empowering provision would set out something similar to this:

\begin{quote}
A notice in the \textit{Gazette} under this section is a disallowable instrument, but not a legislative instrument, for the purposes of the Legislation Act 2012 and must be presented to the House of Representatives under section 41 of that Act.
\end{quote}
Recommendation

We recommend to the Government that, whether or not a register is established, it require

• a DINLI that must be presented to the House to have the words “disallowable instrument” on it at the top of the first page

• the empowering provision of a DINLI that must be presented to the House to include the requirement for presentation explicitly.
7 Improvement of DINLI process, if a register is not established

Our letter inviting submissions on this inquiry identified a number of problems with the process for making and checking DINLIs and also proposed solutions to these problems. If the Government accepts our recommendation to establish a register, the first two problems discussed below, relating to the Gazette, will be resolved and the proposed step-by-step guide will not be needed to solve the third problem but, rather, to explain how to use the register. If the Government does not accept our recommendation to establish a register, all three problems will need attention.

Identification of DINLIs in Gazette

Currently DINLIs cannot be identified by the way they are published in the Gazette; some are published in full and some are notified. Our letter suggested that a possible solution would be to amend the Legislation Act to provide for DINLIs to be notified in the Gazette and published in full on the law-making bodies’ websites.

Evidence

The Ministry of Business, Innovation and Employment, the Ministry of Transport, the Ministry for Primary Industries, and the New Zealand Law Librarians’ Association broadly supported this suggestion in their submissions.

The Ministry of Business, Innovation and Employment said that for some short DINLIs, it would continue to publish the instrument in full in the Gazette.

The Ministry of Transport wrote:

Publication in full in the Gazette may be the most practical option; it would appear to avoid the need to consider where else to publish and requirements to publish details of availability in the Gazette notice.

However, we note the Ministry for Primary Industries’ comment that

notification in the Gazette may have limited assistance from a public accessibility perspective because many people would not refer to the Gazette as a resource. Rather the public is more likely to access the New Zealand Legislation website or a departmental website.

The New Zealand Law Librarians’ Association said that all DINLIs should be “readily and preferably freely available. The most desirable method would be to have free electronic copies available via the Government’s New Zealand Legislation website.”

The Gazette Office told us the Gazette was in transition to a state where the authoritative version is the electronic version which is published online rather than the print version; individual Gazette notices will be published daily rather than weekly.

Discussion

We consider that logically the first decision to be made is whether the relevant legislation should be changed to say that DINLIs must not be published in full in the Gazette. On this
matter, we prefer the viewpoints of Ministry for Primary Industries and the Law Librarians’ Association because they consider the matter from a reader’s perspective.

The second decision to be made is whether legislation should be changed to say that DINLIs must always be notified in the Gazette. None of the submissions queried the value of notifying DINLIs in the Gazette. However, there is now a group of DINLIs—rules made by the New Zealand Qualifications Authority under section 253 of the Education Act 1989—whose empowering provision does not require them to be notified in the Gazette. The only requirement in section 253 is that the instruments are published on a website.

Once a statutory provision appears, it can become a precedent for officials and drafters who do not know about the consequences of using it. Our view is that this risk makes it highly desirable for legislation to state clearly that every piece of delegated legislation must be notified in the Gazette. The Gazette is the authoritative journal of constitutional record.

We believe that developments in the way it is published will make it more accessible for both law-making bodies and readers.

**Provision of template for Gazette notices**

DINLIs present a number of difficulties. Some empowering provisions do not require DINLIs to state the date on which they are made and some empowering provisions do not contain information about the availability of DINLIs. Sometimes the requirements of empowering provisions are not always observed. Law-making bodies follow different practices on stating the authority for making the DINLIs, stating compliance with statutory prerequisites, stating the date of making of the DINLIs, stating the commencement date of the DINLIs, and providing explanatory notes on DINLIs. Our letter suggested a possible solution was the provision of a template for Gazette notices about DINLIs. Our consideration was that a template would ensure that the same basic information was provided for all DINLIs and would give the notices a uniform appearance that would be easier to interpret than the variety of styles currently used.

**Evidence**

The Ministry of Business, Innovation and Employment, the Ministry of Transport, the Ministry for Primary Industries, and the New Zealand Law Society broadly supported the suggestion. The Ministry of Transport commented:

> While there may be benefit in using a standard template when notifying/publishing DINLIs in the Gazette, requirements of this nature ought to be set out in the empowering legislation, not least for reasons of accessibility.

**Discussion**

We consider the provision of a template could be very useful. If the necessary details were required in the template, existing empowering provisions could be amended and new empowering provisions drafted to reflect the same information.

**Provision of a step-by-step guide**

Statutory requirements for DINLIs are not always observed. Our letter suggested that a solution could be the publication of a step-by-step guide to the process of making DINLIs. We indicated that the guide could cover requirements of law-making bodies to

- publish or notify their DINLIs in the Gazette if the empowering provision so requires
• arrange for their Ministers to present their DINLIs to the House if the empowering provision requires this
• arrange for their Ministers to present their DINLIs to the House, if required to do so, within 16 sitting days after their making
• comply with the specific requirements of empowering provisions (which may come to include the details required by a Gazette template).

The guide might also cover the desirability of law-making bodies
• giving DINLIs meaningful titles
• allowing time between the date of publication or notification in the Gazette and the date of commencement of the instrument
• presenting DINLIs to the House before the date of commencement of the instrument.

**Evidence**

The Ministry of Business, Innovation and Employment, the Ministry of Transport, the Ministry for Primary Industries, and the New Zealand Law Librarians’ Association broadly supported the suggestion. We draw attention to Ministry of Transport’s comment that:

> the Ministry and the transport agencies have produced a Regulatory Development and Rules Production Handbook which appears to [be] in keeping with the solution proposed by the committee.

The Law Librarians’ Association submitted that every DINLI should, as a good publishing practice, include clear information regarding the version or edition and date of publication. It suggested that these instructions be included in the step-by-step guide.

The Gazette Office said that it would be important for the step-by-step guide to tell submitters of DINLIs to the Gazette that they must advise the Gazette Office if the instrument is a DINLI. This is because it is difficult for Gazette Office staff to recognise DINLIs.

The Ministry of Transport also raised the following point:

> the need to cater for DINLIs that are made to address safety and security risks that may need to come into force at very short notice, prior to laying before the House and, in some cases, before being notified in the Gazette … there are also some DINLIs in the transport sector such as emergency civil aviation rules dealing with security matters where the Act contemplates that public notification may not be appropriate.

**Discussion**

It appears to us that law-making bodies would welcome a guide. The good work that law-making bodies have already done in producing their own guides would not be superseded. Instead, the new guide could draw on existing guides and would act as an additional aid. The preparation of the guide would be assisted by the different perspectives that agencies would bring to the contents.
We recommend to the Government that it

- amend the Legislation Act to provide for DINLIs to be notified in the *Gazette* and published in full on the law-making bodies’ websites
- require the provision of a template for *Gazette* notices about DINLIs
- require the publication of a step-by-step guide to the process of making DINLIs.
Appendix A

Committee procedure
We met between 13 December 2013 and 26 June 2014 to consider the inquiry. We invited submissions on the inquiry, and received nine submissions from interested departments and organisations.

Committee members
Hon Maryan Street (Chairperson)
Andrew Little
Ian McKelvie
Mike Sabin
Hon Chris Tremain
Appendix B

Examples of law-making bodies

Chief executives of government departments and their delegates
Chief technical officer or management agency (Biosecurity Act 1993, section 131)
Civil Aviation Authority
Dental Council
Drug Free Sport NZ
Electrical Workers Registration Board
Electricity Authority
Environmental Protection Authority
External Reporting Board
Financial Markets Authority
Fire Authorities
Greyhound Racing New Zealand
Harness Racing New Zealand
Institute of Professional Engineers New Zealand
Legal Services Commissioner
Maritime New Zealand
Ministers of the Crown
Medical Council of New Zealand
Medical Radiation Technologists Board
Medical Sciences Council of New Zealand
Midwifery Council of New Zealand
New Zealand Chiropractic Board
New Zealand Dieticians Board
New Zealand Law Society
New Zealand Psychologists Board
New Zealand Qualifications Authority
New Zealand Racing Board
New Zealand Thoroughbred Racing Inc
New Zealand Transport Agency
Nursing Council of New Zealand
Occupational Therapy Board of New Zealand
Optometrists and Dispensing Opticians Board
Osteopathic Council of New Zealand
Pharmacy Council of New Zealand
Physiotherapy Board of New Zealand
Podiatrists Board of New Zealand
Psychotherapists Board of Aotearoa New Zealand
Plumbers, Gasfitters and Drainlayers Board
Real Estate Agents Authority
Social Workers Registration Board
Surveyor-General
Takeovers Panel
OVERSIGHT OF DISALLOWABLE INSTRUMENTS THAT ARE NOT LEGISLATIVE INSTRUMENTS

Teachers Council
The Governor-General of New Zealand
The Privacy Commissioner
Valuer-General
Appendix C

Matters to be considered at a later date

- Oversight of local authority bylaws.
- Aligning presentation and examination so that they mesh.
- Meaning of regulations in Standing Order 314(1).
Activities of the Regulations Review Committee in 2014

Report of the Regulations Review Committee

Fiftieth Parliament
(Hon Maryan Street, Chairperson)
August 2014

Presented to the House of Representatives
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1 Introduction

Recommendation

The Regulations Review Committee recommends that the House take note of this report.

Purpose of this report

Each year, by convention, the Regulations Review Committee produces a report on those of its activities that it has not reported separately to the House. This report is about the work completed by the Regulations Review Committee of the 50th Parliament between 30 January and 31 July 2014.

The presentation of this report demonstrates our approach to the scrutiny of delegated legislation, and draws attention to issues that we consider need to be borne in mind in the making of subsequent regulations.

Functions of the committee

The Standing Orders of the House of Representatives set out the powers and functions of the committee, and allow us to bring specified matters to the special attention of the House.¹ The committee

- scrutinises all regulations
- considers draft regulations referred by Ministers of the Crown and reports back to them
- examines regulation-making powers in bills
- investigates complaints about the operation of regulations
- conducts inquiries into matters related to regulations.

We met 17 times from 30 January to 31 July 2014, and presented nine reports to the House. These reports are printed separately and will be included in the Appendices to the Journals of the House of Representatives.² In the first half of 2014 we made 16 reports to other committees about regulation-making powers in bills, and dealt with many other matters that did not culminate in separate reports to the House.

¹ The relevant Standing Orders are set out in Appendix B.
² The reports are listed in Appendix D, and publicly available at http://www.parliament.nz/en-nz/pb/sc
2 Legislative instruments

Standing Order 314(1) empowers us to examine all regulations. When examining a regulation, we consider whether it should be drawn to the special attention of the House on any of the grounds set out in Standing Order 315(2).

Section 4 of the Legislation Act 2012 defines a legislative instrument (LI). In this chapter, we deal with regulations published in the LI series; disallowable instruments that are not legislative instruments are dealt with in Chapter 3.

Our scrutiny process

We examine each regulation at our weekly meetings as soon as possible after its publication. In the year from 30 January until 31 July 2014 we scrutinised 264 regulations: SR 2013/463–499 and LI 2014/1–226.

We raised any issues with the responsible Ministers, departments, or agencies. After receiving their responses we decided whether to proceed further.

Routine scrutiny

In 2014, we continued to seek explanations as to why some regulations did not comply with the Cabinet Manual’s rule that regulations should not come into force until 28 days after they are notified in the Gazette. The principle underlying this “28-day rule” is that the law should be available so it can be understood before it comes into force.

Non-compliance with the 28-day rule is the issue that arises most frequently in our routine scrutiny work. Although we are almost always satisfied with the explanation we receive from the responsible agency, we consider it important to demonstrate that Parliament takes an active interest in the accessibility of delegated legislation. We highlight the need for the Government to encourage all agencies with responsibility for instruments that do not comply with the 28-day rule to advise the committee proactively as to why, and whether or when, a waiver was obtained, without waiting to be asked by the committee.

We examined a number of fees regulations, and routinely asked the agencies concerned to demonstrate that the fees were calculated in accordance with the Auditor-General’s good practice guide, Charging fees for public sector goods and services, and the Treasury’s Guidelines for Setting Charges in the Public Sector. We referred them to the constitutional principles for fee setting set out in previous reports of the Regulations Review Committee.

This work is routine scrutiny, and typically we are satisfied with the responses we receive. However, the regulations or the responses sometimes necessitate further investigation.

Issues of current concern

We found three key areas of concern in our scrutiny in 2014:

- a potentially unauthorised sub-delegation

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3 The definition is in Appendix C of this report.
4 A list of the regulations about which we sought information is in Appendix E.
the status of an instrument following changes made by the Legislation Act 2012
noting statutory prerequisites in enacting formulae.

We generally sought further information on regulations that appeared to raise any of these issues. We have explained these issues below, with examples of the regulations that raised them.

**Potentially unauthorised sub-delegation**

**Electoral Amendment Regulations (LI 2014/122)**

The regulations were made under the authority of section 267(e) of the Electoral Act 1993 which authorises the Governor-General to make regulations “prescribing conditions upon or subject to which special voters may vote”. Regulation 23A(5) requires the Electoral Commission to “make any arrangements that the Electoral Commission considers to be necessary for the issue and receipt of special votes by dictation [over a telephone]”. We were concerned that the empowering provision did not appear to authorise the delegation by regulation of decisions on these details to another person. In other words, regulation 23A(5) might include an unauthorised sub-delegation.

The common law recognises a distinction between delegating law-making power, and allowing a delegate to determine administrative details; while the former must be authorised by Parliament, the latter need not be. We sought evidence from the Ministry of Justice to decide into which category regulation 23A(5) fell.

The ministry explained to us that the purpose of this regulation is to provide flexibility in the Electoral Commission’s administration of the dictation voting service for people who cannot otherwise vote unaided, mostly because of vision difficulties. The ministry considered the discretion delegated to the commission by regulation 23A(5) to be essential. For example, regulation 23A(5) allows the service to be adjusted in response to feedback from the users. The ministry considered that, while regulation 23A(5) confers a general discretion on the Electoral Commission, this discretion is adequately constrained by other parts of the regulations.

We heard that the ministry had considered whether their administrative process for managing the telephone dictation process might have been developed under a sub-delegation that was not authorised by Parliament. It had been unable to reach a firm conclusion one way or the other.

While we fully supported telephone dictation voting, we were concerned to ensure that the voting system was legally robust. We subsequently wrote to the Minister of Justice and recommended that she consider providing additional clarity around the status of the telephone voting process.

**Status of an instrument following the Legislation Act 2012**

**Fisheries (High Seas Fishing Notifications – North East Atlantic Fisheries Commission) Amendment Notice 2013 (SR 2013/295)**

The notice was made under section 113C of the Fisheries Act 1996. Between 1 November 1999 and 5 August 2013, notices made under this provision were subject to the requirements of the Regulations (Disallowance) Act 1989, which required them to be laid before the House and made them subject to scrutiny by this committee, and disallowance.
Since 5 August 2013, as a result of a consequential amendment made by the Legislation Act 2012, notices made under section 113C are no longer subject to these requirements.

After correspondence about the matter with the Ministry of Primary Industries, we were informed that the ministry was conducting a review of section 303 to establish the legal position that applied before the Legislation Act 2012 amendments, and consider potential legislative means to resolve any problems that might emerge. This review is now complete and the committee understands that the review has resulted in proposed amendments in the Legislation Amendment Bill currently before the House.

**Noting statutory prerequisites in enacting formulae**

The enacting formula is the form of words that precedes the contents of the regulation. It generally cites the empowering provision pursuant to which the regulation is being made, and specifies the person who is making the regulation—usually the Governor-General or a Minister of the Crown.

Section 24(1) of the Interpretation Act 1999 provides that references to background facts, circumstances, or preconditions in the enacting formula are not essential to the validity of the regulation:

It is not necessary for an enactment, Proclamation, Order in Council, Warrant, or other instrument made under an enactment to refer to facts, circumstances, or preconditions that must exist or be satisfied before the enactment, Proclamation, Order in Council, Warrant, or other instrument can be made.

We nevertheless consider that the enacting formula is an important aid to understanding the effect of a regulation, and we follow up pertinent issues with the responsible agencies.

In the first part of 2014 we queried enacting formulae that did not specify whether statutory prerequisites had been met. For example, an empowering Act may require the responsible Minister, before recommending that the Governor-General make an Order in Council, to first comply with specified consultation requirements, or give due consideration to specified matters. It is helpful if enacting formulae state that these requirements have been met; otherwise, we have found that it can be difficult and time-consuming to establish whether, in fact, they have been. If we have difficulty ascertaining compliance, interested members of the public could well struggle to do so. Therefore, despite section 24(1) of the Interpretation Act 1999, we have strongly encouraged the PCO to ensure that the enacting formula preceding a regulation specifies whether statutory prerequisites have been met.

We are pleased to note that this issue has arisen less frequently in 2014. We wrote to the relevant ministers about the following regulations, the enacting formulae preceding which did not specify whether the requisite consultation in fact took place:

- Accident Compensation (Earners’ Levy) Regulations 2014 (LI 2014/30)
- Accident Compensation (Work Account Levies) Regulations 2014 (LI 2014/32)
- Health and Safety in Employment (Mining Operations and Quarrying Operations) Order 2013 (SR 2013/483)

The Ministers concerned confirmed that the required consultation had been undertaken.
3 Disallowable instruments that are not legislative instruments

In this chapter, we deal with disallowable instruments that are not legislative instruments (DINLIs). Section 4 of the Legislation Act 2012 defines a legislative instrument. We examine each regulation as soon as possible after its publication, but specific difficulty identifying and accessing DINLIs may delay our scrutiny. From 30 January to 31 July 2014 we raised concerns about 22 such regulations with the responsible departments or agencies.

Routine scrutiny
Our scrutiny of DINLIs often finds that they exhibit the following problems:

- not specifying the date on which they were made
- not specifying the empowering provision under which they were made
- not specifying the date on which they come into force
- confusing naming practices
- no indication whether any statutory prerequisites (such as a consultation requirement) were complied with
- no accompanying explanatory note
- not being presented to the House within 16 sitting days as required by section 41 of the Legislation Act
- unclear notification in the Gazette, perhaps because of unclear naming practice or inconsistent practices in notifying similar instruments
- not being available on the agency’s website.

We discuss examples of some of these issues below.

Inquiry into oversight of DINLIs
The recurring nature of the problems listed above prompted us to initiate an inquiry into the difficulty of identifying instruments as DINLIs. We recently reported to the House on this inquiry, recommending, amongst other things, that the Government introduce legislation to establish a register of delegated legislation, and designate an agency to be responsible for DINLIs as an area of law.

Issues typically arising
We often find that a single instrument raises more than one of the problems listed above. To supplement the discussion in our inquiry into the oversight of DINLIs, we discuss the following instruments in this report as examples of the types of issue that arise in our routine scrutiny of DINLIs.

Amendments to the Electricity Industry Participation Code
A number of these amendments all raised the same concerns when we examined them.
There is no indication in either the Gazette, or the amendments themselves, that in making them the Electricity Authority complied with the requirements of section 39 of the Electricity Act 2010. When the authority is seeking to amend the Electricity Industry Participation Code, the Act requires it to publicise the draft amendment, prepare a regulatory statement, and consult appropriately. We had previously suggested to the authority that it might consider including a statement of compliance with these requirements in any subsequent amendments.

The authority said that it issued a consultation document for each of these proposed amendments. The documents were notified in the authority’s newsletter, publicised on its website, included a regulatory statement to comply with the requirements of section 39(2) of the Act, and invited submissions. An initiative to include a statement of compliance in future amendments is yet to be implemented.

The Electricity Authority presents copies of its Gazette notices rather the instrument itself to the House, and we asked why. The authority explained that presenting a copy to the House is the role of the Minister of Energy and Resources, under section 37(2) of the Electricity Industry Act. The authority provides the Minister’s office with a copy of the Code amendment and the relevant Gazette notice; the decision to present only the Gazette notice to the House is the Minister’s.

Our final question for the authority on these regulations was whether it would consider simplifying its naming practice, citing the Electricity Industry Participation (Additional Registry Fields) Code Amendment 2012, Amendment 2013 (No 2) as an example of a confusing name. The authority noted that this particular title reflected an unusual situation, but subsequently told us that it would change its naming convention to improve accessibility.

**New Zealand (Maximum Residue Limits of Agricultural Compounds) Food Standards 2013**

**New Zealand (Maximum Residue Limits of Agricultural Compounds) Food Standards 2012, Amendment 3**

Our examination of these regulations suggested some areas for possible improvement, which we invited the Ministry for Primary Industries to consider.

**Confusing titles**

The titles given to New Zealand food standards are confusing. Some are so similar to others as to be difficult to distinguish. We gave the example of these standards:

- Notice under the Food Act 1981 (Notice No. MPI 182)
  This notice is about the New Zealand (Maximum Residue Limits of Agricultural Compounds) Food Standards 2013

- Notice under the Food Act 1981 (Notice No. MPI 183)
  This notice is about the New Zealand (Maximum Residue Limits of Agricultural Compounds) Food Standards 2012, Amendment No. 3

- Notice under the Food Act 1981 (Notice No. MPI 317)
  This notice is about the New Zealand (Maximum Residue Limits of Agricultural Compounds) Food Standards 2013, Amendment No. 1.
We observed that the notices suggest that there are two sets of New Zealand (Maximum Residue Limits of Agricultural Compounds) Food Standards, one made in 2012 and one made in 2013. If that is so, the bracketed part of the headings should indicate how the instruments differ. We suggested the ministry consider developing rules for clear, simple titles.

The ministry explained that the anomalies arose from their consolidation and amendment of the New Zealand (Maximum Residue Limits of Agricultural Compounds) Food Standards (MRL Standards), which is amended several times a year. The MRL Standards consist primarily of a lengthy schedule, and the schedule is subject to amendment as new agricultural compounds need to be included. The amended standards are consolidated regularly for usability and readability. The ministry considers the process of naming and renaming MRL Standards to be appropriate, but agrees that the resulting titles could be clearer.

Uninformative Gazette notice headings

We consider that the headings of some notices in the Gazette for gazetted food standards could be clearer. The heading does not always include the name of the food standard concerned. For example, the notice headed “Notice Under the Food Act 1981 (Notice No. MPI 182)” is in fact notice of the issue of the New Zealand (Maximum Residue Limits of Agricultural Compounds) Food Standards 2013.

The ministry will consult Food Standards Australia New Zealand about a consistent, clear style for the headings. It has asked its notice drafters to consider changing the styles of notices to make them more informative.

Australian food standards

Some food standards relate only to Australia, but this is not clearly signalled; and it is not clear why these notices are published in the Gazette at all. We asked the ministry whether the notices could be expanded to make it clear they pertain to Australia only.

The ministry replied that New Zealand is a party to the Agreement Between the Government of Australia and the Government of New Zealand concerning a Joint Food Standards System. Under the treaty, New Zealand has agreed to give legal effect to any amendments to the Food Standards Code and is obliged to adopt or incorporate them. Although no Food Code amendment is actually in force in New Zealand at the time of a Gazette notice, it gives advance notice to New Zealanders about a change to a joint instrument which will shortly be incorporated into New Zealand law.

The ministry understands the potential for confusion, and will initiate discussions with Food Standards Australia New Zealand to reduce it.

Ministry’s project to improve regulatory stewardship

The ministry told us that it is scoping a project to strengthen regulatory oversight, modernise primary food legislation and improve subordinate legislation. It also has a standards integration programme, which is intended to make the standards and guidance prepared by the ministry clearer and more accessible and consistent.

Notice 43 Amendments to Prospective Financial Statements (Amendments to FRS-42)

Notice 44 Amendments to Prospective Financial Statements (Amendments to FRS-42 (PBE))
Notice 45 Amendments to Prospective Financial Statements (Amendments to PBE FRS-42)

We drew the External Reporting Board’s attention to these facts:

- The notices do not include the date on which they were made—they say only “Issued September 2013”.

- The notices do not include the date on which they come into force. Section 28 of the Financial Reporting Act 1993 provides for such notices to generally take effect 28 days after the date of notification in the Gazette; but it would be preferable to have the date on which a notice comes into force included in the instrument itself, in the interests of certainty.

- There is no indication in the notices or associated Gazette notices that the Board has complied with the consultation requirement of section 26 of the Act.

- There are no explanatory notes accompanying the notices.

- The notices do not appear on the board’s website.

As regards publication, the board explained that, rather than listing all amendments listed separately on its website as they arise, it compiles them into the base standards, and then archives the amendments, which it considers to be more helpful to its constituents. We subsequently heard from the board that it had updated its process for making DINLIs so that the resulting instruments incorporated the points listed above.

Solvency Standard for Civic Assurance

We considered that this standard presented several issues, and we raised them with the Reserve Bank of New Zealand.

- The standard does not include the date on which it was made, it says only “August 2013”.

- Paragraph 1.1.2 of the standard states that, once issued by the Reserve Bank, the standard “becomes a regulation under the Insurance (Prudential Supervision) Act 2010 (refer section 233(1))”. This is not correct. Section 233(1) provides that the standard is a disallowable instrument, but not a legislative instrument, for the purposes of the Legislation Act 2012; it does not provide that it “becomes a regulation under the Act”.

- There is no indication in the standard or associated Gazette notice that the Reserve Bank has undertaken appropriate consultation as required under section 235 of the Act.

- There is no explanatory note accompanying the standard.

- The Gazette notice erroneously states that it is given pursuant to section 55 of the 2010 Act; the reference should be to section 234.
The Reserve Bank acknowledged the matters we raised and undertook to make several changes. It said it would prefer to continue to put only the month and year on the front cover of its standards; but future standards will include the full date of issue in a paragraph in their introductory sections. Future standards will also be worded to reflect their status of disallowable instruments. The Reserve Bank indicated that it plans to include in all future standards a summary of the consultation undertaken in preparing them.

The Reserve Bank has not previously issued explanatory notes for its standards, relying on consultation during their development. In future, however, it will provide explanatory notes. The Reserve Bank agreed that the notification reference in the *Gazette* should have been notified in accordance with section 234 of the 2010 Act, and will ensure future notifications are correct. It noted, however, that the standard was issued in accordance to section 55 of the Act.

We accepted the Reserve Bank’s explanation and assurances.
4 Regulation-making powers in bills

The scrutiny of regulation-making powers in bills is central to our work. In the first half of 2014 we made 16 reports to other committees on regulation-making powers in bills. We encourage committees to advise us of the outcome of their consideration of our advice.

We examine bills to determine whether the delegation of Parliament’s law-making power is appropriate and clearly defined. We are concerned with whether the regulation-making powers represent good legislative process, not with matters of policy, which are for subject committees to assess. In examining regulation-making powers in bills, we are not confined to the grounds for scrutiny set out in the Standing Orders, but they provide a useful test. We also examine whether the regulation-making powers infringe any of the established principles set out in the Legislation Advisory Committee’s Guidelines on the Process and Content of Legislation:

- that matters of policy and substance should not be delegated to regulations
- that Acts should not be amended by regulations (“Henry VIII powers”)
- that law-making powers should not be delegated without provision for adequate controls and independent scrutiny.

Bills reported on in 2014

We reported on the following bills in the first half of 2014:

- Accounting Infrastructure Reform Bill
- Animal Welfare Amendment Bill
- Building (Earthquake-prone Buildings) Amendment Bill
- Credit Contracts and Financial Services Law Reform Bill
- Education Amendment Bill (No 2)
- Environmental Reporting Bill
- Harmful Digital Communications Bill
- Health and Safety Reform Bill
- Human Rights Amendment Bill
- Immigration Amendment Bill (No 2)
- Judicature Modernisation Bill
- Kaikoura (Te Tai-o-Marokura) Marine Management Bill
- Local Government Act 2002 Amendment Bill (No 3)
- Public Safety (Public Protection Orders) Bill
- Smoke-free Environments (Tobacco Plain Packaging) Amendment Bill
- Vulnerable Children Bill
Issues of current concern
We have found the following recurring areas of concern in our scrutiny in 2014 thus far:

- commencement by Order in Council
- non-standard form of regulation-making power
- Henry VIII powers
- use of transitional regulations to override primary legislation
- modifying definitions in an Act by way of regulations
- exemption-making powers without express controls
- significant policy that would more appropriately be included in primary legislation
- broad, open-ended powers.

We illustrate our approach to examining these issues below, by reference to examples.

Commencement by Order in Council

Twelve of the bills we reported on in the first part of 2014 included provision for the resulting Act to come into force on a date to be set by the Governor-General by Order in Council. We mentioned commencement by Order in Council as a matter for concern in our activities reports for 2009, 2010, and 2011. In 2012 and 2013 we saw few examples, but in the first part of 2014 we saw a substantial increase.

In 1996, the committee set down accepted principles relating to provision for commencement by Order in Council. In its report to the House, the committee commented that a piece of legislation “hands over a critical power to the Executive Council—namely, the power to decide not only when, but whether a particular piece of legislation should come into force”. This means that including provisions for commencement by Order in Council in a bill may result in an Act, or parts of an Act, never being brought into force. This is not merely a theoretical possibility; the Parliamentary Counsel Office records that at least 45 Acts or parts of Acts were waiting to be brought into force by Order in Council at 1 July 2013.

The Legislation Advisory Committee’s guidelines include the following principles regarding commencement by Order in Council:

- As a general principle, legislation should incorporate a fixed commencement date.
- Provisions for the commencement of legislation by Order in Council should be used only in rare and exceptional circumstances.
- If a fixed commencement date is not included in a bill, the bill should incorporate a provision that it be brought into force automatically after a specific period of no more than one year following its enactment, unless it is brought into force earlier by Order in Council.

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5 Regulations Review Committee, Investigation into the commencement of Legislation by Order in Council, 1996, I.16K.
6 Ibid., p. 4.
If a commencement date is to be set by Order in Council, the reason for this should be included in any explanatory memorandum accompanying the bill and considered by the select committee considering the bill.

It is an expectation, then, that the reason a commencement date is to be set by Order in Council will be included in the explanatory note accompanying the bill. Four of the bills we examined in 2014 did not give such an explanation, including the Building (Earthquake-prone Buildings) Amendment Bill, and the Education Amendment Bill (No 2). We have recommended that the Government note the principle that reasons for providing for commencement by Order in Council should be provided in the explanatory note accompanying a bill, to allow select committees to determine whether rare and exceptional circumstances indeed exist.

**Human Rights Amendment Bill**

We reported to the Justice and Electoral Committee on the regulation-making power in clause 2 of the bill, which provided for the bill to be brought into force by Order in Council. The explanatory note cited the need to accommodate the remaining terms of the part-time Human Rights Commissioners.

We were concerned that the omission of a “drop-dead” date by which the bill would automatically come into force meant there was no guarantee that the bill would ever do so. The circumstances specified in the explanatory note did not appear to us to be rare and exceptional; the length of the remaining terms of the commissioners must have been known, so it should have been possible to fix a commencement date. On our recommendation, the Justice and Electoral Committee recommended amending clause 2 to include a fixed commencement date, the day after the Act receives the Royal assent. To accommodate the concern cited in the explanatory note, the committee also recommended the insertion of a new schedule providing for transitional provisions. The bill is currently before the House.

**Animal Welfare Amendment Bill**

We reported to the Primary Production Committee on three issues, including provision for large parts of the Act to be brought into force by Order in Council up to five years after enactment.

The explanatory note gave the reason for commencement by Order in Council as the need for regulations to be drawn up to implement in full the bill’s policy objectives. We considered the drop-dead period of five years following enactment to be unusually long and well in excess of the one year we recommend as a general rule.

We recommended that the Primary Production Committee either recommend amending the bill to include a fixed commencement date or, if it considered the circumstances were rare and exceptional, to provide for a shorter drop-dead period. The Primary Production Committee reported the bill to the House with no significant changes to the commencement provisions. The bill is currently before the House.

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Non-standard form of regulation-making power

In the first part of 2014 we made one report on the use of a non-standard form of regulation-making power. This issue has not arisen previously in this Parliament.

Before 1962, regulation-making powers were delegated in two parts:

- first, authorising the making of any regulations deemed necessary for giving full effect to the Act
- second, without limiting that general power, authorising the making of regulations for a number of specified purposes.

In 1962, the standard form of regulation-making powers was changed by reversing the order in which these two parts appeared. This standard form has been used in New Zealand statutes ever since, and typically reads:

The Governor-General may, by Order in Council, make regulations for all or any of the following purposes:

(a) [a specific purpose is listed]
(b) [a specific purpose is listed]
(c) [and so on …]
(d) providing for any other matters contemplated by this Act, necessary for its administration, or necessary for giving it full effect.

The Regulations Review Committee endorsed this change,\(^\text{10}\) and explained the reason for it:

The formula was designed to ensure that the precise limits of the law making power conferred by Parliament were set down as clearly as possible in the enabling Act and that the jurisdiction of the Courts to review delegated legislation and to determine its validity was not excluded or reduced.\(^\text{11}\)

The effect of the change was to reduce greatly the scope of the general power, thus giving Parliament more control over the exact purposes for which regulations can be made.

Since 1962, the general power, in a more limited form, has been placed at the bottom of a list of specific topics. This power is often referred to as the “catch-all provision”. It is well-established that a catch-all provision must be “read down” in line with its preceding paragraphs—in other words, it must be read consistently with the preceding paragraphs and is limited by their content and context.\(^\text{12}\) The catch-all provision is therefore understood as dealing with subsidiary or incidental matters.

Harmful Digital Communications Bill

We wrote to the Justice and Electoral Committee regarding three issues, including the non-standard form of regulation-making power in clause 21 of the bill, which followed a pre-1962 model. We were concerned that as a result clause 21 delegated an extremely broad authority to make regulations—providing for any matters contemplated by the Act, and for any matters considered to be necessary to make the Act work. Parliament would have little

\(^{10}\) Regulations Review Committee, Regulation-making powers in legislation, 1986, I.16A, para 5.6

\(^{11}\) Regulations Review Committee, Inquiry into the drafting of empowering provisions in bills, 1990, para 4.4

control over the exact purposes for which regulations could properly be made, and the jurisdiction of the courts to determine the validity of delegated legislation—that is, whether it was ultra vires—would be reduced.

On our recommendation, the Justice and Electoral Committee recommended the amendment of clause 21 to follow the standard form of delegated legislative power used in New Zealand statutes since 1962. The bill is currently before the House.

**Henry VIII powers**

The issue of Henry VIII powers arose in relation to several bills in the first half of 2014. A Henry VIII provision is the granting in primary legislation of a power for delegated legislation to amend, suspend, or override primary legislation.

The established principle, which we endeavour to uphold, is that such provisions should be avoided unless their use is “demonstrably essential”. An important aspect of this test is whether the purpose of the Henry VIII provision can be achieved by other means. Our committee has previously expressed the view that a Henry VIII provision

- should be included in an Act only in exceptional circumstances
- should never be used routinely in reforming legislation
- should be drafted in “the most specific and limited terms possible”.

The principle that an empowering provision that allows legislation to be amended by regulations should be granted by Parliament rarely and with strict controls is endorsed in the Legislation Advisory Committee guidelines.

**Kaikoura (Te Tai-o-Marokura) Marine Management Bill**

We reported to the Local Government and Environment Committee on clause 12 of the bill. Clauses 9 and 10 of the bill established marine sanctuaries. Clause 12 authorised the Minister of Conservation to impose restrictions on, vary, or abolish these sanctuaries by way of a ministerial notice published in the Gazette. A ministerial notice made under clause 12 could therefore completely overturn Parliament’s decision to establish the sanctuaries.

On our recommendation the Local Government and Environment Committee recommended amending the bill to remove the power to abolish a sanctuary. The committee also recommended amendments to limit the scope of the Minister’s ability to vary a sanctuary to minor and technical variations. The bill is currently before the House.

**Immigration Amendment Bill (No 2)**

We reported to the Transport and Industrial Relations Committee regarding clause 95(3) which authorised the making of regulations replacing or modifying two provisions in the principal Act, new sections 386A and 387A, which set out the process that must be followed for a notice or document to be deemed to have been received.

On our recommendation, the Transport and Industrial Relations Committee recommended amending the clause to remove the power for regulations to modify provisions in the Act,

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14 Regulations Review Committee, 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, 1993-96, AJHR, I.16C, p.16.

15 See LAC guideline 10.1.8.
and to authorise regulations to prescribe rules for service in specific situations. The bill is currently before the House.

**Use of transitional regulations to override primary legislation**

These powers are a particular kind of Henry VIII power, which we have discussed in our 2012 and 2013 activities reports.\(^\text{16}\) We also recently reported to the House on evidence we gathered about these provisions in the course of the 50th Parliament.\(^\text{17}\) We are pleased that the incidence of transitional override powers in bills appears to be decreasing; thus far in 2014, we have seen transitional override powers used in only one bill. In our report on these powers, we recommended that the Government take steps to limit the use of transitional override powers in legislation.

**Health and Safety Reform Bill**

We reported to the Transport and Industrial Relations Committee on a regulation-making power in clause 225 of this bill authorising the making of transitional regulations that could override primary legislation. We drew attention to the broad and largely unconstrained power in this clause for regulations to modify the meaning of specified terms in the Act, disapply or reinstate any provision of the Act, and add or replace any transitional provisions in Schedule 1 of the Act for up to two years after the clause was brought into force.

We were concerned that clause 225 would allow undue flexibility in the implementation of the Act, and recommended that the Transport and Industrial Relations Committee consider whether the power delegated in clause 225 was “demonstrably essential” and justified by exceptional circumstances, or whether its removal from the bill should be recommended.

Alternatively, we recommended the committee consider recommending amendment of clause 225 to constrain the delegated power more appropriately. Suggested amendments included setting out criteria for the Minister to consider before making regulations, and requiring the Minister to consult; replacing the power to modify with a power to prescribe transitional and savings provisions; and amending the clause to state the purposes for which regulations may be made under it.

The Transport and Industrial Relations Committee is yet to report back to the House on the bill.

**Modifying definitions in an Act by way of regulations**

Powers that modify definitions in primary legislation by regulation are a particular kind of a Henry VIII provision. If the definition of a key term is left to be partly determined by regulations, the regulations may have the effect of modifying or altering an Act. This in turn may mean that matters that would more appropriately be the subject of primary legislation are left to be determined by regulations.

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\(^{17}\) Regulations Review Committee, *Briefing on regulation-making powers that authorise transitional regulations to override primary legislation*, 15 July 2014, I.16J.
Judicature Modernisation Bill

We reported to the Justice and Electoral Committee on issues including clause 473(2) which authorised the making of regulations supplementing the definition of “permitted document” in clause 473(1). The bill provided for certain categories of document not to fall within the definition of “permitted document” until declared to do so by regulations made under clause 473(2). These regulations could also exclude other types of documents from the definition.

The concept of a “permitted document” was central to the bill. The bill was an omnibus bill, and clause 473 was intended to eventually form part of the Electronic Courts and Tribunals Act. The concept of a “permitted document” would be central to the application of the Act, the purpose of which was to facilitate the use of such documents in court proceedings.

We expressed concern that regulations made under clause 473 could determine to a significant extent the scope of the application of the Electronic Courts and Tribunals Act by specifying how narrowly or broadly the definition of permitted document would apply. The question of which documents should be defined as permitted also appeared to be a matter of significant policy, which would more appropriately be dealt with in primary legislation.

We recommended that the Justice and Electoral Committee consider recommending amending the bill so as to provide for the definition of “permitted document” entirely in the primary legislation. Alternatively, we suggested recommending an amendment specifying criteria for the Minister to apply in deciding whether a particular type of document should be declared a permitted document.

The Justice and Electoral Committee did not recommend any amendment to clause 473. The bill is currently before the House.

Building (Earthquake-prone Buildings) Amendment Bill

We reported to the Local Government and Environment Committee on four issues, including clauses 37 and 38 which authorise the making of regulations that could modify definitions in the Building Act 2004. We were concerned the clauses authorised the making of regulations modifying the definitions of “priority building” and “moderate earthquake”, which were central to the operation of the bill, with the potential to vary the scope of the operation of the Act.

We noted that a definition of “moderate earthquake” under current regulations had been in operation since February 2005 without amendment. Since the bill proposed to replace this definition with an almost identical one, we suggested that the definition would be suitable for inclusion in the Act itself, rather than being left to regulations.

We recommended that the committee recommend amending the bill to define both of these terms explicitly; or alternatively, to provide for the purpose of defining “priority building” and “moderate earthquake” and to require regulations to be made for that purpose.

The Local Government and Environment Committee is yet to present its report on the bill to the House.
Exemption-making powers without express controls

Bills sometimes provide for people to be exempted from the application of legislation without providing for adequate controls on the power to make such exemptions. We identified delegating such powers without express controls as a matter for concern in our activities reports of 2009, 2010, and 2011. In 2012 and 2013, we saw few examples of this type of provision, but we saw an increase in the first part of 2014.

Where legislation authorises the making of instruments conferring exemptions from the application of specified legislative provisions, it is appropriate for controls to apply. The committee discussed suitable controls in its 2008 report to the House, Inquiry into the use of instruments of exemption in primary legislation. In that report, we said that instruments granting exemptions can have a significant impact on the way the law affects individuals and the public generally, so special attention to provisions authorising instruments of exemption were justified. We recognised that the Legislation Advisory Committee’s recommended safeguards had general application to exemption-making powers. They can be summarised as follows:

- The empowering Act should set out clear purposes for the granting of exemptions.
- The empowering Act should set out clear criteria for the granting of exemptions including, at the very least, a requirement that the exemption be consistent with the objectives of the empowering Act.
- When an exemption is granted, there should be a requirement to state reasons in the exemption instrument itself.
- Empowering provisions should state that exemption instruments granted under them will expire within five years, and exemption instruments should include sunset clauses to that effect.

Credit Contracts and Financial Services Law Reform Bill

We reported to the Commerce Committee on clause 65 of the bill, which would authorise exemption of any agreement or class of agreement from the application of the Credit Contracts and Consumer Finance Act 2003 by Order in Council. We were concerned that clause 65 had the potential to greatly reduce the scope of the application of the Act, and suggested the Commerce Committee recommend amending the bill to set out clear purposes and criteria for exemptions, and require that regulations made under that clause include reasons for granting them.

The Commerce Committee recommended that clause 65 be amended to set out clearly the circumstances in which the exemption power could be exercised. The committee also recommended inserting a requirement for the Minister’s reasons relating to an exemption to be published with the regulations. Clause 65 was eventually enacted in the form recommended by the committee, as amended section 138 of the 2003 Act.
Health and Safety Reform Bill

We reported to the Transport and Industrial Relations Committee on issues including the powers in clauses 221(o) and (p), and 223, which would authorise the making of regulations granting exemptions from aspects of the Act. We acknowledged that the exemption powers in clause 221 would be somewhat restrained by the requirements specified in clause 228(1) regarding their exercise. However, we were concerned that clause 223 was far-reaching as it would allow exemptions from the provisions of the Act, not just the regulations.

We recommended that the Transport and Industrial Relations Committee recommend amending the bill to set out clear purposes and criteria for granting exemptions under these provisions, and to require such regulations to include a statement of reasons for granting exemptions.

The Transport and Industrial Relations Committee is yet to report back to the House on the bill.

Significant policy that would more appropriately be included in primary legislation

It is a well-established principle that matters of principle and policy are usually found in primary legislation, while detail and implementation are ordinarily the domain of delegated legislation. The Legislation Advisory Committee guidelines state that “matters of significant policy” should “rarely, if ever, be included in delegated legislation”, and that it would be “very rare” to find objectively justifiable reasons for including such matters in delegated legislation.23

Animal Welfare Amendment Bill

We reported to the Primary Production Committee on the powers in clauses 8, 10, 12 to 14, 16, and 56, the combined effect of which would be to move the regulatory regime governing surgical or painful procedures on animals from primary to secondary legislation. The explanatory note acknowledged that substantial parts of the policy in the bill would be implemented through regulations to be developed after the bill’s passing.

We were concerned that the proposed changes would leave a matter of significant policy—the appropriate use of surgical or painful procedures on animals—to be determined largely by regulations. We observed that this is a controversial matter that attracts considerable public interest. We recommended that the Primary Production Committee consider recommending amending the bill to ensure that these matters of policy and principle were dealt with in primary legislation, rather than being left to regulations, and that key policies and principles provided for in the bill could not be overridden by regulations.

The Primary Production Committee chose to retain the regime governing surgical or painful procedures on animals in secondary legislation. It recommended inserting a new section in clause 13, to define more clearly the term “significant surgical procedure”, and amending clause 56 to require the Minister to have regard to specified matters before recommending the making of regulations under the section. The bill is currently before the House.

23 LAC guidelines, guideline 10.1.2 and 10.1.3.
Broad, open-ended powers

The issue of regulation-making powers that are drawn unduly broadly arises regularly in our work. It is a well-established principle that regulation-making powers should be drafted so as to specify the limits of the delegated legislative power as clearly and precisely as possible.\(^{24}\) The delegated power should not be drawn more broadly than necessary, lest it be used for purposes that were not intended by Parliament. A delegated power that is broad and open-ended may also authorise the making of regulations on matters of substantial policy that would more appropriately be included in primary legislation.

Public Safety (Public Protection Orders) Bill

We reported to the Justice and Electoral Committee on two issues, including clause 122. The bill would empower the High Court to issue a public protection order allowing people to be detained in a secure facility, called a residence in the bill. Clause 122 would authorise the making of regulations for wide-ranging purposes relating to residences and residents.

We were concerned that the purposes for which regulations might be made under clause 122 were broad and general, potentially encompassing significant matters of policy. For example, regulations could confer wide-ranging powers on residence managers, or other persons, on the basis that they were necessary to run residences efficiently (“the good management of residences”). Regulations could impose further restrictions on residents on the basis that it was necessary for public safety (“the safe custody of residents”). We recommended that the Justice and Electoral Committee consider recommending amending the bill so that important matters of policy and principle were dealt with in the bill itself, and clause 122 specified more narrowly and precisely the limits of the delegated power.

The Justice and Electoral Committee left clause 122 largely unamended, but recommended adding a new clause 122(2) that prevented regulations made under clause 122(1) from conferring any additional coercive powers on residence managers. The bill is currently before the House.

Health and Safety Reform Bill

We reported to the Transport and Industrial Relations Committee on the broad delegated power in clause 221(a) and (c)(iii) of the bill. These provisions would authorise the making of regulations imposing “duties and obligations” on workers and persons running workplaces, with the only constraint that these duties and obligations must relate to work health and safety.

We were concerned that regulations made under this power could potentially be used for unforeseen purposes. Part 2 of the bill would already impose extensive health and safety duties on persons running workplaces and workers. Clause 221(a) and (c)(iii) could be used to impose various additional, wide-ranging duties and obligations that would more appropriately be imposed by primary rather than secondary legislation. We also considered that the way the regulation-making powers were worded meant that regulations could potentially impose a more onerous duty on persons running workplaces and workers than that to be imposed by the Act.

We recommended that the Transport and Industrial Relations Committee consider recommending amending clause 221(a) and (c)(iii) to express the delegated powers in

\(^{24}\) Legislation Advisory Committee guidelines, guideline 10.1.7.
narrower and more specific terms, to clarify how any regulations made under these powers would relate to the duties and obligations already set out in Part 2 of the bill.

The Transport and Industrial Relations Committee is yet to present its report on the bill to the House.
5 Complaints

Under Standing Order 316 any person or organisation that is aggrieved at the operation of a regulation may make a complaint to the Regulations Review Committee. In practice we determine first whether there is a prima facie case to answer before formally resolving to proceed or, by unanimous resolution, not to proceed, with the complaint. If we decide to proceed with an investigation the complainants are given the opportunity to address us.25

Although our jurisdiction to investigate complaints is broad, our only remedy is to make recommendations by means of a report to the House or the Government. Under Standing Order 249 the Government must respond to any select committee recommendations within 60 working days after the report has been presented.

In the first half of 2014 we received six complaints, one of which we found to be not made out on first examination. We considered and reported to the House on five complaints, none of which we upheld.

- Complaint regarding the Canterbury Earthquake (Building Act) Order 2011 (SR 2011/311)
- Complaint regarding the Civil Aviation Charges Regulations (No 2) 1991 Amendment Regulations 2012
- Complaint regarding the Exclusive Economic Zone and Continental Shelf (Environmental Effects—Permitted Activities) Regulations 2013 (SR 2013/283)
- Complaint regarding the Legal Services Regulations (payment for legal aid work) 2011 (SR 2011/144)
- Complaint regarding the New Zealand (Australia New Zealand Food Standards Code) Food Standards 2002, Amendment No 53.

The complaints are listed in Appendix D and are available at www.parliament.govt.nz. We have considered a further complaint, which we discuss below.

Complaint regarding the Arms (Military Style Semi-automatic Firearms—Pistol Grips) Order (SR 2013/464)

The order’s function is to define free-standing pistol grips for the purposes of the definition of military style semi-automatic firearms in section 2 of the Arms Act 1983. The complainant cited Standing Order grounds 315(2) (a), (b), and (e)-(i) as the basis of its complaint.

By unanimous decision, we did not uphold the complaint. We consider that the making of the order was consistent with the object of the Act, and the intentions of the Arms Act as a whole, and did not breach the Standing Orders grounds. In our view, there cannot be, as the complainant claimed, a trespass against personal rights or liberties, as there is no statutory right to possess or own a component of a firearm. We found that the order does

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25 The Office of the Clerk produces a booklet, Making a Complaint to the Regulations Review Committee, to assist potential complainants. It is available online at New Zealand Parliament – Making a complaint to the Regulations Review Committee.
not exclude the jurisdiction of the Courts as claimed. We considered that the order does not contain matters of broad policy or substance more appropriate to primary legislation, on the basis that it simply describes a component of a definition in the Arms Act, in accordance with the legislative power delegated by Parliament in section 74A(a) of the Act and does not introduce new policy.
6 Briefings

The Regulations Review Committee can consider any matter relating to regulations and report on it to the House if it considers this to be necessary. Where we thought matters required further investigation, we sought briefings from the appropriate bodies.

**Regulations that incorporate standards by reference**

The committee initiated this briefing from Standards New Zealand prompted by the committee’s routine scrutiny of the Energy Efficiency (Energy Using Products) Amendment Regulations 2013 (SR 2013/28), which incorporated a number of standards by reference into the Energy Efficiency (Energy Using Products) Regulations 2002.

Our key concern was the accessibility of the law. Although the standards incorporated by reference formed part of New Zealand law, users would nevertheless have to pay to access the standards—and thus the law—instead of being able to access them for free.

Standards New Zealand told us that it has identified 1,186 individual standards incorporated by reference in 238 different instruments or documents by 19 different regulators. It considers its charges are fair and comparable internationally. It believes its charges for standards meet the Legislation Advisory Committee’s guidelines, and notes that standards are freely available in libraries in hard copy (with a strict prohibition on borrowing or copying them), and electronically in read-only format; and concessions are available for students and academics. Some trade organisations provide access as part of their membership. Standards are subject to copyright and intellectual property rights generally, but Standards New Zealand tries to minimise the flow-on of costs to consumers.

We do appreciate that Standards New Zealand receives no public funding, and that it must recover its costs; however our concerns remain.

**Productivity Commission’s inquiry into regulatory institutions and practices**

The Productivity Commission published the draft report *Regulatory institutions and practices* in March 2014. The report described its purpose as developing recommendations “to improve the design of new regulatory regimes and make system-wide improvements to the operation of existing regulatory regimes in New Zealand”.

The report was a draft; at the time of our hearing submissions were still open. The final report was delivered to Ministers on 30 June 2014, and published on 16 July 2014.

The commission told us that it believes that primary legislation should be confined to setting out objectives and intentions, and make provision for secondary and tertiary legislation to hold the operative parts as this would allow changes to be made easily, should they be necessary. The commission considered this particularly important in areas of law that are liable to change quickly or frequently, and argued it would make primary legislation last longer.
We have serious concerns about the commission’s proposed approach. We consider it important that matters of significant policy and principle remain in primary legislation, rather than being pushed to delegated legislation, because these are matters that it is appropriate for Parliament to decide. If powers to make delegated legislation are drawn too broadly, it is difficult for Parliament to retain control over the way in which those powers are used.

We discussed with the commission the future of regulation making in New Zealand, and various ways to increase the efficiency of regulation-makers and make the process easier for them. The commission told us that it believes that oversight of the regulatory system by a senior Minister in Cabinet would be beneficial, and allow more strategic oversight and prioritisation of the maintenance of existing regulations.

We would encourage close consideration by the Regulations Review Committee of the 51st Parliament of the recommendations in the Productivity Commission’s report *Regulatory institutions and practices* regarding the work of the Regulations Review Committee.
Appendix A

Committee members
Hon Maryan Street (Chairperson)
Andrew Little
Ian McKelvie
Mike Sabin
Hon Chris Tremain
Appendix B

Standing Orders 181 and 314 to 316

181 Establishment and life of select committees

(1) The following select committees are established at the commencement of each Parliament:
   (a) ……………
   (b) the Officers of Parliament Committee, the Privileges Committee, the Regulations Review Committee and the Standing Orders 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 311, 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.
Definition of disallowable instruments contained in section 38 of the Legislation Act 2012

38 Disallowable instruments

(1) An instrument made under an enactment is a **disallowable instrument** for the purposes of this Act if 1 or more of the following applies:

   (a) the instrument is a legislative instrument:

   (b) that enactment or another enactment contains a provision (however expressed) that has the effect of making the instrument disallowable for the purposes of this Act:

   (c) the instrument has a significant legislative effect.

(2) However, an instrument is not a disallowable instrument for the purposes of this Act if the instrument—

   (a) is made or approved by a resolution of the House of Representatives; or

   (b) is one that the House of Representatives could, by resolution, prevent from coming into force or taking effect; or

   (c) is one made by a court, Judge, or person acting judicially.

(3) A bylaw that is subject to the Bylaws Act 1910 is not a disallowable instrument for the purposes of this Act.

(4) This section is subject to other enactments that limit or affect when, or the extent to which, a kind of instrument is a disallowable instrument for the purposes of this Act.

Definition of legislative instrument on and after 5 August 2013 contained in section 4 of the Legislation Act 2012

4 Interpretation

In this Act, unless the context otherwise requires,—

... legislative instrument means—

(a) an Order in Council other than—

   (i) an Order in Council that the empowering Act requires to be published in the Gazette:

   (ii) an Order in Council that relates exclusively to an individual:

(b) an instrument made by a Minister of the Crown that amends an Act or defines the meaning of a term used in an Act:

(c) an instrument that an Act requires to be published under this Act:

(d) resolutions of the House of Representatives that—

   (i) revoke a disallowable instrument in whole or in part; or
(ii) amend a disallowable instrument; or
(iii) revoke and substitute a disallowable instrument

Definition of regulations in section 29 of the Interpretation Act 1999

29 Definitions

In an enactment,—

... regulations means—

(a) regulations, rules, or bylaws made under an Act by the Governor-General in Council or by a Minister of the Crown:
(b) an Order in Council, Proclamation, notice, Warrant, or instrument, made under an enactment that varies or extends the scope or provisions of an enactment:
(c) an Order in Council that brings into force, repeals, or suspends an enactment:
(d) regulations, rules, or an instrument made under an Imperial Act or the Royal prerogative and having the force of law in New Zealand:
(e) an instrument that is a legislative instrument or a disallowable instrument for the purposes of the Legislation Act 2012:
(f) an instrument that revokes regulations, rules, bylaws, an Order in Council, a Proclamation, a notice, a Warrant, or an instrument, referred to in paragraphs (a) to (e).
Appendix D

Regulations Review Committee reports published separately during the first part of 2014

Activities of the Regulations Review Committee in 2012 (I.16E)

Activities of the Regulations Review Committee in 2013 (I.16G)

Complaint regarding the Canterbury Earthquake (Building Act) Order 2011 (SR 2011/311)

Complaint regarding the Civil Aviation Charges Regulations (No 2) 1991 Amendment Regulations 2012

Complaint regarding the Exclusive Economic Zone and Continental Shelf (Environmental Effects—Permitted Activities) Regulations 2013 (SR 2013/283)

Complaint regarding the Legal Services Regulations (payment for legal aid work) 2011 (SR 2011/144)

Complaint regarding the New Zealand (Australia New Zealand Food Standards Code) Food Standards 2002, Amendment No 53

Inquiry into the oversight of disallowable instruments that are not legislative instruments (I.16H)

Regulation-making powers that authorise transitional regulations to override primary legislation (I.16J)
Appendix E

List of legislative instruments where information was sought by the committee

The following is a list of legislative instruments where the committee sought particular information from the relevant government department or ministry. This list does not include those legislative instruments where the only information sought was an explanation as to why the instrument did not comply with the Cabinet Manual’s 28-day rule.

Accident Compensation (Earners-Levy) Regulations 2014 (LI 2014/30)

Accident Compensation (Work Account Levies) Regulations 2014 (LI 2014/32)

Auctioneers Regulations 2014 (LI 2014/55)

Civil Aviation Charges Regulations (No 2) 1991 Amendment Regulations 2014 (LI 2014/25)

District Court Fees (Trans-Tasman Proceedings Act 2010—Australian Judgments) Amendment Regulations 2013 (SR 2013/348)

Exclusive Economic Zone and Continental Shelf (Fees and Charges) Regulations 2013 (SR 2013/284)

Fisheries (High Seas Fishing Notifications—Commission for the Conservation of Antarctic Marine Living Resources) Amendment Notice 2014 (LI 2014/2)

Fisheries (High Seas Fishing Notifications—Commission for the Conservation of Southern Bluefin Tuna) Amendment Notice 2014 (LI 2014/1)

Gambling (Non-gambling Activities) Regulations 2013 (SR 2013/392)

Health and Safety in Employment (Mining Operations and Quarrying Operations) Regulations 2013 (SR 2013/483)

Judicial Salaries and Allowances Determination 2013 (SR 2013/498)

Land Transport (Driver Licensing and Driver Testing Fees) Amendment Regulations (No 2) 2013 (SR 2013/326)

Sale and Supply of Alcohol (Fees) Regulations 2013 (SR 2013/452)

Shipping (Charges) Regulations 2014 (LI 2014/26)

Social Security (Childcare Assistance) Amendment Regulations (No 3) 2013 (SR 2013/372)

Social Security (Rates of Benefits and Allowances) Order 2014 (LI 2014/39)
Appendix F

List of disallowable instruments that are not legislative instruments where information was sought by the committee

The following is a list of disallowable instruments that are not legislative instruments where the committee sought particular information from the responsible government department or agency.

**Electricity governance**

Electricity Industry Participation (Time Frames for Invoicing) Code Amendment 2013

Electricity Industry Participation (Metering Arrangements) Code Amendment 2011, Amendment 2013 (No 2)

Electricity Industry Participation (Metering Arrangements) Code Amendment 2013

Electricity Industry Participation (Additional Registry Fields) Code Amendment 2012, Amendment 2013 (No 2)


Electricity Participation (HVDC Link Bipole Control System Testing) Code Amendment 2013

Electricity Industry Participation (Technology Neutral Language in Frequency Keeping) Code Amendment 2013

Electricity Industry Participation (Revocation of Standard Tariff Codes Requirement) Code Amendment 2013

Electricity Participation (Metering Arrangements) Code Amendment 2011, Amendment 2013 (No 3)

**Racing**

Amendments to the New Zealand Rules of Harness Racing 2013

**Miscellaneous**

Sports Anti-Doping Rules (2013)

Takeovers Code (Smith & Caughey Holdings Limited) Exemption Notice 2013

Customs (Volume of Alcohol) Rules 2013

Notice for the Call for the Provision of Electricity-Related Contracts (Aluminium Smelting) Notice 2013

**Medical**

The Psychotherapists Board of Aotearoa New Zealand (Fees) Notice 2013

**Banking**

Registered Bank Disclosure Statements (New Zealand Incorporated Registered Banks) Order (No 2) 2013
Registered Banks Disclosure Statements (Overseas Incorporated Registered Banks) Order (No 2) 2013

Solvency Standard for Civic Assurance

**Land Transport Rules**

Land Transport Rule: Vehicle Standards Compliance Amendment (No 2) 2013

**Food Standards**

New Zealand (Maximum Residue Limits of Agricultural Compounds) Food Standards 2013

New Zealand (Maximum Residue Limits of Agricultural Compounds) Food Standards 2012, Amendment 3
Regulation-making powers that authorise transitional regulations to override primary legislation

Report of the Regulations Review Committee

Fiftieth Parliament
(Hon Maryan Street, Chairperson)
July 2014

Presented to the House of Representatives
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AUTHORISING TRANSITIONAL REGULATIONS TO OVERRIDE PRIMARY LEGISLATION
1 Introduction

Recommendation

The Regulations Review Committee recommends that the Government note this report and take steps to limit the use of transitional override powers in legislation in accordance with the principles identified in this report and the Regulations Review Committee report of 1995.

The Regulations Review Committee can consider any matter relating to regulations and report on it to the House.1 Earlier in this Parliament, in our work scrutinising regulation-making powers in bills before select committees, we became aware of the use of a particular type of regulation-making power. Powers of this type allow the making of regulations that can amend or override primary legislation during a specified transitional period. In this report, we refer to these powers as “transitional override powers”.

Transitional override powers

A transitional override power is a type of Henry VIII provision, because it authorises delegated legislation to amend, suspend, or override primary legislation. The established principle regarding the use of Henry VIII provisions, which we endeavour to uphold, is that they should be avoided unless “demonstrably essential”.2 This reflects the constitutional principle that primary legislation should not be amended by delegated legislation.

A current example of a transitional override power in a bill before the House is clause 225 of the Health and Safety Reform Bill:

225 Regulations providing for transitional matters

(1) The Governor-General may, by Order in Council made on the recommendation of the Minister, make regulations—

(a) providing transitional and savings provisions concerning the coming into force of this Act that may be in addition to, or in place of, the transitional and savings provisions in Schedule 1:

(b) providing that, subject to such conditions as may be specified in the regulations, during a specified transitional period,—

(i) specified provisions of this Act (including definitions) do not apply:

(ii) specified terms have the meaning given to them by the regulations:

(iii) specified provisions repealed or amended or revoked by this Act are to continue to apply:

1 Standing Order 314(4).

(c) providing for any other matters necessary for facilitating or ensuring an
orderly transition from the provisions of any enactments replaced by this
Act to the provisions of this Act.

(2) No regulations made under this section may be made, or continue in force,
later than 2 years after the date on which this section commences.

The effect of clause 225 is that, for the two years after it comes into force, regulations
made under it could

- add to or replace the transitional provisions in Schedule 1 of the Act
- disapply any provision of the Act
- modify the meaning of specified terms, regardless of whether they are in the Act
- reinstate any provision repealed, amended, or revoked by the Act.

**Purpose of this report**

In October 2012, we initiated a briefing on transitional override powers. We sought
evidence as to whether such powers were being used increasingly in bills. We also wanted
to gather evidence about any potential risks or difficulties that might arise from their use.

This report publishes the key evidence we received. It also tracks the use of transitional
2 Principles set down by Regulations Review Committee

In 1995, the Regulations Review Committee identified principles that should apply to the use of transitional override powers. This table summarises those principles.

**Principles applying to the use of transitional override powers**

<table>
<thead>
<tr>
<th>Principle</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 A provision that allows the making of regulations to amend the empowering Act should be used only in exceptional circumstances and should not be used routinely in reforming legislation.</td>
</tr>
<tr>
<td>2 A complex reform involving the amalgamation of a large number of statutes may justify the use of an empowering provision allowing regulations to override the primary legislation, while essentially technical amendments or a rewrite of an existing Act which does not amount to a substantial change in the principles and context do not.</td>
</tr>
<tr>
<td>3 A regulation-making provision that provides for regulations to override primary legislation should be drafted in the most specific and limited terms possible and must at all times be consistent with and in support of the provisions of the empowering Act.</td>
</tr>
<tr>
<td>4 Any such provisions should always have a limited lifespan of no more than 3 years, which should generally be sufficient to allow adequate time for addressing any technical difficulties that arise.</td>
</tr>
<tr>
<td>5 Regulations made pursuant to such an empowering clause should also include a sunset provision not exceeding 3 years.</td>
</tr>
<tr>
<td>6 Where an empowering provision contains a sunset clause with a life of more than 3 years, regulations made pursuant to such a provision should be subject to parliamentary confirmation.</td>
</tr>
</tbody>
</table>

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4 The committee made two further recommendations which were not accepted by the government in its response to the report, and are not included in the table: see Government Response to Report of Regulations Review Select Committee 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, [1993-1996] XLIV AJHR I.20.
3 Work by the committee in this Parliament

Evidence and advice

We first discussed transitional override powers in May 2012. The chairperson at the time asked the committee’s legal advisers for a written briefing on these powers. Our advisers found that, compared with 20 years earlier, transitional override powers were being drafted in increasingly broad and novel language, rather than narrow and consistent terminology, and were subject to marked variations in the conditions that apply to their use. The briefing we received from the Chief Legislative Counsel is attached as Appendix B.

On 25 October 2012, we initiated a briefing on regulation-making powers that authorise transitional regulations to override primary legislation. We invited written evidence from Professor John Burrows, which is attached as Appendix C. We then took oral evidence on this matter from Professor John Burrows and the Acting Chief Parliamentary Counsel, in November 2012. A transcript of this evidence is attached as Appendix D.

Following the hearing of evidence, we wrote to the Legislation Advisory Committee, inviting its response to specific questions that arose from the hearing. The response we received from the LAC is attached as Appendix E.

Scrutinising regulation-making powers in bills

We seek to examine the regulation-making powers in every bill referred to select committee. In the current Parliament, we have reported to the relevant select committee on transitional override powers in the following bills:

Child Support Amendment Bill
Health and Safety Reform Bill
Housing Accords and Special Housing Areas Bill
Land Transport Management Amendment Bill
Resource Management Reform Bill
Social Security (Benefit Categories and Work Focus) Amendment Bill

Legislative Counsel also advised Parliamentary Counsel on a transitional override power in the Student Loan Scheme Amendment Bill (No 2) during a summer period when the committee was not scheduled to meet.5

We have also reported to the House on regulations made under the authority of a transitional override power. Our investigation into the Road User Charges (Transitional Matters) Regulations 2012 resulted in regulations 5(3), 5(4), and 8 being disallowed by the House at the close of 27 February 2013, in accordance with section 6 of the Regulations (Disallowance) Act 1989.6 The regulations were made under the authority of section 90 of

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the Road User Charges Act 2012, a transitional override power that the Transport and Industrial Relations Committee had recommended be inserted into the Road User Charges Bill when it reported it to the House.7

Since 2000, transitional override powers have been recommended by select committees for insertion into bills on nine occasions, and included in bills at Committee of the Whole House stage on two occasions (see Appendix F). When regulation-making powers are inserted into a bill after introduction, it is generally the case that this committee is unable to scrutinise them, because we are not aware of their inclusion. We have discussed this problem at greater length in our 2013 report, Investigation into the Road User Charges (Transitional Exemption for Certain Farmers’ Vehicles) Regulations 2013 (SR 2013/10).8

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7 For a discussion of this, see Regulations Review Committee, Investigation into the Road User Charges (Transitional Exemption for Certain Farmers’ Vehicles) Regulations 2013 (SR 2013/10), 12 August 2013, p. 11.
8 Ibid., pp. 11 and 12.
4 Risks of transitional override powers

We have identified potential risks of transitional override powers in both our 2012 and 2013 activities reports.\(^9\) We have said that we remain concerned that such powers present a number of risks if unchecked:

- Over time they could come to be seen as an acceptable means of modifying or overriding primary legislation without reference to Parliament.
- They could become an ordinary feature of legislation, rather than applying only in rare and exceptional circumstances.
- Their growing prevalence would compound their precedent effect.
- The language and scope of the provisions could become even broader, eventually even extending beyond technical and machinery matters to substantive policy, and thus constituting an abuse of the power.
- Making regulations that allow for transitional and savings provisions in the transition between statutory regimes could lead to a slipshod approach to policy development and drafting, with the regulations effectively providing for “back-filling” undeveloped policy or legislative gaps.
- Increasingly, transitional issues could be relegated to regulations rather than dealt with in primary legislation; important transitional arrangements (for the continuation of existing legal rights under a new statutory regime, for example) can be of critical interest to the public.

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In this Parliament, we have monitored the prevalence of transitional override powers in recent legislation.

These empowering provisions appear to have been increasingly included in legislation over the past 20 years. In 1995, when the committee established principles that should apply to the use of transitional override powers, it cited only eight examples of such provisions. By contrast, we have found that, since 2000, a total of 27 Acts have been passed containing these empowering provisions. Three bills including these powers are currently before the House.

The following table lists the Acts passed or bills introduced since 2000 that have included transitional override powers. A more detailed version of this table is attached as Appendix F.

**Acts passed or bills introduced since 2000 that include transitional override powers**

<table>
<thead>
<tr>
<th>Year enacted</th>
<th>Act (or Bill)</th>
<th>Section (or clause)</th>
</tr>
</thead>
<tbody>
<tr>
<td>2014</td>
<td>Health and Safety Reform Bill</td>
<td>225</td>
</tr>
<tr>
<td>2013</td>
<td>Child Support Act 1991</td>
<td>Schedule 1, clause 8</td>
</tr>
<tr>
<td></td>
<td>Financial Markets Conduct Act 2013</td>
<td>547</td>
</tr>
<tr>
<td></td>
<td>Housing Accords and Special Housing Areas Act 2013</td>
<td>Schedule 3, clause 4</td>
</tr>
<tr>
<td></td>
<td>Land Transport Management Act 2003</td>
<td>159</td>
</tr>
<tr>
<td></td>
<td>Social Security Act 1964</td>
<td>Schedule 32, clause 17</td>
</tr>
<tr>
<td></td>
<td>Student Loan Scheme Act 2011</td>
<td>Schedule 6, clause 17</td>
</tr>
<tr>
<td>2012</td>
<td>Road User Charges Act 2012</td>
<td>90</td>
</tr>
<tr>
<td></td>
<td>Search and Surveillance Act 2012</td>
<td>356</td>
</tr>
<tr>
<td>Year</td>
<td>Act (or Bill)</td>
<td>Section (or clause)</td>
</tr>
<tr>
<td>------------</td>
<td>-------------------------------------------------------------------------------</td>
<td>---------------------</td>
</tr>
<tr>
<td>2011</td>
<td>Criminal Procedure Act 2011</td>
<td>408</td>
</tr>
<tr>
<td></td>
<td>Kiwisaver Amendment Act 2011</td>
<td>71</td>
</tr>
<tr>
<td></td>
<td>Legal Services Act 2011</td>
<td>114</td>
</tr>
<tr>
<td></td>
<td>Student Loan Scheme Act 2011</td>
<td>216</td>
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<tr>
<td>2010</td>
<td>Environment Canterbury (Temporary Commissioners and Improved Water Management) Act 2010</td>
<td>31</td>
</tr>
<tr>
<td></td>
<td>Financial Advisers Act 2008</td>
<td>154</td>
</tr>
<tr>
<td></td>
<td>Insurance (Prudential Supervision) Act 2010</td>
<td>237</td>
</tr>
<tr>
<td>2009</td>
<td>Electoral Amendment Act 2009</td>
<td>23</td>
</tr>
<tr>
<td></td>
<td>Immigration Act 2009</td>
<td>472</td>
</tr>
<tr>
<td>2008</td>
<td>Financial Advisers Act 2008</td>
<td>154</td>
</tr>
<tr>
<td></td>
<td>Land Transport Management Amendment Act 2008</td>
<td>Schedule 2, clause 43</td>
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<tr>
<td>2007</td>
<td>Children, Young Persons, and Their Families Amendment Bill (No 6)</td>
<td>75</td>
</tr>
<tr>
<td></td>
<td>Discharged, 12 March 2012</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Public Health Bill</td>
<td>378</td>
</tr>
<tr>
<td>2006</td>
<td>Kiwisaver Act 2006</td>
<td>71</td>
</tr>
<tr>
<td></td>
<td>Plumbers, Gasfitters, and Drainlayers Act 2006</td>
<td>172</td>
</tr>
<tr>
<td></td>
<td>Therapeutic Products and Medicines Bill</td>
<td>539</td>
</tr>
<tr>
<td>2004</td>
<td>Crown Entities Act 2004</td>
<td>199</td>
</tr>
<tr>
<td>2003</td>
<td>Land Transport Management Act 2003</td>
<td>112</td>
</tr>
<tr>
<td>2001</td>
<td>Accident Compensation Act 2001</td>
<td>349</td>
</tr>
<tr>
<td></td>
<td>Local Electoral Act 2001</td>
<td>144</td>
</tr>
</tbody>
</table>
The following graph illustrates the prevalence of transitional override powers on the basis of the year in which the power was introduced to the bill.

The graph suggests that the incidence of transitional override powers in bills may be decreasing. The data must be treated with caution, because the numbers are small, and factors such as the timing of general elections may have an effect. Nevertheless, we are pleased to see this apparent decrease. We recommend that the Government note this report and take steps to limit the use of transitional override powers in legislation in accordance with the principles identified in this report and the Regulations Review Committee report of 1995.

The Regulations Review Committee will continue to monitor this practice closely.
Appendix A

Committee procedure
We met between 24 May 2012 and 3 July 2014 to consider this report.

Committee members
Hon Maryan Street (Chairperson)
Andrew Little
Ian McKelvie
Mike Sabin
Hon Chris Tremain
Appendix B: Advice from Chief Legislative Counsel, May 2012

Office of the Clerk of the House of Representatives

Te Tari o te Manahautū o te Whare Māngai

17 May 2012

Members
Regulations Review Committee

Empowering provisions for transitional regulations

Purpose
1 The purpose of this memorandum is to brief the Regulations Review Committee about the use of empowering provisions which allow regulations to be made that can amend or override primary legislation during a specified transitional period.

Executive summary
2 In summary, this memorandum notes that the use of such empowering provisions is increasing and they are now appearing commonly in routine legislation (for example, rewrites of existing Acts) instead of only being targeted towards complex legislative reforms. They are also being drafted in increasingly broad and novel language rather than using narrow and consistent terminology. Furthermore, there are marked variations in the conditions that apply to their use. Overall, the principles relating to the use of these empowering provisions that were recommended by a previous Regulations Review Committee are frequently being departed from which indicates that these principles appear to have been lost sight of by departmental officials and drafters. Accordingly, it seems timely to review this issue given recent developments.

3 It is recommended that the Regulations Review Committee consider conducting an inquiry into the appropriateness of empowering provisions for transitional regulations that can amend or override an Act.

Background
4 As a matter of general principle, only Parliament should be able to amend Acts. However, an Act may sometimes contain empowering provisions that allow amendments to be made to the Act by regulations (so-called Henry VIII clauses). It is generally considered that these clauses are undesirable and should not be used unless demonstrably essential. There are some limited occasions, however, when the use of these clauses may be justified. An example is a situation involving the transition from one statutory regime to another following a large and complex legislative reform.
The Regulations Review Committee previously expressed its views on the use of Henry VIII clauses for dealing with transitional issues in its inquiry into the Resource Management (Transitional) Regulations 1994. In its report on that inquiry, the Regulations Review Committee recommended a number of principles to apply to the use of empowering provisions that allow regulations to amend or override an Act during a transitional period. Those principles are as follows:

- a provision allowing for the making of regulations to amend the empowering Act should only be used in exceptional circumstances and should not be used routinely in reforming legislation;
- a complex reform involving the amalgamation of a large number of statutes may justify the use of an empowering provision allowing for regulations to override the primary legislation, while essentially technical amendments or a rewrite of an existing Act which does not amount to a substantial change in the principles and context do not;
- a regulation-making provision which provides for regulations to override primary legislation should be drafted in the most specific and limited terms possible and must at all times be consistent with and in support of the provisions of the empowering Act;
- any such provisions should always have a limited lifespan of no more than 3 years as this period should generally be sufficient to allow adequate time for addressing any technical difficulties that may arise;
- regulations made pursuant to such an empowering clause should also contain a sunset provision not exceeding 3 years;
- if and where an empowering provision contains a sunset clause of more than 3 years, regulations made pursuant to such a provision should be subject to parliamentary confirmation.

Current trends

The table below shows the prevalence of empowering provisions for transitional regulations in Acts and Bills passed or introduced since 2001.

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<table>
<thead>
<tr>
<th>Year</th>
<th>Number of Acts passed or Bills introduced with empowering provisions for transitional regulations</th>
<th>Act/Bill</th>
</tr>
</thead>
</table>
| 2012 | 2                                                                                               | Road User Charges Act 2012, s 90  
Search and Surveillance Act 2012, s 356 |
| 2011 | 3                                                                                               | Criminal Procedure Act 2011, s 408  
Financial Markets Conduct Bill, cl 521  
Legal Services Act 2011, s 114 |
| 2010 | 2                                                                                               | Insurance (Prudential Supervision) Act 2010, s 237  
| 2009 | 2                                                                                               | Electoral Amendment Act 2009, s 23  
Immigration Act 2009, s 472 |
| 2008 | 1                                                                                               | Financial Advisers Act 2008, s 154 |
| 2007 | 2                                                                                               | Children, Young Persons, and Their Families Amendment Bill, cl 75  
Public Health Bill, cl 378 |
| 2006 | 3                                                                                               | KiwiSaver Act 2006, s 71  
Plumbers, Gasfitters, and Drainlayers Act 2006, s 172  
Therapeutic Products and Medicines Bill, cl 539 |
| 2005 | -                                                                                               | - |
| 2004 | 1                                                                                               | Crown Entities Act 2004, s 199 |
| 2003 | 1                                                                                               | Land Transport Management Act 2003, Schedule 2, cl 43 |
| 2002 | -                                                                                               | - |
| 2001 | 1                                                                                               | Accident Compensation Act 2001, s 349 |
| **Total** | **18**                                                                                           | **Total 18** |

Footnotes:

7 From 2001 to the present, a total of 18 Acts and Bills have been passed or introduced containing empowering provisions for transitional regulations that can amend or override primary legislation. Of this total, 15 provisions have appeared in the last 6 years. By comparison, only 8 examples of such empowering provisions were cited by the Regulations Review Committee in the report on its 1994 inquiry. Until recently, these provisions were less common in New Zealand legislation and the increasing use of these empowering provisions seems, therefore, to be a recent development.

2 This total excludes Acts and Bills that provide for transitional matters to be dealt with by regulations but do not allow modifications to be made to the Act by regulations.

3 This number includes the Resource Management (Transitional) Regulations 1994 that were the subject of that inquiry.
The recent examples of legislation containing these empowering provisions include large and complex legislative reforms (for example, the Criminal Procedure Act 2011), as well as revisions of existing Acts (for example, the Legal Services Act 2011 and the Road User Charges Act 2012). While the need for these provisions may be justified in complex legislative reforms where anomalies, discrepancies, and mistakes are more likely to arise and to require remedial action, it is less clear that they are demonstrably essential in respect of rewrite Acts.

The empowering provisions used in recent legislation range from the limited authority to add to, or replace, the original transitional and savings provisions contained in primary legislation (for example, see s 199 Crown Entities Act 2004) to the very wide general powers identical to that contained in s 360(1)(g) of the Resource Management Act 1991 (RMA) which was the subject of the 1994 inquiry of the Regulations Review Committee. The recent examples of empowering provisions that use the same formulation as in s 360(1)(g) of the RMA have largely the same substantive effect as that provision, but are formatted and paragraphed differently from that earlier model to reflect more current drafting practice (see the wording of s 360(1)(g) of the RMA and the corresponding wording of recent legislation in the Appendix).

However, some of the empowering provisions contained in recent legislation have also extended their scope even more widely than s 360(1)(g) of the RMA. For example, s 8(1)(d) of the Local Government (Auckland Transitional Provisions) Act 2010 authorises regulations to be made to “make provision for a situation for which no or insufficient provision is made by or under this Act”. Another example is s 408(1)(d) of the Criminal Procedure Act 2011 which allows regulations to be made to provide “for any other matters necessary for facilitating or ensuring an orderly transition from the provisions of any enactments replaced by this Act to the provisions of this Act”. Of these two examples, the wording of s 5(1)(d) of the Local Government (Auckland Transitional Provisions) Act 2010 is of particular concern as it provides for an open-ended power to amend the Act without any obvious constraints. Given the breadth and novelty of this power, the enactment of this kind of provision may set an undesirable precedent to be followed in future legislation.

There are also wide variations in the conditions that apply to the use of these empowering provisions. For instance, some Acts containing empowering provisions for transitional regulations provide for the expiry of the regulation-making power but not the regulations, and vice versa. There are also inconsistencies in the time limit for the expiry of these provisions. Some Acts and Bills provide for a sunset period not exceeding 3 years as recommended by the previous Regulations Review Committee (for example, s 90 of the Road User Charges Act 2012), but others specify a much longer timeframe such as 7 years (for example, s 71 of the Kiwisaver Act 2006). Other provisions do not provide for any expiry of the regulation-making power or the regulations (for example, clause 378 of the Public Health Bill). Also none
of the examples that lack a sunset provision or have a lifespan of more than 3 years provide for the regulations to be subject to parliamentary confirmation as recommended by the previous Regulations Review Committee.

12 There is also variation in the specification of procedural preconditions that must be satisfied before the regulation-making power can be used, with some empowering provisions specifying such preconditions but others containing none. For example, s 154(6) of the Financial Advisers Act 2008 requires the Minister to be satisfied that regulations are consistent with the purpose of the Act before recommending that they be made. However, by contrast, section 5 of the Local Government (Auckland Transitional Provisions) Act 2010 contains, as noted above, an extremely broad power to make transitional regulations but does not include any procedural constraints governing the exercise of that power.

13 Overall, the matters described in paragraphs 7 to 12 suggest that the principles relating to the use of these empowering provisions that were recommended by the previous Regulations Review Committee are frequently being departed from which indicates that the principles set down by that committee have been lost sight of by departmental officials and drafters. Accordingly, it seems timely to review this issue given recent developments.

Discussion

14 The increasing use of empowering provisions which allow for transitional regulations that can amend or override primary legislation presents a number of risks if left unchecked. Those risks include the following:

- over time the provisions could be seen as an acceptable means of modifying or overriding primary legislation without reference to Parliament;
- the provisions could become an ordinary feature of legislation, rather than applying only in rare and exceptional circumstances;
- the growing prevalence of the provisions will add to their precedential effect;
- the language and scope of the provisions will become even broader and will not necessarily be limited to providing for technical and machinery matters but could extend to substantive policy and constitute an abuse of the power;
- the ability to make regulations that allow for transitional and savings provisions required to support the transition from one statutory regime to another could lead to a slippage in approach to policy development and drafting as the regulations will effectively be providing a “safety net” that can be used at a later time to “back-fill” undeveloped policy or unforeseen legislative gaps;
- increasingly transitional issues could be left to be dealt with by regulations rather than by primary legislation and matters relating to significant transitional arrangements of critical interest to the public (for example, the continuation of existing legal rights under a new statutory regime) could be left to regulations.
Recommendation

15 I consider that the recent developments relating to the use of empowering provisions for transitional regulations establish a clear case for review by the Regulations Review Committee.

16 I recommend that the Regulations Review Committee consider conducting an inquiry into the appropriateness of empowering provisions for transitional regulations that can amend or override an Act.

Renato Guzman
Chief Legislative Counsel
Appendix

Examples of wording of empowering provisions circa 1991 and 2012

S 360(1)(g) of the Resource Management Act 1991 states:

“(1) The Governor-General may from time to time, by Order in Council, make regulations for all or any of the following purposes:

...(g) prescribing transitional and savings provisions relating to the coming into force of this Act, which may be in addition to or in place of any of the provisions of Part 15; and without limiting the generality of the foregoing, any such regulations may provide that, subject to such conditions as are specified in the regulations, specified provisions of this Act shall not apply, or specified provisions of Acts repealed or amended by this Act, or of regulations, Orders in Council, notices, schemes, rights, licenses, permits, approvals, authorisations, or consents made or given thereunder shall continue to apply, during a specified transitional period”.

S 356 of the Search and Surveillance Act 2012 states:

“(1) The Governor-General may, by Order in Council, make regulations-

(a) providing transitional and savings provisions concerning the coming into force of this Act, which may be in addition to or in place of the transitional and savings provisions of this Part;

(b) to facilitate the bringing into force of any regulations under this Act;

(c) providing that subject to such conditions as are specified in the regulations, during a specified transitional period,-

(i) specified provisions of this Act (including definitions) do not apply;

(ii) specified terms have the meanings given to them by regulations;

(iii) specified provisions repealed or amended by this Act are to continue to apply;

(d) providing for any other matters necessary for facilitating or ensuring an orderly transition from the provisions of any enactments replaced by this Act to the provisions of this Act.

(2) No regulations made under this section may be made, or continue in force, after 1 April 2017.”
Appendix C: Written evidence from Professor John Burrows, November 2012

BRIEFING TO REGULATIONS REVIEW COMMITTEE ON EMPOWERING PROVISIONS FOR TRANSITIONAL REGULATIONS

BY J.F. BURROWS

The problem

In New Zealand there is not much pure consolidation – i.e. Acts which simply restate the law to make it clearer. A typical new Act these days contains changes in policy, often very substantial. Most major new Acts repeal and replace a number of earlier Acts, sometimes a very large number.

Some of the law’s most difficult questions can arise from the transition from the old to the new. When does the new Act take over? Do all its provisions do so at the same time? What happens to matters already in place or in progress under the old legislation? What is the relationship of the new Act to others of a related kind? The Interpretation Act 1999 contains some very general guidance about this, but it is too general to cover the variety of circumstances which can arise. So most new Acts contain express transitional provisions which lay down detailed rules to cover situations which are likely to arise. But it is well known that they are just about the hardest provisions to get right. Sometimes they end up in court, and courts occasionally comment about the difficulties to which they can give rise. Sir Ivor Richardson once said:

The dismal experience of those who work with legislation is that special transitional and savings provisions... often tend to become complex which adds to difficulties of interpretation.

It is not within the realms of human capability to foresee and provide for every eventuality in advance. Ironically the more detailed the transitional provision is, the more chances there may be that something may occur which does not quite fit within the detailed words. There has to be a device for resolving this problem. An amending Act is not usually the answer because it is too slow and cumbersome, and would in any event weigh Parliament down with technical detail - if indeed it ever reached the top of the order paper. So the device most commonly used is to provide in the Act for the making of regulations to solve transitional problems which are not covered by the express transitional provisions in the Act itself.

Some of these regulation making powers simply allow for the addition of new transitional provisions to those already existing, but many of them are what are called “Henry VIII clauses” in that they enable a regulation to change or override the words of the Act itself. Such clauses enable the executive to override the word of Parliament. Parliament makes law by open and transparent process with opportunity for scrutiny in select committee, public submisions, and debate in the House by which those opposing the Bill can express their views. A Henry VIII clause allows the executive to
override statutory provisions passed by Parliament with none of these safeguards. Not all Henry VIII clauses are equally objectionable – some do little more than allow for the correction of mistakes. There is even debate about exactly what a Henry VIII clause is – whether, for instance, a clause which extends the scope of an Act without overriding its express words can be so described. In some ways the phrase can obscure principle rather than clarifying it. But the device of allowing Acts to be changed by regulation is clearly capable of misuse, and should only be used with proper checks and balances.

The number of empowering provisions for transitional regulations is increasing. I have been referred to 25 examples over the past 11 years, 12 of them since the beginning of 2010. Two reasons doubtless contribute to this increase. First, legislation is becoming progressively more complex. Most modern Acts are very much longer and more detailed than the Acts they replace. The Search and Surveillance Act 2012 contains over 60 sections amending other Acts and a schedule of 38 pages listing other statutory provisions which are affected by it. The new Financial Markets Bill at 669 pages is more than twice the total length of all five Acts it repeals (the original Securities Act of 1978 was in fact only 70 pages long). The Food Bill currently before Parliament is three times as long as the original Food Act of 1981. This is a reflection not just of the complexity of modern society and business but also of changing methods and theories of regulation.

The second reason is that time pressures in preparing legislation can be considerable. Sometimes departments and drafters have to meet very tight timetables in drafting a very substantial Bill. A good example is the Criminal Procedure Act 2011. This is a much less satisfactory reason than the first. Any incentive to postpone the working out of policy to regulation stage because of time constraints is not to be welcomed. This is not the drafters’ fault. I wish to say here that in my opinion the standard of legislative drafting in this country is second to none in the world. But there are limits to what any drafter can achieve if policy instructions are incomplete because of unreasonably tight timelines.

The increase in the number of such clauses in recent years is notable, although an average of four a year is still scarcely outrageous. Nonetheless continuing vigilance is desirable to ensure that the device is not being used where it does not have to be, and that the proper checks and balances are being observed.

The need for orderly transition

There has to be a device to ensure that unforeseen happenings do not unduly impede an orderly transition from the old to the new. As already stated, regulation empowering provisions are often the most sensible solution. Principle at times has to give way to pragmatism, provided that it is a properly controlled pragmatism. It is perhaps worth pointing out that other initiatives also support the drive for
what I have called orderly transition. First, it is now quite common for Acts to provide that some of
their provisions will come into force by Order in Council and that different provisions can come into
force at different times. That ensures that pragmatic judgements can be made in the light of
experience as to the order in which the various provisions are brought into force. Secondly section 11
of the Interpretation Act 1999 provides that even before an Act comes into force a power may be
exercised under it if the exercise of such power is necessary or desirable in connection with bringing
the enactment into operation. Thirdly, most regulation making powers in Acts provide that in addition
to a long list of specific purposes regulations can also be made “providing for any other matters
contemplated by this Act necessary for its administration or necessary for giving it full effect” (or
similar wording). Those provisions are of the same general rule kind, and have the same general
purpose, as the kind of empowering provisions we are now considering. They are to ensure that Acts
work smoothly.

Constraints, checks and balances

However it is clear that there need to be constraints on the use of transitional regulation empowering
clauses. Maintaining the proper balance between executive and parliamentary law making is
important. It is a constitutional issue. If the device is used in cases where it is not necessary, or
without proper checks and balances, incremental creep can occur and dangerous precedents can be
created. It seems to me that at least the following controls and checks and balances are proper. Most
of them appear in the RRC’s 1995 report on the subject.

1. Transitional regulation empowering provisions should only be used when there is good reason
   for them. That should be the case only when the legislation is complex, and where problems
   are likely to arise that are not foreseeable by the exercise of ordinary care in the process of
drafting. The most complex Acts are those which repeal or amend many others (like the
Search and Surveillance Act) but that is not the only type of complexity. For instance the
Financial Advisers Act 2008 amends only five other Acts, but the new system of regulation
and discipline that it imposes is so different from that which preceded it that implementation
may well raise unanticipated problems. Regulation empowering provisions should not
become an excuse for inadequate specification or policy development in the Act itself. The
test of good reason should be a stringent one, and officials should be prepared to defend their
use of the technique we are considering.

2. Empowering provisions should be as clear, precise and confined as possible particularly when
   they are Henry VIII clauses. However, over-specificity in an empowering provision can be a
problem too, in that it can fall into the same trap as overly detailed statutory provisions and
similarly fail to clearly provide for all problems that might arise. The balance can be quite a
delicate one for the drafter.

3. The regulation making powers should only relate to transitional matters. They should not be
defined so widely as to allow for the amendment of long term substantive provisions in the
Act.

4. There should be appropriate checks and balances, but given the occasional necessity for the
use of this device, those checks and balances should not impose unreasonable hurdles. Some
possible checks and balances are as follows:

a. All regulations when made will be subject to the Regulations Disallowance Act 1989
(or any Act which replaces it) and the RRC has jurisdiction over them. Under the
Standing Orders of the House of Representatives the committee can also consider any
regulation making power in a Bill. It is appropriate that any transitional regulation
making powers in Bills should be considered by the RRC as a matter of course, and
submissions made by it to the subject select committee when appropriate.

b. Such empowering provisions, and any regulations made under them, should be time
limited. There should be a sunset clause. (In theory it is enough if the empowering
clause alone is subject to a sunset clause, because if an empowering clause comes to
an end, so automatically do any regulations made under it. But it is probably clearer
for users if a sunset clause is expressly inserted in relation to both the empowering
clause and the regulations themselves.) It is somewhat arbitrary to name a particular
time limit. In its previous report the RRC thought that three years should be the norm,
but there may be cases where a longer period (say five years) could be desirable. It
depends on the exigencies of the particular case. A longer period should have to be
clearly justified.

c. Any regulations made under the empowering provisions should undergo an
appropriate consultation process. That process may sometimes have to be truncated,
otherwise the device loses much of its point, but those who might be affected by the
regulation should be consulted where possible.

d. There may be a question of whether any regulation made under such empowering
clauses should require confirmation by Act of Parliament or affirmative resolution, as
is the case with some other types of unusual regulation. However these are
cumbersome procedures and probably go beyond what is necessary.
Examples of empowering clauses

I have been supplied with 25 Bills or Acts containing transitional regulation empowering clauses. I have also been supplied with seven examples of regulations made under them. I shall deal first with the empowering clauses. Most of them seem reasonable to me, and appear to be appropriate to deal with the problem of complexity of which I spoke. However I do wish to comment on a few matters. I have not had the opportunity to discuss these with the drafters or departments concerned, and there may be perfectly reasonable explanations for all of them. I simply record my first impressions.

Variety of wording

First, there is quite a range of wording in the various provisions. A form which is in reasonably common use is as follows:

112 Transitional regulation:
The Governor General may from time to time, by Order in Council, make regulations:

(a) Prescribing transitional and savings provisions concerning the coming into force of this Act, which may be in addition to or in place of the transitional and savings provisions of this Part:

(b) Providing that, subject to such conditions as may be specified in the regulations, during a specified transitional period:

(i) Specified provisions of this Act (including definitions) do not apply:

(ii) Specified terms have the meanings given to them by the regulations:

(iii) Specified provisions repealed or amended or revoked by this Act are to continue to apply.

This is from the Land Transport Management Act 2003. This form, or something very similar to it, is repeated in a reasonable number of Acts and Bills. Some might believe that paragraph (b) goes wider than necessary in allowing an Act to be changed, but I do not think so given the caution I earlier expressed that over-specificity can defeat purpose.

Other Acts use that same formula, but add a further sub paragraph (c) as follows:

c) Providing for any other matters necessary for facilitating or ensuring an orderly transition from the provisions of the former Act to the provisions of this Act.

This paragraph nicely captures the transitional purpose. There might be merit in using it more generally, perhaps as a qualifier of the other paragraphs rather than as a standalone ground.
But other Acts use quite different formulae. Here are some of them. The Financial Advisers Act 2008 provides that regulations may be made:

(i) providing that, subject to any conditions stated in the regulations, transitional or savings provisions prescribed by the regulations that relate to the implementation of this Act or the Financial Service Providers (Registration and Dispute Resolution) Act 2008 (in addition to any other transitional provisions in those Acts) apply during the whole or any part of the transitional implementation period ending on 30 June 2013:

(ii) providing that, subject to any conditions stated in the regulations, specified provisions of this Act or the Financial Service Providers (Registration and Dispute Resolution) Act 2008 (including definitions), or provisions of other Acts amended by this Act or the Financial Service Providers (Registration and Dispute Resolution) Act 2008, do not apply, or apply with modifications or additions, or both, during the whole or any part of the transitional implementation period ending on 30 June 2013.

A later part of this provision provides that any regulation must be necessary or desirable for orderly implementation, and consistent with the purpose of the Act. One wonders whether the intent of paras (i) and (ii) is the same as, or goes further than, those in the standard formulae referred to above.

The Social Security (Benefit Categories and Work Focus) Amendment Bill 2012 provides as follows:

14 Regulations providing for transitional matters:

1 The Governor-General may, by Order in Council made on the Minister’s recommendation, make regulations prescribing application, transitional and savings provisions related to the amendments made by the Social Security (Benefit Categories and Work Focus) Amendment Act 2012.

This provides not just for transitional and saving provisions but also for “application” provisions. I am not sure whether “application” adds anything.

Another variant is found in the Plumbers, Gasfitters and Drainlayers Act 2006. It provides that regulations may be made:

1(i) prescribing transitional or savings provisions relating to the coming into force of this Act.

3) Any transitional or savings provisions prescribed in regulations made under subsection (1)(i) are in addition to the provisions of sections 173 to 184.

This more restrained version seems not to permit the overriding of statutory provisions at all but only the addition of new regulatory provisions. If that is right, some would say it is not a Henry VIII clause at all.
Conclusions on the variety of wording

There may be a very good reason for these differences, but if there is not there would be some advantage in having a consistent form of words. Admittedly there can be dangers in standard boilerplate provisions (they can lead to unthinking use), but on the other hand differences in wording can lead to arguments that there are differences in substance, and that some clauses allow more or less than others. If there is to be movement towards a standard form I might suggest that it include a clear reference to the purpose of ensuring orderly transition.

Wider clauses

The empowering clauses in a few Acts and Bills go further than this, and are more questionable. One is the Environment Canterbury (Temporary Commissioners and Improved Water Management) Act 2010. The provision reads as follows:

31 Transitional regulations:

The Governor-General may, by Order in Council made on the recommendation of the Minister, make regulations to—

(a) prescribe provisions concerning the commencement or duration of the powers and functions of ECAN, which may be in addition to or in place of the provisions of this Part;

(b) provide that, subject to any conditions specified in the regulations, in respect of this Part,—

(i) for a specified period or in specified circumstances, specified provisions of the RMA (including definitions)—

(A) do not apply, despite being applied under this Act; or

(B) do apply, despite not applying under this Act;

(ii) specified terms have the meaning given to them by the regulations;

(iii) provide for the application of provisions of this Part, with any necessary modifications, despite their expiry and repeal under section 6;

(iv) provide for the expiry of any regulations made under this section.

This seems wide. For example paragraph (a) gives a far reaching power to determine how long any of ECAN’s powers and functions will last. And paragraph (b) allows specified provisions of the RMA to
be applied or not applied in “specified circumstances” rather than just for a specified time. In fact the provision is not time limited at all. (The Act itself is temporary, but of uncertain duration.) In the context of the growing debate about the powers of central government in relation to local government (which raises important questions about democracy and local government) the desirability of this provision is questionable.

A second is the Local Government (Auckland Transitional Provisions) Act 2010 which confers the following power:

5 Transitional regulations

(1) The Governor-General may, by Order in Council made on the recommendation of the Minister, make regulations to—

(a) prescribe matters in respect of the initial structure and operation of the Auckland Council and its subsidiaries that may be in addition to or in place of the provisions of Part 1 or 2 of this Act;

(b) provide that, subject to any conditions specified in the regulations, during a specified period or in specified circumstances, specified provisions of this Act or any other enactment referred to in Part 1 or 2 do not apply, or apply with modifications, to the Council and its subsidiaries;

(c) extend the time for completing an action, a step, or a procedure that is required by or under Part 1 or 2 of this Act and that is not done or cannot be done by the time required;

(d) make provision for a situation for which no or insufficient provision is made by or under this Act.

These are substantive provisions which seem to go well beyond what would normally be expected in a transitional provision. They allow the prescription of “matters in respect of the initial structure and operation” of the council whatever the Act may say about it; and it allows provision to be made for situations in which the Act is silent, without any apparent limitation. As in the case of the Environment Canterbury legislation it gives the Executive power to do things which would normally be done by Act of Parliament. Once again it raises questions about the central – local government relationship. That, and perhaps some other examples too, may reflect that short deadlines left too little time to work out the policy of the legislation in sufficient detail before it was passed. I do not know whether this was so or not.
I might also make reference to the Children, Young Persons and Their Families Amendment Bill (No 6) 2008. (The Bill was discharged so it is not necessary to make detailed comment on it.) It contained a transitional provision enabling regulations to lay down detailed rules about young people above the age of 17 in relation to the Youth Justice system. It included fundamental matters such as limiting the sentencing powers of the court, and specifying in which court proceedings were to take place. Those, it seems, are significant matters going to the heart of the substance of the Bill which should readily have been foreseeable at the time the legislation was drafted, and provided for in the Bill itself. The fact that the clause was added at select committee may have had something to do with it.

Sunset clauses

There is a third matter of comment. The great majority of the 25 provisions I have looked at have sunset clauses (of varying lengths) but three have none. The provisions in the Children and Young Persons Bill (discharged) and the Environment Canterbury legislation and the Crown Entities Act 2004 are not time limited at all. The powers could in theory be exercised indefinitely. Whether the omission was by mistake or design I do not know.

Regulations made

Regulation-empowering provisions in Acts, and any regulations made under them, are different things. Bad regulations can sometimes be made under perfectly proper empowering provisions. The focus of thi briefing is empowering provisions. They should be drafted in a way which minimises the risk of bad regulation-making, but they can never eliminate it altogether.

Since 2001 14 regulations have been made under six of the Acts containing transitional powers. That would suggest that presently the powers are not being exercised very frequently. I have looked at seven of them. Some of them related to fairly minor matters of a transitional nature, and did not seem to me, in the time I had to study them, to be problematic. One, the Road User Charges (Transitional Matters) Regulations 2012, has been studied by the RRC which has reached the view that it should be disallowed. I do not comment on that. Two others, both relating to the new Auckland Council, deal with matters of some substance. I have already expressed the view that the empowering provisions in that Act are wider than desirable. One of the regulations changed the statutory formula for calculating certain rates: the other dealt with development contributions, and among other things changed the Local Government Act 2002 by providing for the transfer of development contributions to Council controlled organisations. I am not sure whether one can properly call either of them transitional provisions. Nor am I sure whether they caused any hardship to persons or organisations who relied on the Act as originally enacted. But the fact is that they related to more substantial matters than one would normally expect to find in regulations.
Conclusion

Transitional regulation making powers are a necessary evil in this modern complex legislative world. Most of the examples I looked at seemed to be unexceptional but the increasing use of the device is to be noted. I am sure the increasing complexity of legislation accounts for some of the spike in numbers. Overly tight deadlines may contribute as well, by leading to policy being incompletely formulated at the time the Act is drafted. That is more concerning. Negative aspects include:

- A variety of wording in the clauses which might lead to confusion;
- A few broad powers which could be open to abuse;
- A few cases where matters left to regulation should have been foreseen at the time the Act was drafted had time allowed;
- A few cases where the provision is not time limited.

The aberrations to date are a pretty small minority, and the trend cannot by any means be described as critical. But the precedents set in such legislation as the Environment Canterbury and Auckland Council instances do seem undesirable. Given the increasing use of the device, there may be point in reminding the sector of the recommendations in the RRC’s earlier report, and also in asking the Legislation Advisory Committee to expand its Guidelines on the topic. The risks should be in the forefront of the minds of those preparing legislation.

I re-emphasise that I have no inside knowledge of any of the instances, and provide my impressions simply as a first time reader of the legislation involved, in such limited time as was available to me.

J F Burrows
13 November 2012
Appendix D: Transcript of oral evidence from Professor John Burrows and Acting Chief Parliamentary Counsel, Bill Moore, November 2012

Corrected transcript of hearing of evidence 15 November 2012

Members
Charles Chauvel (Chairperson)
Maggie Barry
Raymond Huo
Katrina Shanks
Lindsay Tisch

Witnesses
Professor John Burrows
Bill Moore, Acting Chief Parliamentary Counsel, Parliamentary Counsel Office

Chauvel Welcome Professor Burrows, Mr Moore. Thank you for your attendance at the committee and for the advice in writing that you’ve provided us. I wondered whether what you might be willing to do is perhaps both—if we have the time—briefly summarise the advice and then respond to questions. If we could hear from you, John, first?

Burrows I believe that these kinds of transition regulation-making powers are a necessary evil, provided they are not overused and only used when it’s necessary. But Acts of Parliament are getting much more complex than they used to be, I’ve wondered why that’s so. Many new Acts are many hundreds of pages long, some amend dozens of other statutes and relate to many others, and sometimes it’s just beyond the powers of human foresight to be able to work out exactly how it will work in the early stages.

So what one is looking for is a smooth transition from the old law to the new. If things go wrong, if say an IT system is just not ready to cope with the new system for a while, what’s one to do? One can just do nothing, and that means getting into a mess, or try to pass amending legislation, which will take a very long time, given Parliament’s Order Paper— and amending Act is a very slow and cumbersome way of doing it. So there has to be some efficient way of ensuring that things can be dealt with fairly quickly, and it seems to me that a regulation-making power, provided it’s properly constrained, is an acceptable way of doing that.
There are two qualifications that I put on that. One simply is these clauses should only be inserted in Acts when it is necessary, where there’s a very good reason for it. I think officials have to be prepared to justify why they’ve put it in. There is a concern that, if there’s real pressure to get an Act through, it may go to the House with policy not fully worked through, and it’s just far too tempting to say “Well, put in a clause that regulations can fix up the rest of the policy when it’s in force.”. That simply is not acceptable. So there has to be a real ground that the Act is complex, there could be transitional problems, and there should be a simple clause saying those transitional problems can be fixed when they arise by regulation.

The other qualification I’d put on it is that the regulation-making powers should be as specific and clearly drafted as possible so they’re not too wide. Having said that, there has to be a degree of width about them, because, if you make them too specific, you can be in the same sort of problem again, and find you haven’t covered what you hoped to cover. So I think the drafting is quite a difficult balance to get right.

There’ve been about 25 such bills with these clauses in them over the past 11 years or so. So that’s not a huge number, but they are rising in number and that’s partly due to complexity, I think. They’re averaging about four in each of the last 3 years, which is still not outrageous, but the rise does, I think, have to be watched.

I’d make three comments. I did notice when I looked at these clauses that there is a variety of styles of drafting in them, that there’s no set form. There’s one form more common than any of the others, but many do vary quite a bit from clause to clause and I wondered why that was so. There probably is a very good reason for it, but, if there’s not, a suggestion I would make is that there be, where possible, a standard form of clause that is simple and clear, and makes it very clear that the purpose of it is to ensure there’s an orderly transition from old to new. I like the phrase “orderly transition”, which is used in some of them.

The second comment I have is I did think one or two of them that I looked at went too far. That’s particularly so in some of the local government Acts—for example ECan in Canterbury and the Auckland Regional Council, which are pretty wide powers, which seem to me to be going further than simply transitional powers. Given the sensitivities, of the relationship between local and central government, which I think is a real democratic issue that is growing in some places, I think that’s an issue that has to be watched.

And, thirdly, it’s very important the transitional clauses expire after a set time. Almost all of them do, but there are one or two that didn’t. The ECan Act is one, but then that’s a temporary Act, although the temporary is a sort of ongoing temporary. It’s hard to know when that will come to an end. But I think the expiry after a set time is very important.
So, in conclusion, my view is there are potential dangers in these clauses. They have to be kept an eye on. I wondered if it might be time therefore for the committee to reissue the advice it gave in its report in 1995. That’s obviously for this committee to decide. I also note when I look at the LAC Guidelines, they’re not particularly good on this area. LAC might possibly be requested to expand those and make them a little bit clearer. There’s been a recent chapter on delegated legislation, but it doesn’t touch on this issue perhaps as fully as it might. That could get the word around to the sector fairly quickly.

Moore

Just by way of introduction, Parliamentary Counsel really plays an unusual role in that it actually answers to both the executive and Parliament. You’ve probably come into contact with us more when we’re sometimes seen in a role as defending the executive. What you don’t see and I think what inevitably remains hidden is the degree of negotiations that go on with departments and Ministers about the sorts of changes that are made to regulations or empowering provisions and they, necessarily, I think, remain as it were hidden. So it’s a sort of a dual role, so occasionally frustration develops when someone’s spent a lot of time achieving a compromise, then they read something and say “Oh, well, I’ve done all this work on this paper that’s no good, according to the Regulations Review Committee.”

Chauvel

That sounded like a very polite way of saying we should see the first draft you’re made to come up with.

Moore

Well, you could put it that way, yes. I don’t radically disagree with John on very much. I think I’ve tried to give a reasonably full report setting out statistics and I do mention in relation to standardisation of clauses, yes, there is an attraction in standardisation, on the other hand the condition that it be exceptional really suggests some degree of tailoring as appropriate to particular situations. If you use a standard clause all the time, you can say honestly you haven’t thought about the particular context in which this clause is to operate and what adjustments might be needed. But I set out, and I think it’s described at para 10, the core clause, which basically permits the making of transitional and savings provisions in addition to existing transitional and saving provisions, provides then reasonably standardised displacement provisions.

I think there has been an increase in the use of powers, and at para 15—or empowering provisions—I really attribute this to three things. A lot of projects are dependent on successful implementation of new computer projects, and they almost never go to plan. You actually have an enormous rule of law dilemma here, because you can say, well, if something emerges late in the day, sorry the law says this, the computer system says that. And we can’t change the computer system, because it’s easier to change the law than the computer system.
So the dilemma is, and this is really from a rule of law perspective: do you say let us use these transitional regulation-making powers, arguably in a questionable way to at least say this is authorised by law until struck down or disallowed, or do you say we do nothing, in reality, and you can say well the rule of law means that we shall follow the law, but because the law is really in practices dictated by the computer it actually means that you’re acting in breach of the law. So there’s an interesting dilemma there about whether in fact, if you don’t deal with these things that arise, whether that is in fact showing less respect for the principle of rule of law, because officials—or whoever Minister—say: “Well, we can’t do anything about this. It’s sort of administrative. We’ll fix it up with some amendment having retrospective effect later.”

But, anyway, I think that computer thing has certainly affected student loans and child support. I must move on. I’ve also identified there legislation with a history of complex issues and particularly changing policy all the way through, and I think this is a feature of MMP. In the old days when I started and had black hair, policy would stay the same, drafters would draft 10 or 15 drafts; it would be quite polished. Now we may have the base policy being decided at Committee of the whole, so effectively what’s being passed into law is a working draft and everyone knows it. So it’s one of these adjustments. Ideally, MMP should have probably a 4-year term, but then the electorate won’t vote for that, because they voted 85-15 against in 1990.

I won’t go on too much longer. My main proposal there—I think I differ with John in two respects. I cite the committee in 1995 to say that it’s not possible to devise a standardised provision, which will work in every situation. But my main proposal is that, rather than reissuing the principles now, we defer that for a couple of years for two reasons. I think it would be good to see how those changes in extended sitting hours work out, because I think one of the contentions I have, you’ll see from the stats, is that the number of Acts passed each year from 1994-95 is reduced on average from the low, I think, 143 to about 104 per year. So there’s real pressure on parliamentary time. But if we could have a standard sitting every Thursday or Wednesday morning to progress through legislation, I think the Government would be more open to error correction, through primary legislation, and also if a process could be involved where it was depoliticised in the sense of the fault component being removed, as it were, the finger pointing.

But the other point I make is I think it’s worth having a discussion about a wider range of issues not just transitional ones. There’s the status of the High Court rules, which amend the Act, the Judicature Act by regulations. Should that be permissible? We have debates on whether it’s legitimate to amend schedules by regulations. I contend that that actually give the legislature more control, but I notice other scrutiny committees don’t like it. I think a good way of advancing that discussion—and I do talk about Henry VIII, but in the end conclude that we’re probably only going to disagree forever if we discuss Henry VIII. He wasn’t agreed on 500 years ago, so he’s not going to be agreed on now.
I think basically a way ahead would be for members of my office to sit down, perhaps once a fortnight or once a month, and work through a series of issues on particular clauses, so that they can come back to you at the start of the next Parliament with perhaps some more nuanced positions. What we’d like is a set of clear, orderly rules, which are predictable. I think scrutiny committees naturally want the desire to scrutinise legislation, which contains undesirable features. I think that process would be worthwhile, because, if the extended hours thing could be used on a regular basis, then it may be that the climate will change so there’s less of a backlog on the Order Paper, which is pretty extensive at the moment.

Tisch I’m interested in that point you make about extended hours, because we’re into extended hours this morning. And then in December we do two extended hours there. I’m on the Standing Orders Committee and the points that you make might be worth our consideration. Would you be happy to drop me a line, or through the Clerk?

Moore Yes.

Tisch They’re things that certainly we have never discussed—the points that you raise—but I think there’s merit in further consideration of that. I think the extended hours have worked extremely well, but we’ve only used them for Treaty settlements. We’re doing two this morning.

Moore I think the complex problem is how to run select committees. I know a lot of select committees have meetings on Wednesday mornings. It’s how to mesh that with select committee involvement, so that the bills are selected so that they don’t conflict with members’ committee engagements and interests.

Tisch The ones that are on extended hours at the moment are those that are non-controversial.

Moore Yes.

Tisch So you’ve got support from all parties. That’s why it has probably progressed so well. But if we were to move into the Government’s legislative programme, where there were contentious issues, there might be opposition to having that at the same time that select committees are meeting.

Moore Yes

Tisch But I think what you’re suggesting is worthy, from a Standing Orders Committee point of view, worthy of further consideration.

Chauvel Are the members happy if we table and release the advice? Because I think it’s very helpful. I myself would like to take up Professor Burrows’ suggestion of writing to the Legislation Advisory Committee, sending the advice, if we may, from both of you to them, and seeking their further thoughts on the issue. So I think we might resolve to proceed in that way. Thank you very much for your attendance. We’ll no doubt be calling on you in the future on these questions.

conclusion of evidence
Appendix E: Written evidence from Legislation Advisory Committee, February 2013

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19 February 2013

Charles Chauvel
Chairperson, Regulations Review Committee
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Room 2—037, Parliamentary Library, Parliament Buildings
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EMPOWERING PROVISIONS FOR OVERRIDING TRANSITIONAL REGULATIONS

Background to RRC’s seeking LAC’s views on 4 questions relating to this topic

1 You wrote to the Legislation Advisory Committee (LAC) on 23 November 2012 about empowering provisions for regulations that in a transitional period can amend or override primary legislation.

2 You advised that the Regulations Review Committee (RRC) on 15 November 2012 received a briefing on that topic from (and you attached written evidence given beforehand to the RRC by) Professor John Burrows QC, and the Acting Chief Parliamentary Counsel, Mr Bill Moore.

3 You also attached relevant background information; lists of relevant Acts and Bills, and copies of (as well as examples of regulations made under) relevant empowering provisions.

4 You mentioned relevant principles set down by the Regulations Review Committee in 1995, arising from its inquiry into the Resource Management (Transitional) Regulations 1994. You also noted that the LAC Guidelines at [7.4.2] and [10.1.8] appear to be based largely on the RRC’s 1995 recommendations.
5 You indicated that, in the course of his oral evidence to the RRC, Professor Burrows said that:

- these types of empowering provisions are a “necessary evil” in today’s complex legislative world;
- their increasing use carries some risks that need to be monitored;
- it may be timely for the RRC to reissue its guidelines on such empowering provisions; and
- the guidelines issued by the LAC on these types of empowering provisions (LAC Guidelines at [7.4.2] and [10.1.8]) might helpfully be expanded and made clearer.

6 The RRC would, you said, be grateful for any comments that the LAC might have on 4 questions.

*Might relevant LAC Guidelines helpfully be expanded and made clearer?*

7 Question 1: Does the LAC agree with Professor Burrows that the LAC might helpfully expand and make clearer the LAC Guidelines on empowering provisions for regulations that in a transitional period can amend or override primary legislation?

8 Professor Burrows’ written evidence dated 13 November 2012 includes the following statement: “Given the increasing use of [empowering provisions for overriding transitional regulations], there may be point in reminding the sector of recommendations in the RRC’s earlier report, and also in asking the LAC to expand its Guidelines on the topic. The risks should be in the forefront of the minds of those preparing legislation.”

9 The LAC agrees that its Guidelines could helpfully be expanded and made clearer. But it also considers that any such expansion and clarification must be informed by ongoing experience. That ongoing experience includes the RRC’s scrutiny and inquiry work and principles operating in that work. It is notable, in this connection, that the Acting Chief Parliamentary Counsel’s written evidence to the RRC dated 14 November 2012 suggests that it would be worthwhile to assess whether the changes made to Standing Orders in 2011 (which provide for extended sittings) can, over an extended period of time, improve Parliament’s ability to process an increased volume of legislation. An assessment of how these new Standing Orders procedures work over a 3-year period is likely to have some bearing on how existing principles are restated or modified.

10 Professor Burrows’ written evidence includes that “Transitional regulation making powers are a necessary evil in this modern complex legislative world” and that “The aberrations to date are a pretty small minority, and the trend cannot by any means be described as critical.”
The RRC’s investigation into the Road User Charges (Transitional Matters) Regulations 2012 (SR 2012/145) (13 November 2012) led to the related notice of motion (lodged 13 November 2012) for disallowance of specified provisions of those regulations. Both show the robustness of the standard scrutiny processes for overriding transitional regulations. Both also help to ensure the relevant principles are demonstrated clearly in operation, and are clearly in the forefront of the minds of those preparing legislation. They are just one example of the ongoing robust scrutiny experience that should inform any future revision of the relevant LAC Guidelines.

But the enactment, and use, of these types of empowering provisions, still remain exceptional. That is so even though more of them have been enacted in recent years (most probably because larger numbers of complex transitions have been developed in undesirably tight timeframes). If exceptional circumstances make it necessary to use these types of empowering provisions, their use can be both in line with the empowering provisions concerned, and critically useful. One possible recent example of relevant experience of this kind is the Student Loan Scheme Act 2011 (Transitional Provisions) Regulations 2012 (SR 2012/271). Those regulations enabled Inland Revenue to grant relief to borrowers who were issued end-of-year assessments for the 2012 tax year as an unintended consequence of changes in the Student Loan Scheme Act 2011.

The RRC’s 1995 principles deal only with overriding regulations in a “transitional” setting. They must therefore fit with conclusions on the proper use of other types of empowering provisions for regulations that amend or affect the operation of primary legislation on a permanent basis. An important forthcoming question in this connection is the status of the High Court Rules. The Law Commission has recommended that rules of court not be included in primary legislation (as the High Court Rules currently are), as this would make new courts legislation too unwieldy and inflexible, and would detract from its accessibility. Instead, it recommends that the rules be (disallowable) regulations. This would require greater detail to be included in the legislative provision enabling the making of the High Court rules: (NZLC R126, 2012) R6-R8. Experience with these recommendations will be instructive in any future revision of the relevant LAC Guidelines.

Also instructive will be the RRC’s assessment of, and suggestions for adjustment of, proposals for new empowering provisions for overriding transitional regulations. Strict preconditions as to purpose of use are more and more used in such empowering provisions. Undoubtedly these can be the subject of discussion and agreement between the RRC and PCO. Departmental officials will often have very useful insights as to the exact purposes for which transitional regulations may be needed, and the types of problems that may arise in practice.
Would LAC find it helpful if RRC were to review or reissue its relevant 1995 principles?

15 Question 2: Given that the LAC Guidelines at [7.4.2] and [10.1.8] appear to be based upon principles set down by an earlier Regulations Review Committee in 1995, would the LAC find it helpful if the current RRC were to review or reissue those guidelines?

16 LAC Guidelines on this topic will certainly be largely based on, and informed by, ongoing experience of the RRC’s scrutiny and inquiry work, and the principles operating in that work. So the LAC would generally find it helpful if the current RRC were to review or reissue its relevant principles and guidance, bearing in mind more recent experience and views. But there are several qualifications (as well as the possibility that the LAC could, on this matter, adopt Guidelines that are informed by, but nonetheless also independent from, the RRC’s current views on this matter).

17 One qualification is that a revision or reissuing should arise from an evidential base of experience with the enactment and use of these types of empowering provisions, and a demonstrated trend of (not only aberrational) neglect of accepted relevant principles.

18 A second qualification is that any RRC principles or guides are, for Government measures, subject to binding Government responses to relevant RRC reports. A relevant Government response may require qualified acceptance, or even occasionally rejection, of an approach the RRC advocates.

19 A third qualification is that, in this area of broad principle (not express legal constraints), there will perhaps inevitably be differences over time arising not just from changes to RRC personnel but also from the separate perspectives of (1) the RRC and (2) the elected Government of the day. It can of course take time for these differences to be worked out and reconciled (if they are to be reconciled at all) in a practical or operational sense.

What other sources of authority can LAC draw on in any revision of relevant empowering provisions?

20 Question 3: What other sources of authority are available for the LAC to draw upon, were it to revise the LAC Guidelines in respect of these types of empowering provisions?

21 Other sources of authority the LAC might draw upon, were it to revise the LAC Guidelines in respect of these types of empowering provisions, include the following:

- views of independent legal experts (such as Professor John Burrows QC);
- views of departmental officials advising Ministers of the Crown;
- views of the Parliamentary Counsel Office
views of overseas legislative scrutiny committees such as the Queensland Scrutiny of Legislation Committee (whose work is referred to in the Acting Chief Parliamentary Counsel’s written evidence to the RRC dated 14 November 2012):

academics’ views (such as those in Dr Bogdan Iancu’s Legislative Delegation – The Erosion of Normative Limits in Modern Constitutionalism (Springer-Verlag, Berlin Heidelberg, 2012).

Does LAC agree it is, given emerging practice, timely for RRC to reissue its principles and guidance?

22 Question 4: More broadly, does the LAC agree with Professor Burrows that, given emerging practice in respect of these types of empowering provisions, it may be timely for the RRC to [revise and] reissue its principles and guidance?

23 More broadly, the LAC’s view (as is suggested at [7]-[14] above) is that there would be value in the RRC’s revising and reissuing its relevant principles and guidance on empowering provisions for regulations that in a transitional period can amend or override primary legislation, but only after much greater experience and consideration of the following:

- the enactment (as Parliament considers that justified, and after consultation and, if possible, agreement, between the RRC and PCO) and use of relevant empowering provisions:
- a demonstrated trend of (not only aberrational) neglect of accepted relevant principles:
- whether extended sittings (under the 2011 Standing Orders Reforms) can, over an extended period of time, improve Parliament’s ability to process an increased volume of legislation (particularly remedial legislation of the kind that will be urgently required in the absence of a transitional regulation making power):
- the proper use of other types of empowering provisions for regulations that amend or affect the operation of primary legislation on a permanent basis:
- issues such as whether having standardised formulae for transitional regulation making powers is more principled and effective than having tailored provisions which are directed at the particular situation, or some combination of both standardised and tailored provisions:
- the circumstances in which prescribed amounts or descriptions contained in primary legislation might be altered by regulations, and whether existing regimes of this type (for example, the procedures in the Social Security Act 1964 dealing with increasing rates of benefits) in practice provide greater degrees of parliamentary control than if the subject matter was dealt with entirely in regulations.
Conclusion

24 The LAC is grateful to have been consulted, and asked for its views on this topic, by the RRC.

Yours sincerely

[Signature]

Hon Sir Grant Hammond KNZM
Chairperson, Legislation Advisory Committee
The following table lists

- the Acts passed or bills introduced since 2000 that have included transitional override powers
- the year the transitional override power was introduced into the bill
- the year the transitional override power came into force
- the name of the omnibus bill or amendment Act that included the transitional override power, where this differs from the final Act.

Note that some of the sections have been repealed, and are therefore no longer in force.

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Question of privilege concerning the defamation action Attorney-General and Gow v Leigh

Report of the Privileges Committee

Fiftieth Parliament
(Hon Christopher Finlayson QC, Chairperson)
June 2013

Presented to the House of Representatives
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**Summary of recommendations**

The Privileges Committee recommends to the House that it note that we respectfully disagree with the Supreme Court decision in *Attorney-General and Gow v Leigh* in applying the test of necessity to ascertain the scope of Parliament’s privilege of freedom of speech (p. 31).

The Privileges Committee recommends to the Government that

- it introduce a Parliamentary Privilege Bill to clarify for the avoidance of doubt the nature of parliamentary privilege in New Zealand (p. 34)
- it consider and where appropriate incorporate the recommendations in the *Second Report of the Standing Orders Committee on the Law of Privilege and Related Matters*, November 1989 (I.18B) in drafting the Parliamentary Privilege Bill (p. 37)
- it work with the Clerk of the House of Representatives to draft the Parliamentary Privilege Bill (p. 38)
- once enacted the Parliamentary Privilege Bill be administered by the Clerk of the House of Representatives (p. 38).

The Privileges Committee recommends to the Government that the Parliamentary Privileges Bill

- replace the Legislature Act 1908, the Legislature Amendment Act 1992, and section 13 of the Defamation Act 1992 (p. 37)
- contain a clear statement of purpose to aid in determining the extent and scope of parliamentary privilege (p. 36)
- provide for the avoidance of a doubt a definition of “proceedings in Parliament” and what is meant by “impeaching and questioning” such proceedings, as set out in article 9 of the Bill of Rights 1688 (p. 37)
- make explicit that a member of Parliament, or any other person participating directly in or reporting on parliamentary proceedings, who makes an oral or written statement that affirms or adopts what he or she or another person has said in the House or its committees will not be liable to criminal or civil proceedings unless the statement in and of itself could be defamatory (p. 38)
- provide for the power of the House to fine for contempt (p. 37)
- provide for the power of the House to administer oaths or affirmations in respect of witnesses giving evidence (p. 37)
- confirm that the House does not have the power to expel its members (p. 38)
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- provide that the live broadcast of Parliament’s proceedings, including select committee hearings, is protected by absolute privilege (p. 38)

- provide that delayed broadcasts or rebroadcasts of Parliament’s proceedings, including select committee hearings, that are made by order or under the authority of the House of Representatives are protected by absolute privilege (p. 38)

- provide that a fair and accurate report of proceedings in the House, or summary using extracts of proceedings in the House, by any person is protected by qualified privilege (p. 38)

- provide that the broadcast and other publication of extracts of Parliament’s proceedings, including select committee hearings, that are not made by order or under the authority of the House of Representatives are protected by qualified privilege, in a manner consistent with the provisions of the Defamation Act 1992 (p. 38).
1 Introduction

New Zealand’s Parliament sits at the heart of its democracy. Ensuring the Parliament can discharge its functions fully is vital to the health of New Zealand’s constitutional arrangements. A number of protections, known collectively as parliamentary privilege, exist to safeguard the Parliament’s ability to carry out its business. Unfortunately privilege in this sense is frequently confused with the idea of “privilege” as a personal benefit for an individual. This committee is not concerned with “privilege” in the sense of a special benefit for a particular person. Our task is to consider matters of parliamentary privilege: that is, the protections that apply to the House itself and to the participants in parliamentary processes.

Parliamentary privilege ensures protections for free speech in debates and allows members of Parliament to represent their constituents freely. It also protects the inner workings of the Parliament from interference by the courts, assisting the maintenance of the balance between the three branches of government in the Westminster system.

In September 2011 the Speaker referred to us a question of privilege in relation to a decision of the Supreme Court in Attorney-General and Gow v Leigh.1 This decision appeared to represent a significant shift in the interpretation by the courts of the privileges, powers, and immunities essential to the effective functioning of Parliament.

We have considered how the Supreme Court’s decision and other recent findings affect the operation of Parliament. We have also considered how the recommendations of previous Privileges Committees in relation to the issues raised by Buchanan v Jennings2 and to parliamentary broadcasting3 relate to the question before us. We have not considered in any detail the facts of the case that was before the courts.

In this section we set out the structure of our report and the key issues addressed in it, summarise the court proceedings, and discuss our approach to considering this question of privilege.

Structure of the report and key findings

We begin this report with a précis of the general principles of parliamentary privilege and its history in New Zealand. In the third chapter we discuss the relationship between Parliament and the courts.

We then move to the specific issues raised by the Supreme Court’s judgment in Attorney-General and Gow v Leigh, and their implications for the operation of the House. We find that the decision represents a shift from previous judicial authority, and moves New Zealand away from other Commonwealth jurisdictions in its interpretation of the scope of Parliament’s privilege of freedom of speech. Further, we do not accept that the decision is correct, particularly in its application of the “necessity test” to determine the extent of the

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House’s privileges. We observe that the judgment will damage the House’s capacity to function in the public interest and will have a chilling effect on the ability of the House to receive information.

The final chapters focus on our recommendation of legislative reform to remedy these issues, and the form it might take.

Summary of court proceedings

Background

During 2005 and 2006 the respondent, Ms Leigh, was contracted by the Ministry for the Environment as a communications adviser on climate change issues. In 2006 Ms Leigh was told that another communications adviser, Clare Curran, had been appointed to oversee the communications strategy on which she was working. This led Ms Leigh to terminate her involvement with the ministry.

In 2007 questions were raised in the House about the ministry, the appointment of staff, and the resignation of the respondent. The Minister for the Environment at the time, the Hon Trevor Mallard, requested information from the ministry to help him to respond to further parliamentary questions. Mr Gow, Deputy Secretary at the ministry, briefed the Minister in writing and orally. During question time in the House on 22 November 2007, the Minister criticised Ms Leigh and her performance at the ministry.

On 2 December 2007 Ms Leigh wrote to the Privileges Committee to complain about the Hon Trevor Mallard’s reference to her in the House. The chairperson of the Privileges Committee referred the correspondence to the Speaker, who advised Ms Leigh that a matter of privilege must be raised by a member of Parliament at the earliest opportunity and no such matter had been raised. The Speaker also advised Ms Leigh about the process for having a person’s response incorporated into the parliamentary record.

Further oral questions were asked on 4, 5, and 6 December 2007. A statement about the matter by the Chief Executive of the Ministry for the Environment, Hugh Logan, was tabled in the House by the Hon Annette King on 5 December 2007. On 18 December 2007 the Hon Trevor Mallard made a personal explanation to the House and apologised to Ms Leigh for the comments he had made on 22 November 2007.

Ms Leigh then issued proceedings in the High Court claiming that Mr Gow had defamed her in his oral briefing and in his written briefing note. Ms Leigh argued that the Minister’s answers in the House were a re-publication of Mr Gow’s statements.

High Court proceedings

The defendants in the High Court proceedings sought to strike out the pleadings on the grounds that the statements were both not capable of bearing defamatory meanings and protected by absolute privilege under article 9 of the Bill of Rights 1688. That article provides:

That the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any Court or place out of Parliament.

4 Email from Erin Leigh to the Chairperson of the Privileges Committee (2 December 2007).
5 Letter from Speaker of the House to Erin Leigh (5 December 2007).
6 Standing Orders 156–159 set out the procedure by which a person whose reputation may have been adversely affected by a reference to them in the House can seek to have a response entered into the parliamentary record.
The High Court judge ruled that the passages in the written briefing could not bear defamatory meanings, but that the pleaded oral statements, with one exception, could do so. It was accepted that the Minister’s statements in the House were protected by article 9. The court also concluded that article 9 would preclude any argument that the Minister’s statements amounted to a re-publication of Mr Gow’s comments.

**Court of Appeal proceedings**

The Court of Appeal reversed the High Court’s decision on the issue of defamatory meanings. On the question of the ambit of article 9, the Court of Appeal upheld the judgment on the republication issue. In the High Court it had been argued that article 9 not only protected what the Minister had said in the House, but also protected the information asked for and communicated for the purposes of the replies to oral questions in the House. The High Court and Court of Appeal disagreed with this argument and held that this was an occasion of qualified rather than absolute privilege and that the claim could not be struck out as barred by absolute privilege.7

The Attorney-General and Mr Gow appealed to the Supreme Court on the conclusion that the occasion on which Mr Gow communicated with the Minister was not one of absolute privilege. The Speaker, on his own initiative, instructed counsel to address the Supreme Court on aspects of parliamentary privilege that arose in this case.

**Decision of the Supreme Court**

The Supreme Court dismissed the appeal and concluded that statements made by an official to a Minister for the purposes of replying to questions for oral answer were not themselves parliamentary proceedings. Such statements could be the subject of court proceedings as they were not protected by absolute privilege. In reaching this conclusion the court placed considerable weight on the recent decision of the United Kingdom Supreme Court in *R v Chaytor*,8 which concerned the prosecution of members of the House of Commons and House of Lords for submitting false expense claims.

In *Leigh*, the New Zealand Supreme Court took the view that the test was whether it was necessary for the proper and efficient functioning of the House of Representatives that the occasion on which Mr Gow communicated with the Minister be regarded as an occasion of absolute privilege. In other words, had Mr Gow shown that without this kind of occasion being regarded as absolutely privileged, the House could not discharge its functions properly?9

The court rejected the submissions of counsel for the Speaker that the proper test was whether the occasion in question was “reasonably incidental” to the discharge of the business of the House.9 The Supreme Court also disagreed with the conclusion reached in *Parliamentary Practice in New Zealand* by David McGee QC that while necessity can help to elucidate the existence and extent of a particular privilege, it is not the legal foundation of parliamentary privilege in New Zealand. Mr McGee concluded that the foundation of parliamentary privilege has been firmly rooted in New Zealand’s own statute law since

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7 Absolute privilege is recognised by section 13 of the Defamation Act 1992 as extending to proceedings in the House of Representatives. A defence of qualified privilege is provided for under section 19 of the Act.


9 This concept is derived from section 16(2)(c) of the Australian Parliamentary Privileges Act 1987 and the approach taken by Lord Wilkinson Brown in *Prebble v Television New Zealand* [1994] 3 NZLR 1 (PC), referring to the Australian Act as declaring what had previously been regarded as the effect of article 9.
The Supreme Court concluded that necessity was and remains an essential underpinning for parliamentary privilege in New Zealand.

Referral of question of privilege

The Supreme Court gave its decision in the case on 16 September 2011. On the next sitting day, 27 September 2011, the Speaker referred a question of privilege in relation to the decision, stating that the decision raised serious issues affecting the privileges of the House.

A copy of the Speaker’s ruling is attached as Appendix B.

We note that we were not asked to make any finding in relation to a potential breach of the House’s privileges in this case. Our task has been to consider the potential effect of the Supreme Court’s judgment on the future operations of the House.

Committee process

The Privileges Committee of the previous Parliament met to consider the referral, and requested that advice be prepared for consideration in the new Parliament.

We first met to consider this question in 2012, and agreed to inquire into the issues raised by the question. We established terms of reference (see below), issued a public call for submissions, and invited certain experts to make submissions. In addition, we contacted our counterparts in Australia, Canada, and the United Kingdom, inviting their thoughts on the issues before us and asking about their experience. We are grateful to all those who took the time to provide us with evidence on this matter.

Terms of reference

Our terms of reference covered specific issues raised by the decision and also considered the need for legislative reform of the basis for parliamentary privilege in New Zealand. We requested submissions addressing the following:

- the important constitutional relationship of mutual respect and restraint between the House of Representatives and the judiciary (comity)
- whether the judgment affects or purports to affect the scope of article 9 of the Bill of Rights, which protects freedom of speech and “proceedings in Parliament” from being questioned or impeached outside Parliament
- whether the judgment affects the privilege of the House of exclusive control of its own proceedings
- whether the judgment affects the ability of members, Ministers, the Clerk of the House, and their staff, departmental officials, and members of the public to participate appropriately in parliamentary proceedings, in both the House and its committees
- the appropriateness of applying the doctrine of necessity to parliamentary privilege and whether as a consequence the same test would apply to other privileges, including protections available in relation to judicial proceedings and other legal matters

See chapter 2 for further detail about the foundation for parliamentary privilege in New Zealand.
• the desirability of possible legislative reform of the basis for the law of parliamentary privilege in New Zealand in the light of issues raised during the inquiry and in recent reports of the Privileges Committee

• whether the meaning of “proceedings in Parliament” should be defined in legislation

• any other related matters.
2 General principles of parliamentary privilege

Parliamentary privilege is a term used to refer collectively to the privileges, powers, and immunities possessed by a parliament to allow it to carry out its key roles of legislating, representing constituents, and providing oversight of executive government. Parliamentary privilege includes exceptions to ordinary law intended to allow members of Parliament and the House itself to perform their duties without fear of coercion or punishment, and without impediment.

Parliamentary privilege in Westminster-style democracies has evolved over several centuries. It entails two essential freedoms: freedom of speech in debate and the right of exclusive cognisance (the exercise by Parliament of control over its own affairs). These are privileges of the House as an institution, not of individual members, although members may enjoy the benefits at times of these privileges. These freedoms ensure the Parliament can perform its functions and that it maintains its independence from the executive.

Freedom of speech

In order to discharge their responsibilities to the House, members of Parliament must be able to participate in its proceedings without legal repercussion. Article 9 of the Bill of Rights 1688 provides “That the freedom of speech, and debates or proceedings in Parliament, ought not to be impeached or questioned in any court or place out of Parliament.” This assertion of the House’s freedom of speech helps delineate the respective roles of Parliament and the courts, and reduce the risk of conflict between the two. As David McGee QC puts it,\(^\text{11}\)

\begin{quote}
Thus the courts will uphold and refuse to question the House’s control of its own internal proceedings and its exercise of its power to punish for contempt, and will not visit legal liability on the contributions that members and others make to parliamentary debates and other proceedings…
\end{quote}

In the legal sense, freedom of speech is a wider concept than freedom of expression. The New Zealand Bill of Rights Act 1990 provides for freedom of expression. Other laws place limits on that freedom, such as the Human Rights Act 1993 and the Defamation Act 1992. Despite these limits, words spoken as part of parliamentary proceedings are covered by absolute freedom of speech. This protects not only members of Parliament, but also witnesses and advisers at select committee meetings, from being sued for defamation or otherwise being held legally liable for what they say in a parliamentary proceeding. This ensures the House and committees are free to hear of any matters that may affect the business under consideration. Elected representatives make important decisions, and they are better able to do so where information and opinions can be disclosed without fear of legal consequences. It has been said that if the protection of free speech were removed “parliaments probably would degenerate into polite but ineffectual debating societies”\(^\text{12}\).

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Natural justice protections

The privilege of free speech in Parliament carries an obligation to use it responsibly. The House has the ability to punish for contempt, such as misleading the House or a committee deliberately. There are procedures for both the House and select committees to ensure natural justice (fairness of process) is observed. These procedures allow right of reply to anyone who considers their reputation has been damaged by statements made under privilege.

Exclusive right to control its own proceedings

The right of exclusive cognisance, or exclusive jurisdiction, is the articulation of the principle that the House regulates and controls its own internal processes, free from outside interference. It is for the House itself to determine how it conducts its proceedings, and this cannot be examined elsewhere. This right is not dependant on article 9 of the Bill of Rights.

The House sets out its procedures in the Standing Orders, and itself determines whether they have been complied with. Should the Parliament choose to legislate for how a particular matter should be considered, however, the House would be required to comply with the resultant legislation.

Basis for parliamentary privilege in New Zealand

There is no single instrument or statute that sets out the privileges, powers, and immunities of the New Zealand legislature. When the General Assembly of New Zealand first met, colonial legislatures did not possess all the privileges of the British Houses of Parliament. Common law held that colonial legislatures enjoyed only those privileges of the House of Commons that were incidental and necessary for their efficient functioning. For example, when the Newfoundland Legislative Assembly attempted to impose a penal power of arrest for contempt of its authority, the Privy Council declared the Assembly’s powers did not extend to penal powers.

Like other colonial legislatures of the time, the New Zealand General Assembly was concerned to secure contempt powers to uphold its authority. Soon after it first met in 1854 it determined that the privileges “reasonably necessary” for it to operate were not sufficient for it to carry out its role as a legislature effectively. Following a select committee inquiry into the nature of the Assembly’s privileges, it conferred on itself by way of legislation many of the privileges held by the House of Commons, but not the power to punish for contempt.

A committee was appointed in 1861 to investigate the contempt jurisdiction and recommended legislative changes to give the House additional powers. In 1864 the Privy Council held that a colonial legislature could confer on itself privileges equivalent to those held by the House of Commons, including the power to punish for contempt. The Parliamentary Privileges Act 1865 applied the full expression of parliamentary privilege to the New Zealand legislature by adopting all the powers and privileges “held, enjoyed and exercised” by the House of Commons as at 1865. This forms the basis of section 242 of the Legislature Act 1908, which is still in force, supplemented by other legislation touching on the privileges of the House.

In order to ascertain the privileges enjoyed by the New Zealand House of Representatives, it is necessary to establish the nature of the privileges enjoyed by the House of Commons so far as these have not been altered by British statutes passed since 1 January 1865 and any
changes to New Zealand legislation since that date. Today parliamentary privilege in New Zealand is derived from

- section 242 of the Legislature Act 1908 and other related legislation
- common-law principles developed from decisions of the courts
- parliamentary practice and rules, including the Standing Orders and Speakers’ Rulings.

The privileges of the House of Representatives in New Zealand have a long history, and are part of a well-established tradition. Along with other privileges related to the legal profession and with concepts such as judicial immunity, they are a fundamental part of the way New Zealand’s democracy is protected. Any attempt to place limitations upon these must be viewed seriously.
3  The relationship between Parliament and the courts

The relationship between the three branches of government—Parliament, the courts, and the executive—is fundamental to New Zealand’s constitutional arrangements.

The separation of powers has evolved as a crucial part of the Westminster tradition, enjoining a balance between the different arms of government, preventing any one branch from assuming absolute power. In the Westminster system of government, there is an overlap in the membership of the legislative and executive branches. Nevertheless, the essentials of the different roles are clearly understood. The separation of parliament and the judicial function is more distinct.

There exists a very long history of how the courts and Parliament have developed their separate roles under the Westminster system. Judicial independence in English history has its cornerstone in the Glorious Revolution, expressed in the Act of Settlement 1700. However, the establishment of the New Zealand colony did not include a guarantee of judicial independence and there is doubt that Part 3 of the Act of Settlement relating to the tenure and salary of judges ever applied in New Zealand. For example, during the period 1840–50 judicial appointments in New Zealand were made at the Governor’s pleasure. From 1858 the New Zealand legislature enacted a number of legislative measures modelled on the Act of Settlement to guarantee judicial tenure and financial security. These provisions led to the Judicature Act 1908 and the Constitution Act 1986, which consolidated the principal constitutional provisions of New Zealand.

The separation of judicial powers is more distinct than the separation of the executive and the legislature under the Westminster system. The courts, like Parliament, enjoy certain powers and immunities in order to carry out their role. The principle of judicial independence (which includes the concept of immunity) is a key element in the separation of powers. It has been observed that the principle of judicial independence is not a subject likely to excite public imagination or sympathy. The real danger is a “weakening of the castle foundations over a period of time”, rather than a sudden fall. Similarly, any shift in the relationship between Parliament and the courts by failing to maintain well-established principles of mutual respect and restraint runs the risk of altering the fundamental relationship between the various arms of government.

Mutual respect and restraint between the courts and Parliament

It is at the margins that the greatest challenge arises in the relationship between the legislative and judicial branches. The general principles are widely acknowledged:

In addition to article 9 itself, there is a long line of authority which supports a wider principle, of which article 9 is merely one manifestation, viz that the Courts and Parliament are both astute to recognise their respective constitutional roles. So far as

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the Courts are concerned they will not allow any challenge to be made of what is said or done within the walls of Parliament in performance of its legislative functions and protection of its established privileges…

The principle of exclusive cognisance reflects the importance of ensuring no overlap between the courts and Parliament. Section 242(2) of the Legislature Act 1908 provides that the Parliament’s privileges are part of the general and public law of New Zealand, and it is the duty of the courts to apply the law. However, many of Parliament’s privileges exist to ensure the Parliament can function free from judicial interference. The courts must therefore be careful to resolve justiciable issues relating to parliamentary privilege in a way that is consistent with non-intervention in parliamentary matters.

The New Zealand Parliament has been careful to turn its mind to maintaining the principle of mutual respect between the courts and Parliament. The Parliament inherited the House of Commons tradition of not debating matters awaiting adjudication in a court, to avoid prejudice to the trial of the case. Known as the “sub judice rule”, this principle was first expressly included in the New Zealand Standing Orders in 1929 and has evolved over time into a more comprehensive description of the boundaries between the two jurisdictions.

The last review of the Standing Orders in 2011 included a more comprehensive statement of the sub judice rule, as the result of recommendations from the previous Privileges Committee.

The previous committee considered how the House’s privilege of free speech should be balanced with respect for decisions of the judiciary to suppress certain information. It noted that the relationship between the courts and Parliament is a matter of the highest constitutional significance. It should be, and generally is, marked by mutual respect and restraint. The underlying assumption is that what is under discussion or determination by either the judiciary or the legislature should not be discussed or determined by the other. The judiciary and the legislature should respect their respective roles. This principle is often referred to as “comity”.

As a result of the committee’s report a specific example was added to the Standing Orders of a contempt of knowingly making reference to a matter suppressed by a court order, contrary to the Standing Orders, in the House or a committee. A new mechanism for committees to exclude material that might breach a court order was also added.

These changes demonstrate how careful the House has been to consider how it should respect the boundary with the courts.

The public interest and individual rights

A previous Privileges Committee set down the three important issues at play in balancing parliamentary privilege and common law rights such as access to justice, as identified by the Privy Council in Prebble v Television New Zealand:

16 McGee, p. 613.
18 McGee, Chapter 46.
RELATIONSHIP WITH THE COURTS

1. The need to ensure that the legislature can exercise its powers freely on behalf of its electors, with access to all relevant information;

2. The need to protect freedom of speech generally; and

3. The interests of justice in ensuring that all relevant evidence is available to the courts.

The law has long been settled that the first of these public interests must prevail. But the other two interests were still important...

This reflects the reality that the rights of an individual cannot be more important than the preservation of New Zealand’s system of representative parliamentary democracy. The individual is protected by the House itself through its own procedures for responses and natural justice.

Parliamentary privilege not only ensures the independence and authority of the House, but serves the public interest by ensuring scrutiny of executive actions. It ensures that its members are available to carry out their duty to the Parliament, free from external impediment. It allows the Parliament to operate effectively, which is in itself in the public interest.

We consider that the courts’ recent approach to parliamentary privilege with regard to New Zealand has been inconsistent. Following the reconfirmation in Prebble v Television New Zealand of the constitutional centrality of article 9, in the case of Buchanan v Jennings the issue arose of whether what a member said in the House could be sued on by reference to Hansard, when the member had “effectively repeated” the speech outside Parliament. This was the subject of a report by a previous Privileges Committee, which found that in a case of “effective repetition”, parliamentary statements would be put directly to the court because they would be the only or the main evidence of the defamation. In these circumstances the principle of mutual restraint would break down completely, as the court would be judging the quality of the parliamentary proceedings directly. This has major implications for the relationship between the legislature and the courts. The committee recommended that the law be amended to remedy the situation.

In contrast, the New Zealand Court of Appeal decision in Boscawen v Attorney-General was careful to consider matters of comity. That case involved judicial review proceedings regarding a decision of the Attorney-General not to report to the House under section 7 of the New Zealand Bill of Rights Act that the Electoral Finance Bill violated the right to freedom of speech. In that instance, the court recognised that proceedings in the House were involved.

In our view, the decisions in Buchanan v Jennings and Leigh represent a shift away from one side of the balance described as “well settled” in Prebble v Television New Zealand: we consider that the need to ensure that the legislature can exercise its powers freely on behalf of electors with access to all relevant information must prevail.

Reference to parliamentary proceedings before a court

We are concerned that the courts may have attributed to Standing Order 408 a meaning other than that intended by the House in adopting it. This Standing Order was intended

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21 The full Standing Order is set out in Appendix D.
to abolish a previous practice of requiring an application to the House for leave to refer to its debates in proceedings before a court. Litigants applied to the House for permission so as to avoid a breach of privilege. This does not mean, however, that the House has waived its article 9 protections. Indeed, Standing Order 408(2) explicitly states that any reference to proceedings remains subject to article 9.

The New Zealand House of Representatives has never taken the view that a mere reference to or production of what was said in Parliament infringes article 9. Its concern has always been to protect against a contravention of article 9: that is, the courts impeaching or calling into question proceedings in Parliament. By clarifying the requirements for those wishing to make reference to proceedings, the House was not opening up proceedings for wholesale questioning by the courts.

**Striking the appropriate balance**

It is vital to the constitutional health of New Zealand that the respective branches of government maintain the appropriate separation of functions and powers. Judicial examination must be limited to ensuring that Parliament does not seek to exercise its power outside its proceedings in an unlawful way. It is not for the courts to sit in judgement on individual actions taken within the parliamentary process. The courts have a role in assisting the articulation of the extent of parliamentary privilege, but it is for the Parliament itself to determine how it exercises that privilege.

As we will discuss in the next chapter, we consider that the Supreme Court’s *Leigh* decision attempts to redraw the boundaries in a novel way. It applies the law of parliamentary privilege in the abstract, and interferes with the ability of the House itself to assert and enforce its privileges. We believe that the principles articulated in *Prebble v Television New Zealand* correctly captured the way the balance of rights should be maintained.
4 Issues raised by the Supreme Court’s decision

In this chapter we examine the issues that flow from the Supreme Court’s Leigh judgment. In preparing this material we found the expert evidence of Professor Philip Joseph of particular assistance, along with David McGee’s Parliamentary Practice in New Zealand, which we consider is the authoritative guide to the practices and procedures of the New Zealand House of Representatives.

**Application of common law test of “necessity”**

One of our terms of reference was to consider the appropriateness of applying the doctrine of necessity to parliamentary privilege and whether as a consequence the same test would apply to other privileges, including protections available in relation to judicial proceedings and other legal matters.

The Supreme Court’s approach appears to narrow the test for article 9 protection to whether the asserted privilege is necessary for the proper and efficient functioning of the House and its members, rather than whether the occasion is directly or formally connected with the business of the House. This approach appears to reduce the privileges of the New Zealand House of Representatives to those it enjoyed prior to expressly obtaining the same privileges as those held by the House of Commons in 1865.

Parliamentary privilege exists to enable the House to operate effectively. The powers it confers are not a bare minimum to allow the House to operate—they ensure the House can carry out its functions fully. To restrict parliamentary privilege to what is deemed necessary would severely limit the way Parliament evolves to remain relevant and to operate in the public interest.

Privilege therefore helps to define the type of legislature that New Zealand enjoys (for example, one having an inquisitorial role), rather than being wholly supportive or subsidiary to it or explicable only in terms of essentiality.22

**Test applied by Supreme Court**

Leading constitutional law academic Professor Philip Joseph of the University of Canterbury provided expert evidence to us on the appropriateness of the test applied by the Supreme Court.

Professor Joseph told us that the Supreme Court had made a mistake in drawing on the approaches taken in judgments on two overseas decisions.23 In both of those decisions the courts in question were considering the boundaries of Parliament’s privilege of exclusive cognisance. In both cases a claim was made that certain matters were part of Parliament’s internal workings, and therefore could not be determined in the courts. The privilege of exclusive cognisance is based in common law, and therefore the courts in those cases could apply relevant common law tests in determining the scope of the privilege.

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22 McGee, p. 606.
The freedom of speech privilege is based in statute law through article 9 of the Bill of Rights 1688. The test of “necessity” is a common law test, and is therefore applied in error to Parliament’s freedom of speech, which has a statutory basis. Professor Joseph was clear in his submission that if the courts are to consider the scope of the freedom of speech privilege, then they should do so using the standard techniques of statutory interpretation.

In disregard of that approach, the Supreme Court in *Leigh* made no attempt to interpret the language in Article 9: in particular, the scope of the phrase “proceedings in Parliament”. The test of necessity which it applied was foreign to the statutory context.

Professor Joseph points to the essential difference in the two privileges: freedom of speech being concerned with protecting Parliament’s core business, and exclusive cognisance with protecting actions that enable Parliament to discharge its core business.24

The Rt hon Kevin Barron MP, the Chair of the Committee on Standards and Privileges of the House of Commons, also noted that necessity should be applied only to determining the scope of a privilege, rather than to individual actions or statements made under it.

The mutual respect of courts and Parliament, as evinced in the absolute nature of Parliamentary privilege and the prohibition on Parliament extending the scope of privilege by its own motion, is itself necessary. Without privilege, the unelected courts would be supreme; if Parliament were the sole arbiter of privilege it would be oppressive. Once privilege is established, the test of necessity is appropriate only when deciding whether a particular category of actions is privileged, not whether it is necessary to extend privilege to a particular action or utterance within a privileged category.

Although the *Leigh* matter concerned statements made by an official to a Minister directly preparing to answer oral questions, the Supreme Court’s judgment raises an issue of whether the necessity test could apply equally to members’ statements in the House. If it is not necessary for the proper and efficient functioning of the House for statements of an official to a Minister to be protected by absolute privilege on the basis that the defence of qualified privilege is available, the same argument could logically apply to statements made by members in the House. If such an approach were to be taken, the protection of article 9 would be lessened.

The judgment implies that the necessity test should be applied to all questions involving parliamentary privilege. We consider, however, that the position as expressed by Professor Joseph is correct, and that the test is not appropriate to apply to Parliament’s freedom of speech.

**Defence of qualified privilege in defamation proceedings**

The law may accord qualified legal privilege to certain communications not protected by parliamentary privilege. Qualified legal privilege provides a defence to actions for defamation provided that the person who published the defamatory material was not motivated predominantly by ill-will towards the person defamed and did not otherwise take improper advantage of the occasion of the communication to defame that person.

Qualified legal privilege shares a name with parliamentary privilege, but is otherwise a separate matter. Some confusion may however arise in that the publication of fair and

accurate reports of parliamentary proceedings qualify for the qualified legal privilege defence.

The effect of the Leigh decision is that while the Minister’s statements in the House were protected by absolute privilege as “proceedings in Parliament”, the oral and written briefings by Mr Gow to the Minister were protected by qualified privilege only. In particular, the Supreme Court held that Mr Gow would have a defence unless Ms Leigh could show that he was predominantly motivated by ill will or otherwise took improper advantage of the occasion of his communications with the Minister.

This focus of the decision on parliamentary privilege in the context of defamation and the defence of qualified privilege, which is available only for proceedings in defamation, does not take into account the wider context in which the privilege applies. The article 9 protection applies “…in any court or place out of Parliament”, not just to defamation proceedings. As we discuss further in the next chapter, the context of Parliament’s privileges is broader than protections in defamation, and they extend to other matters where the courts might otherwise be asked to intervene, such as a breach of a court order or a statutory requirement.

**Parliamentary privilege is an absolute privilege**

The Supreme Court’s decision in Leigh treated parliamentary privilege as if it were the same as any other privilege that provides a legal defence. This approach confuses parliamentary privilege, an absolute privilege protected by article 9, with qualified privilege.

The action before the Supreme Court was brought under the Defamation Act. Section 13(1) of the Act provides that “Proceedings in the House of Representatives are protected by absolute privilege”. The first question the court ought to have asked therefore was whether the statements in question were part of a “proceeding in the House”. If the answer to that question was “yes”, then the matter was subject to absolute privilege and the protections of article 9.

As Crown Law noted in its evidence to us, the matter was not one of what defence might be available.

The assertion of a question of privilege by the House was not a matter for Mr Gow to advance as if a defence for his actions… The fact that the Court saw the case as Mr Gow raising a defence of absolute privilege is underscored by the question further to the point of whether the public servant or whoever else communicates information to a Minister needs more than qualified privilege (as a defence to a defamation action) in order to enable the Minister and the House properly and efficiently to deal with parliamentary questions.

Again, the issue is not what any person outside the House needs as a protection, but whether the supply of information to the Minister under an obligation to address the House as to the answers to parliamentary questions is an integral part of a proceeding in the House. And if it is, whether the threat of defamation actions against the Minister’s constitutional advisors, with a duty both to the Minister and the House of complete candour, affects that duty and the resulting freedom to speak in the House.

The court appears to have erred in deciding that the defence of qualified privilege was sufficient “to enable Ministers, and the House as a whole, properly and efficiently to deal with Parliamentary questions” and “that level of privilege gives ample protection to the
public servant in circumstances like the present”. The issue of a defence does not arise if the circumstances in which the communication occurred are protected by absolute privilege. The application of the necessity test would have made sense if a consideration of a qualified privilege defence had been relevant. The evidence we received, however, made it clear that it is not appropriate to apply necessity to an absolute privilege.

We will consider the definition of a “proceeding in Parliament” further in the next chapter.

**Parliamentary redress available**

As we have noted, the House itself recognises that its privileges may affect the rights of individuals. It has in place its own protections for individuals to ensure fairness of procedures, particularly for witnesses before select committees (the most frequent direct involvement of the public in proceedings). It also provides for response from people to allegations made about them before a select committee that might seriously damage their reputation, and ensures anyone who may be subject to an adverse finding by a committee has an opportunity to comment before the finding is presented to the House. The House restricts itself by its own definition of contempt, and by provisions such as the sub judice rule.

Of particular relevance to the *Leigh* matter, the House has a procedure by which a person whose reputation may have been adversely affected by a reference to them in the House can seek to have a response entered into the parliamentary record. This procedure is set out in Standing Orders 156 to 159, attached as Appendix C.

In summary, a person who has been referred to in the House may make a submission to the Speaker in writing claiming to have been adversely affected or to have suffered damage to their reputation as a result. The submission must include a succinct and strictly relevant response to the reference, and must request that the response be incorporated into the parliamentary record.

When such a submission is received, the Speaker considers whether, in all the circumstances of the case, the response should be incorporated into the parliamentary record. This consideration usually includes giving the member who made the reference an opportunity to comment on whether the response should be incorporated. The Speaker takes account of the extent to which the reference is capable of adversely affecting, or damaging the reputation of, the person who made the submission. If the Speaker considers that a response should be incorporated into the parliamentary record, the response is printed as a parliamentary paper and presented to the House by the Speaker.

The purpose of this procedure is not to allow the correction of the record. It is intended to provide a recourse for persons who are named or identified in the House and consider that they have been adversely affected or have suffered damage to their reputation.

We note that Ms Leigh did not choose to take up this avenue of parliamentary redress, despite having been advised of its availability and the relevant process.

**Application to other privileges**

The discussion in this report has necessarily focused on parliamentary privilege. We have considered also how the novel approach taken by the Supreme Court might affect other types of privileges.

For example, we see parallels between the circumstances in *Leigh* and the legal preparation of witnesses to appear in court. If the doctrine of necessity applies to parliamentary
privilege, the same argument could well be made in respect of other occasions where privilege applies.
5 Implications of the decision for the operations of the House

Professor Joseph told us that the Supreme Court’s approach in *Leigh* does “incalculable damage to Parliament’s capacity to function in the public interest”, by potentially collapsing the scope of Parliament’s privilege of freedom of speech to cover only things said in the course of parliamentary debates and before select committees. However, in order for members to speak freely in debates or at select committee meetings, they need access to all the necessary supporting information.

In this chapter we consider the potential consequences of the *Leigh* judgment for the operation of the House of Representatives in the light of the concerns raised by submitters.

**Effect on the scope of article 9 of the Bill of Rights 1688**

A key term of reference was whether the judgment affects or purports to affect the scope of article 9 of the Bill of Rights, which we note above protects freedom of speech and “proceedings in Parliament” from being questioned or impeached outside Parliament. It appears to us that the meaning of “proceedings in Parliament” is the key to considering the scope of article 9. The *Leigh* judgment raises issues about the scope of article 9 and freedom of speech in respect of proceedings in Parliament. Even though the court decisions examined the meaning of “proceedings in Parliament” in order to ascertain whether the statements were protected by article 9, the meaning of the term remains uncertain.

**Meaning of “proceedings in Parliament”**

The meaning of “proceedings in Parliament” as used in article 9 of the Bill of Rights is not defined in New Zealand or British legislation, although Australia has enacted a statutory definition of the term.

In New Zealand, the term has generally been understood to go beyond words spoken in debate or actions taken on the floor of the House or at select committee meetings. It has been taken to cover all functions associated with the law-making process, including the drafting of bills, debates in the House, the making of submissions, and the presentation of bills for the Governor-General’s royal assent. It also covers the Attorney-General’s function of reporting on consistency with the New Zealand Bill of Rights Act 1990. This understanding is encapsulated in the definition of the term contained in *Parliamentary Practice in New Zealand*:

> Actions of the House, committees, members, officers, witnesses and petitioners which are either the transaction of parliamentary business themselves or which are directly and formally connected with the transaction of such business… This encompasses all the actions taken by the House itself, whether of a legislative or non-legislative nature.

As much of parliamentary business is not conducted directly on the floor of the House, it had been assumed prior to *Leigh* that the term “proceedings in Parliament” protected...
things said or done by parliamentary or ministerial staff in facilitating the business of the House. Professor Joseph describes the protection extending beyond members and actions taking place on the floor of the House:

Many staff engaged directly in the work of the House may likewise claim parliamentary privilege. Members of the Clerk's office who attend upon the House and service the select committees are predominantly engaged in proceedings in Parliament. Ministerial staff who assist their Minister prepare statements to be delivered in the House are also engaged in proceedings in Parliament. Their notes, preparatory materials, and drafts of parliamentary speeches are privileged and cannot be the subject of scrutiny in legal proceedings.26

Experience of other jurisdictions

In Australia, a definition of “proceedings in Parliament” is set out in the Parliamentary Privileges Act 1987. This Act includes a codification of the scope and operation of article 9 within the Commonwealth of Australia. Section 16(2) provides:

proceedings in Parliament means all words spoken and acts done in the course of, or for purposes of, or incidental to, the transacting of the business of a House or of a committee, and, without limiting the generality of the foregoing, includes-

(a) the giving of evidence before the House or a committee, and evidence so given;
(b) the presentation or a submission of a document to a House or a committee;
(c) the preparation of a document for purposes of, or incidental to, the transacting of any such business; and
(d) the formulation, making or publication of a document, including a report, by or pursuant to an order of the House or a committee and a document so formulated, made or published.

The Australian definition has been accepted in some situations in the New Zealand and English courts, including Prebble v Television New Zealand. In its evidence to us, the Australian Standing Committee on Privileges and Members’ Interests noted that the inclusion of the words “or incidental to” was particularly helpful in clarifying for the courts the breadth of the term's meaning. The committee noted that the small number of cases which had interpreted section 16(2) had affirmed that the term “incidental to” has allowed a relatively wide interpretation of “proceedings in Parliament”.

The Australian Senate Committee of Privileges commented that briefing material of the kind at issue in Leigh had been routinely accepted by Australian courts as falling within the scope of “proceedings in Parliament” as defined in the Australian Act. It was concerned that the Leigh decision rejected the argument that section 16 of the Australian legislation codifies article 9, as the decision is at odds with Australian authority.

The Rt hon Kevin Barron MP, the Chair of the Committee on Standards and Privileges of the House of Commons, observed that “it has long been held that material closely connected to a proceeding is also privileged”.

We heard also from a working group of the Canadian Senate’s Standing Committee on Rules, Procedures and the Rights of Parliament, which noted that Canada does not have a

legislated definition of “proceedings in Parliament” either, and that this had led to considerable uncertainty about the scope of the term.

**Effect on scope**

The Clerk of the House noted that much of the House’s business is transacted off the floor of the House, meaning that a narrow construction of “proceedings in Parliament” could have significant practical implications for anyone supporting such proceedings, or participating in them but not directly on the floor of the House or in a select committee meeting.

For the House to operate successfully, there needs to be certainty that Ministers and members are able to be informed, as freely and frankly as possible, about the business to be transacted, without the threat of legal sanction hanging over them or their advisers. Otherwise, scrutiny of the executive and public representation, two of Parliament’s core functions, are likely to be significantly compromised, as is the proper functioning of the House.

As we noted earlier, the logic of the *Leigh* decision seems to be driven by the law of defamation and the availability of the defence of “qualified privilege”. It is possible that “proceedings in Parliament” may be challenged in actions beyond defamation proceedings, where the defamation defence of qualified privilege is not available. For example, it is unclear what the effect might be in other legal proceedings such as breach of suppression orders, legislative compliance, or breach of confidentiality, where the defence of qualified privilege is not available, or if matters were raised with bodies such as the Human Rights Commission or the Broadcasting Standards Authority. The Clerk pointed out that a narrow definition of “proceedings in Parliament” could have the consequence of encouraging such actions and further inhibiting the ability of the House to transact its business because of the legal implications for advisers.

**Weakens the protections that had previously been understood to apply**

The *Leigh* decision has moved New Zealand away from the Australian position and the approach previously followed by the Privy Council. A decision of the Court of Appeal of the Supreme Court of Queensland, for example, recognised that documents obtained by or provided to a Senator relating to a subject which he raised in the Senate were protected under the Australian legislation.

The approach adopted in the Supreme Court’s decision in *Leigh* also moves New Zealand away from the practice of the House of Commons. No exhaustive definition of “proceedings in Parliament” has emerged in the United Kingdom, but the corresponding protection in the UK Defamation Act 1996 is said to include the giving of evidence before either House or a committee; the presentation or submission of a document to either House or a committee; and the preparation of a document for the purposes of or incidental to the transacting of any such business.

The practice of the UK Houses is reflected in the interpretation of “proceedings in Parliament”, which are exempt from the application of the UK Freedom of Information Act 2000. Exemptions guidance material prepared by the UK Ministry of Justice lists information that may be covered by parliamentary privilege as including:

- any unpublished correspondence between Ministers (or departmental officials) and any Member or official of either House, relating specifically to proceedings on any
Question, draft bill or instrument, motion or amendment, either in the relevant House, or in a committee.

Just as New Zealand looks to definitions and interpretation from comparable jurisdictions, those jurisdictions look to examples from New Zealand. By weakening the position of the Parliament in New Zealand, the judgment potentially weakens the position of other Commonwealth parliaments also.

**Chilling effect on the House's ability to receive information**

Professor Joseph told us that the knowledge that participants were not protected from legal liability when engaging in Parliament’s proceedings would “unavoidably have a chilling effect on the free flow of information” and that this would “contravene the public interest in the efficient functioning of the House.”

The free flow of information is the lifeblood of a parliamentary democracy. Collapsing Parliament’s privilege of freedom of speech will have a chilling effect on Ministers’ and members’ access to vital information. Parliamentary staffs, departmental officials and members of the public will be more economical in their communications, knowing that these may no longer be absolutely protected by parliamentary privilege. The possibility of legal action—no matter how remote—will unquestionably curb the free flow of information that is crucial to an efficiently functioning legislature.

The Rt hon Kevin Barron noted the judgment was likely to affect the frankness of communication between Members, their staff, staff of the House and constituents. It will inevitably have a chilling effect if those communicating with Members know that if matters are raised on the floor of the House the information supplied to Members to enable them to initiate such proceedings, and the motivation for supplying it, may be questioned.

**Behaviour of public servants**

We asked the State Services Commissioner to consider the effects of the judgment for public servants. He noted that under the Standards of Integrity and Conduct that he issues under the State Sector Act 1988, public servants are expected to be “fair, impartial, responsible and trustworthy.” These obligations would apply when briefing Ministers, and would therefore require a public servant to ensure they were fair in relation to any person who was the subject of a briefing. If they made statements to a Minister in the course of a briefing that were predominantly motivated by ill will, they would put at risk the wider bond of trust between the Minister and the public servant, open the public servant up to action under the code of conduct, and potentially to disciplinary action, he told us. Since the *Leigh* judgment, they might also be exposed to an action of defamation.

While the commissioner considered that the *Leigh* decision did not create management difficulties for the public service, nevertheless we consider that a natural human reaction of public servants following the judgment may be to curtail the information provided to Ministers or committees to minimise personal risk.

**Failure to recognise the practical operations of the House and its committees**

As the Hon Sir Grant Hammond commented, the *Leigh* decision does not appear to be grounded in the facts of parliamentary life, but rather it attempts to apply the law in the
abstract. The reality of parliamentary life is that it is a series of complex interactions leading to expression in debates and select committee meetings, and it is not necessarily easy to draw sharp lines between these interactions and expressions.

**The status of material prepared for questions for oral answer**

In *Leigh* it was accepted that the Minister’s statements in the House were proceedings in Parliament and protected under article 9. The effect of the decision however is that the advice, briefings, and draft replies provided by officials to a Minister are not “proceedings in Parliament” and could therefore be subject to defamation action.

The process of asking questions in the House is a fundamental way of holding the executive to account, and there is a strong public interest in ensuring that Ministers respond to questions on the basis of free and frank advice provided by officials. Departmental officials have an obligation to supply information to Ministers, and through the Ministers to the House and the public.

If the advice provided by departmental officials to Ministers directly for the purposes of replying to questions can be subject to legal proceedings, there may be reluctance to provide free and frank advice to the Minister. Protection of information given when the Minister answers questions in the House is something of an illusion if the information provided by officials directly for the purpose of answering a question is subject to legal challenge.

**Application to evidence and advice received by select committees from officials**

The *Leigh* action concerned answers to oral questions in the House, but its application could extend to preparatory advice or briefings given to witnesses appearing at select committee hearings. While the evidence of a witness given to a select committee would be protected by article 9 as a proceeding in Parliament, the information or advice prepared directly for the purpose could be subject to legal challenge. For example, the statements of a chief executive appearing before a select committee at an examination of a department’s financial performance would be protected by article 9, but the briefing or advice prepared by his or her officials for the purposes of the hearing would not be protected. Arguably, this could have a chilling effect on the evidence given by officials or any witnesses to select committees. Officials particularly have an obligation to be free and frank to select committees, which makes the application of article 9 to those proceedings so fundamental. If the advice or information supplied to a witness for the purposes of a hearing is not protected, the effect of the protection afforded to the actual statements made when the witness appears before the select committee will be reduced considerably.

The decision also has implications for the preparation of advice to be given by officials in the role of advisers to select committees, as such advice may not be absolutely protected as “proceedings in Parliament”.

In addition, this decision may have implications for official information requests to departments for material the department has prepared for select committees. Section 18(c)(ii) of the Official Information Act 1982 provides grounds for refusal to release information where the release would constitute a contempt of the House. On occasion officials rely on this ground for not releasing information which the department has prepared for a select committee, so as not to infringe the confidentiality of select committee proceedings before the committee reports to the House. The rationale behind the provision is that it is for Parliament to determine how proceedings in Parliament are
made available; but the *Leigh* decision suggests that advice of this kind may not be considered a parliamentary proceeding.

**Application to public participation in proceedings**

We are concerned that the reasoning in the *Leigh* decision puts at risk all those people who provide either written or oral evidence to committees, not just departmental officials, as well as those who petition Parliament. If *Leigh* stands, then a similar argument could be made in the courts that withholding the protection of parliamentary privilege from them would not threaten or prejudice Parliament’s core business, therefore there would be no need to grant the protection of parliamentary privilege. The implication of the decision is that a defence of qualified privilege under the law of defamation would be sufficient.

The *Leigh* decision may also have implications which would have an impact on the protection of some evidence given to select committees. Evidence which is accepted by select committees as private or secret evidence would be protected from legal challenge as “proceedings in Parliament”, but any advice, briefings, or drafts created for the purposes of preparing that evidence might not have the same protection.

**Application to the media and third parties**

Participation in parliamentary proceedings is not limited to members of Parliament and advisers. Significant input is provided by members of the public, particularly in relation to the select committee process but also through other parliamentary mechanisms such as petitioning Parliament. As we note above, the Supreme Court judgment raises questions about the status of draft material being prepared for submission to the House. Further, it potentially exposes witnesses before committees to examination in a court in relation to the evidence provided to Parliament. This is not consistent with article 9.

The media too should be protected in performing their role of reporting on the business conducted in Parliament. Limiting the protections for participants in the process also has the effect of reducing the protections available to the media. As noted in the previous committee’s report on freedom of speech in the context of court orders, the media appear to believe incorrectly that they have protection from actions such as contempt of court or breach of statutory no-publication provisions when reporting anything said in the House, providing the report is fair and accurate. This is not the current legal position.

In his submission, Professor Joseph noted that the effective repetition issue raised by the *Buchanan v Jennings* decision also opens up the possibility of action against the media for reporting on any occasion of such repetition.

The [effective repetition] doctrine exposes to action both the media and the original maker of the intra-parliamentary statement (namely, Ministers or members)—the original maker of the statement for effectively repeating it outside Parliament, and the media for reporting it… To expose to action either the media or the member in this way is contrary to the public interest, which commends full and unimpeded access to political decision-makers through a free press.
6 The desirability of legislative reform

We have considered carefully the evidence and advice provided to us, and have concluded that the Supreme Court judgment in *Leigh* raises significant issues that must be addressed. In this chapter we summarise our concerns about the potential effects of the judgment and consider the options for addressing these issues, including legislation.

**Application of comity principles**

The House endeavours to apply the principles of comity, and in particular to avoid the situation of having to comment directly on a judgment of a court. With this particular judgment, we were faced with a question of whether the House is bound to defer to the courts in any question of a breach of article 9 which has been determined in a judicial proceeding. The answer to that question is in theory “no”, but in practice “yes”.

In the past the House, when notified of a question of privilege before a court, has deferred any question of a breach of privilege until after the matter has been determined in the court. It has further deferred to the process by at times seeking to be heard on the matter, traditionally by the process of an amicus intervention. The amicus is not instructed to assert that in the opinion of the House a breach of privilege has occurred, as this could represent a challenge to the jurisdiction of the court.

If the position were reached where the House ruled that, despite a ruling of the court, a breach of its privilege of freedom of speech had occurred, this would demonstrate a crisis of confidence and trust such as the comity principle is intended to avoid.

With this particular reference, we were not asked to consider whether a breach of privilege has occurred, and we have not done so. Our findings relate to the test used in the Supreme Court judgment, and its consistency with the powers, privileges, and immunities of the New Zealand Parliament.

**Supreme Court’s approach**

We respectfully disagree with the Supreme Court’s approach in making the central factual issue a question of whether the defendant had demonstrated that “without this kind of occasion being regarded as absolutely privileged the House could not discharge its functions properly”. This approach treated Parliament’s freedom of speech as if it were merely a defence in defamation. The issue is not what a person outside the House needs as protection, but rather whether the supply of information to Ministers under an obligation to address the House in answer to parliamentary questions is an integral part of a proceeding in Parliament.

The privilege of free speech protects not only the words spoken on the floor of the House or in committees, but the actions that support and lead up to them. We are concerned that the judgment may have a chilling effect on the ability of the House to receive information.

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from officials and others supporting the parliamentary process to ensure members are fully informed about matters before the House.

Further, we consider that placing the rights of individuals ahead of the interests of our system of representative parliamentary democracy is not in the public interest. We have noted that the Privy Council in Prebble v Television New Zealand has found that the interplay between these competing interests is well settled, giving primacy to the ability of the legislature to exercise its powers freely on behalf of electors, with access to all relevant information (although the other interests should not be ignored). The Parliament itself recognises that protecting those other interests is important, and provides its own protections through natural justice and sub judice rules.

In this particular situation we therefore consider we must assert that the decision of the court was incorrect.

**Recommendation**

1. We recommend to the House that it note that we respectfully disagree with the Supreme Court decision in Attorney-General and Gow v Leigh in applying the test of necessity to ascertain the scope of Parliament’s privilege of freedom of speech.

**Effective repetition**

In considering this matter, we also note that the issues raised by the decision in Buchanan v Jennings have yet to be resolved.

In 2005 the Privileges Committee recommended abolishing the doctrine of “effective repetition”, in order to overturn the decision in Buchanan v Jennings. The principal issue in this case concerned the extent to which something said by a member inside Parliament could be used in a defamation claim on the basis of an effective (as opposed to actual) repetition of the parliamentary statement outside the House.

The Privy Council considered that such effective repetition was subject to the established principle that re-publication outside Parliament of a statement previously made in Parliament is not protected by absolute privilege. This legal finding raised issues of the courts assessing and adjudging parliamentary proceedings, the potential for a chilling effect on free speech in the House and in public debate, and the possibility of the effect spreading beyond defamation.

The previous committee noted that in defamation, a plaintiff is alleging that false statements have been published with an intent to defame. In a defamation action using the “effective repetition” approach, the court must assess whether the member spoke falsely in the House. This is a direct contravention of the principle of mutual restraint, as the court is judging directly the quality of parliamentary proceedings. Further, the committee was concerned that, by making participants in parliamentary proceedings potentially answerable before a court, the effective repetition doctrine could have a chilling effect on their contributions in proceedings.

While effective repetition had arisen in the context of a defamation action, the committee noted that principles of law have an inherent capacity for development and that the doctrine could be extended to other circumstances. For example, within the parliamentary

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context the doctrine could be used to pursue a prosecution for sedition, incitement to racial disharmony, or a breach of the obscenity laws. It could also extend beyond parliamentary proceedings, opening up participants in court proceedings to similar liability.

The Privileges Committee of the 47th Parliament recommended that the Legislature Act be amended to “provide that no person may incur criminal or civil liability for making any oral or written statement that affirms, adopts or endorses words written or spoken in proceedings in Parliament where the oral or written statement would not, but for the proceedings in Parliament, give rise to criminal or civil liability.” The committee of the 48th Parliament reiterated this recommendation, but such an amendment has not yet been made. We note that the purpose of this recommendation was not to seek any special protection for defamatory statements made outside Parliament, but rather to ensure that the article 9 protections of free speech in Parliament are maintained.

**Response to Buchanan v Jennings decision in other jurisdictions**

Several Australian legislatures have considered the effect that the decision in *Buchanan v Jennings* might have in their jurisdictions. The Australian Senate Committee of Privileges noted in 2008 that promoting a remedy might seem premature as there have been no similar cases in Australia with a result comparable to *Buchanan v Jennings*, but it is a very well-established practice for the Australian courts to consult the jurisprudence of comparable common law countries such as New Zealand. Should there be such an outcome for which a legislative remedy is sought, however, or if a legislative solution was considered desirable to pre-empt such an outcome, the Senate committee proposed a number of principles to guide any proposed amendment. These included that such an amendment should be expressed “for the avoidance of doubt” and not expand the currently accepted scope of the protection of proceedings in Parliament.29

A committee of the Western Australia Legislative Assembly also recommended in 2006 that its Parliamentary Privileges Act 1891 be amended to include a provision that ensures that parliamentary proceedings cannot be used to establish what was “effectively” but not actually said outside Parliament.30

Both the reports recommended that the matter be discussed by the Standing Committee of Attorneys-General. To date no legislative amendment has been necessary in either jurisdiction.

**Legislation required to clarify current position**

We consider that the Parliament has been put in a position where its relationship of trust and confidence with the courts has become strained because comity has not been recognised, leading to a conflict over their respective jurisdictions. This strain was recognised in the previous committee’s report on *Buchanan v Jennings*, where the committee disagreed with a court’s finding, and again in this case. It is unfortunate that the Parliament now finds itself in the position of needing to clarify for the courts the nature of Parliament’s privileges.

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Options for reform

There are two common approaches to defining parliamentary privilege. The first approach, traditional in Westminster democracies, is to leave definitions imprecise, to allow for necessary evolution to keep pace with the operation of the House. The second is to set out clearly the boundaries of the privilege in order to provide certainty to participants.

The traditional concern about the latter approach is that it would generally require legislation of some kind. While it would be the Parliament that would legislate, ultimately it would be for the courts to interpret that legislation, opening up the same dangers of breaching the comity principle we describe earlier.

For these reasons we have thought very carefully about the kind of legislative reform we might recommend. We considered several options.

The first option would be not to legislate at all, but wait to see whether the predicted effects in fact occur. We believe we have now passed the point where this would be a viable option, given the very real concerns the Buchanan v Jennings and Leigh decisions raise.

The second would be to resolve only the issue in Leigh, by amending the Defamation Act to provide that information given to a Minister solely for the purpose of responding to a question in the House is protected by absolute privilege. The disadvantage of this option is that it would address only the limitations of the Leigh decision in respect of defamation and would leave the wider effects unresolved.

A third option would be to enact a statute giving legislative force to the common law privileges, but without setting them out in detail. This would be similar to the approach taken by some overseas Parliaments.31

A fourth option would be to set out the extent of privilege fully in legislation. While this might give greater certainty to the meaning and extent of parliamentary privilege, it also carries the risk that legislation might not then keep pace with the operations of the House, and could bring the courts into examining House proceedings directly.

Scope of legislation

We consider that legislation is required. In considering our proposed approach, we have also taken into account the fragmented nature of the current law on parliamentary privilege, and the reforms already recommended in previous Privileges Committee reports. We do not wish to see a full codification of parliamentary privilege in legislation; we consider this properly remains with the Parliament. We do however wish to set out some general principles to ensure that our parliamentary democracy is safeguarded appropriately and to provide more clarity than the existing 1908 legislation affords. We therefore propose that legislation of the style suggested as the third option above be advanced. We set out our proposed inclusions in the next chapter.

We do not recommend codifying parliamentary privilege, and particularly contempt, in the legislation. The House is the ultimate judge of whether or not a contempt arises, and provides its own general definition and examples of contempts in the Standing Orders.

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31 For example, in the Parliament of Canada Act, which also deals with several other matters relating to the operation of the Parliament. A similar approach is taken in the Australian federal jurisdiction, in the form of the Parliamentary Privileges Act 1987. This also effectively legislates the common law privileges, but without explaining their extent. We discuss this legislation further in the next chapter.
Recommendation

2. We recommend to the Government that it introduce a Parliamentary Privilege Bill to clarify for the avoidance of doubt the nature of parliamentary privilege in New Zealand.

History of legislative proposals

There have been several recent attempts to legislate in this area. In 1989 the Standing Orders Committee recommended enactment of a Legislature Bill, to consolidate and amend certain provisions of the law relating to parliamentary privilege. In 1994 the Hon David Caygill introduced a member’s bill, which was considered by the Standing Orders Committee. The committee did not support the bill, however, largely because it went too far in the direction of codification and gave the courts too great a role in relation to contempt.

Australian legislation

We found the Australian experience with regard to legislation particularly useful in considering the options before us. The Commonwealth of Australia faced a similar concern to ours when in 1986 the New South Wales Supreme Court found on two occasions that material considered to be covered by the definition of “proceedings in Parliament” could be subject to cross-examination in court. As a result of this perceived encroachment on the Parliament’s understanding of the interpretation of article 9, the Parliament decided to enact its preferred interpretation of article 9. The Parliamentary Privileges Act 1987

- makes it clear that the purpose of the enactment was to establish the Parliament’s interpretation of the effect of article 9
- defines “proceedings in parliament”
- clarifies what “impeaching or questioning” by a court or tribunal would amount to
- protects directly, even from production in a court or tribunal, in-camera evidence to parliamentary committees
- permits the use of “proceedings in parliament” in court and tribunal proceedings in specific circumstances, such as for the purposes of statutory interpretation.

The legislation is generally considered to have been successful in dealing with the interpretation issues that arose in the 1980s, as few cases have arisen or been pursued under the Act. Our Australian counterparts consider that “an appropriate balance has been achieved between the operation of the justice system and the requirements of Parliament.” The Act appears to have successfully confirmed what had always been assumed to be the scope of the freedom of speech in Parliament.

United Kingdom review

In April 2012 the Government in the United Kingdom issued a Green Paper seeking input on a Government-led review of parliamentary privilege. The review was focused on whether the available immunity for parliamentarians from criminal prosecution was appropriate, and whether protections for free expression in proceedings and the media reporting of those proceedings required strengthening.

33 The equivalent of secret evidence in the New Zealand system.
A Joint Committee on Parliamentary Privilege has been established by the House of Commons and the House of Lords to consider and report on the Green Paper. We await the outcome of that committee’s deliberations with interest.
7 Extent of proposed legislation

In this chapter we consider the extent of legislation that we believe would appropriately clarify the current position regarding the privileges, powers, and immunities of the New Zealand Parliament.

Purpose provision

An important starting point for the new legislation will be providing a clear declaration that the privileges, immunities, and powers conferred on the House, its committees, and members are conferred for the purpose of enabling them to carry out their functions. Any consideration of matters of privilege must be accompanied by the understanding of its purpose. Despite its unrelated pejorative overtones, parliamentary privilege operates to facilitate the workings of New Zealand’s most important constitutional institution, not to confer personal benefits on a particular group. A clear understanding of this distinction should be facilitated by the legislation.

We therefore endorse the suggestion of the Clerk of the House that the bill should include a statement of purpose to aid in determining the extent and scope of parliamentary privilege, as was proposed in the 1989 Standing Orders Committee report.

Recommendation

3. We recommend to the Government that the Parliamentary Privilege Bill contain a clear statement of purpose to aid in determining the extent and scope of parliamentary privilege.

Consolidation of existing law

We consider that the general provision relating to parliamentary privileges, powers, and immunities in section 242 of the Legislature Act should be retained in the new legislation, as it was when the 1908 Act replaced the Parliamentary Privileges Act 1865.

We consider that it would be helpful to draw together and replace the few remaining provisions of the Legislature Act 1908, the provisions subsequently enacted in the Legislature Amendment Act 1992, and those in section 13 of the Defamation Act.

This should include removing the current distinction in the Legislature Act between different courts in the provisions exempting members and certain officers of the House from attendance as witnesses in court proceedings.

We note that the 1989 Standing Orders Committee report made a number of recommendations as to how some of the other remaining provisions could be tidied up, and we suggest that consideration be given to these recommendations in drafting the new bill.
Recommendations


5. We recommend to the Government that it consider and where appropriate incorporate the recommendations in the Second Report of the Standing Orders Committee on the Law of Privilege and Related Matters, November 1989 (I.18B) in drafting the Parliamentary Privilege Bill.

Reaffirmation of Parliament’s privilege of freedom of speech

In the light of the approach taken by the Supreme Court in the Leigh decision, we consider that the bill should reaffirm Parliament’s privilege of freedom of speech and debate as provided for in article 9 of the Bill of Rights.

To help interpret this privilege, we suggest taking a similar approach to that in the Australian legislation. For example, a definition of “proceedings in Parliament” should be included. The law should, however, be clear that such a definition is provided for the avoidance of doubt, thus avoiding inadvertently undermining the common law. The bill could also clarify the interpretation of “impeaching and questioning” such proceedings in court. We consider that clarifying these boundaries would help prevent conflicts arising between the courts and Parliament.

Recommendation

6. We recommend to the Government that the Parliamentary Privilege Bill provide for the avoidance of a doubt a definition of “proceedings in Parliament” and what is meant by “impeaching and questioning” such proceedings, as set out in article 9 of the Bill of Rights 1688.

Further clarifications

We also recommend making specific provision in the law for other privileges that have not previously been codified in this way. These are not new privileges, and they have previously been asserted. In particular, we propose the inclusion of provisions covering the power of the House to fine for contempt, and the power to administer oaths or affirmations in respect of witnesses giving evidence. We also consider the legislation should confirm that the House does not have the power to expel its members. Any question of the eligibility of a member to serve in the House should be provided for in an Electoral Act, and we consider the Parliament should disclaim any power to expel a member.

Recommendations

7. We recommend to the Government that the Parliamentary Privilege Bill provide for the power of the House to fine for contempt.

8. We recommend to the Government that the Parliamentary Privilege Bill provide for the power of the House to administer oaths or affirmations in respect of witnesses giving evidence.

34 Fines have been imposed in the past by the House on members and non-members, most recently in 2006 when Television New Zealand was fined $1,000. The last occasion before that was in 1903.
We recommend to the Government that the Parliamentary Privilege Bill confirm that the House does not have the power to expel its members.

Recommendations of previous Privileges Committees

We note the recommendations of previous Privileges Committees that legislative changes are required to reverse the doctrine of effective repetition, clarify the situation in relation to media reporting of Parliament, and provide for the official broadcast of parliamentary proceedings. We consider these recommendations should also be addressed in the new bill.

Recommendations

10. We recommend to the Government that the Parliamentary Privilege Bill provide that the live broadcast of Parliament’s proceedings, including select committee hearings, is protected by absolute privilege.

11. We recommend to the Government that the Parliamentary Privilege Bill provide that delayed broadcasts or rebroadcasts of Parliament’s proceedings, including select committee hearings, that are made by order or under the authority of the House of Representatives are protected by absolute privilege.

12. We recommend to the Government that the Parliamentary Privilege Bill provide that a fair and accurate report of proceedings in the House, or summary using extracts of proceedings in the House, by any person is protected by qualified privilege.

13. We recommend to the Government that the Parliamentary Privilege Bill provide that the broadcast and other publication of extracts of Parliament’s proceedings, including select committee hearings, that are not made by order or under the authority of the House of Representatives are protected by qualified privilege, in a manner consistent with the provisions of the Defamation Act 1992.

14. We recommend to the Government that the Parliamentary Privilege Bill make explicit that a member of Parliament, or any other person participating directly in or reporting on parliamentary proceedings, who makes an oral or written statement that affirms or adopts what he or she or another person has said in the House or its committees will not be liable to criminal or civil proceedings unless the statement in and of itself could be defamatory.

Administration of new Act

We consider that the new legislation should be administered by the Clerk of the House, who provides Parliament’s secretariat. We suggest that the Government work with the Clerk on the drafting of the bill.

Recommendations

15. We recommend to the Government that once enacted the Parliamentary Privilege Bill be administered by the Clerk of the House of Representatives.

16. We recommend to the Government that it work with the Clerk of the House of Representatives to draft the Parliamentary Privilege Bill.
8 Conclusion

Parliamentary privilege provides protections for the participants in parliamentary proceedings to ensure that Parliament fully discharges its crucial functions of legislating, scrutinising the government, and representing the people. These protections, like those applying to participants in court proceedings, have a long history and are central to the balance between the three branches of government in the Westminster system.

In the last Parliament, changes were made to the sub judice rule in the Standing Orders to give more prominence to the issue of comity and the mutual respect between Parliament and the courts regarding their various roles. While the House has moved recently to recognise more clearly constraints on the privilege of freedom of speech in the House in respect of matters before the courts, the effect of the decision in *Leigh* is to move the courts in the other direction to allow more questioning of business directly connected with the House.

The necessity test determined by the United Kingdom Supreme Court in *Chaytor*, which concerned a criminal prosecution relating to members’ expenses claims, has no place in respect of material directly associated with the business of the House. If the necessity test were to apply equally to statements of members as well as to information provided by officials, the protection of article 9 of the Bill of Rights would be substantially lessened. The logic of *Leigh* is driven by the law of defamation and leaves it uncertain how the meaning of “proceedings in Parliament” would be determined in other actions where the defence of qualified privilege was not available. The judgment has a potentially chilling effect on the ability of the House to receive the information it needs to operate effectively. Further, it is questionable whether the courts’ jurisdiction is such that they can challenge the extent of parliamentary privilege in this manner.

We consider the time has come for comprehensive legislative reform of parliamentary privilege in order to clarify for the courts the nature and scope of that privilege. We have recommended that a Parliamentary Privilege Bill be introduced, replacing the piecemeal legislation that exists at present. We suggest that the Australian Parliamentary Privileges Act 1987 would provide a useful model for the bill.

We look forward to the introduction of suitable legislation, and to the opportunity for the House to consider the appropriate way to provide certainty in this area.
Committee procedure

We met between September 2012 and June 2013 to consider the question of privilege. We received evidence from Mary Harris, Clerk of the House of Representatives; Crown Law; Graeme Edgeler; Hon Sir Grant Hammond; Mark D McNicholl; the New Zealand Law Society; Professor Philip Joseph; Professor Ursula Cheer; and the State Services Commission.

We also received evidence from our counterparts from the Committee of Privileges, Australian Senate; the Committee of Privileges and Members’ Interests, Australian House of Representatives; Rt hon Kevin Barron MP, United Kingdom House of Commons; and a working group of the Canadian Senate Standing Committee on Rules, Procedures and the Rights of Parliament.

We received advice from Debra Angus, Deputy Clerk of the House of Representatives.

The evidence and advice received by the committee has been published on www.parliament.nz.

Committee members

Hon Christopher Finlayson QC (Chairperson)
Hon John Banks
Hon Gerry Brownlee
Charles Chauvel (until 27 February 2013)
Hon Lianne Dalziel
Dr Kennedy Graham
Chris Hipkins (from 27 February 2013)
Hon Murray McCully
Hon David Parker
Rt Hon Winston Peters
Hon Anne Tolley
Hon Tariana Turia

Committee staff

Debra Angus, Deputy Clerk of the House
Catherine Parkin, Clerk of the Committee
Appendix B

Speaker’s ruling

I wish to advise the House that, on my own initiative, earlier this year, counsel was instructed to address the Supreme Court on any aspects of parliamentary privilege that might arise in an appeal arising from a defamation action between Ms Erin Leigh and the Ministry for the Environment. My intention in instructing counsel was so that a full submission could be provided on the law of parliamentary privilege relevant to the provision of advice by officials and parliamentary staff to members for the purpose of supporting the effective conduct of the business of the House.

The Court gave its decision in the case on Friday 16 September 2011.

The Court has held that statements made by an official to a Minister for the purpose of replying to questions for oral answer are not themselves parliamentary proceedings. Such statements can therefore be the subject of court proceedings as they are not protected by absolute privilege.

I consider that the Court’s decision in Attorney-General and Gow v Leigh [2011] NZSC 106 raises serious issues affecting the privileges of the House.

Consequently, I have determined that a question of privilege is involved and, therefore, the question stands referred to the Privileges Committee.
Appendix C

Standing Orders relating to applications for response

RESPONSES

156 Application for response

(1) A person (not a member) who has been referred to in the House by name, or in such a way as to be readily identifiable, may make a submission to the Speaker in writing—
   (a) claiming to have been adversely affected by the reference or to have suffered damage to that person’s reputation as a result of the reference, and
   (b) submitting a response to the reference, and
   (c) requesting that the response be incorporated in the parliamentary record.

(2) A submission must be made within three months of the reference having been made.

(3) Any response must be succinct and strictly relevant to the reference that was made. It must not contain anything offensive in character.

157 Consideration by Speaker

(1) The Speaker considers whether in all the circumstances of the case the response should be incorporated in the parliamentary record.

(2) In that consideration, the Speaker—
   (a) may confer with the person who made the submission and with the member who referred to that person in the House, and
   (b) takes account of the extent to which the reference is capable of adversely affecting, or damaging the reputation of, the person making the submission.

(3) The Speaker is not to consider or judge the truth of the reference made in the House or of the response to it.

158 Speaker decides against incorporation

If the Speaker decides that the response should not be incorporated in the parliamentary record, the Speaker must inform the person concerned that no further action will be taken.

159 Speaker decides response should be incorporated

(1) A response that the Speaker determines should be incorporated in the parliamentary record is presented to the House and is published under the authority of the House.

(2) The Speaker may decide that a response should be incorporated in the parliamentary record after the person has amended it in a manner approved by the Speaker.
Appendix D

Standing Order 408

408 Reference to parliamentary proceedings before court

(1) Subject to this Standing Order, permission of the House is not required for reference to be made to proceedings in Parliament in any proceedings before a court.

(2) Reference to proceedings in Parliament is subject always to article 9 of section 1 of the Bill of Rights 1688, which prohibits the impeaching or calling into question in a court of such proceedings. Nothing in paragraph (1) is intended to derogate from the operation of article 9.

(3) Paragraph (1) does not authorise reference to proceedings in Parliament contrary to any Standing Order or other order of the House relating to the disclosure of proceedings of the House or of a committee of the House.
Question of privilege regarding use of intrusive powers within the parliamentary precinct

Interim report of the Privileges Committee

Fiftieth Parliament
(Hon Christopher Finlayson QC, Chairperson)
December 2013

Presented to the House of Representatives
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Question of privilege regarding use of intrusive powers within the parliamentary precinct

**Recommendation**

The Privileges Committee recommends that the House take note of its interim report on the Question of privilege regarding use of intrusive powers within the parliamentary precinct.

**Introduction**

On 11 July 2013 the Speaker ruled that a question of privilege arose from issues raised in a letter to him from Dr Russel Norman. The issues related to the exercise of intrusive powers against members, and the release of information from parliamentary information and security systems. The question consequently stood referred to this committee. The ruling is appended to this report (Appendix B).

Because of the intense public interest in the incident that led to the referral, we have decided to make this interim report, setting out our findings of fact regarding the circumstances of the incident.

**What we were asked to do**

We were tasked with examining the particular incident involving the release of information from parliamentary information and security systems that led to the question of privilege being referred, and the more general issue of appropriate principles for access to and release of information from parliamentary information and security systems.

The particular incident involved the release of information held on parliamentary information systems to the author of *Inquiry into the unauthorised release of information relating to the GCSB compliance review report: The leak of the Kitteridge report*.

We decided to begin our consideration by establishing the facts of this incident. To help us do so, we invited evidence from the principal organisations and individuals concerned: those who requested information, those who responded to the requests and could discuss pertinent policy and procedure, and those who were the subject of the information requests.

The transcripts of our hearings of evidence are contained in Appendices E to I of this report, and the written evidence we received has been published on www.parliament.nz.

**What we were not asked to do**

The Speaker did not ask us to investigate this release as a contempt. Nor did he ask us to determine who was responsible for the release.

**Interim report**

This is an interim report. While this report records our findings in relation to the incident, our consideration of the wider matters of principle is continuing. We will report to the House on these matters in due course.
**Structure of our report**

In this report, we first set out a brief background about the matters leading up to the establishment of the Inquiry into the unauthorised release of information relating to the GCSB compliance review report. The status of this inquiry, and its function and nature, is pivotal to our consideration.

We then set out the detailed facts of the incident itself, based on the evidence we have heard. In general, there has been no dissent as to the evidence. There is no suggestion that the information releases in question did not occur, and little disparity in accounts of the facts of their occurrence. A summary of the effect of the incident and our concerns about the operation of key parties is included in that chapter. We also comment here on “the three agreements”: rules about the collection and review of information, which operate only in respect of particular elements of the Executive who are party to the agreements.

In our final section, we set out the key issues highlighted by the incident. The information we have gathered has helped to clarify for us where the main issues lie. We expect the next stage of our consideration to focus on these issues. We intend to examine the approaches taken in other jurisdictions to comparable matters, and consider carefully how these issues interact, before we make our final report setting out the principles we consider should guide access to and the release of information.

Some contextual information about the service arrangements within the Parliamentary Service is set out in Appendix C. The service is a large organisation which supports a number of different bodies, and we think these service arrangements have contributed to the issue that has arisen. We also set out in Appendix C information on the role and responsibilities of the Department of the Prime Minister and Cabinet, the Office of the Prime Minister, and the Government Communications Security Bureau, all of which have had a part to play in the events leading up to the referral of this question of privilege.
1 Incident concerning the release of information

This chapter sets out a summary of the incident. It provides contextual information about the establishment of the inquiry, then outlines in detail the facts of each set of information released to the inquiry. Our key concerns about the information releases are summarised at the end of this chapter.

Background and establishment of the inquiry

In 2012, concern was raised about legal compliance by the Government Communications Security Bureau (GCSB), as a result of events involving Kim Dotcom. Rebecca Kitteridge, the Cabinet Secretary, was seconded to carry out a review of the GCSB’s compliance systems and processes, commencing on 2 October 2012. A final report was prepared, dated 22 March 2013. The report was classified as “sensitive”.

Members of the Intelligence and Security Committee, which at the time was examining the Government Communications Security Bureau Bill, received an embargoed copy of the report. On 9 April 2013 the Dominion Post newspaper published an article by Andrea Vance disclosing content from the report. At that time the report had not been released publicly; it was released publicly, by the Prime Minister, soon after.

On 15 April 2013, at the request of the Prime Minister, David Henry (a former Commissioner of Inland Revenue and Chief Electoral Officer) was commissioned by the chief executives of the Department of the Prime Minister and Cabinet (DPMC) and the GCSB to carry out an inquiry into the unauthorised leak of the Kitteridge report. The inquiry was asked to

- investigate and report the facts about the unauthorised disclosure of information
- report any appropriate findings on how this information was released and by whom
- make recommendations (if applicable) on improving the internal information management process, on the basis of any lessons to be drawn from the inquirer’s investigations.

As the DPMC and GCSB staff were possible sources of the Kitteridge report leak, the inquiry was established to be independent from the two agencies. A DPMC staff member was seconded to assist Mr Henry in the administration of his inquiry, but was accountable only to Mr Henry for the duration of the inquiry, and considered independent of the DPMC in relation to his work on the Henry inquiry. GCSB staff members provided administrative support in the early stages of the inquiry, but not during the period relevant to our consideration.

The inquiry was expected to have two stages, the first consisting of reviewing communications and copying equipment and records, log books, and any other relevant material from the people (or their offices) who had or were likely to have had access to the compliance review report. Stage 2 would include formal interviews, if the inquirer believed they were warranted by the facts and would help him meet the objectives of the inquiry.
Notably, the inquiry had no formal powers to compel the provision of information. In his report, Mr Henry noted that had compulsion been necessary to obtain information in relation to public servants he “would have asked for an appropriate delegation from the State Services Commissioner under the State Sector Act 1988”. We note Ministers and members are not public servants. However the provisions of the Official Information Act 1982 apply to Ministers and their offices, and were not invoked by Mr Henry.

The second stage of the inquiry was never reached. On 7 June 2013, the inquiry report (dated 5 June 2013) was released by the Prime Minister. The report concluded that extensive checks of the relevant government agencies and ministerial offices, including emails sent and received by public servants and ministers, had identified three people who had access to and possession of the report before the leak, and had contact with Ms Vance. The inquirer said he was satisfied that the contacts of two of the three people were entirely commensurate with their official duties, but said that he was unable to obtain all the information he required from the third person, the Hon Peter Dunne, although Mr Dunne had advised him he did not provide the reporter with access to the Kitteridge report.

In his report, Mr Henry made it clear that Mr Dunne had declined to allow him access to some emails between him and Ms Vance. Mr Henry concluded that he needed access to all emails, and without it he “[could] not take the matter any further”. The committee is not convinced by this.

**Information released to the Henry inquiry**

The incident we are examining is about information which was released to Mr Henry during the course of his inquiry. In order to compile his report, Mr Henry was provided with a large amount of data from parliamentary information and security systems. The information provided included

- records of email traffic between Ms Vance and relevant Ministers and staff (email metadata)
- the content of some of the emails indicated by the metadata records, logs of phone calls made and received on certain landlines in the precinct, and on mobile phones belonging to Ministers and their staff
- security records relating to the use of swipe cards within the parliamentary precinct.

For the purposes of our inquiry, the significant information releases are those that relate to the Hon Peter Dunne and Ms Vance. While information relating to other Ministers (and ministerial staff) was sought and provided, and we expect our eventual findings on the principles applying to releases of information will cover the requesting of information relating to any Minister or staff member, the releases relating to Mr Dunne and Ms Vance have initiated the question now before us.

For much of the information relating to Mr Dunne and Ms Vance, the consent of the particular individuals involved was not sought. In other cases, consent was sought but not given, but the information was provided to the inquiry regardless. In addition, one set of data was given twice to the inquiry, even though it had not been requested. The interactions between the inquiry and the Parliamentary Service regarding the instances of release which are relevant to our examination are described in detail below.
Email metadata

On 29 April 2013, the inquiry administrator contacted the manager of Parliamentary Service ICT (PS ICT) and requested print, copy, and scan records for a number of specified Ministers and ministerial staff, for the period 22 March to 9 April 2013. After a series of emails between the two, an email described as a “formal request for the required information” was sent to PS ICT on 30 April 2013.

The request was put to the General Manager of the Parliamentary Service, Geoff Thorn. Mr Thorn decided there was no authority for the service to release the requested information to anyone other than the account holders themselves, and the agreement of each account holder would be necessary before the requested metadata could be handed over to the inquiry. Mr Thorn considered that the Department of Internal Affairs (DIA) could ask the service for information relating to ministerial staff in its capacity as their employer. However, he considered that Ministers’ information could be released only upon the authority of the relevant Minister.

The inquiry administrator then approached the Ministerial and Secretariat Services unit in the Department of Internal Affairs, which is responsible for providing office support and staffing to the Prime Minister and Ministers of the Crown, to discuss its request. On 8 May, the General Manager of the unit, Janice Calvert, emailed PS ICT staff asking them to supply the inquiry with the requested information, which the Parliamentary Service “holds on Ministerial Services’ behalf”. The inquiry sent a further email, confirming its request, and referring to Ms Calvert’s authorisation. This subsequent email included a request from the inquiry for logs showing all emails to and from the addresses of the specified Ministers and ministerial staff over the specified date range.

Again, the request was taken to Mr Thorn. He considered the position unchanged, and stressed that written confirmation would be required from each Minister that they were willing for the service to make this information available to the inquiry before it could be released. Mr Thorn did not agree that the Parliamentary Service was holding information relating to members or Ministers on behalf of Ministerial and Secretariat Services. In his view, that material was being held on behalf of the particular Ministers and members. However, Mr Thorn agreed that equivalent information pertaining to ministerial staff could be released on Ms Calvert’s authority.

Mr Thorn’s decision was relayed to Ms Calvert, who contacted Mr Thorn to discuss the issue. Mr Thorn remained unpersuaded from his view that authorisation would be required from each Minister to release their information, and Ms Calvert eventually agreed to arrange this authorisation.

Ms Calvert then contacted the Prime Minister’s Chief of Staff, Wayne Eagleson, to discuss the necessary authorisation. Mr Eagleson indicated that the Prime Minister’s wish was for a speedy and efficient inquiry, and that—in Mr Eagleson’s view—individual authorisation from each Minister was not necessary for information to be released to the inquiry, given its terms of reference and a comment by the Prime Minister to the effect that he expected all Ministers to comply with the inquiry.

On 9 May 2013, Mr Eagleson called Mr Thorn. He subsequently emailed Mr Thorn, advising that at the outset of the inquiry he had written to the senior private secretary in each ministerial office noting that the Prime Minister expected the Ministers (and their offices) to cooperate fully with the Henry inquiry, and authorising the release of information relating to Ministers and their staff.
Mr Eagleson acknowledged that he did not seek express consent from individual Ministers for access to information by the inquiry. In Mr Eagleson’s view, he had sufficient authority to authorise release of the information requested because all Ministers involved had been made aware of the terms of reference for the inquiry (which had made clear the type of information that would be sought). In addition, the Prime Minister had stated, both publicly and to Mr Eagleson personally, that he expected Ministers to cooperate fully with the inquiry. This indication, together with the fact that Ministers are accountable to the Prime Minister for their behaviour, was considered by Mr Eagleson sufficient for him to authorise release on behalf of the Prime Minister. Mr Eagleson accepted that a more sensible approach in future might be to go to each Minister with a piece of paper and say “Please sign it”, and one would expect they would all do so.

In response to Mr Eagleson’s contact, Mr Thorn agreed to release the information relating to Ministers. He was satisfied that Ministers had agreed to the release. Mr Thorn told us that his usual process would have been to seek express agreement from each Minister involved, but from his conversation with Mr Eagleson, he understood Mr Eagleson to be conveying each Minister’s consent. He did not question Mr Eagleson’s authority to provide that authorisation; he told us that he did not second-guess where Mr Eagleson was getting his authority from, and that it was not unusual for him to deal with chiefs of staff over such matters. He understood that Mr Eagleson was not directing him, but was conveying that Ministers had given consent. He relied on Mr Eagleson’s authority as chief of staff.

**Email content**

On 20 May 2013, PS ICT received a further request from the inquiry. It sought the full content of certain emails between Mr Dunne and Ms Vance, along with that of emails between Ms Vance and a number of ministerial staff members.

PS ICT initially indicated it thought it could provide the information. However, the matter again reached the attention of Mr Thorn. Mr Thorn seemed comfortable to supply the requested staff emails, considering the previous authority given by Mr Eagleson and Ms Calvert sufficient to allow their release; but he expressed concern about the release of a Minister’s email content without the account holder’s knowledge or agreement.

Mr Thorn contacted Mr Eagleson, and advised him that he did not consider the previous authorisation sufficient to allow the release of a Minister’s email content, particularly where the Minister was a support party member rather than a member of the New Zealand National Party. Mr Eagleson agreed, and asked for time to consider the matter. He subsequently rang his counterpart in Mr Dunne’s office, Rob Eaddy, about the request, and Mr Eaddy undertook to put the request to Mr Dunne directly.

We explored with Mr Thorn and Mr Eagleson whether they considered that the specific consent required for release of email content should be different from the consent required for release of email metadata. When we asked Mr Thorn about this, he said he considered that metadata does disclose some information, and he was not prepared to release anything until it had been approved or agreed by specific Ministers. Mr Eagleson considered that the Minister’s consent was implicit from the Prime Minister’s direction to Ministers, and was able to satisfy Mr Thorn that he had authority to say each Minister’s consent had been provided. Mr Thorn noted he had not had a high level of comfort with the release of metadata on this basis, even though he agreed to it.
On 22 May, Mr Eaddy informed Mr Eagleson that Mr Dunne was not prepared to approve the release of the emails, but would be happy to meet Mr Henry to discuss the emails. According to Mr Eagleson, this information was subsequently relayed to the Acting General Manager of the Parliamentary Service.

In the intervening period, Mr Dunne’s emails were given to the inquiry in error. As the timeframe for the request was expected to be tight, PS ICT began to collate the requested information the day after receiving the request. While it was clear Mr Dunne’s authority was still to be sought, it seems that staff had an impression that it was likely to be forthcoming. They decided to extract the requested emails, including Mr Dunne’s, with the intention of filtering out Mr Dunne’s emails if his approval was not secured.

When all the requested files were ready, the compiler forwarded them to the PS ICT manager attached to a single email. The PS ICT manager forwarded this email straight to the inquiry administrator at 3.23pm on 22 May 2013, having forgotten that Mr Dunne’s emails might need to be removed. When he realised this mistake, an attempt was made to recall the email (at 5.18pm). A call was also made to the inquiry administrator, who undertook to delete the attachment relating to Mr Dunne, and not to use it for the purposes of the inquiry. As it turns out, the attachments had been provided in a form that could not be opened by the inquiry administrator. The files subsequently supplied to the inquiry in a format that they could read did not include emails relating to Mr Dunne.

We were told by the Parliamentary Service that the file containing Mr Dunne’s emails was not accessed by any Parliamentary Service staff or contractors, or anyone else during the time it was on the Parliamentary Service server.

**Phone logs**

Cellphone and landline logs for calls to a particular cellphone number by each specified Minister and their staff were requested in the email sent from the inquiry administrator to PS ICT on 8 May 2013. As with the requests for email metadata in the same email, the authorisation of Ms Calvert was considered sufficient to release this information regarding ministerial staff, and the authorisation of Mr Eagleson sufficient to rely on for releasing this information regarding Ministers.

Subsequently, in discussions between the inquiry administrator and PS ICT, the request for phone logs was modified. On 10 May 2013, the inquiry administrator emailed PS ICT with “two numbers, as discussed”. One of these numbers was for a Fairfax Media telephone extension in the precinct, used by Ms Vance. On 14 May, PS ICT began making arrangements for a record to be compiled of all calls to and from these two numbers. Between 14 and 20 May, the inquiry administrator and PS ICT continued conversations about the request. Eventually, the inquiry administrator advised PS ICT that the inquiry no longer wanted such a list, and the arrangements being made to obtain it were cancelled.

On 20 and 30 May, the inquiry administrator sent through two new requests for phone logs; one request was sent directly to the PS ICT manager, and the other to the Chief Information Officer. The first request was for all phone logs that displayed contact between certain specified extensions within the parliamentary precinct (contact between extensions for Ministers and ministerial staff, and the two previously supplied numbers), or all calls from the ministerial and staff extensions—whichever might be easier to compile. In this request, the administrator noted that the inquiry no longer wanted all call logs from the two numbers, as this was “outside the parameters of the inquiry”. The second request,
made 10 days later, was for call logs between ten named Ministers’ personal landlines, and
the two numbers of interest.

These requests were dealt with separately, the day after receipt. However, they were both
dealt with in the same way. For each request, reports of the call logs requested was
compiled. In each case, these reports were empty. Because of this, in both cases, in order to
demonstrate that the reporting function used to compile the reports was working, the staff
member compiling the reports ran additional reports showing all calls to and from the two
numbers of interest. These reports captured a call log over a three-month period, as the
compiler was not sure of the required timeframe.

In respect of the first request, once the reports were received by the PS ICT manager (on
21 May 2013), the manager called the inquiry administrator, and informed him of the nil
result for the requested report, and told him the additional report had been run. The
inquiry administrator advised that the inquiry was not interested in the additional report.
No reports were therefore supplied to the inquiry in response to the first request.

However, in response to the second request, both reports (one with no content, the other
showing all calls to and from the numbers of interest) were supplied to the inquiry twice. In
response to the first supply (by Datacom staff), the inquiry administrator noted “we did not
request the second report you’ve attached here—i.e. the one showing all calls to and from
the numbers of interest. We’re not interested in looking at that.” The same day, the same
email containing these reports was sent again to the inquiry, by the Chief Information
Officer.

In his evidence to us, Mr Dunne suggested that Mr Henry had asked him for consent to
access his office landline data at a meeting on 31 May 2013. Mr Dunne had agreed to this
request. However, we note that, if the meeting where this request was put was indeed held
on 31 May 2013, this information had already been requested by the inquiry, and possibly
already supplied.

**Swipe card records**

On 27 May 2013, the inquiry requested swipe card information showing the movements of
Mr Dunne and Ms Vance within the precinct over three days, including 8 May 2013. The
request was put to Mr Thorn. He considered the position regarding Mr Dunne clear; the
information related to his role as a member or as a Minister, and should not be released to
the inquiry without his authorisation. Mr Thorn sought authorisation from Mr Eaddy to
provide swipe card records, and the requested swipe card record relating to Mr Dunne was
provided to the inquiry with the agreement of Mr Dunne. However we note that, in his
evidence to us, Mr Dunne told us his agreement was for his records to be provided for one
day only (7 April 2013), and that this was the request put to him at a meeting with Mr
Henry on 31 May 2013.

Because Ms Vance is not a member of Parliament, the request for her information was
dealt with differently. Mr Thorn decided to apply the principles of the Security Policy for
the Parliamentary Precincts. According to Mr Thorn, this policy requires the general
manager to manage access to the precincts so as to ensure a balance between access and
the protection of people, property, and information. On the basis of the request by the
inquiry, Mr Thorn judged that access to the Kitteridge report may have resulted from a
security breach within the precinct. He considered that he should not second-guess the
security implications and, on this basis, decided to release the swipe card information
relating to Ms Vance to the inquiry. We note, however, that the inquiry asked for the records but never alleged a security breach.

This decision by Mr Thorn was made without any reference to the Speaker.

Ms Vance has confirmed to us that her consent to release this information was never sought and, had it been, she would not have agreed.

**Storage of the material**

The electronic records and papers of the inquiry were stored on the DPMC system. Mr Kibblewhite told us they were segregated from other departmental files and access to those records and papers was restricted to Mr Henry and the staff member assisting Mr Henry during the conduct of the inquiry.

The DPMC has confirmed that none of its staff viewed the files released to the inquiry. In addition, we have been assured that steps were taken to ensure that the DPMC ICT system did not hold any of the information received in error, and to destroy any copies found on the system.

We were informed that no information accessed by the inquiry was made available to, or held by, the GCSB.

The Parliamentary Service confirmed to us that the file containing Mr Dunne’s emails was not accessed by any Parliamentary Service staff, contractors, or any other person while it was on the Parliamentary Service server.
2 Effect of the incident and summary of our key concerns

The effect of the incident has been considerable. The incident has raised some important questions about protecting the privileges and immunities of the House, including the freedom of speech of members, and the ability of Parliament to maintain control within its precincts. The conduct of the agencies and certain individuals involved in the incident, and the seeming lack of regard for the separation of the Executive from Parliament, the need for confidentiality of sensitive information, or the freedom of the press, are of grave concern.

Role of the Speaker

On each occasion, the decision whether or not to comply with requests from the inquiry was made by the general manager of the service, without reference to the Speaker of the House. Nor was there any attempt by Mr Henry to contact the Speaker about the inquiry, and how it might operate appropriately within the parliamentary precinct, at any stage.

We are disappointed that there seems to have been no consideration of whether the inquiry, or its requests, should have been brought to the attention of the Speaker. The Speaker is the Parliament’s representative; he speaks for the House to the Crown and others. He personifies the voice and views of the House of Representatives on matters related to Parliament.

In our view, the Speaker should have been involved from an early stage and informed about the inquiry, and consulted about the requests and releases, as his involvement could have helped to ensure that relevant safeguards for parliamentary information were enforced.

Conduct of the Parliamentary Service

The releases have resulted in Mr Thorn resigning as General Manager of the Parliamentary Service, and the credibility of the service being called into question. We were told that inadvertent misinformation to the Speaker about the releases and the Parliamentary Service’s interaction with the inquiry was a key factor in Mr Thorn’s decision to resign. However, Mr Thorn also accepted that there had been operational issues for PS ICT in implementing his decisions, and that in hindsight or with better information some of his decisions might have been different.

Managing the conflict created by service arrangements

That operational issues arose in the incident is evident, and we consider that to a large extent the facts speak for themselves in this regard. However, we also consider that the incident highlights serious issues regarding service arrangements, that is, the relationships Parliamentary Service maintains with those for whom it provides support (members, Ministers, staff, and organisations within the complex), and the various—and sometimes confusing—obligations these relationships create. In our view, the complexity of the relationships, and in particular the servicing of the Executive as well as parliamentary needs, has contributed to the unfortunate circumstances the service now finds itself in.
Prior to 2009, IT support for Ministers was provided through DIA, and for other members of Parliament through the Parliamentary Service. This arrangement ensured a clear delineation between the Executive and Parliament as two, very distinct, constitutional branches. However, these separate IT arrangements posed some practical problems; for example, there were difficulties in ensuring that the respective IT systems aligned in a way which supported the ability of members and Ministers to carry out their roles effectively, and when members became Ministers (or members who are Ministers lose their ministerial status), the process for changing systems was time-consuming and cumbersome. In 2009, a transition to IT support for all members (including Ministers) through the Parliamentary Service was made. While we accept this transition has had practical benefit, in our view ease of service provision must be a secondary consideration to security of parliamentary proceedings, and appropriate service delivery to Parliament and parliamentarians. Those who provide services to both the Parliament and the Executive must remain cognisant of the constitutional differences between the two, and what this means for their service delivery on any particular occasion.

We are very concerned that little thought seems to have gone into how such relationships should affect requests for information, and where ownership (and therefore authority) over such information rests. The Parliamentary Service holds a large amount of data and information relating to individuals on the precincts, and little analysis seems to have been done on the general policy question of when this data should accessible, and by whom.

Nor does it seem that there is any clear escalation process for issues that arise. While Mr Thorn was asked for direction on a number of occasions, at least one request changed after his engagement without further direction being sought. We understand that the Speaker (who, on behalf of the House, exercises control over the parliamentary precinct so that the House can function properly in its role as a legislature) was not informed of, or asked for direction on, any of the requests, nor was legal or procedural advice sought on the matter.

**Security policy does not provide sufficient guidance**

The general rule applied by Mr Thorn was that members’ information should not be disclosed to anyone except the member concerned or with the member’s consent, unless there was a lawful and binding request by a third party such as the Police acting under a search warrant or an authority such as the Auditor-General or a commission of inquiry. This approach does not seem to be articulated in any documentation that we have viewed. In addition, this principle does not seem to us to cover all the necessary considerations; and even in these limited circumstances, the principle was applied inconsistently. We consider the security policy that was applied to the request of one set of information (swipe card records) patchy, to say the least. Provisions pertaining to the release of CCTV footage were applied as the policy does not refer explicitly to swipe card logs. The security policy is also silent on the threshold at which it can be invoked, and where the onus to establish that a security breach has occurred might lie. We are not confident that this policy was appropriately applied in the circumstances, particularly given that there was never any allegation made of a security breach.

**The three agreements**

In recent years Speakers have entered into agreements with enforcement and intelligence agencies, which have implications for the House and its members. In 2004, a memorandum of understanding was signed with the Commissioner of the New Zealand Police on policing functions within the precinct; in 2006 an interim procedure relating to the exercise
of search warrants was agreed between the Speaker and the Commissioner of the New Zealand Police; and in 2010 the Speaker entered into a memorandum of understanding with the New Zealand Security Intelligence Service and the Minister in charge of the New Zealand Security Intelligence Service about the collection and retention of information relating to members of Parliament. Each of these documents involves the Speaker of the House of Representatives being informed and involved in high-level decision-making. These agreements apply to the exercise of powers regarding members of Parliament and activities within the parliamentary precinct.

While the three agreements apply to the signatories in particular circumstances, the principle that underlies them is the general principle of exclusive cognisance: the House should have control of its own operations. This principle does not appear to have been considered in either the requests for information or its release. There does not appear to have been any recognition that if formal agreements exist regarding the exercise of certain powers within the precinct and in relation to members, either a formal agreement, or the application of similar principles, would be relevant in respect of the current inquiry.

**Conduct of the Henry Inquiry**

We have concerns about the way this inquiry operated in respect of its requests for information from the Parliamentary Service. In his evidence to us, Mr Henry made it clear that he considered it the duty of others to ensure that they were authorised to supply the information he requested. A number of the requests made were discussed only between staff of the inquiry and PS ICT, no direct contact was initiated by the inquirer to the General Manager of the Parliamentary Service before these requests were made, and no formal notification of the terms of reference of the inquiry was ever made nor the rationale for its particular requests put to the Parliamentary Service.

Mr Henry never chose to seek information under the Official Information Act, even though that Act contains provisions, applying to Ministers and their offices, intended to ensure an appropriate balance is struck between transparency of Executive information on one hand, and protection of sensitive information on the other.

**Interactions with the Parliamentary Service**

It is clear, from the evidence we heard, that the inquiry’s persistent pressure on the Parliamentary Service, and approaches to third-tier and more junior staff, had a part to play in the releases which resulted. On at least one occasion, direction given by Mr Thorn seems to have been subverted by subsequent approaches from the inquiry to lower-level service staff. In his evidence to us, Mr Thorn noted a particular occasion where he had clearly instructed that email content would not be released without the Minister’s specific authorisation, yet he received a phone call from the PS ICT manager, who had the inquiry administrator in his office seeking clarification and further information. We acknowledge Mr Thorn’s surprise that such an approach was made after his clear direction on this matter had been articulated to the inquiry. We agree with Mr Thorn’s view that the implementation of his decisions was undermined because of the continual, extensive interaction between the inquiry team and his staff over a lengthy period, and the resultant erosion of some of the formality that could reasonably be expected regarding such an inquiry.

We consider Mr Henry should have been in direct contact with the Speaker about the inquiry, from its outset. In addition, he should have been in contact with Mr Thorn
directly, rather than allowing communications and requests to be made by the inquiry administrator; a junior DPMC staff member.

However, we are also of the view that Mr Thorn should have had in place clear processes and protocols for dealing with such communications and requests within the Parliamentary Service. Had these been in place, much of the failure caused by the inquiry’s pressure on junior staff would not have been allowed to occur. We also consider Mr Thorn erred by not engaging the Speaker when faced with the inquiry and its requests.

The incident was caused, in large part, by a complete failure of communication at all levels.

Oversight of the inquiry

The inquiry was commissioned by the Department of the Prime Minister and Cabinet and the Government Security Communications Bureau at the request of the Prime Minister. The terms of reference were prepared by the two agencies. The inquiry was, however, established to operate independently as those who commissioned the inquiry were also subject to it, leaving the inquiry to operate with very little oversight. The inquiry administrator was seconded from the DPMC, but was considered independent of the DPMC for the purposes of the inquiry.

The inquiry was into a sensitive matter, and Ministers and members of Parliament were centrally involved. It was also expected to look into matters that might have occurred within the parliamentary precinct. Because of these highly unusual and sensitive factors, an experienced senior public servant was sought to undertake the inquiry. It is not unreasonable to expect the inquirer to pay particular attention to the particular circumstances and the complexity of the environment in which the inquiry was operating when determining the limits of the information they might request, and in tailoring their approach to making the necessary requests. It is clear that, in relation to at least one of the pieces of information requested (Ms Vance’s swipe card data), the Parliamentary Service’s confidence in the prudence of the requestors was not warranted in the circumstances.

Operation of inquiries

Our main purpose is not to investigate the outcome of the inquiry. We do expect, however, to look in general at the way government inquiries might be expected to interact with Parliament in the next stage of consideration of this matter. We are particularly interested in this, given the recent passage of the Inquiries Bill through the House. This legislation will give inquiries powers exceeding those of the Henry inquiry, and some thought will be needed as to how these powers should operate in a parliamentary context.
3 Key issues highlighted by the incident

The incident has drawn attention to significant gaps in the policies and principles guiding the Parliamentary Service in relation to the information it holds, including a lack of clarity about the authority under which information should be released, or who should be ultimately responsible for establishing justification for release.

While the three agreements (between the Speaker and the Commissioner of the New Zealand Police, the New Zealand Intelligence Service, and the Minister in charge of the New Zealand Security Intelligence Service) provide clear guidance on the processes and practices that should be employed regarding specific operations of the New Zealand Police or the NZSIS within the parliamentary precinct or in relation to members of Parliament, there is an absence of clear, accessible guidance on dealing with other information requests relating to the collection and review of information—from the Executive, or from others. We expect the considerations that guided the development of the three agreements to inform our thinking in the next stage of our examination.

The next step for our examination is to define the principles which should govern the release of information from parliamentary information and security systems. This chapter sets out briefly the issues the incident has helped to bring to light, which we now expect to spend more time reflecting on as we devise our guiding principles.

Role of the Speaker of the House and members of Parliament

One of the most mystifying factors of the circumstances leading to this referral is why the Speaker of the House was not consulted, or at least informed, about the requests and information releases. The Speaker is the Minister responsible for the Parliamentary Service, where the information requested was held; and, given the significance of the requests, and the nature and persistence of the requestors, it would seem appropriate for the Minister responsible to be informed. Also, and more importantly, the Speaker is the representative of members, and as such could have been expected to offer an informed and considered view on whether the requests and releases were appropriate. Indeed, under the three agreements, the Speaker is clearly designated an appropriate authority to make decisions about the release of parliamentary material to specified Executive bodies. The views of members must be paramount in decisions relating to release of parliamentary information.

We acknowledge Mr Thorn’s view that the consent of particular members is necessary for any release of material relating to them. We find the lack of engagement with the Speaker on these releases very troubling. We expect to consider the role of the Speaker, and the consent of members, further in the next stage of our consideration, and certainly expect that the guidelines we determine will signal a need for engagement with the Speaker on future matters such as those which have triggered this referral.

Status of information

We note that dealing with information held within the parliamentary precinct and by members of Parliament is inherently highly complex. There are different categories of information, some of which have special protection. Information may be held by people in different capacities: as Ministers, as members of Parliament, or as staff working in
organisations in the parliamentary precinct. “Parliamentary proceedings” (such as the proceedings of the House and committees and other activities related to those proceedings) are protected by parliamentary privilege and may not be questioned or examined by any external body. While the Parliamentary Service provides support to Parliament, only some of the information it holds is proceedings in Parliament. Much of the information will relate to the Executive, some to members acting in their constituency or party roles, and some will be organisational information for the entities within the precinct.

On most occasions in this incident, the General Manager applied a basic rule: that the service holds members’ and Ministers’ information as their agent, and so will not use that information in any way or give it to anyone except the member concerned without their express authority.

While perhaps this basic rule was conceived in an effort to protect parliamentary proceedings, it fails to recognise the extent and limits of what might constitute parliamentary proceedings, and what protection is afforded by parliamentary privilege. It does not acknowledge the different capacities that members may act in in the course of their work, or the roles of staff or others in the precinct in relation to Parliament (and the possibility that this work might also involve proceedings protected by privilege).

When faced with requests regarding information it holds, the service needs to consider the nature of the information being sought—particularly if the requests come from the Executive branch. Importantly, we expect that the principles we will set out in our next report will help the service to determine whether a request raises issues of privilege that need to be taken into account.

**Types of information held**

The Parliamentary Service holds a vast amount of information. In the incident, different sets of information were treated differently; for example, for members, metadata was released on the authority of someone judged to be able to speak on their behalf, whereas for email content, the direct authority of the member was required.

The rationale for this difference in treatment is not clear. We note that, while on the face of it, metadata can seem less informative than substantive content, in practice a large amount of information can be gleaned from these bare bones. In this case, a significant amount of knowledge of interactions was gained solely from the metadata logs provided, and it was this information—together with the eventual refusal of Mr Dunne to provide the substantive comment of some emails—that led directly to the key findings of Mr Henry.

In addition, we note that the amount of knowledge that may be gained is perhaps not the most fundamental question to be asked. We are not convinced that a distinction should be drawn between metadata and substantive content. We consider that any decision to release should be made on the basis of sound principle rather than the probability that significant knowledge could be gained as a result.

We expect that the principles we develop will help clarify the core considerations to be taken into account in any request for information to be released, regardless of the type of information requested. Should our consideration lead us to believe that different types of information should be treated differently, we expect to provide guidance accordingly.
Legislative principles which might interact with privilege when developing security policies

The principles underlying legislation relating to release of information do not seem to have been considered in this incident. For example, there is no evidence that the principles behind the Official Information Act were considered, that the Privacy Act’s explicit privacy principles were factored in when determining the appropriateness of release of information relating to individuals, or that the Evidence Act 2006, which allows the protection of journalistic sources, was reflected on in relation to the requests regarding Ms Vance.

While we acknowledge that these pieces of legislation do not necessarily apply to Parliament, we consider the principles on which they are based are likely to be pertinent to any consideration of the appropriateness of a proposed information release. We intend to consider these principles carefully, and examine how they might best interact with the principles underpinning parliamentary privilege when developing overarching guidance on releasing information from parliamentary security and information systems.

Role of members, staff, journalists, and other key groups in the precinct

The basic rule applied by Mr Thorn in this incident meant, by its silence on the matter, that information relating to people other than members could be released without the service turning its mind to whether individual consent might be desirable. For staff, information was released on the authority of the organisation they were employed by, and for Ms Vance, it was judged that information could be released if it were requested in the context of a possible security breach.

In the decisions made, consideration of the particular roles played by individuals within the precinct—members, staff, and journalists alike—and the capacities in which they act, does not seem to have featured. In particular, the unique role of the press in New Zealand’s democracy does not seem to have been considered at all. We have concerns about this. The role of the press, as the fourth estate, is an important one. Without the relaying of informed comment on parliamentary and government matters to the public, the transparency and accountability of these constitutional branches is diminished, and democracy suffers as a result.

It is possible that different security considerations will need to apply to specific groups operating within the precinct, apart from members. The principles we develop will take account of the distinct roles and functions of all the key groups within the precinct, including members, staff, and journalists.
4 Conclusion

In coming to our conclusions we acknowledge that, to the best of our knowledge, the circumstances giving rise to this question were unprecedented. That these are uncharted waters has, for example, necessitated us making inquiries of other jurisdictions to assist us with the second part of our examination of this matter. We accept that the unique circumstances of the situation had a part to play in the events leading to this referral.

The right of the House to control its own operations is a key strand of parliamentary privilege. It ensures that the Parliament operates free of external interference, so that the House, its committees, and its members can carry out its proper functions, including scrutiny of the Executive. Any investigation involving access to information held in the parliamentary precinct and involving members of Parliament, and others who interact with them, must as a first step involve an assessment of whether parliamentary proceedings are being called into question by an outside authority. Proceedings of Parliament are subject to absolute privilege. Select committee or House documents which have not been made available publicly must remain completely confidential to the House or relevant committee, and their release entirely under the House or relevant committee’s control. The content, or status, of these documents cannot be impugned elsewhere. Much of this material is kept on systems maintained and serviced by the Parliamentary Service, from which material was released to the Henry inquiry. The fact that no consideration was given to this issue at the outset of the Henry inquiry is of considerable concern to us.

In addition to this, members have a great deal of information on the Parliamentary Service information systems that extends beyond this narrow category of parliamentary proceedings. Members may also have control of and access to constituents’ information, party information, and their own personal information which needs to remain private so that members can carry out their function as elected representatives. It is particularly important that the service has sound processes and guidance to ensure this information is treated sensitively and appropriately, and not inappropriately disclosed.

While we have not investigated this referral as a contempt, we cannot ignore the evidence that failures on many levels have led to the matter that now stands referred to us. We find it unacceptable that an inquiry, lacking formal powers to control the production of information, into an Executive information leak, was so readily given parliamentary information, including information about a journalist, without the direct involvement of members or the Speaker. We believe that the Speaker should have been involved by the participants, and that members should have been consulted. That such an intrusion has been allowed to occur does not reflect well on the agencies responsible.

Although they remain unsatisfactory, we note that some of the specific failures in this matter can be explained by history or circumstance: for example, the blurred understanding of accountabilities within the Parliamentary Service, probably caused by the advent of IT service provision by the Parliamentary Service to both Parliament and the Executive; and similarly, the lack of formal communication about the inquiry, a lack of interaction at a senior level between Mr Henry and Mr Thorn, and a lack of communication of either with the Speaker, led directly to wrong decisions being made by Mr Thorn, and to decisions.
being poorly implemented (as a result of persistent approaches by the Henry inquiry to third-tier and more junior staff).

However, factors underlying these events cannot be ignored. The failure to consider the complex role of members of Parliament in a representative democracy, where all members, including Cabinet ministers, have distinct roles in relation to the House, their constituents, and their parties, is concerning. In particular, our inquiry has highlighted a lack of understanding by key participants of the distinction between Parliament and the Executive. The necessary separation between Parliament and the Executive is clearly acknowledged in many forums and contexts; legislation such as the Official Information Act 1982 or the Privacy Act 1993 does not apply to Parliament; the Speaker is in charge of the precinct, and special arrangements have been made through the Speaker to clarify when formal investigations by the Executive may access material related to Parliament. That this separation was not considered in relation to these requests confounds us.

In addition, the lack of thought about the rights attached to the important role particular groups such as journalists might play in our democracy is similarly worrying. The media has a key role in ensuring Parliament remains transparent and accountable; their reports to the public on matters of public interest help to maintain the integrity of all our key constitutional branches. The specific protections found within the Evidence Act for journalists, and their sources, are a legislative acknowledgment of this vital role.

In our view, the absence of appropriate policy guidance on what information can be released and when, or when issues should be escalated and to whom, and indeed the disappointing actions taken, result primarily from these underlying deficiencies.

The next part of our inquiry will focus on ensuring that proper systems and processes are established to guide access to and the release of parliamentary information. We expect the guidance we provide will address these fundamental underlying flaws. We consider that the current situation, if left unchecked, would have the effect of weakening our representative democracy and our constitutional arrangements.
Appendix A

Committee procedure
We have been meeting on this matter since July 2013. The evidence received by the committee has been published on www.parliament.nz.

We received advice from Debra Angus, Deputy Clerk of the House of Representatives.

Committee members
Hon Christopher Finlayson QC (Chairperson)
Hon John Banks
Hon Gerry Brownlee
Hon Lianne Dalziel (until 25 September 2013)
Dr Kennedy Graham
Chris Hipkins
Hon Murray McCully
Hon David Parker
Rt Hon Winston Peters
Grant Robertson (from 25 September 2013)
Hon Anne Tolley
Hon Tariana Turia
Appendix B

Speaker’s ruling

I have received a letter from Dr Russel Norman raising as a matter of privilege statements made by Rt Hon John Key, Prime Minister, in the House in reply to supplementary questions to question 4 on 2 July 2013, concerning the release of information from parliamentary information and security systems.

Standing Order 400 requires an allegation of contempt to be formulated as precisely as possible so as to give the member or person against whom it is made full opportunity to respond. An allegation of contempt against the Rt Hon John Key in regard to the statements made is not clearly made out.

However, the member’s letter raises serious issues. The exercise of intrusive powers against members threatens members’ freedom to carry out their functions as elected representatives and the House’s power to control its own proceedings and precincts, without outside interference.

The release of information from parliamentary information and security systems relating to the movements of journalists within the parliamentary precincts has also been questioned. Although the media do not necessarily participate directly in parliamentary proceedings, they are critical to informing the public about what Parliament is doing and public confidence in Parliament. Actions that may put at risk journalists’ ability to report freely are a significant concern.

The parliamentary precincts are also a workplace for both parliamentary employees and the employees of government departments. Access to parliamentary information and security systems data of any sort must, therefore, also have regard to the respective rights of employers and employees, and the role of the Speaker as a responsible Minister, and the Prime Minister and his ministers.

I believe some sort of common understanding is required to ensure on the one hand that the functioning of the House and the discharge of members’ duties is not obstructed or impeded, but on the other that the maintenance of law and order and the ability to investigate and prosecute offences committed within the parliamentary precincts is preserved.

The concerns raised are ones that should be looked at by the Privileges Committee. It is the body the House has established to investigate such matters. It has the power to hear evidence and formulate recommendations for the House that will provide guidance for the future.

Consequently I have determined that a general question of privilege does arise. The question therefore stands referred to the Privileges Committee.
Appendix C

Role of agencies involved in the inquiry

The Parliamentary Service

The Parliamentary Service delivers administrative and support services to the House and its members. It was established by the Parliamentary Service Act 1985 and continues under the provisions of the Parliamentary Service Act 2000. The service is headed by the General Manager, who is accountable to the Speaker for the running of the service. The Speaker is the responsible Vote Minister and determines the services that the Parliamentary Service will provide to members and to the House. The Parliamentary Service is not part of the executive government, but is a “department” for the purposes of the Public Finance Act 1989.

The Parliamentary Service is the largest of the agencies housed in the parliamentary complex. The service employs approximately 460 staff as well as another 260 people employed as out-of-Parliament staff in the regions. The staff on the parliamentary complex include those employed in security, the Parliamentary Library, facilities management, accounting/finance roles, tour guides, travel officers, ICT, and human resources/payroll. The Parliamentary Service also employs the staff who work as executive assistants, researchers, media and other advisors, for members of Parliament and for the political party leaders.

Assistance with support for other organisations

While its primary duty is to deliver services to the House and its members, under its legislation the service is also able, with the approval of the Speaker, to provide administrative and support services to other institutions, including officers of Parliament, offices of Parliament, officers of the House, or any department or other instrument of the Crown.

The service delivers services currently to a range of organisations that cohabit within the parliamentary precinct. These include the Office of the Clerk, Parliamentary Counsel Office, Department of the Prime Minister and Cabinet, and Ministerial and Secretariat Services. The support provided by the service to each of these organisations varies, but for all it includes provision of security cards for access to the precinct, and for most it includes a significant amount of ICT support. For Ministerial and Secretariat Services (the part of the Department of Internal Affairs responsible for providing support services to Ministers of the Crown), support by the service includes provision of all ICT support for Ministers.

For much of its day-to-day ICT operational support, the service contracts a private organisation (Datacom) to provide assistance. Datacom manages and services the ICT information systems related to members and staff, and Datacom contractors deal directly with members and staff where ICT queries or issues arise.

While there are fundamental differences between those who benefit from service support (for example, a difference between members and Ministers, and between each of the organisations), all core ICT systems through which the service provides support are shared; in the ICT system treatment, no distinction is drawn between organisations, or between
individuals with particular roles. Nor do the systems identify in what capacity a member—or any other individual—might have been acting at any point in time. This means that a member who has a ministerial portfolio will use their same ICT system (i.e. email address, network log-in, and telephone number) regardless of which capacity they are behaving in at the time.

Department of the Prime Minister and Cabinet and Office of the Prime Minister

The Department of the Prime Minister and Cabinet, and the Office of the Prime Minister both provide support services directly to the Prime Minister, the former in his role as the leader of the Government and the latter in his role as political leader.

The two have existed since 1990, the result of a report which recommended establishing structures to provide two separate streams of advice to the Prime Minister; one, a government department to supply impartial, high quality advice and support to the Prime Minister and Cabinet (DPMC), and another, a Prime Minister’s private office (which is not part of DPMC), to provide personal support and media services, and advice of a party political nature.

Department of the Prime Minister and Cabinet

The DPMC is headed by the Chief Executive, Andrew Kibblewhite. It provides advice and assistance to the Prime Minister on matters relating to the conduct of executive government and issues associated with the operation of the Cabinet system, advice on major and daily issues, and oversight of wider government activity. It works directly with Ministers on specific issues, and works with central agencies to draw departments together in support of the Government’s priorities. It also provides administrative support to the Prime Minister and to Cabinet committees.

The DPMC is comprised of seven business units (and an office to support the Chief Executive):

- Cabinet Office (provides secretariat services to the Executive Council, Cabinet, and Cabinet committees; advice to the Governor-General, Prime Minister, and other Ministers; assists in coordinating the Government’s legislative programme; administers the New Zealand Royal Honours System; facilitates communication between the Governor-General and the Government; and oversees the policy and administration of Government House)
- Government House (provides administrative and support services for the Governor-General and maintains Government House)
- Policy Advisory Group (provides advice on issues of the day to the Prime Minister, and sometimes other Ministers)
- National Assessments Bureau (makes objective assessments of events and developments to inform government decision-making, and leads coordinating assessment reporting to Government on matters concerning national security)
- Security and Risk Group (deals with national security threats that affect New Zealand and its interests, advises the Prime Minister on intelligence and security matters, and coordinates activities relating to security crises, emergencies, and national disasters)
• Intelligence Coordination Group (provides support in respect of New Zealand intelligence security governance, and provides leadership and coordination for New Zealand intelligence agencies)

• National Cyber Policy Office (leads the development of cyber security policy advice for Government).

**Office of the Prime Minister**

The overall function of the office is to provide support and advice to the Prime Minister relating to political and administrative issues that are outside the purview of the politically neutral Department of the Prime Minister and Cabinet. Specific functions undertaken by the office include media relations, liaison with the political party organisation of the Government in office, correspondence to the Prime Minister, liaison with other Ministers’ offices, and advising on parliamentary issues of concern to the Prime Minister.

The office is headed by the Chief of Staff, Wayne Eagleson, together with the Chief Press Secretary in charge of the press office. It has a staff establishment of approximately 25. At present there are 17 staff including private secretaries, press officers, administration officers, secretary typists, and records clerks.

The Ministerial and Secretariat Services unit in the Department of Internal Affairs provides routine administrative and financial support services for the office.

**Government Communications Security Bureau**

The Government Communications Security Bureau, established under the Government Communications Security Bureau Act 2003, is an instrument of the Executive Government.

It is responsible primarily for matters relating to the protection, security, and integrity of government information. It also investigates and analyses cyber incidents against New Zealand’s critical infrastructure, collects and analyses foreign intelligence which may have a bearing on New Zealand’s interests, and assists other New Zealand government agencies to discharge their legislatively mandated functions.

The Minister responsible for the GCSB is the Prime Minister. Under its establishing legislation, its Director has all the powers necessary or desirable for the purposes of the GCSB performing its functions. However, the Prime Minister retains ultimate control of the GCSB. The Director is appointed by the Governor-General, on the recommendation of the Prime Minister, and can also be removed on the Prime Minister’s recommendation. The performance of the GCSB’s functions and relative priorities are determined by the Director, subject to the control of the Prime Minister (or another Minister authorised by the Prime Minister to be in control of the bureau), and the GCSB reports, and provides any intelligence collected, to the Prime Minister (or another Minister, as authorised by the Prime Minister).

The GCSB maintains its own information systems.
Appendix D

Timeline
<table>
<thead>
<tr>
<th>Date</th>
<th>Time</th>
<th>Type</th>
<th>From</th>
<th>To</th>
<th>Event</th>
<th>Source</th>
</tr>
</thead>
<tbody>
<tr>
<td>9/04/2013</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Media report on the Kettinage report</td>
<td>DPMC submission</td>
</tr>
<tr>
<td>Between 9</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Prime Minister agrees that DPMC and CSB should commission an independent inquiry into the leak and lead the development of terms of reference, including consultation with the State Services Commission. Mr Henry appointed to lead inquiry.</td>
<td>DPMC submission</td>
</tr>
<tr>
<td>15/04/2013</td>
<td></td>
<td>Email</td>
<td>Prime Minister's Chief of Staff</td>
<td>Senior Private Secretary</td>
<td>Mr. Krobbershuts writes to all those who had received the Kettinage report (Ministers, their staff, and departments) informing them the inquiry has been established and asking them to meet with Mr. Henry.</td>
<td>DPMC submission</td>
</tr>
<tr>
<td>19/04/2013</td>
<td></td>
<td>Email</td>
<td>Inquiry Administrator</td>
<td>PS</td>
<td>Prime Minister's Chief of Staff emails relevant Ministers' senior private secretaries on the inquiry.</td>
<td>Office of the Prime Minister's submission</td>
</tr>
<tr>
<td>30/04/2013</td>
<td>5:07 pm</td>
<td>Email</td>
<td>Inquiry Administrator</td>
<td>PS</td>
<td>Inquiry Administrator sends the Service requesting all printing, copying, and scan records for the 12 Ministers who had access to the Kettinage report, the senior staff (including SFMs and Press Secretaries) of those Ministers, and for three staff members in the Prime Minister's office.</td>
<td>DPMC submission</td>
</tr>
<tr>
<td>30/04/2013</td>
<td></td>
<td>Email</td>
<td>Inquiry Administrator</td>
<td>PS</td>
<td>Prime Minister's Chief of Staff meets with Mr. Henry, and tells him the Prime Minister expects Ministers and staff to comply with the inquiry.</td>
<td>Office of the Prime Minister's submission</td>
</tr>
<tr>
<td>6/05/2013</td>
<td>8:45 am</td>
<td>Email</td>
<td>Inquiry Administrator</td>
<td>Ministerial Services</td>
<td>Inquiry Administrator sends Ministerial Services to advise that the Parliamentary Service requires authorisation for the release of the printing, copying, and scanning records.</td>
<td>DPMC submission</td>
</tr>
<tr>
<td>8/05/2013</td>
<td>10:29 a.m</td>
<td>Email</td>
<td>Inquiry Administrator</td>
<td>ICT Manager</td>
<td>Inquiry Administrator sends ICT Manager and provides a formal request for information (this acts as an update of the earlier request). This request includes a request for phone metadata (call logs and landline logs) showing call details to a particular number.</td>
<td>PS submission</td>
</tr>
<tr>
<td>8/05/2013</td>
<td>10:29 a.m</td>
<td>Email</td>
<td>Inquiry Administrator</td>
<td>PS</td>
<td>Inquiry Administrator sends a revised request, asking for email logs for external emails for the 12 Ministers and their staff for the date range 22 March to 9 April. It advises that Ministerial Services has authorized this request to be processed.</td>
<td>DPMC submission</td>
</tr>
<tr>
<td>8/05/2013</td>
<td>2:51 pm</td>
<td>Email</td>
<td>Inquiry Administrator</td>
<td>Ministerial Services</td>
<td>Inquiry Administrator requests call metadata for Ministerial Services for the 12 Ministers and their staff, and staff from the Prime Minister's office, for 25 March to 9 April.</td>
<td>DPMC submission</td>
</tr>
<tr>
<td>8/05/2013</td>
<td></td>
<td>Phone call</td>
<td>Ministerial Services</td>
<td>Prime Minister's Chief of Staff</td>
<td>General Manager, Ministerial and Secretarial Services calls the Chief of Staff for approvals for release of relevant Ministerial staff records. Agreed no issue with staff records. Chief of Staff indicated no need for Ministers to give individual consent given the Prime Minister's expectation that Ministers comply.</td>
<td>Office of the Prime Minister's submission</td>
</tr>
<tr>
<td>Date of call uncertain</td>
<td></td>
<td>Phone call</td>
<td>Inquiry Administrator</td>
<td>ICT Manager</td>
<td>ICT Manager has a telephone conversation with Inquiry Administrator about the request. ICT Manager states that the request asks for details in relation to Ministers and their senior staff. ICT Manager asks Inquiry Administrator to provide a full list of Ministers and their senior staff who are the subject of the request.</td>
<td>PS submission</td>
</tr>
<tr>
<td>8/05/2013</td>
<td></td>
<td>Meeting</td>
<td>ICT Manager</td>
<td>Datacom Operations Manager, Datacom employees</td>
<td>ICT Manager calls a meeting to make Datacom aware of the requests that will be coming from the inquiry and that they are to be treated confidentially. They also PRINT/scan records as some of the information being requested and ICT Manager states he will send an email through with the details.</td>
<td>PS submission</td>
</tr>
<tr>
<td>8/05/2013</td>
<td>4:41 p.m</td>
<td>Email</td>
<td>Inquiry Administrator</td>
<td>ICT Manager</td>
<td>Inquiry Administrator sends ICT Manager and clarifies his earlier request by adding the full list of Ministers and their senior staff who are the subject of the request.</td>
<td>PS submission</td>
</tr>
<tr>
<td>8/05/2013</td>
<td>4:41 p.m</td>
<td>Email</td>
<td>Inquiry Administrator</td>
<td>PS</td>
<td>Inquiry Administrator sends PS to request printing and copy records for 12 Ministers and their staff, and staff from the Prime Minister's office.</td>
<td>DPMC submission</td>
</tr>
<tr>
<td>Date</td>
<td>Time</td>
<td>Type</td>
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<td>Event</td>
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<tr>
<td>8/05/2013</td>
<td>4:45 pm</td>
<td>Email</td>
<td>PS</td>
<td>Ministerial Services</td>
<td>PS emails Ministerial Services to ask for written confirmation from each Minister that they are happy to make available information relating to staff as it believe Ministers are the employer.</td>
<td>DPMC submission</td>
</tr>
<tr>
<td>8/05/2013</td>
<td>5:15 pm</td>
<td>Email</td>
<td>Ministerial Services</td>
<td>PS</td>
<td>Ministerial Services confirm that the Department of Internal Affairs is the employer of all Ministerial staff and all staff had signed a Code of Conduct so the inquiry does not need written authorisations. With respect to Ministers, hold cellphone records for each Minister while Ministerial Services deals with the request from PS to get authorisation from each Minister individually.</td>
<td>DPMC submission</td>
</tr>
<tr>
<td>Date of call uncertain</td>
<td>Phone call</td>
<td>ICT Manager</td>
<td>Inquiry Administrator</td>
<td>ICT Manager phones Inquiry Administrator and asks him to clarify the cellphone/landline log component of the request.</td>
<td>PS submission P</td>
<td></td>
</tr>
<tr>
<td>9/05/2013</td>
<td>2:59 p.m.</td>
<td>Email</td>
<td>ICT Manager</td>
<td>Datacom Operations Manager</td>
<td>ICT Manager forwards (by email) Inquiry Administrator's request to Datacom for acting.</td>
<td>PS submission P</td>
</tr>
<tr>
<td>9/05/2013</td>
<td>9:40 am</td>
<td>Phone call</td>
<td>Prime Minister's Chief of Staff</td>
<td>General Manager</td>
<td>Chief of Staff phones General Manager with follow-up email, authorising release of material relating to Ministers and their staff. No discussion relating to Ms Vase's phone records.</td>
<td>Office of the Prime Minister's submission</td>
</tr>
<tr>
<td>10/03/2013</td>
<td>2:17 p.m.</td>
<td>Email</td>
<td>Inquiry Administrator</td>
<td>PS</td>
<td>Inquiry Administrator emails PS with Andrea Vase's landline and cellphone numbers.</td>
<td>DPMC submission P</td>
</tr>
<tr>
<td>10/03/2013</td>
<td>2:21 p.m.</td>
<td>Email</td>
<td>Inquiry Administrator</td>
<td>ICT Manager</td>
<td>Inquiry Administrator emails ICT Manager, describing how two telephone numbers (a landline and a cellphone). In the context of the previous discussions between Inquiry Administrator and the ICT Manager, this is to be used in respect of call log requests.</td>
<td>DPMC submission P</td>
</tr>
<tr>
<td>14 May to 20 May</td>
<td>Phone call</td>
<td>ICT Manager</td>
<td>Inquiry Administrator</td>
<td>ICT Manager</td>
<td>Between 14 May 2013 (after the above email is sent) and 20 May 2013, ICT Manager and Inquiry Administrator have a phone conversation. Inquiry Administrator states he has new information and has changed his mind about how phone checks are to be conducted. He states he no longer wants all calls to/from the “numbers of interest” (the two numbers identified above). After this phone conversation, ICT Manager verbally relays this message to the Datacom Operations Manager and instructs him not to action his request provided on 14 May 2013 and accordingly this request is not acted upon. Datacom Operations Manager verbally instructs Datacom employee who runs phone call requests that Inquiry Administrator does not want any reports from the perspective of the numbers of interest then solves.</td>
<td>PS submission P</td>
</tr>
<tr>
<td>14/03/2013</td>
<td>11:30 am</td>
<td>Email</td>
<td>Inquiry Administrator</td>
<td>PS</td>
<td>Inquiry Administrator requests cellphone call logs for Ministers and staff. He believes all individual Ministers have given written approval (because of message from Ministerial Services on 10 May).</td>
<td>DPMC submission P</td>
</tr>
<tr>
<td>16/03/2013</td>
<td>3:24 pm</td>
<td>Email</td>
<td>Inquiry Administrator</td>
<td>PS</td>
<td>PS emails Inquiry Administrator with metadata for Ministers on call logs internally, including Mr Dunn’s.</td>
<td>DPMC submission P</td>
</tr>
<tr>
<td>17/03/2013</td>
<td>10:22 am</td>
<td>Email</td>
<td>Inquiry Administrator</td>
<td>PS</td>
<td>More attachments with Ministers’ metadata regarding scans from photocopiers to 12 ministers’ email addresses.</td>
<td>DPMC submission S</td>
</tr>
<tr>
<td>17/03/2013</td>
<td>10:37 am</td>
<td>Email</td>
<td>Inquiry Administrator</td>
<td>PS</td>
<td>Inquiry Administrator emails PS to advise only thing now missing is mobile phone call logs for people on the list.</td>
<td>DPMC submission P</td>
</tr>
<tr>
<td>17/03/2013</td>
<td>3:59 pm</td>
<td>Email</td>
<td>Inquiry Administrator</td>
<td>PS</td>
<td>PS emails Inquiry Administrator with call logs for Ministers and staff. Includes Ministerial cell phone.</td>
<td>DPMC submission P</td>
</tr>
<tr>
<td>20/03/2013</td>
<td>5:53 p.m.</td>
<td>Email</td>
<td>Inquiry Administrator</td>
<td>ICT Manager</td>
<td>Inquiry Administrator emails ICT Manager and requests call logs between certain named extensions of Ministers/Ministerial staff and two “numbers of interest” as that is outside the parameters of the inquiry.</td>
<td>PS submission P</td>
</tr>
<tr>
<td>Date</td>
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<td>To</td>
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<tr>
<td>20/03/2013</td>
<td>11:41 a.m.</td>
<td>Email</td>
<td>Inquiry Administrator</td>
<td>ICT Manager</td>
<td>Inquiry Administrator emails ICT Manager and enquires about how much effort (how long) would be involved in extracting the full text of the email(s) requested. He also queries whether, if the emails were from Ministers, that presented any issues?</td>
<td>PS submission</td>
</tr>
<tr>
<td>20/03/2013</td>
<td>11:41 a.m.</td>
<td>Email</td>
<td>Inquiry Administrator</td>
<td>PS</td>
<td>Inquiry Administrator inquires whether remaining 10 phone records have been located. Also asks how long it would take to retrieve content of emails, if requested, and whether it would be an issue if those emails were for Ministers.</td>
<td>DPMC submission</td>
</tr>
<tr>
<td>20/03/2013</td>
<td>1:32 p.m.</td>
<td>Email</td>
<td>ICT Manager</td>
<td>Inquiry Administrator</td>
<td>ICT Manager emails Inquiry Administrator and confirms that it would be a matter of hours work and a quick turnaround should be possible. He states he believes the Service has the required permission to do so from Ministers.</td>
<td>PS submission</td>
</tr>
<tr>
<td>20/03/2013</td>
<td>1:32 p.m.</td>
<td>Email</td>
<td>PS</td>
<td>Inquiry Administrator</td>
<td>PS confirms the emails could be provided the same day if the number were small, and that they believe they have the necessary approval to do this for Ministers.</td>
<td>DPMC submission</td>
</tr>
<tr>
<td>20/03/2013</td>
<td>2:25 p.m.</td>
<td>Email</td>
<td>Inquiry Administrator</td>
<td>ICT Manager</td>
<td>Inquiry Administrator sends an email to ICT Manager requesting emails between Andrea Vance (a Fairfax journalist) and Hon Peter Dunne between 22 March and 9 April. The request listed 93 emails by date identified within the specified timeframe from the metadata review. This request also sought emails between Andrea Vance and four named DIA staff.</td>
<td>PS submission</td>
</tr>
<tr>
<td>20/03/2013</td>
<td>2:25 p.m.</td>
<td>Email</td>
<td>PS</td>
<td>Inquiry Administrator</td>
<td>PS requests phone records for Ministers and staff members for contact numbers and email addresses. Specifiess that not requesting the phone logs of Ms Vances phone.</td>
<td>DPMC submission</td>
</tr>
<tr>
<td>20/03/2013</td>
<td>5:53 p.m.</td>
<td>Email</td>
<td>Inquiry Administrator</td>
<td>PS</td>
<td>PS requests phone records for Ministers and staff members for contact numbers and email addresses. Specifiess that not requesting the phone logs of Ms Vances phone.</td>
<td>DPMC submission</td>
</tr>
<tr>
<td>21/03/2013</td>
<td>unknown</td>
<td>Meeting</td>
<td>ICT Manager</td>
<td>CIO</td>
<td>ICT Manager meets with CIO and asks if it is “OK” to send the emails to the inquiry. CIO looks back at the 20 May request for emails and notes that Mr Dunne (a non-Cabinet Minister) is on the list. He instructs that the information is not forwarded until he can clarify with General Manager whether provision of emils from Mr Dunne is authorised.</td>
<td>PS submission</td>
</tr>
<tr>
<td>21/03/2013</td>
<td>9:55 a.m.</td>
<td>Email</td>
<td>ICT Manager</td>
<td>Datacom Operations Manager</td>
<td>ICT Manager emails Datacom Operations Manager seeking a timesframe for the provision of selected email and attaches the inquiry request.</td>
<td>PS submission</td>
</tr>
<tr>
<td>21/03/2013</td>
<td>9:55 a.m.</td>
<td>Email</td>
<td>PS</td>
<td>Datacom Operations Manager</td>
<td>PS forwards email request to contractor, following up by asking for estimate of effort and likely delivery time.</td>
<td>DPMC submission</td>
</tr>
<tr>
<td>21/03/2013</td>
<td>10:21 a.m.</td>
<td>Email</td>
<td>Datacom Operations Manager</td>
<td>ICT Manager</td>
<td>Datacom Operations Manager emails ICT Manager saying it would not be a lot of effort that he would try and get to this today. In his email, Datacom Operations Manager asks if he should proceed?</td>
<td>PS submission</td>
</tr>
<tr>
<td>21/03/2013</td>
<td>10:26 a.m.</td>
<td>Email</td>
<td>ICT Manager</td>
<td>Datacom Operations Manager</td>
<td>ICT Manager emails Datacom Operations Manager and asks him to wait until he confirms he has obtained authority to provide Mr Dunne’s emils and ends the emil with “the rest is fine”.</td>
<td>PS submission</td>
</tr>
<tr>
<td>21/03/2013</td>
<td>unknown</td>
<td>Meeting</td>
<td>CIO</td>
<td>OM</td>
<td>CIO meets with General Manager to discuss the authority to provide emails to the inquiry. They determine that it would be inappropriate to provide Mr Dunne’s email without his consent.</td>
<td>PS submission</td>
</tr>
<tr>
<td>21/03/2013</td>
<td>unknown</td>
<td>Meeting</td>
<td>CIO</td>
<td>ICT Manager</td>
<td>CIO instructs ICT Manager to provide the inquiry emails for the named DIA staff listed in the request. He informs him that the Service will need Mr Dunne’s approval to provide his emails. After some discussion between them they conclude that Mr Dunne’s consent is likely to be forthcoming so for expediency decide to instruct Datacom to obtain emils for all individuals listed in the request. Their intention was for the ICT Manager to exclude Mr Dunne’s emils prior to sending the request to the inquiry if consent was not provided.</td>
<td>PS submission</td>
</tr>
<tr>
<td>Date</td>
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<tr>
<td>21/03/2013</td>
<td>11:36 a.m.</td>
<td>Phone call</td>
<td>General Manager</td>
<td>Prime Minister's Chief of Staff</td>
<td>General Manager and Prime Minister's Chief of Staff have a telephone discussion around the inquiry's request for Mr Dunne's emails. Both were of the view that Mr Dunne's consent was required prior to release.</td>
<td>PS submission</td>
</tr>
<tr>
<td>21/03/2013</td>
<td>12:29 p.m.</td>
<td>Email</td>
<td>ICT Manager</td>
<td>Datacom Operations Manager</td>
<td>ICT Manager emails Datacom Operations Manager and tells him that there are no results for phone contact between the named Ministers. The Inquiry Administrator's request and the &quot;numbers of interest&quot;. ICT Manager states an additional report is run to check the system is reporting correctly which contains all calls from the Parliament entry Precinct to the &quot;numbers of interest&quot;. Inquiry Administrator states he is not interested in this report.</td>
<td>PS submission</td>
</tr>
<tr>
<td>21/03/2013</td>
<td>2:44 p.m.</td>
<td>Email</td>
<td>Datacom employee</td>
<td>ICT Manager</td>
<td>Datacom employee sends ICT Manager and states that the requested report for calls from the named Ministers to/from the number of interest is empty (i.e. there are no results). He states an additional report was run for calls from any number within the Parliamentary Precinct to/from the &quot;numbers of interest&quot;.</td>
<td>PS submission</td>
</tr>
<tr>
<td>21/03/2013</td>
<td>1:10 p.m.</td>
<td>Email</td>
<td>General Manager</td>
<td>Prime Minister's Chief of Staff</td>
<td>General Manager emails Prime Minister's Chief of Staff and summarises the issue they just discussed regarding the request for email content.</td>
<td>PS submission</td>
</tr>
<tr>
<td>22/03/2013</td>
<td>10:30 a.m.</td>
<td>Email</td>
<td>Datacom employee</td>
<td>ICT Manager</td>
<td>Datacom employee obtains and sends the emails requested by the inquiry to the ICT Manager stating the emails are in separate PST files for each mailbox. This transmission includes Hon Peter Dunne's emails.</td>
<td>PS submission</td>
</tr>
<tr>
<td>22/03/2013</td>
<td>10:30 a.m.</td>
<td>Email</td>
<td>Contractor</td>
<td>PS</td>
<td>Email sent with attachment of emails records for Mr Dunne/Mr Vance and email records between four Ministers and Mr Dunne.</td>
<td>PS submission</td>
</tr>
<tr>
<td>22/03/2013</td>
<td>12:30 p.m. - 2:00 p.m.</td>
<td>Phone call</td>
<td>Prime Minister's Chief of Staff</td>
<td>Hon Peter Dunne's Office</td>
<td>Wayne Eagleson's timeline released on 3 August 2013 states: &quot;Calls Mr Dunne's office and outlines the issue querying whether he is prepared to authorize the release of his emails to the inquiry. His office responds they will put the request to Mr Dunne. His office rings back, to say that for privacy reasons Mr Dunne is not prepared to give approval for the release of his emails but is happy to meet with Mr Henry to discuss the emails and related matters.&quot;</td>
<td>PS submission</td>
</tr>
<tr>
<td>22/03/2013</td>
<td>12:30 p.m. - 2:00 p.m.</td>
<td>Phone call</td>
<td>Prime Minister's Chief of Staff</td>
<td>Acting General Manager</td>
<td>Wayne Eagleson's timeline released on 3 August 2013 states: &quot;Calls the acting GM of Parliamentary Service and tells him that Parliamentary Service cannot release the emails without Mr Dunne's permission, and that a likely alternative is to meet with Mr Dunne meeting with Mr Henry. The acting GM of Parliamentary Service says he will discuss with Mr Dunne's office.&quot;</td>
<td>PS submission</td>
</tr>
<tr>
<td>22/03/2013</td>
<td>3:23 p.m.</td>
<td>Email</td>
<td>ICT Manager</td>
<td>Inquiry Administrator</td>
<td>ICT Manager forwards the email file to PST from provided by Datacom to the Inquiry Administrator. The file relating to Mr Dunne are not removed due to an oversight.</td>
<td>PS submission</td>
</tr>
<tr>
<td>Date</td>
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<tr>
<td>22/03/2013</td>
<td>3:25 p.m.</td>
<td>Email</td>
<td>Postmaster</td>
<td>ICT Manager</td>
<td>ICT Manager receives DPMC Postmaster Out of Office notification on behalf of Inquiry Administrator stating &quot;Thanks for your message. I will be out of the office all day on 22 May, back on Thurs 23 May&quot;</td>
<td>PS submission</td>
</tr>
<tr>
<td>22/03/2013</td>
<td>3:25pm</td>
<td>Email</td>
<td>PS</td>
<td>Inquiry Administrator</td>
<td>Email records file for Mr Dunne's V once email and email records between four Ministerial staff and Ms V were sent to Inquiry Administrator.</td>
<td>DPMC submission</td>
</tr>
<tr>
<td>22/03/2013</td>
<td>unknown</td>
<td>Meeting</td>
<td>ICT Manager</td>
<td>CIO</td>
<td>ICT Manager and CIO meet and have a discussion around the inquiry. During the discussion CIO queries whether Hon Peter Dunne's emails were removed prior to transmission. ICT Manager realises the error takes immediate steps to remediate the issue.</td>
<td>PS submission</td>
</tr>
<tr>
<td>22/03/2013</td>
<td>5:12 p.m.</td>
<td>Email</td>
<td>ICT Manager</td>
<td>Inquiry Administrator</td>
<td>ICT Manager sends the Inquiry Administrator an email with the subject &quot;call me urgently please&quot;, providing his mobile phone number. This email was sent as a request to call the Inquiry Administrator were unsuccessful.</td>
<td>PS submission</td>
</tr>
<tr>
<td>22/03/2013</td>
<td>5:12pm</td>
<td>Email</td>
<td>PS</td>
<td>Inquiry Administrator</td>
<td>PS emails asking Inquiry Administrator to call urgently was email sent at 3:25pm.</td>
<td>DPMC submission</td>
</tr>
<tr>
<td>22/03/2013</td>
<td>5:16 p.m.</td>
<td>Email</td>
<td>ICT Manager</td>
<td>Inquiry Administrator</td>
<td>ICT Manager sends the email files in PST form to the Inquiry Administrator after removing those relating to Hon Peter Dunne.</td>
<td>PS submission</td>
</tr>
<tr>
<td>22/03/2013</td>
<td>5:16pm</td>
<td>Email</td>
<td>PS</td>
<td>Inquiry Administrator</td>
<td>PS send to the Inquiry Administrator revised file with only email records between the four Ministerial staff and Ms V were sent.</td>
<td>DPMC submission</td>
</tr>
<tr>
<td>22/03/2013</td>
<td>5:18 p.m.</td>
<td>Email</td>
<td>ICT Manager</td>
<td>Inquiry Administrator</td>
<td>ICT Manager attempts to recall the email sent to the inquiry at 3:25 p.m. containing the emails.</td>
<td>PS submission</td>
</tr>
<tr>
<td>22/03/2013</td>
<td>5:18pm</td>
<td>Email</td>
<td>PS</td>
<td>Inquiry Administrator</td>
<td>Recall notice for 3:25pm email sent.</td>
<td>DPMC submission</td>
</tr>
<tr>
<td>22/03/2013</td>
<td>5:43 p.m.</td>
<td>Phone call</td>
<td>ICT Manager</td>
<td>Inquiry Administrator</td>
<td>ICT Manager phones the Inquiry Administrator and informs him that Mr Dunne's emails were supplied accidently when no authority has been granted for their use by the Inquiry. The Inquiry Administrator confirms he will delete them and they won't be used. He states he was out of the office and had not seen the email referred to.</td>
<td>PS submission</td>
</tr>
<tr>
<td>23/03/2013</td>
<td>8:34 a.m.</td>
<td>Email</td>
<td>Inquiry Administrator</td>
<td>ICT Manager</td>
<td>Inquiry Administrator deletes email with Mr Dunne’s V once records, without opening it.</td>
<td>DPMC submission</td>
</tr>
<tr>
<td>23/03/2013</td>
<td>8:34am</td>
<td>Email</td>
<td>Inquiry Administrator</td>
<td>PS</td>
<td>The Inquiry Administrator emailed ICT Manager stating as discussed, &quot;we can't open pst documents because our email program e is Groupwise, rather than Outlook&quot;.</td>
<td>PS submission</td>
</tr>
<tr>
<td>23/03/2013</td>
<td>9:07 a.m.</td>
<td>Email</td>
<td>Inquiry Administrator</td>
<td>PS</td>
<td>Inquiry Administrator responds to 5:16pm email of 22/5 by noting he cannot open pst files.</td>
<td>DPMC submission</td>
</tr>
<tr>
<td>23/03/2013</td>
<td>9:19 a.m.</td>
<td>Email</td>
<td>Datacom employee</td>
<td>ICT Manager</td>
<td>ICT manager emails Datacom employee informing him that DPMC is on Groupwise and can't open PSTs and asks other options they have.</td>
<td>PS submission</td>
</tr>
<tr>
<td>23/03/2013</td>
<td>9:30 a.m.</td>
<td>Email</td>
<td>Inquiry Administrator</td>
<td>ICT Manager</td>
<td>Datacom employee emails ICT Manager providing options on how they could access the PST file. Alternatively he suggests Datacom could extract the emails and save them as HTML files saving the attachments separately.</td>
<td>PS submission</td>
</tr>
<tr>
<td>23/03/2013</td>
<td>9:30am</td>
<td>Email</td>
<td>Inquiry Administrator</td>
<td>PS</td>
<td>Inquiry Administrator sends email to update the ICT Manager on the work underway to seek Hon Peter Dunne's permission. He states &quot;I'm unsure of what the result of that will be&quot;. The Inquiry Administrator requested that the service continues working around the issue, on the assumption that they would eventually get the authority to view the emails.</td>
<td>PS submission</td>
</tr>
<tr>
<td>23/03/2013</td>
<td>9:30a.m</td>
<td>Email</td>
<td>Inquiry Administrator</td>
<td>PS</td>
<td>Inquiry Administrator emails PS saying Mr Henry had discussed an issue with Ministerial Services and the Prime Minister's Chief of Staff but not the Acting General Manager. The Acting General Manager would be talking with Mr Dunne's office with the aim of getting permission for the emails to be viewed.</td>
<td>DPMC submission</td>
</tr>
<tr>
<td>23/03/2013</td>
<td>10:46 a.m.</td>
<td>Phone call</td>
<td>Acting General Manager</td>
<td>Hon Peter Dunne's Office</td>
<td>Acting General Manager calls Mr Dunne's office to discuss Hon Peter Dunne meeting David Henry to discuss the issue of email permission.</td>
<td>PS submission</td>
</tr>
<tr>
<td>Date</td>
<td>Time</td>
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<tr>
<td>23/05/2013</td>
<td>12.17 p.m.</td>
<td>Email</td>
<td>Datacom employee</td>
<td>ICT Manager</td>
<td>Datacom employee sends the emails requested to the ICT Manager in HTML format by Datacom Operations Manager. This includes Hon Peter Dunne's emails.</td>
<td>FS submission</td>
</tr>
<tr>
<td>23/05/2013</td>
<td></td>
<td>Meeting</td>
<td></td>
<td></td>
<td>Mr. Henry meets with Hon Peter Dunne, indicates interest in period 27 March to 9 April. Mr. Dunne declines request to access content of emails.</td>
<td>Hon Peter Dunne's submission</td>
</tr>
<tr>
<td>26/05/2013</td>
<td>9.49 p.m.</td>
<td>Email</td>
<td>PS</td>
<td>Inquiry Administrator</td>
<td>PS emails Inquiry Administrator saying files can be sent if authorization has been acquired.</td>
<td>DPMC submission</td>
</tr>
<tr>
<td>26/05/2013</td>
<td>10.12 p.m.</td>
<td>Email</td>
<td>ICT Manager</td>
<td>Datacom Operations Manager</td>
<td>ICT Manager requests that the Datacom Operations Manager sends the HTML form at emails to the Inquiry Administrator. He makes clear the need for encryption and stresses the need to exclude the emails of Hon Peter Dunne.</td>
<td>FS submission</td>
</tr>
<tr>
<td>27/05/2013</td>
<td>8.18 a.m.</td>
<td>Email</td>
<td>Inquiry Administrator</td>
<td>PS</td>
<td>Inquiry Administrator emails PS to confirm that authorization has been given only for non-Minister email.</td>
<td>DPMC submission</td>
</tr>
<tr>
<td>27/05/2013</td>
<td>9.28 a.m.</td>
<td>Email</td>
<td>Datacom Operations Manager</td>
<td>Inquiry Administrator</td>
<td>Datacom Operations Manager attempts to send the zip file through the Inquiry Administrator stating in the email that it does not include emails for Hon Peter Dunne as they do not have authorization. The email delivery fails because of the way the email address is entered.</td>
<td>FS submission</td>
</tr>
<tr>
<td>27/05/2013</td>
<td>10.45 a.m.</td>
<td>Email</td>
<td>Inquiry Administrator</td>
<td>PS</td>
<td>Inquiry Administrator asks who to contact to access swipe card records within the precincts.</td>
<td>DPMC submission</td>
</tr>
<tr>
<td>27/05/2013</td>
<td>2.47 p.m.</td>
<td>Email</td>
<td>Inquiry Administrator</td>
<td>PS</td>
<td>Inquiry Administrator requests building access logs for two people for 6-8 April. Asks whether this can be retrieved, and what authorization is required.</td>
<td>DPMC submission</td>
</tr>
<tr>
<td>28/05/2013</td>
<td>5.30 p.m.</td>
<td>Email</td>
<td>PS</td>
<td>Inquiry Administrator</td>
<td>PS emails Inquiry Administrator with two activity reports, authorised by the General Manager.</td>
<td>DPMC submission</td>
</tr>
<tr>
<td>29/05/2013</td>
<td>12.35 p.m.</td>
<td>Email</td>
<td>PS</td>
<td>Inquiry Administrator</td>
<td>PS emails Inquiry Administrator the security policy for the Parliament entry precincts.</td>
<td>DPMC submission</td>
</tr>
<tr>
<td>30/05/2013</td>
<td>8.37 a.m.</td>
<td>Email</td>
<td>Datacom Operations Manager</td>
<td>Inquiry Administrator</td>
<td>Datacom Operations Manager sends requested email files in HTML format to Inquiry Administrator. This excludes Hon Peter Dunne's emails.</td>
<td>FS submission</td>
</tr>
<tr>
<td>30/05/2013</td>
<td>8.37 a.m.</td>
<td>Email</td>
<td>PS</td>
<td>Inquiry Administrator</td>
<td>PS sends to the Inquiry Administrator email records between the four Ministerial staff and Ms V once in a readable format.</td>
<td>DPMC submission</td>
</tr>
<tr>
<td>30/05/2013</td>
<td>5.27 p.m.</td>
<td>Email</td>
<td>PS contractor</td>
<td>Inquiry Administrator</td>
<td>PS contractor emails Inquiry Administrator saying PS has approved provision of phone information, and asking for the request to be forwarded by email.</td>
<td>DPMC submission</td>
</tr>
<tr>
<td>30/05/2013</td>
<td>5.37 p.m.</td>
<td>Email</td>
<td>Inquiry Administrator</td>
<td>CIO</td>
<td>Inquiry Administrator emails CIO requesting call logs of named Minister's landlines showing any contact between the Ministers' personal landlines and three telephone numbers. The list includes Ministers, but not Ministers outside of cabinet. No date range was specified for the request.</td>
<td>FS submission</td>
</tr>
<tr>
<td>30/05/2013</td>
<td>5.37 p.m.</td>
<td>Email</td>
<td>Inquiry Administrator</td>
<td>PS</td>
<td>Inquiry Administrator emails PS requesting landline call logs for 10 Ministers and for Ms V and her extension, landline, and cellphone.</td>
<td>DPMC submission</td>
</tr>
<tr>
<td>30/05/2013</td>
<td>7.22 p.m.</td>
<td>Email</td>
<td>CIO</td>
<td>General Manager</td>
<td>CIO email to General Manager states he has verbally confirmed to Inquiry Administrator that Parliament entry Services is able to supply the requested information. CIO subsequently has a conversation with the General Manager to further inform him they are acting on the request. CIO verbally instructs Datacom to action the request.</td>
<td>FS submission</td>
</tr>
<tr>
<td>31/05/2013</td>
<td>9.02 a.m.</td>
<td>Email</td>
<td>Inquiry Administrator</td>
<td>PS</td>
<td>Inquiry Administrator emails PS noting that permission not yet received for non-National Party Ministers, but this was expected later in the day.</td>
<td>FS submission</td>
</tr>
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<tr>
<td>31/03/2013</td>
<td>9:44 a.m.</td>
<td>Email</td>
<td>Datacom employee</td>
<td>Inquiry Administrator and Datacom Operations Manager</td>
<td>Datacom employee emails Inquiry Administrator and attaches two reports run over a three month period. The requested report relating to all calls to and from the Minister's personal landline is empty and the Datacom employee states he has run an additional report showing calls from any number within the Parliamentary Precinct to/from the &quot;numbers of interest&quot;. When the Datacom employee actions this request, he does not actually use the Ministers personal landlines as the numbers themselves were not identified in the request and he did not know how personal/private landlines were different from a Minister's normal extension number. Accordingly, to action this request, the Datacom employee looked up the Minister's extensions on the staff directory, and used these numbers to run his report.</td>
<td>FS submission</td>
</tr>
<tr>
<td>31/03/2013</td>
<td>9:44 a.m.</td>
<td>Email</td>
<td>PS contractor</td>
<td>Inquiry Administrator</td>
<td>PS contractor sends call log for 10 National Ministers and for Andrea Vince.</td>
<td>DPMC submission</td>
</tr>
<tr>
<td>31/03/2013</td>
<td>9:46 a.m.</td>
<td>Email</td>
<td>Datacom Operations Manager</td>
<td>CIO</td>
<td>Datacom Operations Manager forwards the email that the Datacom employee sent to Inquiry Administrator to CIO as an FYI.</td>
<td>FS submission</td>
</tr>
<tr>
<td>31/03/2013</td>
<td>11:19 a.m.</td>
<td>Email</td>
<td>Inquiry Administrator</td>
<td>Datacom Operations Manager, Datacom employee</td>
<td>Inquiry Administrator emails Datacom and clarifies that the supplied information was more than had been discussed and that they did not request the additional information.</td>
<td>FS submission</td>
</tr>
<tr>
<td>31/03/2013</td>
<td>11:19 a.m.</td>
<td>Email</td>
<td>Inquiry Administrator</td>
<td>PS</td>
<td>Inquiry Administrator clarifies that the inquiry does not want to see all calls to and from Ms Vance's number.</td>
<td>DPMC submission</td>
</tr>
<tr>
<td>31/03/2013</td>
<td>3:13 p.m.</td>
<td>Email</td>
<td>PS</td>
<td>Inquiry Administrator</td>
<td>Email sent at 9:44am recent by a PS staff member.</td>
<td>DPMC submission</td>
</tr>
<tr>
<td>31/03/2013</td>
<td>3:34 p.m.</td>
<td>Email</td>
<td>CIO</td>
<td>Inquiry Administrator</td>
<td>CIO forwards the email Datacom Operations Manager sent him to Inquiry Administrator (this forwarded email has both the requested report and the additional report).</td>
<td>FS submission</td>
</tr>
<tr>
<td>31/03/2013</td>
<td>4:00 p.m.</td>
<td>Email</td>
<td>Inquiry Administrator</td>
<td>Chief of Staff of Hon Peter Dunne</td>
<td>Inquiry Administrator emails Chief of Staff noting Mr Henry said Mr Dunne had approved release of information, and advising what information would be requested.</td>
<td>DPMC submission</td>
</tr>
<tr>
<td>31/03/2013</td>
<td>5:15 p.m.</td>
<td>Email</td>
<td>Inquiry Administrator</td>
<td>PS</td>
<td>Acknowledges receipt of earlier email.</td>
<td>DPMC submission</td>
</tr>
<tr>
<td>31/03/2013</td>
<td></td>
<td></td>
<td></td>
<td>Mr Henry requests access to Mr Dunne's office landline data with respect of calls made to Mr Vance's office landline, office extension, and mobile number for the period 27 March to 9 April, and Mr Dunne's stripe card records for 7 April. Mr Dunne agrees to both requests.</td>
<td>P/C</td>
<td></td>
</tr>
<tr>
<td>04/04/2013</td>
<td>8:59 a.m.</td>
<td>Email</td>
<td>Chief of Staff of Hon Peter Dunne</td>
<td>Inquiry Administrator</td>
<td>Confirms Mr Dunne agrees to request to access phone logs of his landline.</td>
<td>DPMC submission</td>
</tr>
<tr>
<td>04/04/2013</td>
<td>10:46 a.m.</td>
<td>Email</td>
<td>PS</td>
<td>Inquiry Administrator</td>
<td>PS advises Inquiry Administrator that Minister's private lines potentially not logged, to be confirmed.</td>
<td>DPMC submission</td>
</tr>
<tr>
<td>04/04/2013</td>
<td>1:39 p.m.</td>
<td>Email</td>
<td>PS</td>
<td>Inquiry Administrator</td>
<td>PS sends report of Mr Dunne's landmine calls.</td>
<td>DPMC submission</td>
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<tr>
<td>05/04/2013</td>
<td>10:59 a.m.</td>
<td>Email</td>
<td>Inquiry Administrator</td>
<td>PS</td>
<td>Inquiry Administrator emails PS noting a tight deadline, and requesting answer by 2pm.</td>
<td>DPMC submission</td>
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<td>05/04/2013</td>
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<td>Henry inquiry report delivered to the Prime Minister.</td>
<td>DPMC submission</td>
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<td>07/04/2013</td>
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<td>Henry inquiry report released by the Prime Minister.</td>
<td>DPMC submission</td>
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Appendix E

Corrected transcript of evidence 21 August 2013

Members
Hon Christopher Finlayson (Chairperson)
Hon David Parker (Deputy Chairperson)
Hon John Banks
Hon Gerry Brownlee
Hon Judith Collins
Dr Kennedy Graham
Chris Hipkins
Rt Hon Winston Peters
Grant Robertson
Hon Anne Tolley
Hon Tariana Turia

Witnesses
David Henry
Isaac Holliss, Department of the Prime Minister and Cabinet
Wayne Eagleson, Chief of Staff, Office of the Prime Minister
Andrew Kibblewhite, Chief Executive, Department of the Prime Minister and Cabinet
John Subritzky, Director, Office of the Chief Executive, Department of the Prime Minister and Cabinet
Geoff Thorn, former General Manager, Parliamentary Service
David Stevenson, Acting General Manager, Parliamentary Service
Robert Buchanan, Counsel

Finlayson Well, good morning everyone. I thought I would start by making a brief preliminary statement under Standing Order 221. I think it is worth just reminding members of the committee, the media, and the public who may be present that we are dealing with some specific issues, and the examination will be limited by the matters that we have been asked to look into. The committee has been tasked with examining the particular incident involving the release of information from parliamentary information and security systems which led to the question of privilege being referred, and a more general issue about developing principles for the access to, and release of, information from parliamentary information and security systems.

In this hearing we are going to be focusing particularly on gathering information concerning the circumstances which led to the release of information from parliamentary information and security systems to the authors of the inquiry into the unauthorised release of information relating to the GCSB compliance review report.
Today we are going to be speaking to some of the key entities and individuals involved in this release, those who were involved in the request for information, and those who have responded to that request and are also able to discuss current policy and procedure.

We have also received some information from those to whom the information request applied, but will not be hearing evidence from them today.

We have not been asked to investigate this release as a contempt. The overall aim is not, therefore, to establish personal culpability or hold individuals to account. We are looking at this matter in detail only in so far as it is a practical example of how any policies and procedures that govern the access and release of information from parliamentary information and security systems are to be applied.

We expect the information we are going to gather here today will help inform us about where the main issues in this area lie, whether there are problems with the policies and procedures themselves, and, if so, where the gaps are or whether the problem has arisen due to their application. We expect it will assist us with our primary aim of developing principles for the access to, and release of, information from parliamentary information and security systems. In short, we need to have an understanding of what went wrong only to guide us about what we need to do to put it right.

These are the only relevant matters to this committee today, and I take the opportunity to remind members of the committee and those appearing that under Standing Order 222 the chair is the sole determiner of relevancy—and, Mr Robertson, note that.

So we are going to begin with hearing evidence from David Henry. Good morning. The way we are going to do it is we will take the material as read and invite you or your counsel, or whatever, if you have got some preliminary comments you wish to make and then I will begin by inviting Mr Parker, the deputy chair of the committee, to ask questions.

Henry

Thank you, Mr Chairman, and good morning to you and to members of the committee. I am the author of the report of 5 June into the leak of the Kitteridge report. I have with me Mr Isaac Holliss, who assisted me in the inquiry. Mr Holliss is from the DPMC and was seconded to help me. I don’t have any counsel with me, Mr Chairman. I should say that Mr Holliss’ position—he carried out any of the activities of the inquiry under my supervision, so I am the person responsible for the conduct of the inquiry, solely.

I welcome the opportunity to help in any way that I can. I have given you a submission. I’m sorry it was late, but I have given you a submission, and I would like to speak to that. The time should take about 6 or 7 minutes, if that is appropriate.

First, some background to the inquiry, some context, and then some specific comments on things which I think are of specific interest to you.

[ Interruption to adjust sound system]
The inquiry was commissioned by the chief executives of the DPMC and GCSB, and I reported to those chief executives at the end of the inquiry, and I gave them, of course, some interim briefings as I went along.

It is important to note that although it was not an inquiry that was legally independent of those commissioners, I did conduct it independently throughout. The significance of that is that the chief executives themselves and their staff were potential suspects under the inquiry. So there were many people who could possibly have leaked the Kitteridge report, including the chief executives, theoretically at least, and their staff. So I was very careful in that regard to operate independently. So, the first point is it was an independent inquiry in practice.

Secondly, the information that I sought under the inquiry was the information that I considered was necessary for the purpose of the inquiry.

The inquiry itself, third point, was informal, as I think you know. I could request information that I considered necessary but I couldn’t compel the production of that information.

The next point is that in seeking information that I considered necessary, I sought information from, amongst others, Parliamentary Service and Ministerial Services. It was a matter for them as to whether that information could be produced and whether, if authorisations of some kind were necessary, whether those authorisations were held. I had the expectation—and I think it was a reasonable one—I had reasonable grounds to think that any information supplied to me that I had requested that was necessary for my purposes would be appropriately supplied according to whatever rules they were operating.

Now, dealing directly with the swipe card records of the parliamentary complex, I asked for limited information regarding the entry and exit security records of two people in regard to the parliamentary complex. One was Mr Dunne, the Hon Peter Dunne, and the other was the journalist concerned. I realise this is a sensitive issue, but I considered it was necessary for the purpose of the inquiry to seek limited information, not for the purpose of inquiring into the journalist, per se, but for the purpose of inquiring into the activities of Mr Dunne. The information I requested was limited to the crucial period when I believed this leak had occurred.

I conducted the inquiry as fairly as I could, and I applied natural justice principles, including providing to anyone who the report was going to mention in a way that might have drawn adverse criticisms from others I gave copies of my drafts and I took into account their comments that they made when finalising my report.

The question of permission being granted by Mr Dunne, I’m not sure how relevant that is to your inquiry, but I could perhaps briefly say that until 23 May I was working on the expectation and on the grounds that Mr Dunne was in the same position as any other Minister who was subject to the inquiry. There were 13 Ministers subject to the inquiry potentially at the
beginning, of which one was Mr Dunne, and prior to 23 May they were all being treated exactly the same.

Thank you, Mr Chairman.

Finlayson Thank you, Mr Henry. I said I would start with you, Mr Parker.

Parker You’ve said that you had responsibility for the conduct of the inquiry, and all of the inquiries that were made on behalf of the inquiry were therefore your inquiries and your responsibility. In terms of the authorisations that were sought for the release of data it appears that some of them were made by Mr Holliss, and the authorisations that were requested by Parliamentary Service to authorise the release of the information you requested of Parliamentary Service, on my reading of the evidence that we’ve been given, were coming from a variety of sources, which included Ms Calvert and Wayne Eagleson. Were there any others that you were aware who were involved in authorising Parliamentary Service’s releasing information, other than Ms Calvert and Mr Eagleson?

Henry The inquiry was not involved in obtaining any authorisations. Mr Holliss mentioned sometimes the question of authorisation, but that question was not one for the inquiry. Now, in answer to your question about other people, who was involved in authorisation—

Parker Did you have discussions with Mr Eagleson about the release of information?

Henry No.

Parker Did Mr Holliss have discussions with Mr Eagleson about the release of information?

Henry No.

Parker So all of the discussions between Mr Eagleson and others were other than with the inquiry?

Henry I don’t know what discussions Mr Eagleson had. What I can tell you is the only discussion I had with Mr Eagleson was to question him about his handling of the report as he was one of the subjects of the inquiry.

Parker Can I ask you what led—I have an email here, which is between Parliamentary Service and their Datacom contractor. It is asking for phone logs for extensions and phone logs to and from a number.

Finlayson There were a lot of emails. Which one are you referring to in particular?

Parker Email dated 14 May at 9.34am.

Finlayson Just give Mr Henry a minute to look it up.

Henry Could you just tell me who it is from and who to?

Parker Yes, it is from Parliamentary Service’s IT manager to one of their contractors, the Datacom operations manager, and it is copied to a Datacom employee. It says “We need to get email logs from the Gateways for in and out bound emails for all names on the list previously provided.
Note: [somebody] already did this but only for Ministers’ primary mailboxes.”

Finlayson
Now, wait one moment because several members are having difficulty finding the particular email. There are quite a number.

Parker
If I can help. It is the eighth page in.

Henry
Of the last bundle.

Parker
Of the bundle of emails that we have been supplied.

Robertson
I think Mr Henry has it, Mr Chair.

Henry
No, I’m afraid I don’t have it. I don’t think it would have been an email which the inquiry was privy to.

Parker
My question is that there was reference already being made to Ministers’ primary mailboxes, as if there is a difference between—and I think there is—their primary mailboxes and their other mailboxes.

Collins
There is.

Parker
I agree. That’s where I’m going. Did your inquiry see a difference between information that was in Ministers’ primary emails, which they have as their ministerial emails compared with non-ministerial emails?

Henry
My understanding, from what I saw, was that there was one email system which for a Minister included both correspondence in their capacity as an MP and correspondence in their capacity as a Minister.

Parker
The reason I ask is that I am still intrigued by why some of these emails, if they were from Ministers’ offices and they might have shown Ministers corresponding with other people about the details of the inquiry, why they weren’t matters of public record under the Official Information Act?

Finlayson
That is almost a legal question for Mr Henry. Mr Henry was tasked with investigating something, not to interpret the Official Information Act.

Member
But we’re not saying it’s not a good point.

Parker
Well, there has been a lot of dancing on the head of a pin. I wonder whether the obvious was missed here. Some of these emails would have been properly disclosable under the Official Information Act because they were official correspondence between Ministers and somebody else.

Henry
Perhaps to just step back a moment. The inquiry is operating on the basis of obtaining cooperation and is not compelling anybody. It is not using any powers to get anything. Now, when we started off, we had various records that we wanted, and those included—let’s talk about Ministers—those included Ministers’ landlines, Ministers’ mobile phone records, Ministers’ email logs, and we examined those when—we asked for them and they were supplied. We examined those with the aim of seeing whether any Minister—and Ministers were a subset of the total number of people subject to the inquiry—to see whether they had any contact with the reporter. So, the questions about the Official Information Act and so on never raised their heads.
Brownlee I am a little bit concerned about a couple of things. Firstly, we are here for this inquiry to look at the issues that relate to the rights, if you like, of journalists to have communications with MPs effectively, Ministers or otherwise, to keep some confidences, particularly if they are constituency matters, and Parliamentary Service know that that is a preserve that they cannot break. Were you ever given any advice about what would and would not be appropriate for you to ask for?

Henry No, I simply asked for what I thought was necessary, and I left it to—I am not trying to dump on Parliamentary Service, but I left it to those people to determine what could be supplied and what could not.

Brownlee So the question then would simply be: when you wrote your report were you quite confident that it was reasonable to say that you were denied access on almost a belligerent point by Mr Dunne, as opposed to, perhaps, mentioning that there could have been some legitimate reasons why they weren’t being release?

Henry Mr Dunne was being treated the same, as I mentioned, as all Ministers up to 23 May. Therefore, I didn’t have any particular concerns about that matter until on 23 May I was told he did not want the content of his email logs—being logs which we had already received in respect of all Ministers—to be read. I went to see him, as I put in my, I think, report, to discuss that with him, whether he would allow me to read the content of his email correspondence, not generally but with the journalist concerned, and I was unable to persuade him to change his mind on that.

Robertson Mr Henry, I want to read you some evidence that the committee has been provided by Geoff Thorn, a particular quote (page 4) where he says “I am in no doubt that the implementation of my decisions was undermined because of the extensive and ongoing interaction that occurred between the Inquiry team and my staff over a lengthy period, which removed some of the formality that I would have expected in the process.” What is your response to that, and what obligations do you think you had to have a formal process for this inquiry?

Henry The process that we set up was that we dealt with—and particularly my administrator, analyst—the people in Parliamentary Service that were appropriate, but, as far as I was concerned, Mr Thorn and the senior people in Parliamentary Service were aware of what was going on and, indeed, it was a matter for them as to how they organised. We had one person dealing with Parliamentary Service. Now, that was an ongoing thing. How they organised themselves to deal with this was entirely a matter for them.

Robertson Well, to follow up on that, Mr Thorn also says in his evidence, on page 3, that “… it is important to say that at no time was I, as General Manager, approached formally or informally by either Mr Henry or any member of his Inquiry team.” Don’t you think you had a responsibility to do that?

Henry My understanding was that Parliamentary Service, and the General Manager, were au fait with the terms of reference—the terms of reference...
had been published on 15 April, when the inquiry was announced—and that they would organise themselves to deal with the requests that we made.

Robertson But, you see, you don’t take any responsibility for having to talk to the general manager of the organisation from whom you were extracting a large amount of information.

Henry No, I don’t think so. I think it was a matter for him to organise himself and his people to meet our request. We had one person dealing with that, and it was a straightforward process as far as we were concerned.

Robertson Just one further follow-up, Mr Chair, on that. When, through Mr Holliss, you requested phone records to and from Ministers and the journalist concerned, did you at any point consider that if you were getting records from a journalist’s phone you should be seeking consent from that journalist?

Henry We did not seek any information from the journalist’s phone.

Robertson I'm sorry to interrupt you, Mr Henry. At 5.53pm on 20 May Mr Holliss asked for phone records to and from—

Henry No, just hold on a moment, please. Mr Holliss, when he first discussed with Parliamentary Service the question of phone logs, made it quite clear, and it is on the record, those phone logs were not the phone logs of the journalist. Secondly, the email that you are talking about, when the information was supplied, Mr Holliss immediately went back and said “We don’t want that information.”. Yes.

Collins Mr Henry, having read your submission and your evidence and also the email printouts that you provided, I have to say I felt it was quite a chilling experience to realise that Ministers’ and staff’s emails and their right to privacy was treated with what I would say is, frankly, a contemptuous attitude. I am picking up from what Minister Brownlee has already said, why did you not think that you should check as to what are the constitutional issues that might in fact be affected by members of Parliament, their staff, and journalists having emails logged, read. I particularly note a comment from Ms Calvert, from Ministerial Services, regarding the phone records of Ministers that she keeps. Did it not occur to you, Mr Henry, with all your vast experience in government, that this actually might be an issue where you needed to get clarification on before requesting this information?

Henry I was given a job to do, to do this inquiry. I decided to ask for information that I considered was necessary. I expected the recipients of those requests to gain any authorisations needed. In the email correspondence you will see that the question of authorisations by Ministers complying with those requests is dealt with, not by me but by Ministerial Services and Parliamentary Service. So from my point of view that was a matter for them to sort out. Now, I understand the sensitive issues that you are talking about, but I did take note that they were in the course of, as I understood it, operating on the authorisations of Ministers for us to carry out this inquiry.

Collins From Mr Thorn’s evidence that Mr Robertson has already read out, he has made some attempt to say that there needs to be authorisation, did you get
any such response from Ministerial Services, which is different from Parliamentary Service. Ministerial Services, did they at any stage say you need to get authorisation from the Ministers, from those who have been the recipients of emails from those Ministers such as Ms Vance, or phone records, before you can access those? Did they alert you to this issue?

Henry

My recollection, and there were a lot of emails, is that we were copied in on some of the things that were going on between Ministerial Services, Parliamentary Service, and so on. My recollection is that Mr Thorn advised Ministerial Services that authorisation of individual Ministers would be required, and my recollection is that Ministerial Services appeared to be in the course of obtaining that. Now, I thought they had obtained it, because they held up giving us certain information that we had requested until they had obtained the necessary authorisation. And then that information started to flow to us. So, from my perspective I thought it had been cleared.

Collins

So, Mr Henry, why would you have thought that when Mr Dunne clearly did not give his permission, yet you knew, from information provided to you, that he had been in email contact and telephone contact with Ms Vance?

Henry

I think part of the problem here might be the sequence of events. Mr Dunne, up until 23 May, was as far as I was concerned, from what I had seen, on the same basis as all the other Ministers. My understanding was, my belief was, that he had given the same permissions and had the same authorisations applied to him as applied to the other Ministers concerned. It was only on 23 May that I was alerted to the fact that he was not taking the same line as other Ministers, and it was then that I went to see him and found that he did not—

Collins

So, Mr Henry, how did you know other Ministers had agreed to this?

Henry

That was my assumption based on the correspondence, including the copying-in of certain emails to us, that Ministerial Services were in the course of gaining authorisation and would hold the material until they had it.

Collins

There is a comment here from the other side on this, but ultimately it is your responsibility, not the responsibility of others I would have thought. And how did you know that there were, what, 86 emails? How did you know that?

Henry

Prior to 23 May the information that we had requested and which was supplied included email logs, the email logs of a number of people including Ministers. Those email logs were—we were looking for emails between Ministers and the reporter. Those email logs were supplied. Mr Dunne’s 86 emails to and from the reporter were on the email log. So, prior to meeting with Mr Dunne we had obtained under the situation I have explained his email.

Collins

Who from? Who gave this to you?

Henry

They were requested from Parliamentary Service and Ministerial Services.
I’ve got three questions. The first one is, just picking up on the line of questioning from Judith Collins, the appropriateness of who is responsible for determining any constraints on seeking information, whether it is Mr Henry as author and the requester of information or Parliamentary Service as the recipient of that request. Can I refer you, first, to your own report here, paragraph 29, where you say “My position is that I asked for what I considered I needed for the purpose of my inquiry and it was over to Parliamentary Service to decide whether the information could be supplied.” So, essentially, you are saying there that you are free to roam pretty much without constraint, asking for information under your terms of reference, and it is for the recipient to determine whether it is appropriate to give it to you or not. I then read Mr Thorn’s report to the committee, paragraph 42, “… I was by this time aware that Mr Henry had been asked by the Prime Minister to inquire into access to a sensitive classified report by a person not authorised to receive it, and it appeared that the access might have resulted from a security breach within the precincts. I decided that I should not second-guess those security implications, and on this basis I decided to release the information to the Inquiry.” The implication of Mr Thorn’s statement there is that he felt under some pressure because of “security implications” coming from the genesis of the inquiry. When you were undertaking the inquiry, did you at any stage consider whether you should be operating under constraints as to what information you requested from anybody, and did you seek, at any stage, legal advice to assist you in making that determination?

The constraint that I saw myself operating under was whether the information was necessary. I think you mentioned roaming far and wide. I did not roam far and wide. I was very specific. The inquiry, of course, as it reduced in width, increased in depth, as I have mentioned. So, in fact, the constraint I was concerned about all the time was, was it necessary.

May I ask a question of you—

Sorry, if I could just answer the second point. I’m not sure what Mr Thorn felt about that.

So, in response, may I ask, is it conceivable that within the totality of what is necessary there may be something that is not appropriate?

It is conceivable, yes, and—

But you did not act on that predetermination?

My position was I would ask for what I think is necessary. The recipient of the information, since it is not a compellability issue, will make a decision on whether that information can be supplied. You know, we’ve had a lot of comment about the journalist’s phone logs. Despite the questions I was given earlier, we did not ask for the journalist’s phone logs, and the email record makes that crystal clear, if anybody reads all of them.

If I could refer to your paras 7 and 8 pertaining to stage 1 and stage 2 of the inquiry—

Sorry.
Graham: Your report, paras 7 and 8, pertaining to stages 1 and 2 of your inquiry, and particularly para. 8 where you say “Stage 2 of the inquiry was to be a formal process, which would require powers to compel the production of information. Given the results of the informal inquiry I did not consider it appropriate for me to seek formal powers under the State Sector Act and therefore did not move to Stage 2.” Could I ask you to elaborate on why you made that decision, because you were in the situation where one of the Ministers was not prepared to release information under your informal powers, and you concluded in your report that you could take the issue no further because of that fact, why did you then not move to Stage 2 so that you could elicit that information?

Henry: The problem was that the delegation under the State Sector Act deals with the conduct of public servants, essentially.

Graham: Then you didn’t state in the report that that Stage 2 would not be relevant to Ministers? It would have helped.

Henry: Well, you know, one resists the temptation to rewrite the whole thing, but, yeah.

Tolley: Just to go back a bit. In your appendix 3 you talked about the processes. Can I just clarify—I am trying to follow your process—when you asked for the information about the persons of interest, and you list them there, in appendix 3 on page 16, under paragraph 4, and you finish with “… and landline calls to specific numbers of interest.” Those were the numbers of particular journalists.

Henry: Of one journalist, yes.

Tolley: But further on in the emails there are three numbers that are blanked out. Those were the three numbers of one particular journalist. Is that correct?

Henry: That’s correct.

Tolley: Then over on phase 3 you are talking about two of the three individuals who had granted access to view the content of the emails.

Henry: Yes.

Tolley: And you were telling us that that was granted to you by Parliamentary Service?

Henry: If I can just elaborate a little. What we were faced with was we had a handful of people left to eliminate. One of those was Mr Dunne. The others were—

Tolley: I was one of them, as you can see from the papers, yes.

Henry: You were one of those yet to be eliminated?

Tolley: Yes.

Henry: Oh, OK. No, I don’t think so. I think you were eliminated earlier.

Tolley: Earlier on. OK.
Henry The others were public servants. And the question of reading them—it was an employer issue and a code of conduct issue. Those emails were supplied and by reading them we were able to say, well, those people—it was completely commensurate with their official duties, yeah.

Tolley So, at the core of this is the authorisation, really, of access to records and, in some cases, contents. You've worked in parliamentary services for a long time. You understand this place particularly well. Did it never occur to you that this is a different place from the outside world and that you should perhaps seek some guidance from the Speaker, who is, after all, the ultimate Minister responsible for what happens—

Peters You have to be joking.

Tolley —and get some guidance around—excuse me, I've got the floor—some of these more delicate issues that impinge on the privacy of Ministers of the Crown and their staff and members of Parliament? I am surprised that you didn't do that, I have to say.

Henry I can understand your point. I would just say that Mr Thorn reports to the Speaker.

Tolley But you didn't talk to Mr Thorn, either.

Henry No, and we talked to whoever Parliamentary Service put up to do with us. We had one—

Tolley I understand your saying that.

Henry I won't repeat it.

Tolley I’m just questioning—given your knowledge of things like parliamentary privilege—you are not someone from the private sector who perhaps doesn’t understand that this place operates under some slightly different rules. Did it never occur to you at any stage, early on in your inquiry, knowing what sort of information you were going to be asking for, that you should perhaps contact the Speaker directly about parliamentary privilege?

Henry With hindsight, 20-20 hindsight, it might have been a wise thing to do, I agree. But, as I said, I had a reasonable ground to believe that Parliamentary Service, reporting direct to the Speaker, knew what they were doing.

Peters Arising from the last question, when you took this job on did you think you had the forensic ability to do the job?

Henry The?

Peters When you took this inquiry on did you personally think that you yourself had the forensic ability to do this job?

Henry Yes.

Peters Well, it’s not when you are measured up against your track record, is it? You can recall the inquiries in form over substance and what you did about that?

Finlayson Relevance.

Peters Well, the relevance is I want to know—
Finlayson  We are not going back 20 years to some jihad you may have conducted.
Peters  Well, no, but I want to know why someone will take a job on and botch it up a second time. I think that is relevant, Mr Chairman.

Finlayson  Ask questions and make them relevant.
Peters  That’s why I’m asking the question because I want to know why he took the job given that we are now having an investigation into what happened when he did the job—for the umpteenth time. That’s the relevance.

Henry  Am I allowed to answer it, or not?
Peters  Yes.

Finlayson  Well, I hope you are, yes, please.

Henry  Well, Mr Peters, you’ve been going on about this for 20 years, haven’t you?
Peters  Yes.

Henry  For anyone who is interested in the commission of inquiry which finished in 1997, there is a public record of the commission of inquiry, there is a public record of the subsequent court case on avoidance evasion, and there is a public record of my evidence and there is a public record of your evidence. So, anybody who is interested can look at it.

Peters  You’ve made out my point, actually.

Finlayson  Mr Hipkins.
Peters  No, next question.

Finlayson  Oh, have you got another one?
Peters  Yes, I’ve got another question, and a few more, actually, if you don’t mind. If you go to your mission on not taking a more formal process with respect to your inquiry—page 2.8—and if you go to your report, strange enough it’s also on page 2.8, you seem to be distinguishing between Ministers. Why would that be the case?

Henry  Please point me to the reference again.

Peters  Right. What you say here: “Ministers are not public servants but with the support of the Prime Minister any information I require relating to the Cabinet Ministers was provided to me.” There you’ve got a blanket assurance, virtually, that you were able to get ministerial cooperation. Except he had a man called Mr Dunne, bullet point 9 of your report, is identified not as a Minister but as a leader of a political party. Why would that be the case?

Henry  Mr Dunne as a Minister, wearing his ministerial hat, wanted to distinguish between these things, I’m not sure, but anyway, wearing his ministerial hat, up until the 23 May, as I explained, as far as I was concerned he was on the same basis as the rest of the Ministers. When on 23 May I was contacted—and I think from memory it was by Parliamentary Service—to say that Mr Dunne did not want the content of his emails read, then I went to see him. At that stage there were a couple of things. One was that it became clear to
me that whatever the Prime Minister had asked other Ministers to do, Mr Dunne was in a different position or saw himself in a different position than the others. I was aware, of course, that he was not in the Cabinet. So, at that stage I had to treat him differently. In regard to your point about being the Leader of the Opposition, in the course of the drafting of the report I gave him a draft of the report, and part of it was regarding the briefing that he was given on the Kitteridge report on 27 March; he considered that he was given that briefing in his capacity as the leader of United Future, and that’s the way I wrote it. I took into account his comment and altered it from “Minister being briefed” to the leader of a small party being briefed.

Peters Can we get this very clear. Because he was reluctant to give over information that hitherto, up until that time, you thought other Ministers would happily hand over, and because he on the 23rd—or his office made it clear he wasn’t prepared to do that—you regarded that he had now got a changed status. Why would that be the case?

Henry Well, he changed that status for himself.

Peters But he’s still a Minister was he not?

Henry Well, absolutely true.

Peters And you said you had the Prime Minister’s backing to ensure that Ministers will comply.

Henry That’s right. Absolutely right.

Peters So why did you change his status then?

Henry I didn’t change his status. He changed it himself.

Peters Well, you can’t do that in this job, with respect, Mr Henry. You have got a designation. It’s a public office. You’re sworn in. You are either a Minister or not a Minister. So why would you take the view that he could change his status?

Henry Mr Dunne distinguished himself from other Ministers by saying that the content of his emails I was not allowed to read. I had no power to compel him to produce that content, and I attempted to persuade him to let me read it.

Peters You never considered adding those powers. Going back to the Prime Minister to seek those powers.

Henry It was my job—well, let me deal with that. I have already mentioned that the powers of delegation under the State Services Act, which were what was contemplated, I think, in the terms of reference in the two-stage terms of reference, would have been of no consequence with regard to a non public servant, Mr Dunne being a Minister and an MP. So, therefore, if I was to gain powers to compel evidence from a Minister or an MP, it would have had to have been, I assume, a commission of inquiry. Now, I reported to where I had got to on 5 June. I did not report to the Prime Minister; I reported to the people who had commissioned my report. If the
Government wanted to have a commission of inquiry, that was a matter for the Government; not for me. I had taken it as far as I could.

Peters So your point is then that you were at a stage where you couldn’t get at the truth as you were, presumably, hired to do, but that you did not report to the Prime Minister this deficiency in the process or his need to establish a more formal inquiry using greater powers. At no point did you say that to the Prime Minister, did you?

Henry I never spoke about this report to the Prime Minister. Let me tell you something: I have never met the Prime Minister. I have had no dealings with the Prime Minister.

Peters I’m not suggesting that you’ve met him or not met him. I am saying that at no point did you write to him and say “I have not got the powers to get to the truth; therefore, I suggest that you consider another form of inquiry where maybe the truth can be got at.”

Henry I reported to the people who had commissioned the inquiry: the two chief executives. It’s quite simple, really.

Peters Did you think Mr Dunne had the same rights and liberties as, for example, Andrea Vance?

Henry In what respect?

Peters Well, did you think they had different obligations and different rights—one being a journalist with a right to maintain confidentiality of information; Mr Dunne being a Minister having foresworn to hold secret matters secret, a member of the Intelligence and Security Committee and leaking documents, not once but a number of times? Did you think they had different legal obligations and different liberties or freedoms between the two of them?

Henry The journalist was entitled to the protection of section 68 of the Evidence Act. That protection applies to the right of a journalist to refuse to disclose sources in a civil or criminal proceeding. I was not engaged in a civil or criminal proceeding, but I took into account those principles when I was carrying out the investigation. That’s why I never approached the journalist to ask anything of her. So, in that respect, secondly, the journalist was not the subject of this inquiry.

Parker Did you ask for security access logs for Andrea Vance?

Henry Yes.

Parker Well, how do you reconcile that with the answer you just gave Mr Peters?

Henry The journalist was not the subject of the inquiry. I asked for her access records for the purpose of the inquiry into the activities of Mr Dunne.

Parker Well, didn’t you ask for her security access logs so that you could see her movements?

Henry For the purpose of inquiring—

Parker So how do you reconcile your statement that you were alert to and protecting the interests of the media to go about their business?
Henry: I did not at any stage attempt to find from the journalist her sources. What I did do was ask Parliamentary Service for the movement, the swipe card records of Mr Dunne, and, as part of that, I asked for the swipe card records of the journalist for that limited time.

Peters: But the point is you were asked—

Finlayson: Let him finish.

Parker: Why did you need access to Andrea Vance’s access logs in order to look at Mr Dunne’s movements?

Henry: Because I wanted to be in a position of ascertaining Mr Dunne’s activities, particularly on the Monday—

Parker: No, you wanted to know Ms Vance’s movements.

Henry: Yes, but as part of that, in my examination, my questioning of Mr Dunne, I wanted to have information which would allow me—one of the problems I’ve got, Mr Chairman, is that in order to explain the necessity of looking at not just his swipe card records but the journalist’s for that limited time, it takes me into the detailed questioning of Mr Dunne. You know, if the committee wants me to do that, then I will, but it’s a question.

Finlayson: The point is made. I think we will move on to Mrs Turia.

Peters: Hang on. With respect, the question I was asking, and it related to the distinction, your treatment, between (a) a journalist and (b) a politician or a Minister. It seems to me that you now have accessed the movements of this person. There was no distinction in your mind then, though you tend to make it now. It goes to the point, at page 4, point 26 of your actual report. That’s how you got to that conclusion that “It is not possible to be definitive but it is likely that the report was provided directly to the reporter by the leaker. The report would have been copied by the leaker and a copy provided to the reporter, or it could have been lent to the reporter and returned later.” You knew how it happened, didn’t you?

Henry: No, I didn’t know.

Peters: You still don’t know how it happened?

Henry: No, not for certain, no.

Finlayson: Mrs Turia.

Peters: Don’t you want to find out? It’s a terrible rush, Mr Chairman.

Finlayson: No. Doing my job.

Peters: Well, you’re not, actually. I mean, I thought we were—

Finlayson: Well, they’re questions, not submissions. They are matters of submission which we can deal with later on.

Peters: Yes, I know. We’ve got the witness with us now—

Finlayson: Mrs Turia.
Peters —on his report. And we won’t be ridden over roughshod, Mr Chairman, when this is a serious investigation into fundamental constitutional issues.

Finlayson Thank you for that, Mr Peters. Mrs Turia.

Turia Mr Henry, you were the head of the inquiry and you claimed that Peter Dunne made a mistake in saying that you had not requested from him or Parliamentary Service for a comparison of the telephone records. How does that then relate to the fact that you wanted to compare the comings and goings of Andrea Vance into the building? How were you going to make a link between that and the leak, because you’ve said that the phone records wouldn’t have given you that and that’s why you didn’t ask Mr Dunne, even though he says that you wanted to compare them. He isn’t usually a person who would forget or make a mistake of that nature.

Henry Yes, I think there is some confusion around this, which I would like to try not to add to. Mr Dunne did think that I had told him that I was going to, or had or was going to, ask for the phone logs of the journalist in order to compare them with his phone logs.

Turia But you have already admitted just before that you wanted to compare her access with his record.

Henry But they were two separate things.

Turia Well, they might be two separate things but they are both relevant.

Henry Well, OK.

Turia Surely if you are saying you wouldn’t have asked for the phone records because that wouldn’t have proved anything, why then would the access records have proved anything?

Henry Well, with the phone records we were able to obtain the information from the other end—that is, the people who were subject to the inquiry. So, when we asked for the phone logs of people who were subject to the inquiry, whether they were Ministers or public servants, we then were able to check whether those people had any telecom contact with the reporter. In regard to the access records, of course there wasn’t another end to look at in regard to the movements.

Turia You were heading the inquiry, yet you didn’t think it was important for you yourself to seek the authorisations. You left that to just anybody who happened to be on deck that day? I am talking about Parliamentary Service now. You never got that from Geoff Thorn. Why not?

Henry I didn’t think it was my responsibility to get that authorisation. I believed it was my responsibility to ask for the information I thought was necessary,
and I believed, and I had reasonable ground to believe, that Parliamentary Service were themselves organised and able to decide what could be released and what could not. Now, some of the email correspondence actually gave me comfort in that area, because they, at one stage at least, were taking legal advice on the requests that I was making. So, you know, as I say, maybe in hindsight I should have gone to see the Speaker, but the Speaker has the General Manager directly, and the General Manager is responsible for organising Parliamentary Service, so—

Robertson But you never spoke to him.

Turia You never spoke to him.

Hipkins When you asked for the journalist’s swipe access records, on whose authority do you believe you were acting?

Henry I was acting, I believed, in accordance with the terms of reference.

Hipkins But where in the terms of reference do you think you have got the authority to ask for that information?

Henry The terms of reference pointed me to logs specifically, and inherent is anything that I was able to obtain, that I could ask for anything that was necessary for the purpose of my inquiry. So, as I mentioned before, if the recipient of the request wanted to take issue with that—if they had come back and said to me “Look, you can’t have those.” I would have had to accept it.

Hipkins But do you think, in fact, the terms of reference you were given not only authorised you to ask for that information but in fact required you to ask for it?

Henry No, I don’t think they required me to ask for it in that sense; I think they left it effectively to me to determine what I thought was necessary. For the reasons I’ve mentioned, I thought it was necessary to ask for those swipe card records for that limited period only.

Banks Mr Henry, today are you now very disappointed in the way in which you handled this inquiry?

Henry No.

Banks So you still believe, in answer to Mr Peters’ question, that on day 1 you had the ability to do justice to this inquiry?

Henry Well, I didn’t know on day 1, but I think I did as much as I possibly could until I got to the stage that it was time to report. I think I conducted the inquiry fairly, professionally, and the result I would like, of course, to have been able to eliminate Mr Dunne. Nothing would have pleased me more, but I couldn’t.

Banks In your wildest dreams when you started this you never thought you would end up here and be held to account, did you?

Henry I don’t understand that question, I’m sorry.
Banks  Let me put it this way. Could I and the public, and in particular the media, be forgiven for seeing you as a modern-day sleuth that came through this place trawling for information and trampling on the rights and freedoms of members of this Parliament and, more particularly, the media, the Fourth Estate, in a very cavalier attitude, that you thought you would never be held to account?

Henry  Well, does that mean—let me try to make sense out of it. I carried out the inquiry as best I could. Whether I was going to be held to account or not didn’t cross my mind.

Banks  Didn’t matter.

Henry  Well, as I said at the beginning here, I am quite happy to be held to account. I have been held to account many times in many jobs. I am quite happy about it. It is part of the system. I don’t have any problem with it.

Banks  Final question. If you knew what you now know, what would you have done differently in respect of trawling for the information of one of the journalists in this Parliament?

Henry  If I knew now I would have known that at the end of the day the information provided from the journalist’s swipe card log was not particularly useful, but I didn’t know that when I asked for it. Hindsight is a wonderful thing.

Parker  You said earlier in your evidence to us that you didn’t think that your inquiry had been pressuring Parliamentary Service to release data. I just want to put to you what Mr Thorn has to us. He said that the initial approach came from Mr Holliss for a list of email-related what he calls metadata and that that was refused. Were you aware of that, or was your assistant aware of that?

Henry  Perhaps one simple way of helping the committee on this—in my submission at appendix D I have provided a time line for the—

Parker  Perhaps we can ask Mr Holliss then. Mr Holliss is with you and presumably he’s here for a reason.

Henry  No.

Finlayson  No, if we need to get Mr Holliss back, we can.

Parker  Well, he’s here at the table.

Henry  I can answer—

Parker  No, can I ask Mr Holliss, because according to Mr Thorn it was Mr Holliss who contacted the ICT manager by telephone on 29 April and then followed up with a series of emails, culminating with one on 30 April which was described as a formal request for the required information, and the response from Mr Thorn was no. Were you aware of that, Mr Holliss?

Finlayson  I think the best—

Parker  Well, can I ask—

Finlayson  You can’t because Mr Henry is giving evidence.
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Parker What is he doing here? What is he doing here?

Finlayson Mr Holliss can give evidence at a later date.

Peters Excuse me. Excuse me. With respect, the witness said that he had Mr Holliss here also, at the start, at the opening of his submission. Now you are just changing the rules, having it read or not demurred when he made that statement. So please let someone ask the question whilst he’s here and stop wasting everybody’s time.

Finlayson We are trying to deal with matters in an orderly fashion.

Banks But he’s turned up as a witness. He’s—

Finlayson He has not turned up as a witness.

Banks What’s he doing here?

Peters What’s he doing here then?

Finlayson He was sitting with Mr Henry—

Peters Holding his hand.

Henry Mr Chairman, may I speak?

Peters We’re not going to have a cover-up here.

Finlayson We’re not having cover-ups. People need to give—Mr Holliss, I will ask it, are you in a position to address that question this morning?

Holliss Yes, I am. Mr Parker, Geoff Thorn, through his chief information officer, who I was dealing with at the time, phoned me and said they first needed authorisation from Ministerial Services before they could process this request. So, in answer to your question, did they say no to us, well, no they didn’t.

Parker OK. Now, the second request was one week later, on 8 May according to Mr Thorn, when Janice Calvert, the General Manager of Ministerial Services, emailed and asked for information, and at that point the position was conveyed, according to Mr Thorn, back to Ms Calvert that, you know, didn’t think the information was authorised to be released. Were you aware of that approach by Ms Calvert and the response from Mr Thorn?

Holliss We were aware that Janice Calvert told Geoff Thorn through Mike Middlemiss, the chief information officer, that in relation to ministerial staff they had the required authorisations and they said to go ahead with those. And in relation to Ministers, Janice Calvert undertook or said that she understood that Ministerial Services needed to obtain the written authorisation from each Minister. Janice Calvert then said Ministerial Services will not hand over any Minister’s data until they had those authorisations. A couple of days later we started receiving Ministers’ information.

Parker And where did that authority come from then?

Holliss Well, we weren’t sighted on that. The inquiry wasn’t sighted on what authorisations were then sought afterwards.
Parker Were you aware that Mr Eagleson was then drawn in to establish that there was the appropriate authorisation for Ministers’ information to be handed over?

Holliss No, we weren’t aware of Mr Eagleson’s involvement until after the inquiry was finished.

Brownlee Do you accept that—

Finlayson Who are you addressing this to?

Brownlee Well, I’ll try Mr Henry, but Mr Holliss clearly was quite involved in the aspect I am about to question on. Do you accept that Parliamentary Service and Ministerial Services are not constitutional bodies; they are functionary bodies designed to provide services to members of Parliament and to Ministers? If you do accept that, I am struggling to understand why you didn’t think it was appropriate to approach Ministers or members about the access to communications. If it was conveyed to you the idea that that was not necessary, who was that conveyed from?

Henry Well, that’s quite a large question. The position, as I understood it, was that Ministerial Services was part of the Department of Internal Affairs and that Parliamentary Service was responsible for certain systems and information, including security for the parliamentary precinct. My understanding was that Parliamentary Service operated certain information systems as agents for Ministerial Services in respect of Ministers. As I have said, quite a few times now, my dealings, our dealings, were with those two organisations, and we relied on their expertise to obtain whatever authorisations were required. I have already said, you know, with the benefit of hindsight perhaps I should have gone and talk to the Speaker about it, but at the time it seemed completely reasonable to be dealing with the experts in that area, the people who held information, and if the Speaker needed to be consulted then I would have expected Mr Thorn to do that.

Brownlee Given the conclusion in your submission today and indeed your report alongside that admission that if you had been perhaps more aware you might have done something else, it is difficult on a number of fronts to see that natural justice was served here in any way. We are not here to examine you, I might add; we are here to find out exactly where that line exists between the ability for any inquiry or any member of the public or journalist, for that matter, to access records of members of Parliament without those members knowing exactly what’s being accessed. I think one of the difficulties here is that, as fine a point as you might like to put on the nature of your inquiry, Mr Dunne has not stepped outside what is effectively a right he has as a member of Parliament but has been pilloried for doing it.

Henry Well, you won’t find any criticism by me of Mr Dunne in regard to his decision not to allow that.

Brownlee Innuendoes are a very powerful thing.

Henry Pardon?
Brownlee: Innuendoes are a very—

Henry: Well, there is no innuendo in my report whatsoever.

Brownlee: Well, that’s an interesting read of it.

Finlayson: Thank you very much, Mr Henry, Mr Holliss.

Finlayson: Good morning Mr Eagleson. I don’t know whether you were here when I mentioned it to the previous witness, but we can take your statement as read. If you’ve got brief preliminary comments you’d like to make, fine, otherwise we’ll just launch into questions.

Eagleson: Thank you, Mr Chairman. No, I am very happy to go straight into questions.

Robertson: Mr Eagleson, you would’ve heard the last exchange around the question of authorisation or access to Ministers. Can we confirm that you were aware of the sequence of events that led up to the discussion Geoff Thorn had with you—i.e. that Mr Holliss had initially asked for material about Ministers, and Mr Thorn had been reluctant to provide it. Ms Calvert asked Mr Thorn to provide material. He was reluctant to provide it about Ministers, and you intervened at that point to authorise the access to the ministerial information.

Eagleson: That is substantially correct. I would refer members to my submission on page 3, paragraphs 14 through to 19, or thereabouts. Essentially, I received a call from Janice Calvert, exactly as was outlined. She indicated that the inquiry had made a request for information. I think, as has been pointed out, it was never any issue about staff data, so we moved pretty quickly off that point and on to the question of Ministers. She indicated that Mr Thorn, I think, quite properly, had said that he required the necessary authorisations before he would release that material. I indicated that the Prime Minister had been pretty clear that he expected all Ministers to cooperate and that I would call Geoff Thorn to provide the necessary authorisation.

Robertson: And you then did that and wrote an email to that effect.

Eagleson: I did, Mr Robertson, yes.

Robertson: The basis on which you believe that you had the right to say that each Minister authorised the release of this material—what was the basis of that?

Eagleson: Well, there are essentially two things. One is the terms of reference had been released. They made very clear the type of information that would be sought. Secondly, the Prime Minister had made it clear, both publicly and to me personally, that he expected Ministers to fully cooperate. I think it is pretty clear if you look at the Cabinet Manual that Ministers are accountable to the Prime Minister for their behaviour. On that basis, I felt that was sufficient authority to give that authorisation.

Robertson: OK, so we can establish that the reason that ministerial data was released was because you said to Geoff Thorn it was OK to do so.

Eagleson: That’s correct.
Robertson: Were you, at that point on 9 May, drawing any distinction between different types of Ministers—National Party Ministers or non-National Party Ministers?

Eagleson: I think it’s a fair point. The context—there was actually quite a lot happening around that time in other matters.

Robertson: There always is.

Eagleson: There always is, as of course you would know from your time in the Prime Minister’s office. The way I look at Mr Dunne, it was clear to me that he had been provided a copy of the report in his capacity as leader of United Future. That was clear to me. But nonetheless he is a Minister—he was a Minister—and once the inquiry was set up, it was my view that he should be treated like other Ministers.

Robertson: But it wasn’t until 23 May that any distinction was drawn. In between times, that caused Mr Henry to become aware that there were 86 emails between Andrea Vance and Peter Dunne. That is correct, isn’t it?

Eagleson: That is correct.

Robertson: So that was as a result of your decision to authorise the release of that information?

Eagleson: That is correct.

Hipkins: Did you have any contact with Parliamentary Service specifically on the issue of swipe access records?

Eagleson: No. In fact, what happened when Janice Calvert raised the issue of data generally, I wasn’t party to any discussions with the inquiry about the types of information they were after. My role was simply to say, look, the Prime Minister was very clear that he expected cooperation. I think Mr Henry made it clear in his evidence to the committee before that he didn’t have powers to compel, and so that was the kind of inquiry it was. I wasn’t involved in the toing and froing, the backwards and forwards, about what type of information would be provided in specific terms.

Hipkins: So were you aware at any point that the swipe access of the journalist were being asked for as part of this investigation?

Eagleson: Not till much later. I think it came up in the context of being made aware about Mr Dunne giving his approval.

Hipkins: OK. Can I just take you page 2 of your submission, clause 10 there, where you say—you’re talking about the establishment of the terms of reference—“I don’t recall much of any discussion on the fact that Mr Henry would not have the power to compel witnesses or evidence under this form of inquiry.” Was it your assumption, therefore, that he would have some power to require information?

Eagleson: No, it was my assumption, in fact, that he wouldn’t, that it would be done on the basis of cooperation. I mean, perhaps—and I won’t take much time, Mr Chair—but the context of this occurred some months after the leaked material from the Ministry of Foreign Affairs and Trade about a whole
range of issues. The State Services Commissioner, as I recall, established the Rebstock inquiry. It took a lot of time, cost a lot of money, and there were all sorts of issues with powers. The Prime Minister was quite determined, as I recall, that this would be a much more efficient, shorter process, and so I don’t recall there being discussion about that kind of power.

Brownlee For the sake of clarity here, have you or any of your staff ever asked, in any other circumstance, for the meta-type data for Ministers to be made available to inquiries?

Eagleson No. This is the first time in the 4½ years I’ve been the Prime Minister’s chief of staff.

Robertson Didn’t you access—

Eagleson I think Mr Brownlee’s question was about Ministers and not about staff. Staff is a quite different point.

Finlayson Mr Brownlee, have you got other questions, and then do you have a supplementary one, Mr Robertson?

Brownlee Well, my question is: what was different, then, in this circumstance to the many other inquiries?

Eagleson I think there were two or three differences. One was the very narrow range of people involved in this inquiry. So, in the time that I’ve served as the Prime Minister’s chief of staff, there have obviously been a number of inquiries of a range of natures into leaked material, many involving a range of public servants and so on. What made this, I think, unique was the very small number of people who had received access to the report and the fact that the bulk of them were actually Ministers. In fact, I will clarify that. I can’t quite recall the numbers, but certainly a significant number were Ministers or Ministerial Services staff, including myself. Excuse me, Mr Chair, would someone be able to provide me a glass of water? I’m happy to go and get it. Thank you.

Robertson I hope that won’t prevent you from answering. I just want to return to the question of the request that you effectively authorised for what we now know to be—I guess the best term to call it is—metadata. When you were considering that question, what did you think constituted metadata?

Eagleson To be honest, I didn’t give a huge range of thought to it. One of the initial aspects that I know Mr Henry was going to be looking at was things like photocopying records. So photocopying records, email logs, those kinds of things. But I didn’t spend much time thinking about it.

Robertson I guess one of the difficulties I have with this situation is that there has been an insistence from your boss and from others that there was no attempt to look at a journalist’s records—

Eagleson Absolutely.

Robertson —but in considering that you are talking about communication between people—and that includes communication that comes from the journalist not just to the journalist—that at some point someone would have thought,
gosh, we need to ask for consent here because it involves the communications written by Andrea Vance. Did you not think at any point that consent should be being asked for from a journalist?

Eagleson I’m glad you’ve asked that question because it simply never occurred to me in providing that authorisation on 8 or 9 May, or whenever it was, that we were talking about any records that would have any relation to a journalist.

Robertson How is that believable, Mr Eagleson? If you’re trying to find out about contact between people, surely it has to involve the other person, the journalist?

Eagleson Well, Mr Robertson, in the end, you can make your own judgment. I’m just telling you that it never occurred to me that would be the case.

Peters But she was reporting it. That’s a bit of pretty serious DNA, isn’t it?

Eagleson I wasn’t running the inquiry, so that’s not a matter for me to concern—

Robertson But you authorised it?

Eagleson No, no. What I authorised very clearly and very specifically was ministerial staff’s records and for Ministers as well. That was it. There was never any discussion with Mr Thorn or, indeed, anybody else about me authorising or being involved in any kind of approval process, for a journalist’s records. And frankly, you know, if you think of the politics of all this, it would be crazy.

Robertson But you authorised, effectively, the release of records—phone records, emails—that were about contact between the journalist and the Minister. At that point, don’t you have an obligation to think about the consent issues—which is what this whole inquiry is about—and about whether you should be asking a journalist about material that they write? Shouldn’t they have been asked for their consent, just as you were asking Ministers for their consent?

Eagleson Well, that’s a question that perhaps arises in the context all that’s flown, you know, all the water that’s come under the bridge in that period of time. At the time I provided the authorisation to Mr Thorn, my mind was very clearly about Ministers and their staff on a very narrow matter.

Robertson I find that hard to believe, Mr Eagleson.

Collins I just wanted to come back to Mr Brownlee’s question he asked you about accessing emails or metadata or whatever from Ministers for any other inquiry. There has been some concern raised, Mr Eagleson, about that. So have you—just to confirm you and your office—accessed or received any emails or data from Ministers or MPs in your time?

Eagleson Absolutely not.

Hipkins Did you or the Prime Minister have involvement in the drawing up of the terms of reference for the Henry inquiry and sign off on those effectively?

Eagleson I refer to that in my submission on page 2(a). This all happened relatively quickly, as these things sometimes do. The Prime Minister was in China
with Mr Kibblewhite. I was here. There was pretty quick agreement after phone calls that there needed to be an inquiry into this matter. My recollection is that Mr Kibblewhite, in particular, worked to pull together those terms of reference. We had a look at them. They looked fine.

Robertson So you agreed to them?

Eagleson Well, my recollection was certainly Mr Kibblewhite and Mr Fletcher were the decision makers, if you like. But of course, given a matter of this significance, you would expect them to run it past us, and we said yeah, they look fine.

Robertson So you agreed to them.

Eagleson I think you are putting words in my mouth. The word “agree” suggests somehow that I had a role in approving it. I gave some feedback, as I recall.

Hipkins Did the Prime Minister see the terms of reference before they were released?

Eagleson I’m sure he would have.

Hipkins So he approved the terms of reference too?

Eagleson Well, again, I think that’s perhaps a question you might want to ask Mr Kibblewhite, who is going to be appearing before you shortly, because he and Mr Fletcher were the chief executives driving the inquiry.

Hipkins We will.

Robertson I’m sure we will.

Graham I have three questions. The first is with respect to the relationship between the executive and the legislature. You would agree that obviously you are acting as a member of the executive.

Eagleson Yes.

Graham Mr Thorn is obviously acting as a member of the legislature—an official staff member serving the legislature.

Eagleson No, I understand the point you’re making, Dr Graham. I draw members’ attention to page 3, paragraph 15. What is clear—and I agree that it muddies the water somewhat—is that Parliamentary Service, in effect, acts as the agent for Ministerial Services.

Graham I understand that.

Eagleson You know, that wasn’t the case once upon a time, I accept, but for no doubt reasons of efficiency and others that I wasn’t involved in, there is one system. So when I ring Geoff Thorn, as I think Mr Robertson has pointed out I had done on a couple of previous occasions, about staff, I’m ringing him particularly about matters to do with ministerial emails. So I have absolutely no influence over broader parliamentary matters.

Graham Well, I understand from what you’re saying and having read your report that, for operation reasons, they were technically merged to some extent. But you would also agree that that doesn’t in the slightest alter the
constitutional separation between them. On that basis, when I read your report paragraph 2(d) where you say: “I advised Parliamentary Service that they could not release the emails.”, my inference from that is that you are telling Parliamentary Service something. So as a member of the executive, you are telling a staff member of the Parliament—the legislature—something. Then I look to paragraph 19: “On 9 May, I rang Geoff Thorn to discuss the matter. I subsequently emailed Mr Thorn to authorise the release of the material.” So you get my point. As a member of the executive, you are directly instructing the Parliamentary Service to do something.

Eagleson To do with matters relating to the executive, yes.

Graham Second question: Mr Henry, this morning, made the comment that the report was obviously commissioned by two CEOs, and that the CEOs and the staff were, themselves, potential suspects. Just in your own individual opinion, do you think that’s a desirable situation, for an inquiry to be initiated, commissioned, and managed by potential suspects?

Eagleson I must admit, that thought had never occurred to me. Given that the report that had been the subject of the leak was a report prepared by Ms Kitteridge for the GCSB, I mean, it seemed entirely appropriate, those things. I think the other point is that my understanding—and again, you may wish to follow this up—was that both Mr Kibblewhite and Mr Fletcher would have been questioned, as I was, on our individual handling of that report. I mean, I was one of a number of people who received that report. My contact with David Henry was actually about where did I have it, what did I do with it and, what steps did I put in place to make sure that I kept it secure. So I don’t see anything particularly unusual.

Collins Mr Chair, can I have a point of clarification. How can Mr Eagleson be a member of the executive? He is working on behalf of the executive.

Graham He works on behalf. Well, thank you for that clarification. It leads me into my third question.

Collins Good.

Graham It’s all harmony and light around the table here. Mr Eagleson, acting, obviously, on behalf of the Prime Minister, discussed the terms of reference with the Prime Minister, and those terms of reference were endorsed and the inquiry proceeded. Would Mr Eagleson agree that, in acting on behalf of the Prime Minister, the Prime Minister is therefore—as he has indeed said in the House himself—responsible for the inquiry, or at least responsible for initiating the inquiry and receiving the report, independent of the precise operation in the middle?

Eagleson Well, I think it’s clear that he has ministerial responsibility for what was set up to be an independent inquiry. I think Mr Henry made the point himself that actually he hadn’t met the Prime Minister and hadn’t spoken to the Prime Minister. In fact, I only had one discussion with him, and that was when he came in to interview me over my own handling of the matter.

Graham Would you be good enough to advise the committee of your understanding of the beginning and end of ministerial responsibility in that respect?
Eagleson  I think I would prefer to leave that to people far more learned than me.

Robertson  So there was a point, wasn’t there, at which you paused when Mr Thorn came back to you around the question of the release of ministerial information, and that was to do with the fact that Mr Dunne was not a National Party Minister. That was your concern?

Eagleson  Yes.

Robertson  At no point at that stage was your concern related to the fact that Andrea Vance’s communications were caught up in all this?

Eagleson  The matter never arose. It was nothing to do with that. It was about Mr Dunne’s role.

Robertson  But at that point you knew that this was a matter to do with communications to and from Andrea Vance.

Eagleson  Yes.

Robertson  But your concern wasn’t about Andrea Vance; it was about whether you could compel Peter Dunne, as a United Future Minister. So it had nothing to do with Andrea Vance.

Eagleson  Correct.

Collins  Mr Eagleson, you’ve listened to the evidence this morning of Mr Henry.

Eagleson  I have.

Collins  One of the things that I took from it is that Mr Henry was communicating at not as senior a level as he should have been, perhaps, with Parliamentary Service. I think in hindsight he sees that. Is that something that you might have expected, that he would have talked to the Speaker, as Mrs Tolley asked?

Eagleson  It’s a very fair question because some time after the fact of the inquiry, you look back and you look at all the things that could be perhaps described as process deficiencies and you’d say really there must be a better way. One of the things—and why I think it is useful from a staff perspective that this committee is looking at this matter—is that there was no template. There was no recent precedent that anybody could recall about this matter. I think the other thing is I had very little, if any—I spoke to Mr Henry about my handling of the document. After that, I wasn’t involved. I think that was important because it was an independent inquiry, not something that was run in the office. So I didn’t have any visibility on it until the issue around Mr Dunne came back.

Peters  You prepared the terms of reference?

Eagleson  No, I did not prepare the terms of reference, Mr Peters, but I was certainly shown a draft of them.

Peters  Did you have any say in who the person was to chair the inquiry?

Eagleson  I don’t recall. I do recall it being raised, and I certainly didn’t raise any objections. But in terms of Mr Henry’s appointment, that would have been
recommended by the chief executives involved, not the Office of the Prime Minister.

Peters All right. In page 2 of your submission, point 6: “…my view was that its leaking was a serious matter and that an Inquiry was necessary.”

Eagleson Yes.

Peters Were you aware of other leaks as well? For example—

Finlayson Sorry, what was that?

Peters Was he aware of other leaks as well, such as the leak on the morale report of the GCSB?

Eagleson I wasn’t aware of that particular one. In terms of other leaks, it’s perhaps unfortunate to say, but that’s a reality of working in this building, there are leaks from time to time.

Peters So you were not aware that there was not just one leak, but a number of leaks that pointed to one Minister? You weren’t aware of that?

Eagleson No, and I certainly wouldn’t have drawn that conclusion.

Finlayson Well, hold on, where is that whole concept of relevance?

Peters Really?

Finlayson Yes.

Peters So what are you here for, then? I want to find out what happened with respect to the length of the inquiry when it came to information sources.

Finlayson Yes, well, ask questions. Get on with it.

Peters Well, I’m getting on with it, if you don’t mind. You’ve taken a whole lot of questions from others, and, frankly, I’m not going to be railroaded.

Finlayson I’m not railroading you.

Peters So you sit there and let me ask my questions properly.

Finlayson I’m just trying to deal with this. I’m just trying to give everyone an opportunity to ask questions.

Peters That’s wasting everybody’s time as well. Were you aware of any other persons’ access cards information, as to toing and froing—

Eagleson No.

Peters You are not aware of that happening either? No other staff member was involved, of any Minister?

Eagleson Staff members?

Peters No staff member of any Minister was ever looked into in terms of their access cards?

Eagleson No. Perhaps, just for the purposes of clarity, can I go back a step? Because I don’t want to mislead the committee in any way. I think Mr Henry made the point that there were a number of ministerial staff, including one in the Office of the Prime Minister, who had had contact with the journalist in
question. So I had given approval—in fact, Ministerial Services, frankly, had before I needed to—to have a look at their records. Now, as I understand it, they looked at their emails, which then, I think, Mr Henry, in his evidence to you earlier, demonstrated that it showed normal day-to-day contact with the journalist in question. I have no knowledge of anything to do with ministerial staff swipe card access.

Peters But no one ever raised that with you.

Eagleson No.

Peters OK.

Tolley I just wanted to follow up on Mr Robertson’s question. So when that pause came and you talked with Mr Thorn, I think the question was put to you about the release of emails to and from Andrea Vance. Were you aware, at that stage, or were you made aware at any stage, of emails from Andrea Vance, or were you talking about the emails from Mr Dunne? Because in your evidence, that’s what you’ve talked about.

Eagleson Yeah, and that was my focus. But I also take Mr Robertson’s point that an email conversation is a two-way thing. That wasn’t what I was being asked about.

Tolley Right. That didn’t form any part of your conversation?

Eagleson It was about Mr Dunne’s. And I think the other thing is that my point about it was that the Prime Minister had clear expectations of all his Ministers, and so my role, and the reason why I was contacted, was that at that point—and it wasn’t clear, because this thing still had some time to run, that Mr Dunne was prepared to fully comply—my role was, via Mr Dunne’s chief of staff, to encourage him to do so. I had never seen these emails and still haven’t, and have no knowledge of the backwards and forwards. Frankly, I didn’t give any consideration to those issues.

Tolley And it wasn’t raised with you that there were emails from Andrea Vance and from Mr Dunne?

Eagleson I don’t recall.

Parker I want to go back to one of your opening statements, which was the capacity in which Mr Dunne received the original draft Kitteridge report. Did he owe a duty of confidence in respect of that report like other Ministers who received it?

Eagleson Yes.

Parker So he received it—

Eagleson Sorry, Mr Parker, can I just add one thing. Actually, in our confidence and supply agreement with United Future, it is also clear that information provided to him in that context needs to be kept confidential as well. So I understand your point, but whether it is in his capacity as a Minister or the leader of United Future—when the Prime Minister’s deputy chief of staff went to brief him, provide him with the material, and so on, of course it
was assumed that he would keep it confidential, like any other Minister involved.

Parker If a Minister is unwise enough to do something that is improper and it is on their ministerial computer, why isn’t that an official document for the purpose of the Official Information Act?

Eagleson Well, I think you’re asking me for a legal opinion there, Mr Parker, which is perhaps best left for the Ombudsman.

Finlayson That is something that the committee may well want to take a look at.

Eagleson It is a fair point. As you would appreciate, the Office of the Prime Minister would receive more OIAs than about every other—

Parker Similarly, whilst we have to protect journalists’ sources, if journalists write a document to an official place, like if they write to a Government department or a Minister, it becomes an official document, in some occasions, when it is at the departmental end or at the ministerial end.

Eagleson I acknowledge that.

Parker Well, why is it, then, that no one has ever asked the question as to whether, rather than this convoluted route of going through Parliamentary Service, these emails or some of them are a matter of public record under the Official Information Act?

Eagleson I think the first point is that Mr Dunne is very clear that they are not. In his view, he was clear that his emails were sent not in a ministerial capacity and are not subject to the Official Information Act.

Parker Well, but if they’re on a ministerial drive and they’re in respect of confidential ministerial documents, how can that be right?

Eagleson Can I correct you there? That would widen the scope hugely. We are a minority government, as, under MMP, you would expect, and the vast bulk of occasions things would be. So we rely on putting together a majority on any given bill by dealing—

Member That’s not what it’s—

Eagleson No, no, well, if you would let me finish, it is. What it is about is actually we deal with confidential information, whether it is with ACT, United Future, or the Māori Party on a range of things in that capacity. That does not make it official information.

Collins Mr Chair.

Finlayson Is this a point of order?

Collins Yes, it is a point of order, actually. This is not actually what Mr Eagleson is here to give evidence about. In fact, the member is asking for an opinion from the Ombudsman, essentially, not from Mr Eagleson, and not only that, the member has forgotten about the Privacy Act implications. So of course it is nothing to do with the drive that it is on; it is all to do with the content of the email.
I.17B INTERIM REPORT ON USE OF INTRUSIVE POWERS

Parker  Could I speak to the point of order? In his evidence, he said that in his view it wasn’t necessary for Ministers to get individual consent even because of the generality of the terms of reference of the Prime Minister's comments. I am just trying to elicit why it was that there was this convoluted route—

Finlayson  You’ve raised a number of points. As you said some weeks ago, with respect, absolutely correctly, the purpose of the first stage of this inquiry is to deal with primary fact issues. Questions of law and questions of policy are matters that we are going to certainly deal with. The question is whether we elicit those matters through whips—we’ll have a discussion later on. Focus on, as you yourself said, primary factors.

Parker  Are you aware of whether there have been any requests made under the Official Information Act by journalists or other political parties or anyone else for copies of the emails sent and received on ministerial addresses in respect of this confidential Government document?

Eagleson  My understanding is that there have been some. They either were not made to the Office of the Prime Minister or they were transferred, so those would be matters between the relevant agency and the Ombudsman.

Parker  OK, I have another area of questioning, and that is that you said—and I am reading from your evidence—that it was not necessary for Ministers to give individual consent, given the terms of reference in the Prime Minister’s comments that he expected any Minister to comply. I can understand why you might expect Ministers to agree to provide documents, but I don’t know how you can assume consent. Can you explain that?

Eagleson  Well, I think I answered that question, Mr Parker, at the beginning with reference to both the terms of reference, the fact that the Prime Minister had made it very clear to both me, to Ministers as well, actually, and publicly that he expected their cooperation and the broader reference to the Cabinet Manual. But, look, what I would say is were such an event to happen again, and one would’ve thought that it’s sort of highly unlikely, then the more sensible thing would simply be to go to each Minister with a piece of paper and say “Please sign it.”, and one would expect they all would do so.

Parker  So you didn’t get their express consent–

Eagleson  No.

Parker  —and you didn’t use the Official Information Act?

Eagleson  Well, it would’ve seemed a bit strange to the Official Information Act on Ministers in the Prime Minister’s Cabinet.

Robertson  Well, indeed, but the point is you didn’t get the info, did you?

Parker  So, you didn’t get their approval but you didn’t–

Eagleson  Mr Robertson, the inquiry was an independent inquiry. The Prime Minister was not involved in the operation of that inquiry.

Robertson  But you were. Acting as the agent of the Prime Minister, you were involved.
Eagleson  I think I have been very clear in my evidence about the limited nature of my involvement.

Robertson  But you were involved.

Eagleson  I’m happy for members to make a judgement about whether or not I had the authority and then to do that, but I’m clear about that.

Finlayson  One at time. If you ask a question at least have the courtesy to let the witness answer it, and then we’ve just got to bear in mind this question of primary facts as opposed to law and policy. We can deal with law and policy later on, Mr Robertson, if we’re still lucky enough to have you on the committee.

Member  You will be.

Parker  So you have just said that it was for inquiry to get to the bottom of what happened. Are you surprised that the inquiry didn’t seek approval from individual Ministers for release of information or use the Official Information Act to obtain what would be legally obtainable under the Official Information Act?

Eagleson  If I can start with—

Finlayson  Hold on. You’re asking him for an opinion. It is not primary fact.

Eagleson  I am happy to answer, Mr Chair.

Finlayson  Oh, well, answer it.

Eagleson  If I can start with the second part of your question, Mr Parker, I would’ve been staggered if any inquiry would use the Official Information Act to try and get something in that situation.

Parker  Why, when the information had been not voluntarily produced if it was a legal means of getting the information and you wanted to get to the bottom of what happened?

Eagleson  Well, I think that’s a matter that I appreciate the committee has discussed with Mr Henry and may well discuss with Mr Kibblewhite, because it was always left open, as I recall, in the terms of reference to possibly go back and seek more powers, and that wasn’t done.

Parker  OK. One final question and that is, were you aware at any time that records were being sought from Parliamentary Service that weren’t ministerial records?

Eagleson  Can you repeat the question?

Parker  Were you aware at any time that records were being sought from Parliamentary Service that were not ministerial records?

Eagleson  At some stage late in the piece I was aware that a journalist’s swipe card access had been sought, but that was after it had occurred.

Parker  After the inquiry had reported back or—

Eagleson  I can’t recall whether it was either just prior to or just after, but after the records had been provided by Parliamentary Service,
Robertson Which was after your authorisation for them to be provided.
Eagleson I am very clear, Mr Robertson: my authorisation specifically related to Ministers and their staff.
Robertson And their communications with journalists.
Eagleson I don’t see it that way.
Robertson Well, that’s what it was.
Finlayson Thank you very much, Mr Eagleson. Most grateful to you for coming along.
Finlayson Right, so we’re dealing now with the statement of Mr Kibblewhite, who is here this morning—the Chief Executive of the Department of the Prime Minister and Cabinet—with Mr Subritzky, is that correct?
Kibblewhite That’s correct.
Finlayson Right, good morning. I don’t know whether you’ve been here throughout, but the idea is that people do not need to read their statements, but if they can speak, feel free to speak briefly to various points. Everything you say is being recorded, and then I’ll ask Mr Parker to start the questioning.
Kibblewhite Thank you, Mr Chair, and thank you to the committee for the opportunity to provide evidence on this matter. My written submission does address many of the concerns raised about the inquiry and attaches a chronology of events. I won’t, clearly, go through that, but I would like just to highlight some of the key facts to begin with.

The first point I would make is that I regarded the leak of the Kitteridge report as a serious matter. I had a number of discussions with the Prime Minister both in China and on our return as to how we should respond to it. The PM agreed that DPMC and GCSB should commission an independent inquiry into the leak. Both our agencies were possible sources of the leak, so therefore the independence of the inquiry from the two commissioning departments was particularly important.

DPMC took the lead in establishing the inquiry. I discussed the terms of reference and the form of inquiry with Mr Fletcher, Mr Eagleson, and with the State Services Commissioner. Mr Fletcher and I finalised the terms of reference in consultation with the Prime Minister. We decided to appoint Mr David Henry as the reviewer because of his previous experience as Commissioner of Inland Revenue, Chief Electoral Officer, and, most recently, commissioner on the Pike River royal commission.

I’d like to emphasise at this point that the inquiry was into the source of the leak—that is, the actions of those who had access to the report—and I think that’s clear in the terms of reference. The journalist Ms Andrea Vance was not the subject of the inquiry.

I was the designated contact point for the Henry inquiry regarding any questions about the terms of reference and support requirements. In this role I met with Mr Henry on a regular basis. I was only briefed in a very general way about the day-to-day work of the inquiry. Administrative support for the inquiry included seconding a staff member to work with Mr
Henry, providing ICT support and office accommodation. The independence of the inquiry from DPMC and GCSB was particularly important to me, so the seconded staff member was clear he was acting independently of DPMC under the authorisation and direction of Mr Henry.

As the end of May approached, Mr Henry informed me that a Minister had not agreed to release certain information to the inquiry. Mr Henry advised me that his inability to access those emails meant he was unable to conclude his review of the contacts between the Minister and the journalist, and it subsequently became apparent that that Minister was Mr Dunne. I discussed Mr Dunne’s failure to comply with Mr Henry’s requests with Mr Eagleson on 28 May and the desirability of an approach being made to Mr Dunne to reconsider his decision. I do not have any direct knowledge of the requests made by the Henry inquiry for a range of information held by Parliamentary Service. As I said before, it was very important to me to ensure the inquiry was independent of DPMC as one possible source of the leak.

The remainder of my comments focus on the events that occurred once I was advised on 5 July that the following information was provided in error to the Henry inquiry: phone logs of Ms Andrea Vance—they clearly were not requested but provided to the Henry inquiry—and email correspondence between Mr Dunne and Miss Vance, provided to the Henry inquiry on 22 May but not viewed. Key points I was informed of in relation to this information were that the Henry inquiry did not request Miss Vance’s phone logs, did not want them, and did not view them. The Henry inquiry did not attempt to view the email correspondence between Mr Dunne and Mr Vance. It complied with the recall message sent by Parliamentary Service and deleted the message and attachments.

My first action in response to being advised of this situation was to seek confirmation that no DPMC staff had viewed the files in question. I received that confirmation. I can assure the committee that no one in DPMC accessed those records. I took steps to ensure our ICT systems did not hold any of the information received in error, and ensured any copies found on the system, including the backup systems, were destroyed. I can confirm that all copies have been destroyed.

On that basis I’m satisfied that Mr Dunne’s and Miss Vance’s privacy was not breached by DPMC. I have sought advice and had this view confirmed for me by Crown Law. To this day, DPMC has not shared the detailed records of the Henry inquiry with the Prime Minister or his office, as they were not involved in the administration of the inquiry, and to respect the privacy of the individuals named in those records.

And, finally, in light of some of the public commentary about DPMC, I would like to state that I have every confidence in my staff, their integrity, and their professionalism. We take our responsibilities as public servants and adherence with the State sector code of conduct very seriously.

I’m happy to take any questions the committee may have.
Graham: Just a point of order. That statement broadly reflected the written statement, but departed at certain areas. I take it we can have it as a transcript?

Finlayson: Oh, yes, most definitely. If not, when could we have a transcript available for Dr Graham? A couple of days, Kennedy.

Parker: My first question is the commissioners of the report were you and Mr Fletcher, and you appointed Mr Henry to conduct the inquiry on your behalf. Were you surprised to find that he requested security access logs?

Kibblewhite: Yes, I was surprised that he requested the access logs for the journalist.

Parker: And with the benefit of hindsight, do you believe that was appropriate or inappropriate?

Kibblewhite: Well, even with the benefit of the hindsight, I’m conscious that I was not privy to the conversations that Mr Henry and the inquiry were having with Parliamentary Service, and I understand the sorts of considerations that Mr Henry outlined earlier, so I think it’s an issue really to be addressed to him.

Parker: Well, we’ve got to make a decision here. We’ve got to make a decision around this committee as to whether we think it’s appropriate. I’m a bit surprised that the head of DPMC hasn’t thought with the benefit of hindsight. I’m not asking you to criticise Mr Henry. Do you think it’s appropriate that security logs in respect of journalists that effectively are used to track their movement should be made available?

Kibblewhite: I did not anticipate that they would be accessing journalists’ logs.

Parker: That wasn’t my question. We’ve been asked to look at whether this should be done in the future. What’s your opinion?

Kibblewhite: Well, I think, in hindsight, it would certainly have been clear that Mr Henry could have looked with Parliamentary Service to make sure that all those who were having their access records accessed were happy with that.

Parker: I’ll put it another way, then. Do you think in the future it should be permissible for Parliamentary Service to give over access records relating to journalists for the purposes of inquiries like this, as opposed to looking at whether there’s a terrorist attack involving a journalist upon Parliament?

Kibblewhite: I think the details of any inquiry will obviously determine that, but I would say that I think there would have to be a very high threshold for the access records of a journalist to be handed over to an inquiry.

Parker: Well, unless there was a security issue involving threats to Parliament, do you think that access codes of journalists should be made available by Parliamentary Service in respect of journalists?

Kibblewhite: Look, I think I’ve said in relation to this terms of reference that it certainly wasn’t anticipated in the terms of reference that a journalist’s access records would be requested, and I’ve said I think there would need to be a very high threshold for an inquiry to look at a journalist’s access records.
Parker Well, again, that wasn’t my question. My question was relating to our terms of reference. We’ve got to report back to Parliament as to whether we think things like access codes in respect of journalists should be handed over that enable journalists’ movements to be tracked. And I’m asking you if there isn’t a security—as in a sort of a physical threat to members of Parliament, so we’re excluding that circumstance, because I see why it might be possible to argue for it in that circumstance. In any other circumstance, shouldn’t the answer be no?

Kibblewhite Well, I think, actually, the clarification of the committee will be very helpful on that point.

Parker I’m asking your opinion.

Finlayson Yes, but ultimately he is the head of a department of the executive. The question you ask is actually a very fair one. It’s a question of whether this particular witness—and we’re going to have to answer it—the question is whether what this witness has to say, with the greatest respect to this witness, matters a great deal in terms of what we’re doing.

Parker Well, I would have thought, speaking to that point of order, I would have thought that if anyone could argue on behalf of the executive that there could be a circumstance that the executive thinks could apply, that he would be able to tell us. So can I ask him, Mr Chairman, whether there is a circumstance that he could envisage that it would be appropriate for them to be handed over, other than relating to physical security.

Kibblewhite I think if there are material matters of security, then you could envisage circumstances where it would be appropriate.

Parker Physical security?

Kibblewhite We could end up in a quite convoluted discussion of what security constitutes. You know, there is security of property, there is security of person. I think that’s actually a reasonably complicated discussion. I will say I did not envisage, in setting the terms of reference, that the access records of a journalist would be sought, certainly not without permission of the journalist.

Robertson It’s on that point—I don’t know if you were here for Mr Henry, but he made very clear to the committee that he believed the terms of reference did authorise him to do that.

Kibblewhite Well, I think when I look at the terms of reference, stage one does involve reviewing communications, copying equipment and records, log books, and other material considered relevant of the persons who had or who were likely to have had access to the compliance review report. Certainly, in the first part of that phrase, I can imagine access logs being included in that. And the second part of that phrase—Miss Vance was not the subject of the inquiry. I suppose to—

Robertson I’m sorry, but she had access to the report. That’s obvious, isn’t it?
Kibblewhite I think it was very clearly understood that this report was about looking at the unauthorised disclosure, which is from those individuals such as myself, such as the Ministers who had access to the report.

Robertson Did Mr Henry ever discuss the terms of reference with you or Mr Fletcher?

Kibblewhite Yes, before they were finalised—I think on the Monday. This all moved very quickly. We did send him a copy of the draft terms of reference, and he may have made one or two minor suggestions to it at that point.

Robertson What do you think, then, gave rise to his view that accessing Andrea Vance’s access records was appropriate under these terms of reference?

Kibblewhite Well, I think he can read the terms of reference, and I did hear at least part of his testimony earlier. He thought it was a relevant fact concerning the unauthorised disclosure.

Brownlee What did you expect the inquiry to achieve, given that it was informal, had no authority to require information? So what was your starting point? Did you have a view that, in fact, the information held by Ministers was different to that held by members, that there was no separation between Ministers and members, and that any communications therefore by a Minister who is also a member were fair game for the inquiry? I think one of the difficulties here—and I’m just trying to get to the bottom of it—is Mr Henry, from his testimony today, clearly believed he had quite widespread inquiry powers. He’s said to us that now he knows that perhaps wasn’t quite the same way. But there’s a little bit of an uncomfortable element here that we are going to have to deal with from the point of view of the long-term protection that members of Parliament believe they have now and want to have reaffirmed. So what did you expect from the inquiry? How did you expect it to progress, given that it was informal and there were no particular powers granted to the inquisitor to inquire?

Kibblewhite Well, the first thing I would say is that I regarded the leak as a very serious matter, and that whenever a leak occurs, it shakes one’s confidence in the people who have had access to that information. In my case that included both public servants, and clearly I was worried about leaks that might have emanated from Ministers’ offices as well. So what I hoped to get from the inquiry was assurance that would effectively give me more confidence that people who had had access to the report had dealt with it appropriately, and if there was a culprit for the unauthorised disclosure, that that person would be identified.

So the inquiry, as you note, did not have any formal powers, and there’s been some discussion already this morning as to whether they were necessary. My view at the time was that they probably would not be necessary but that if we needed them—particularly in relation to public servants—we could then get them. I spoke with the State Services Commissioner, and we were clear that if the inquiry felt a need to compel public servants to appear under oath, he would be prepared to make, effectively, his powers available, and that’s what we have anticipated in stage two of the inquiry.
In relation to Ministers, I think it goes to the conduct expected of Ministers as set out in the Cabinet Manual, to the fact that Ministers are accountable to the Prime Minister, and we anticipated that that would provide sufficient cover for any ministerial information either to be made available or, effectively, for it not to be made available, which, indeed, happened and prompted the resignation of Mr Dunne.

Brownlee Isn’t the small problem here, though, that Mr Henry knew that the information existed, so someone had told him that and they had presumably accessed that in order to be able to tell him that without going through what would be—without recognising, I suppose you’d say—the normal privileged position that MPs think they’ve got in their communications?

Kibblewhite Well, I don’t think anyone—you’d really have to address the question to Mr Henry about the analysis he did to identify, effectively, to eliminate his suspects. But my understanding was that he progressively eliminated by looking at who had contact with the journalist, and, where possible, making sure that that—

Brownlee That is exactly the point. He had information about who had contacts. He was able to say there were 86 emails. He was able to actually put that into the public arena.

Kibblewhite That’s correct.

Brownlee There is a fine line here between doing the job that was required and a high degree of contempt for the privilege of Parliament. I think that’s the danger that we are trying to sort out here at this inquiry. So I’m just interested in your views about how you think the progress of Mr Henry’s inquiry was reasonable, given what you understand to be the protections that both members and Ministers have.

Kibblewhite Well, clearly, getting clarity, as the committee is undertaking, will be very helpful around those matters. My view was that, as I’ve said, I did not get involved in the detailed work of the inquiry, and it was quite important that I did not. But certainly from the email record that I think members have all seen, there was quite a lot of discussion around appropriate authorisations that occurred between the inquiry and Parliamentary Service. The point that that fell down was effectively when Mr Dunne—entirely reasonably—said: “I’m not prepared to give access to the content of my emails.” That then swung into a different sort of conversation relating to his accountability to the Prime Minister.

Graham I’ve got three questions of Mr Kibblewhite. The first is to do with the ministerial responsibility of Mr Key and your relationship with him in that respect. On page 2 of your report you do say here that the Prime Minister “agreed that DPMC and GCSB should commission an independent inquiry”. I’d like to get you to comment on whether that is agreement or a decision on the part of the Prime Minister, and I guess the best way of framing that is to say would you have proceeded with the inquiry if he had not agreed or indicated agreement to you? In other words, were you totally
independent in your decision, or was it subject to a decision by the Prime Minister?

Kibblewhite Certainly, I took the lead in preparing the terms of reference for the inquiry and finalised them. If the Prime Minister had not wanted us to have an inquiry, then we wouldn’t have. So, no, we did that in consultation with the PM.

Graham You would not have proceeded?

Kibblewhite That’s correct.

Graham So it was essentially a decision by the Prime Minister in that respect?

Kibblewhite To have an inquiry, yes.

Graham Would you be prepared to provide the committee with any relevant emails between yourself and the Prime Minister discussing that point?

Kibblewhite Look, I’d be very prepared to describe quite fully the nature of the conversations that we had, and that would be actually much more revealing than any emails, because we began the conversation when we were both in China. We talked about the appropriate response. I know the PM was concerned because he was getting accused of leaking it himself. I was concerned because I thought this was a really quite serious matter. The report was a really very serious report, and it was very unhelpful and basically undermined my confidence that it had been leaked. So we had a number of conversations—not in email—around forming an inquiry.

Graham Thank you. So, in principle, you don’t have a problem with supplying the committee with any of that information that you think is relevant?

Kibblewhite Well, I don’t think there are any emails. We had a lot of conversations. I put some—

Graham Well, I was just thinking—I understood you to say not much email but that there were many conversations. There could be a précis, perhaps, done by you, of those conversations—dates and nature of discussion.

Kibblewhite Well, I’ve largely provided it to you now, I think. I can be a little fuller. Whilst I was still overseas with the PM, my acting chief executive had some discussions with the State Services Commissioner about the appropriate form of an inquiry. They pulled together a first draft of the terms of reference. We returned to New Zealand, I think, on the Saturday, and I reviewed those terms of reference over the weekend. I would have had a conversation and shown them to the Prime Minister on Monday morning. I probably had conversations over the course of the day on Monday, I expect, with Mr Henry, just to finally confirm the terms of reference and make sure he was comfortable with them, and we had made sure the Prime Minister was happy with them before we then—I think the PM announced them, I think, on the Monday afternoon at his press conference, from memory.

Graham Thank you for that. The second question pertains to the independence of the inquiry with Mr Henry responsible for day-to-day operation of it. I just
put it to you that there may be some difficulties in terms of the
independence in reality with the inquiry. The first point that Mr Henry
made this morning, one of the early points—I am not sure if you were
here—was that you as CEO of the DPMC, and other senior staff, ought to
have—were, in fact—seen as potential “suspects”.

Kibblewhite Indeed.

Graham So you have what I have to think is a slightly bizarre situation where a
potential suspect in a leak is generating the inquiry, setting the terms of
reference, identifying the author of the inquiry, seconding staff as well, and
interacting with both the inquiry itself and with PMO in the broad sense, in
the context of the inquiry. Would you agree that this is faintly weird?

Kibblewhite I certainly wouldn’t call it faintly weird—

Graham More than faintly.

Kibblewhite —or weird at all. Clearly—

Graham OK, “unweird” then.

Kibblewhite Look, I was very mindful of exactly the issues that you’re raising, and,
indeed, that was why we made sure that the inquiry behaved very
independently, why we engaged someone of Mr Henry’s standing to
undertake it, because I do not think anybody would expect that Mr Henry
would in any way be engaged in some sort of cover-up if it had been Mr
Fletcher and myself. Mr Fletcher and I had commissioned the—or Mr
Fletcher in the first instance, supported by me—compliance review that
Miss Kitteridge undertook. So I think you can very clearly see why it would
be appropriate that we would be the ones taking the lead in terms of
investigating its unauthorised disclosure.

Graham The final question pertains to the operation of the Henry report itself. This
morning Mr Henry attached a lot of importance to what I suppose he
would wish to call the doctrine of necessity, that basically he felt free in
performing his terms of reference to require any information relevant to the
inquiry that he felt was necessary. I put it to you, and I did to him this
morning, that it may be the case that within the totality of what is necessary,
there may be a subset that is not appropriate to obtain. Would you agree
with that?

Kibblewhite Certainly in the general way that you have phrased that, yes. There may be
some information that wouldn’t be appropriate to obtain.

Graham Thank you.

Collins I also have three questions. So Mr Kibblewhite, if we go to the written
statement that you have made in your submission to the committee, and on
page 2 you have made a statement halfway down that “The Henry inquiry,
unlike a formal commission of inquiry, did not have any powers to compel
people to provide information.” Do you stand by that? So if we accept that
information comes in various forms, surely Mr Henry having access to MPs’
and journalists’ swipe card details does, in fact, constitute Mr Henry having
access to information by actually, frankly, compelling it?
Kibblewhite: No, I don’t think it was by compelling it. I think it was all provided voluntarily by the—

Collins: By whom?

Kibblewhite: —Parliamentary Service.

Collins: But it wasn’t their information, really, was it—about personal and private details about where people were?

Kibblewhite: Well, I think Parliamentary Service does probably hold the information and they hold it for a range of reasons. You’d be best to ask Parliamentary Service about it directly.

Collins: So Parliamentary Service—I don’t believe and I can’t imagine that you would believe this, so I will put it to you. Do you believe that Parliamentary Service holds information as to where Miss Vance happens to be in any part of the building, for the purpose of finding out who is talking to Miss Vance?

Kibblewhite: I would be surprised if that is why they hold that information.

Collins: So in which case, if they held the information, it should be used for the purpose that it is held, which will be either security, whether it’s personal security, building security, or it’s security of information such as—or property security, such as, you know, if somebody steals something off someone’s desk, well, that would be a legitimate purpose, I would say. But surely not to see who she’s talking to.

Kibblewhite: Well, I think that was obviously not a decision that I was involved in. I think the question would be worth addressing to Parliamentary Service as to whether and how they saw that this was a security-related matter.

Collins: So my contention and point to you is that if the information is provided without the person whose personal information it is, then, effectively, they’re being compelled, whether they know it or not. In her case she didn’t know it.

Kibblewhite: Indeed, but I certainly don’t think it was in the minds of the inquiry that they were compelling that information; they were seeking information.

Collins: No, they just weren’t thinking about it, were they, I think is what we’ve found it. The other issue is Mr Thorn has produced a written statement to the committee, where he has criticised the level of engagement between Mr Henry in his inquiry and Parliamentary Service. I think he refers to a third-tier engagement, which, he has said, has put at risk and did put at risk the ability of Parliamentary Service to protect members of Parliament and the other users of the parliamentary complex to protect their privacy. When you engaged Mr Henry, did you make it clear to him that he could engage at any level, that he could go to the IT contractor employed at, or contracted to, Parliamentary Service to get that information, or did you leave that up to Mr Henry?

Kibblewhite: Well, as I’ve said, I was very mindful that Mr Henry should act independently in the inquiry. You’ve seen the emails, as I have, and there...
was extensive discussion of authorisations for various bits of information throughout those emails.

Collins  
So you left it up to Mr Henry; you didn’t say you can go to the IT guy that happens to be contracted today?

Kibblewhite  
No, I certainly did not.

Collins  
All right. Are you aware that members of Parliament, whether they are Ministers and members of the executive or members of Parliament—all of our executive are actually members of Parliament first and foremost—do receive information which comes to them from constituents or personal information? Would you expect Mr Henry to have been able to access constituent information? Because most Ministers would deal with all of that information through the parliament.govt.nz email addresses that they use, rather than the ministerial email addresses.

Kibblewhite  
I would only expect Mr Henry to access information that was relevant to the inquiry, and I would only expect him to do it after receiving the appropriate authorisations from those who held the information.

Collins  
Why would you expect that? What did you say to him?

Kibblewhite  
I think the terms of reference set that out for starters—and I think it effectively goes without saying that he’s not on some sort of wild romp, and I don’t think that’s how he interpreted his role.

Tolley  
So if I just refer you back to the terms of reference, given what you’ve just said in relation to Ms Collins, what did you understand by the line at the bottom of this, talking about “All relevant rules of natural justice will be observed in terms of any persons identified in the conduct of this inquiry.”? What did you expect when you put that in the terms of reference?

Kibblewhite  
Well, certainly, in the first instance, what I expected was that if any accusations or statements were being made about the culpability for the unauthorised disclosure, whoever was so mentioned would have every opportunity to comment on and reflect on that. That was fundamentally what I interpreted.

Tolley  
And that was the only context of natural justice?

Kibblewhite  
Well, I think natural justice is no doubt a broader concept that just that—

Tolley  
Absolutely.

Kibblewhite  
—and, in part, why we got somebody of Mr Henry’s standing to do this inquiry was because he would have a good and sound understanding of that. He’d been involved as a commissioner on the royal commission for Pike River, which clearly would have dealt with all of those sorts of issues.

Tolley  
And would you have understood, though, that might mean if you were examining, for instance, a journalist’s records, location within the building, that that journalist might be contacted and made aware of that, in the interests of natural justice?
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Kibblewhite Well, certainly, that would be one possibility, but I would expect that Mr Henry would undertake the inquiry, making the judgments about what information to ask for and getting sufficient confidence that the information had been authorised, taking into account all those sorts of principles.

Robertson Just to follow up Ms Collins’ question, just to be clear, is it your understanding that the authorisation for the access to the records of MPs, effectively, although as Ministers, was a result of Mr Eagleson’s contact with Mr Thorn?

Kibblewhite Certainly, I understand, as I think Mr Eagleson set out himself, that he had provided approval, if you like, for accessing Ministers’ logs.

Robertson I’m just taking this because of Ms Collins’ point about the different roles people played. So it was that?

Kibblewhite It was in the context of the fact that they were Ministers, and the Cabinet Manual clearly sets out that Ministers are accountable to the Prime Minister, and the Cabinet Manual actually doesn’t discriminate between the various roles that a Minister holds.

Robertson Just very briefly, then, one very quick point. In your submission, on page 3 you talk about the material that was provided in error to the Henry inquiry, i.e. email correspondence and phone logs. I would challenge that statement. Those things were asked for by the Henry inquiry, so they can’t have been provided in error if they were asked for.

Kibblewhite Certainly, the content of the emails was asked for by the Henry inquiry, subject, of course, to the appropriate authorisations. I think it was sent in error because it was sent without the appropriate authorisations.

Robertson But it was asked for. That’s my point.

Kibblewhite Certainly, the email content was asked for—no question.

Finlayson Right, now, before I go to—Mr Peters, do you have a question? Mr Brownlee has got a brief supplementary.

Peters Well, Mr Brownlee has had a lot of questions. Perhaps I could get one. Before he gets to all his supplementaries, perhaps we could go through the full panel like it usually happens in question time, rather than giving a whole lot of people supplementary questions—

Finlayson All right, fire away.

Peters —and everybody has to wait. That’s not how it is properly handled. So in answer to a question, you said that there wouldn’t have been an inquiry unless the PM agreed.

Kibblewhite Correct.

Peters Well, you knew there was more than one leak from this committee, didn’t you?

Finlayson What was the question again, please?
The question is that you say here: “We would not have had an inquiry unless the PM agreed.” You said that that’s correct. You know there was more than one leak from the GCSB via the Intelligence and Security Committee, because that’s where it originally arose—for example, on the matter of morale of the GCSB. OK? So you’ve got now more than one leak, or were you only aware of one?

Certainly, I was aware, because I read it in the newspaper, the day after an ISC meeting in the prior calendar year, of that very story about morale in the GCSB that you’re talking about. So I was quite concerned that there appeared to have been a leak from someone in the Intelligence and Security Committee.

So you are aware that there was more than one leak, to your knowledge?

The one that you’ve identified is the only one that I was aware of.

OK. Did you think that was deadly serious?

Yes, I was very concerned that there had been a leak from the committee.

But up to that time there was no inquiry going on as to who this leak could possibly be.

The nature of the Intelligence and Security Committee is such that I am not allowed to talk about what happened in there, but I can, I think, in the interests of this committee, note that that committee itself had a conversation about the importance, reiterating, of not leaking from that committee, and they were all very mindful of that at a subsequent meeting, particularly because of the story on morale.

Hang on. That discussion was leaked as well, wasn’t it? That discussion was leaked as well, and it appears in the Andrea Vance article. So you’ve got the morale leak, you’ve got the very concerned about what’s going on leak, and now you’ve got the early leak of the report. Three leaks and you are saying that if the Prime Minister hadn’t agreed, you wouldn’t have had an inquiry.

Look, I’m not sure about the second one that you refer to. It may have even been that the committee resolved that they were happy to talk about that, so I cannot comment one way or another on that. But, no, certainly, it would be up to a Minister to agree—and, in this case, the Prime Minister—whether we have an inquiry. My role would be to advise him if I thought that was necessary, which is what I did.

Everything in your submission you think is relevant to this select committee hearing today?

Sorry?

Do you think everything in your submission is relevant to the select committee today?

Well, hopefully. That’s why I provided it.
I was conscious that, on a whole range of fronts, Mr Henry was a public servant of high standing.

I think he has fulfilled a wide number of—

There was a massive raid on the Treasury of this country. Don’t you know about it? It was condoned by the head of the IRD.

Where are the elements of relevance on all these questions?

That’s why I established relevance because I asked him—his submission in writing—was it prepared with relevancy to this committee. He said yes, and I didn’t see you demur then, so now I went straight to the issue that he said is relevant and you want to stop me. I said there was going to be a botch-up long before Mr Henry made his inquiry known. And you know that, don’t you? I said there was going to be a botch-up long before he made his inquiry known. Don’t you know that?

I think you wrote to me, making some remarks along those lines.

Well, exactly. And it was a botch-up, wasn’t it? That’s why we’re here now.

I don’t think the inquiry was a botch-up at all.

Oh, you don’t think it was a botch-up? Well, what do you think you’re doing in front of this committee now? What do you think you’re explaining? We’ve got some people whose fundamental rights have been invaded and you don’t think that’s a botch-up?

Look, I think certainly some mistakes were made about handing information over, and I think those have been well canvassed and identified, so I certainly wouldn’t say that everything has been perfect, but the inquiry has provided me with the assurance that I sought that public servants and all but one Minister had not leaked the report.

Mr Kibblewhite, who leaked the report, then? If this inquiry was satisfactory in your view, who was it that leaked the report?

Well, you can see the report of Mr Henry’s, just the same as I can. What I have been assured by in the report is that there is no evidence that any public servant—and, certainly, Mr Henry was satisfied that all but one Minister had not leaked the report. It is another step from there to say who leaked the report, and I don’t think that’s absolutely clear.

Well, what sort of botched-up inquiry is it that doesn’t get to the truth? We want to know who leaked the report. You’re standing here, as a highly paid civil servant, saying no one, apparently, according Mr Henry, but there is a clear inference from his report that it must be one Minister. What is it? Is it satisfactory that you have a report costing a lot of money, hundreds of
thousands of dollars, and a whole lot of people’s time, and you don’t know what the outcome is?

Kibblewhite: I think the cost of the inquiry was $42,000, which I think is—

Peters: What about everybody else involved?

Kibblewhite: It was a short, sharp, and effective inquiry. What I have got from the inquiry is a great deal of assurance about systems and the integrity of staff inside DPMC and inside GCSB, and it is clear that all but one Minister were eliminated from the inquiry’s view of who perpetrated the leak.

Peters: OK, so you cleared up all the people around you and we have an inquiry that does that with respect to other Ministers. At the end, you are satisfied with a report that doesn’t identify who leaked the report in the first place?

Kibblewhite: I am satisfied with the report, subject to, I think, clarification that this committee can helpfully provide to some of the issues around accessing information.

Peters: Look, that’s a banana republic inquiry, surely? Mr Kibblewhite, surely that’s a banana republic inquiry, when you are satisfied with that sort of outcome?

Finlayson: You are starting to argue with the witness now and making submissions. We can deal with that—

Peters: Well, do you know who leaked them?

Finlayson: I beg your pardon?

Peters: Do you know who leaked the report?

Finlayson: We’re here to discuss—

Peters: Apparently he’s not interested.

Finlayson: The idea is primary fact evidence this morning, not getting too far into opinion or conclusions. There are certain matters that we’re going to need to look at as a committee—very important policy issues. But the scope, as we discussed very early in this inquiry, was as I’ve said.

Banks: Who would have suggested that Mr Thorn should pack his bags?

Kibblewhite: Look, I think that’s a question you’ll have to address to Mr Thorn. That would relate to conversations that I wasn’t privy to.

Banks: It seems to me that given the sort of legacy of these matters and the myriad of mistakes, if we could put it in a kind way, that were made by the leader of this, Mr Henry, that it was at least unfortunate and at worst very unfair that Mr Thorn has now gone and lost his livelihood. Do you agree with that?

Kibblewhite: What I can say is that I feel real regret that Mr Thorn has resigned. I think he has had a very fine career as a public servant.

Banks: So he’s had a fine career a public servant, and he’s got caught up in these matters, and he finds himself out of work and out of his livelihood. Do you think that’s fair?
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Kibblewhite As I say, I think that relates to conversations between Mr Thorn and the Speaker, and, clearly, I’m not in a position to comment on that.

Banks In terms of where we want to land with these matters, what have we learnt from this? Have we learnt, for instance, that we need to choose carefully the kinds of people that we put into these roles, and that Mr Henry indeed was a mistake? Have we learnt that?

Kibblewhite I think we already knew that we need to think very carefully about the kinds of people we put into these roles. I don’t think appointing Mr Henry to undertake this inquiry was a mistake.

Banks Have we learnt that dealing with third-tier managers around this place, to get responsibility, was a mistake?

Kibblewhite I think the discussions around making information available were clearly discussions that took place between the inquiry and Parliamentary Service. I think I heard Mr Henry say earlier that perhaps a degree of greater formality around some of those interactions may well have been appropriate, and I wouldn’t disagree with that. Clearly, as the inquiry was under way, I made an absolute point of not involving myself in those sorts of things, given the points raised earlier about needing to ensure the inquiry was run in an independent fashion.

Hipkins Just very briefly—the time line that you’ve provided us at the back of your submission doesn’t include Wayne Eagleson authorising the release of ministerial emails. Why is that? From 9 May—between 8 and 10 May there was an email from Mr Eagleson authorising the release of those ministerial emails.

Kibblewhite I’m sorry. I’m not aware of that specific email. I’m sure we can go and identify it. This was simply the chronology that was prepared when we went through and pulled out the key information.

Hipkins It was the most substantive email, was it not? It was the one that basically said, yes, they were allowed to get the emails.

Kibblewhite I think I’d have to take that request around that particular email—I suspect they are not held by DPMC, which may have been the reason—and we’d have to have a look at the specifics of it.

Hipkins So the file—at the bottom of the page it says “time line of events public”. Is there a non-public version of this document?

Kibblewhite I think the time line of events public would simply be the file name we put on that, because this was pulled together I think at quite short notice to get put out to inform the public discussion on these matters.

Hipkins So there’s no non-public version of the file, then?

Kibblewhite Certainly there’s been no attempt to in any way submerge any details, and I think Mr Eagleson was actually quite forthright and forthcoming in his testimony as to the nature of the conversations that he had with Parliamentary Service.
Thanks, Mr Kibblewhite. I appreciate the way you’re answering the questions. I just want to refer back to the issue of the outcome of the inquiry itself, and the fact, as I think has been raised, that there is no clear indication as to the product of what the commission was meant to produce. My question to you is that on your page 2 you say here that “The Henry inquiry, unlike the formal Commission of Inquiry, did not have any powers to compel people to provide information. The expectation was that if Mr Henry considered he needed further powers”—etc.—“that would be considered as and when required.” Can you elaborate for the committee as to precisely what that might have been? Given the report back that said because of the refusal of Mr Dunne to provide information, he could take it no further, so you as commissioner are in receipt of a conclusion that the matter is not resolved. Did you give consideration to taking it to stage two—and if stage two only involves the State sector and therefore officials, it would have to go beyond that—into something that empowers the inquiry or you to get the access from that particular Minister? What would be the nature of that further inquiry? Would it be a formal commission of inquiry or something else? Did you discuss with the Prime Minister whether to take it?

I think the inquiry did come to quite a clear resolution on a number of points. It provided a great deal of confidence that staff in GCSB and DPMC had not leaked the report, and it provided a great deal of confidence around all but one Minister. That is not the same as saying that the other Minister is guilty, but beyond that point matters moved into a different domain. They clearly moved into a discussion between the Prime Minister and Mr Dunne, which has been well discussed by both of those two, where Mr Dunne wasn’t able to make the further information available, and the Prime Minister at that point, as I understand it, accepted his resignation.

It’s one thing to accept a resignation, it’s another thing to determine whether there should be a higher commission of inquiry of some kind, so I think my question still stands.

Well, a higher commission of inquiry was not something that we particularly contemplated going to, because we felt that this inquiry had reached a resolution.

I put it to you, with respect, that it had not. You have the resignation of a Minister. That’s somewhat incidental. The question is you had not got the result. You had the option of going to another inquiry. Did you consciously decide not to do that? And why?

We’re not here to just deal to those matters, Kennedy. This is a preliminary factual inquiry—

I will accept your judgment on this, Mr Chairman, but I would put it to you that if, in the stage two, when looking at principles for the future to recommend, then I think we do need to know whether, if a particular informal level of inquiry didn’t produce the result required, was there a decision to take it to another stage, which was an option. I would like to
know whether that option was considered and not exercised, and why. I think that’s relevant to stage two.

Parker I have two areas of question. The first is that it seems strange to me that it now appears the inquiry got information it shouldn’t have got, and didn’t get information it should have got. The first instance is obviously the journalist’s logs and the phone records of the journalist. That’s information that the inquiry shouldn’t have got. One of them they said they didn’t want; the other one they did want—being access logs. Then we’ve heard evidence this morning that until 23 May, everyone thought that Mr Dunne was happy for all of his ministerial emails to be handed across, the content of them. After he said he wasn’t happy for all of them to be going across, no one got the emails that he had to put across because they were official documents that were, through a simple mechanism like the Official Information Act, properly obtainable. How did we get to this point? We’ve got information going to the inquiry that they shouldn’t have got. The inquiry didn’t get information that it should have got. We’re left in the position of you saying: “Well, we only have one suspect, and the one suspect says: ‘It wasn’t me.’ ”

Kibblewhite I’m not sure I understand the question.

Finlayson It’s more of a rhetorical.

Parker Well, did you expect that the inquiry would get information that it wasn’t entitled to?

Kibblewhite No.

Parker Did you expect that the inquiry would get all of the relevant information that it was entitled to?

Kibblewhite Well, I certainly hoped that it would.

Parker Did it get information that it wasn’t entitled to?

Kibblewhite Yes, clearly, it was sent some information—

Parker Did it not get some of the information that it was probably entitled to?

Kibblewhite If the member is suggesting there’s a certain irony in the situation, I’m happy to agree with that.

Parker My next question relates to metadata. The metadata here shows that over a period of less than 2 weeks there were 86 emails between Peter Dunne and Andrea Vance—a somewhat unusual turn of events, shown by metadata. The metadata also—and this is made clear in Mr Henry’s report—said that the email log, which is part of that metadata, on the subject line showed that a meeting was set up between Peter Dunne and Andrea Vance on the day of, or a day before, the leak.

Peters The day before the leak of the report?

Parker Yes. The day before the leaked report was reported. We have a submission from the Office of the Clerk, and I will read it to you: “The issue of the release of metadata is one that the committee may wish to consider further in terms of providing guidance. It was not entirely clear to me what was
included in the metadata that was released, but the perceived wisdom now seems to be that metadata ought to be treated in the same way as the actual content of the email.”

I think what the Clerk is suggesting there is that the quantity of data or things that are in the metadata, like in the subject line, setting up a meeting, can themselves, effectively, be intrusions into privacy. Would you agree with that?

Kibblewhite Certainly I think there is information included in what we’re calling metadata here, which, in particular, I think are the email logs.

Parker So this distinction that seems to have been made, not just here but actually also in respect of the GCSB bill, between metadata and the content of emails is rather arbitrary.

Finlayson Too far.

Parker Well, it’s not for you, Mr Chair, to say it’s too far. It’s for this witness to say—

Finlayson I have to decide on the question of relevance, and the GCSB legislation is not part of the purview of the inquiry of this committee.

Parker Speaking to the point of order, which you seem to be raising, Mr Chair, the clerk of the committee says that the issue of the release of metadata—

Finlayson You can ask questions on that.

Parker Well, I just have.

Finlayson You'll need to range far and wide.

Parker I have just suggested, Mr Chair, that the clerk of the committee is right, as evidenced by the fact that this metadata shows 86 emails in less than a 2-week period, which is very unusual in itself, and disclosed the subject place of a meeting on the day before a leaked document appeared in the media. If there is a proper privacy interest in that information not being disclosed—I’m not asking you to opine as to whether there was a privacy interest—doesn’t that show that this distinction between metadata and the content of emails is arbitrary?

Kibblewhite I think that I agree with the Clerk, that it would be a very—

Peters Mr Chairman, how many witnesses have you got now?

Finlayson It’s very difficult—

Peters I can hear three voices, and I can only see one witness up the front—

Finlayson This has happened a few times this morning. Generally, people have been pretty good, but sometimes there are cross-currents and it’s helpful if the witness can answer the questions.

Kibblewhite I’m very happy to. I think the Clerk makes a very useful point, and I think it would be very helpful to have that explored.

Brownlee Just getting back to the reason why we’re having this inquiry, which is to work out what we need to do to reinforce the protections around members’
communications and dealings with other people. Your stage one terms of reference stating to Mr Henry that the expectation was it was a [inaudible] and include review of all communications, copy of records, and everything else. It was never ever possible for him to do that, was it?

Kibblewhite Well I think, subject to him getting the appropriate authorisation to have that information—

Brownlee That’s the issue. Just so we don’t overreact in the way we do, and why we prescribe things from here, is it simply a failing on the part of DPMC to make clear to the inquirer the limitations of its inquisitive powers?

Kibblewhite No, I don’t think so. I think Mr Henry was undertaking to seek information from those who would provide it and who held it, and that’s what he did.

Brownlee But then he has reached a conclusion, whether you like it or not, he’s reached a conclusion that it is unfavourable to someone who has simply sought recourse to a privilege that he thought he always had. I think that is one of the difficulties here, for us, and we’re certainly going to have to sort that out with some pretty hard and fast rules.

Kibblewhite I look forward to any guidance the committee can provide in that respect. I think that, in terms of seeking that information and getting the appropriate authorisations from Parliamentary Service largely, which held that information, but also from DPMC in relation to information of my staff, they basically acted in an appropriate way.

Finlayson All right. Thank you very much Mr Kibblewhite and Mr Subritzsky.

Finlayson If I can just say that it’s now 12.30. I’m conscious that Mr Thorn may not be available next week.

Brownlee Is Mr Thorn here?

Finlayson And Mr Buchanan, you’re here. I’m conscious also that there are other witnesses from the Parliamentary Service who will want to speak—Mr Stevenson in particular. Can I suggest that to accommodate Mr Thorn, subject to what you may say, Mr Buchanan, that if you like, we could have your opening statement and then hear from Mr Thorn. Would that suit you?

Buchanan Mr Chairman, the intention was to have a short opening statement from Mr Thorn, followed by one from Mr Stevenson on behalf of the service. They have been prepared as complementary statements, and the proposal was going to have them both speak first, and then open for questions to both of them.

Finlayson Mr Buchanan, by arrangement, is appearing as counsel for—

Robertson Counsel for Mr Thorn?

Buchanan For both Mr Thorn and the service.

Finlayson Mr Thorn, I was given to understand that there may be some time constraints on you in terms of your travel arrangements.
Thorn: Yes, Mr Chair. I’m actually out of the country as from Friday next week, so the hearing would have to be reconvened—

Finlayson: Friday next week?

Thorn: Yes.

Finlayson: OK. So it could well be—I don’t want to inconvenience you—we’ll see how we go, but it could well be that you could be available next week, although it would be much more preferable from your point of view if we dealt with it today.

Thorn: I’d certainly prefer to.

Finlayson: Let’s start, and we will see where we get to.

Thorn: Thank you, Mr Chair and the committee. I appreciate the opportunity to come and be heard on some of the issues that are now before the committee, in terms of the way that information is managed by the Parliamentary Service.

There are some key points I would like to make in terms of my personal involvement in these issues. First off, I would like to note that the service does generate and hold substantial amounts of sensitive information relating to members of Parliament, Ministers, and the parliamentary parties in the way that it performs its functions. Throughout my time as General Manager the service took its responsibilities extremely seriously in relation to that information. It was an axiom of my time as General Manager that the service holds this information on their behalf, as its custodian, and that it must not give that information to anyone other than the member concerned or with the member’s consent and authority.

At the outset it’s important for me to say that at no time was I, as the General Manager, ever approached formally or informally by either Mr Henry or any member of his inquiry team about the terms of reference or the inquiry itself. I believe that this was a contributing factor to some of the errors that subsequently occurred, and I will go into that in slightly more detail.

My staff involved me with four key decisions in relation to the inquiry. Although I believe that my decisions were based on sound principles, I’m in no doubt that the implementation of my decisions was undermined because of the extensive and ongoing interaction that occurred between the inquiry team and my staff over a lengthy period. This interaction removed some of the formality that I would have expected in such a process.

My staff informed me of the first request and sought my guidance as to whether it could be responded to. On seeing the email exchange, I instructed my staff that there was no authority for the service to release the requested information to any person other than the account holders. This was a request for metadata. In other words, the Ministers and ministerial staff identified in the email requesting the metadata had to be consulted.

I expressed concern to my staff about the lack of information concerning the nature of the inquiry or why the information was being requested. In
these circumstances I said that we would need to apply our normal approach to these matters and get the agreement of each account holder to access their account to obtain the information before handing any information over to a third party.

About a week later I was made aware of an email from Janice Calvert, the General Manager of Ministerial Services, who had now been approached by the inquiry team, seeking the same metadata information which I had refused to provide. Miss Calvert emailed my ICT staff, saying that she would be grateful if we would provide all of the information that, she said, we held on Ministerial Services’ behalf.

The metadata information had been expanded at this point, to include email logs and cellphone and landline logs in relation to the same Ministers and staff members who were included in the first request. Miss Calvert noted in the request that Ministerial Services itself held the cellphone records for its staff based in ministerial offices and records for some Ministers who held phones in addition to those phones that were issued by the Parliamentary Service.

On being informed of the request, I directed that the position was unchanged. We needed written confirmation from each Minister that they were willing for us to make available information that we held in relation to them, although I agreed that we could hand over the staff metadata, on the basis of the email from Miss Calvert, as I considered that this was her authority as the employer of those staff.

I believe that that position was conveyed back to Miss Calvert. She then called me and we discussed the situation at length. In relation to employees, she confirmed that the staff had signed the DIA’s code of conduct, which allowed their employer to gather and use information of the type requested. I agreed that we could provide the staff members’ information on that authority. However, I reiterated that in relation to Ministers’ records we needed authorisation from each Minister. Miss Calvert undertook to obtain that authorisation. She then emailed my ICT manager to confirm that situation.

Shortly after that conversation the Prime Minister’s Chief of Staff, Mr Eagleson, contacted me in relation to the request. During my discussion with Mr Eagleson I reiterated my position that in accordance with our practice the service required written authorisation from the Ministers concerned before the service could give the inquiry any information from those accounts.

The discussion proceeded on the basis of seeking an understanding of whether Ministers had actually already consented to the information being released to the inquiry. In the end, Mr Eagleson satisfied me that Ministers had agreed to the information being released.

The rationale explained by Mr Eagleson was on a number of points. First, Ministers had agreed to the inquiry being set up. Ministers had agreed to the terms of reference, which stated that the metadata would be sought, as part
of the inquiry. The Prime Minister had made it clear to all Ministers that he expected them to cooperate with the inquiry. Mr Eagleson had written to Ministers’ offices advising the Prime Minister’s expectations of cooperation, and that no Minister had indicated that they were not prepared to cooperate with the inquiry. That conversation was followed up with an email, dated 9 May, which has been referred to.

I then directed my staff to make available the metadata information that had been requested. The service received a further request on 20 May that sought the full email content of certain emails between Mr Dunne and Ms Vance, which was referred to me by my CIO. I was most concerned at any suggestion that the service should release any ministerial email content without the account holder’s knowledge or agreement.

I contacted Mr Eagleson by phone and advised him that I was concerned about the disclosure of the email content, and did not consider his previous authorisation covered the matter. We agreed, and I must say at this point that it was not a long conversation before we agreed—we both agreed—that he probably was not in a position to authorise the release of the content of Mr Dunne’s emails, particularly as he was a support party Minister and the leader of a party.

Mr Eagleson asked me for additional time to consider the situation and get advice. I then left the next day, or thereabouts, to travel to Australia. I subsequently learnt that Mr Eagleson confirmed that position with Mr Stevenson, who was acting in my capacity.

I believe that I took a principled approach to the release of the information to the Henry inquiry, but I subsequently learnt that there were two errors in the way my decisions were implemented.

I would just like to pause at this point and note that I agreed to the release of the metadata information, based on an understanding that Ministers had consented to that, through Mr Eagleson. However, when I saw the request for email content, at that point I decided that there would be no further information provided to the inquiry that related to any Ministers and that any further requests relating to Ministers had to go back to the Ministers concerned. I wasn’t even prepared to deal with them on the basis that the Minister might provide authority. The request had to go to the Ministers. At that point I believe that I changed the position that I had started from with Mr Eagleson.

In terms of the two errors, I understand that the content of Mr Dunne’s emails had been provided to the inquiry. Mr Stevenson will provide more detail on how that error occurred. Although I was later advised of this error, I understood that the error had been discovered shortly afterwards and that the email had been successfully recalled. In addition, I understand that the file format of the content sent to the inquiry administrator was incompatible with the software used by the inquiry, and that the members of the inquiry would be unable to open it. I therefore considered that although this was a close call, the content of the emails had not actually been seen by the inquiry.
The second error involved the mistaken disclosure of telephone records from the Fairfax media telephone extension used by Ms Vance. Again, that is described in more detail in the Parliamentary Service submission. At the time that I was advised that this occurred, I was told that the information was not from Ms Vance’s account as such, but, rather, it was information showing calls from other accounts on the precincts to her number. I advised the Speaker of this.

Subsequently, as a result of further work by my staff to ascertain the detail of what happened and how the records had been generated, I learnt that the report from the system had in fact been generated in reference to the extension used by Ms Vance and showed calls to and also from that number. Although the information was effectively the same, no matter which account it’s released from, I can say that had the inquiry requested disclosure of telephone records specifically from Ms Vance, I would have refused that request unless her authorisation had been obtained.

The next request from the inquiry was the one seeking access to the swipe card records for Mr Dunne and Ms Vance. I considered the position as regards to Mr Dunne to be clear. The information related to his role as a member and/or as a Minister and it should not be released to the inquiry without his authorisation. I later spoke directly with Mr Eaddy of Mr Dunne’s office, who confirmed that Mr Dunne was willing for that information to be given to the inquiry, and the information was provided on that basis—again, fully in accordance with principle and our past practice.

I did consider Ms Vance’s building access records to be in a different category because she was not a member of Parliament, and there was no policy or precedent about how to deal with this part of the inquiry’s request. Indeed, these issues are dealt with more by convention and practice than they are by any particular rules. I was aware that the press gallery has very broad access across the precinct, and in fact the press gallery has wider access across the precinct than any of the committee members or most MPs.

I was aware that the investigation was considering the unauthorised access to a classified report, and I’m also aware that there have been other issues that have involved the press gallery that suggested that it would be appropriate for me to release that information.

From my perspective it was a security issue, and the access rights that the press gallery have carried a commensurate responsibility on the gallery to act in accordance with the rules as laid down by the Speaker. These matters fell squarely within the guiding principles of the security policy for the parliamentary precincts. This policy required me, as the General Manager, to manage access to the precincts in a way that ensured a balance between access, as well as the protection of people, property, and information.

In the end I had to balance these factors. It appeared that the access to classified material might have resulted in a security breach within the precincts, and I decided that I should not second-guess those security
implications, and on that basis I decided to release the information to the inquiry.

In closing, I wish to reiterate the concern I have, in hindsight, about the way the inquiry went about its business. Direct approaches to third tier staff and the service’s contractor, in my view, compromised the service’s position and my position as the holder of sensitive information on behalf of members. During the process I became concerned about the lack of formality or clarity about the inquiry status and role. In hindsight, I should have contacted Mr Henry directly and expressed my concern about the way the inquiry was going about its work, but I did not do so.

I believe that the service and the other agencies involved in this matter will obviously benefit from any guidance that the committee can provide about how members’ information should be managed in the future. I believe that some important, but also very complex, issues have been raised. Thank you, Mr Chair.

Finlayson Mr Buchanan, do you want Mr Stevenson to read his—

Buchanan I think it would be helpful, Mr Chairman, because it does cover a little bit more detail of the mistaken disclosures of the information, and it would be helpful for completeness, I think. It won’t take too long.

Finlayson I invite comments from members as well. I’ve just briefly had a chat to my deputy chair. Next week, say? Would that suit people to come back? Would that be convenient to you, Mr Stevenson?

Stevenson Yes, it is.

Brownlee It’s very bad timing.

Finlayson It’s a very bad time.

Parker Mr Chair, I would say that we can’t do it properly today. Mr Thorn goes away at the end of next week, so we effectively either have got to do it later this week or next week.

Peters Just for Mr Thorn?

Finlayson Well, we could try to deal with all witnesses. Look, I thought—it’s my fault—we could short cut it, but maybe we just have to have a discussion, because we know Mr Thorn’s movements, so we’ll just have a discussion with the committee at the end of Mr Stevenson’s statement.

Buchanan Given that there’s not really effectively any time for questions, it is probably worthwhile hearing from Mr Stevenson, and then you can consider what to do from there. Great. Thank you, Mr Chairman.

Finlayson I emphasise Mr Stevenson that we’ve read the submission, so you can take it as read but you’re more than welcome to make any additional comments or provide a summary, or whatever.

Stevenson Good afternoon. I’m David Stevenson and I’m the Acting General Manager of the Parliamentary Service. By way of statement I wish to make the following points. First, it is important to understand that as a service we
received and dealt with four separate requests for information relating to the Henry inquiry. These requests are set out in my submission.

Secondly, it is important to note that each and every one of these requests, the decision whether to comply with them, was rightly made by the General Manager of the service, who at the time was Mr Thorn. This was despite the fact that, as Mr Thorn has said, at no stage did he receive any communication directly from the Henry inquiry about the terms of reference, legal status, or the nature of the information it needed.

Thirdly, the requests were not and were never regarded as legally binding on the service. For each request, therefore, as he has said, Mr Thorn applied the fundamental principle used by the service in its role as the provider of ICT and security services to the agencies which occupy the parliamentary precincts.

That principle is that the service holds members’ and Ministers’ information as their agent, directly through the Ministerial Services and secretariat branch of DIA, and that information may not be used in any way without the express consent of those individuals.

Mr Thorn’s decisions were that he would not allow any members’ information to be released to the inquiry unless he could be satisfied in each instance that such authority existed. He required the equivalent authority for ministerial and support services in relation to the Ministers’ staff, on the basis that they are DIA employees.

Where he was not satisfied that such authorisation existed, Mr Thorn directed that the inquiry’s requests be refused. That was in the case in respect of the first two requests, until appropriate authorisation was provided; the third request, in so far as it concerned Mr Dunne’s emails; and the fourth request in respect of Mr Dunne’s swipe card usage.

Fourthly, the factors relevant to the inquiry’s request for Ms Vance’s building access records were different from those relating to the information held on behalf of members. Ms Vance was not an MP. As Mr Thorn has said, his decision on this request came under his ultimate responsibility for security on the parliamentary precincts. His decision that that requested information should be given to the inquiry was made in the exercise of that responsibility.

Fifthly, the service knows that its implementation of its General Manager’s decisions on the second and third requests—that is, the requests for the phone records and the content of Mr Dunne’s emails—was less than adequate and resulted in the mistaken disclosure of information to the inquiry. The information that was wrongly disclosed can be described in simple terms. First, records from the Fairfax media parliamentary telephone extension used by Ms Vance showing calls to and from the extension, in addition to the records of Ministers’ and staff members’ telephones, for which authorisation existed, but for which no data could successfully be extracted. Second, an electronic file containing a number of Mr Dunne’s emails, which was not removed from a larger zip file containing the
ministerial staff emails, was sent in error to the inquiry administrator. The error was picked up immediately, and the inquiry administrator was contacted before he had an opportunity to open the file. He undertook to delete the file. The email was recalled by the service, and in any case we later found that the zip file had been sent in a form that the inquiry could not open.

Sixthly, the service accepts that these two errors occurred because of our inadequate oversight of staff, including the Datacom Wellington staff who were given the rather difficult task of extracting the phone records that were being sent to the inquiry, at Mr Thorn’s direction, once he had received the necessary authorisation from Ministers and DIA to release them.

The service accepts that errors have undermined confidence in its role as the custodian of parliamentary information. The service apologises to those concerned.

Seventhly, and in the service’s defence, it needs to be understood that the task of identifying and extracting information for the inquiry, particularly in relation to the metadata of the phone records, became protracted and highly complex as a result of repeated requests and refinements received from our staff by the inquiry administrator. The task was also unprecedented. None of this metadata had ever been analysed before, for the simple reason that it is not our role to analyse it. We are merely the custodians of this information.

As our written submission explains, Datacom is our ICT service provider and has staff based in our Bowen House offices. We had to rely on Datacom to extract that information to the inquiry. Our contract with Datacom already had stringent confidentiality requirements, and because their personnel work in our office they understood the sensitivities involved. However, we also stressed to Datacom in this particular instance that we needed to treat these requests with the utmost confidentiality.

The only reasons any records were extracted from the Fairfax telephone extension was that when Datacom attempted to run reports to the ministerial extensions, they showed no results. Datacom ran a test in order to show that the systems were capable of producing data. These records were then given to the inquiry, without authority but in a genuine and good-faith attempt by a staff member to provide useful information that would satisfy the inquiry’s request.

In relation to Mr Dunne’s emails, it is important to explain that our staff knew there was no authorisation to provide them to the inquiry. This had been communicated by Mr Thorn, following discussion with the Prime Minister’s chief of staff. That said, the zip file containing all the emails should have been checked before it was sent, to ensure Mr Dunne’s emails had been removed.

Finally, I can report to the committee that on taking office as the Acting General Manager of the service I engaged KPMG to carry out two urgent reviews. The first involved a thorough review of all the communications
and interactions between our staff and the Henry inquiry team, leading up to the authorised disclosures and the two unauthorised ones. This was in response to the confused picture that was emerging, both in the public domain and in our own efforts to get to the bottom of what had happened.

We now have the benefit of an excellent piece of work by KPMG, which I am confident has got to the bottom of what went on. We have drawn on that analysis, and the written material that I have provided you here today. I refer members in particular to the two appendices in relation to the phone records and Mr Dunne’s emails respectively, which include spreadsheets of all the communications and two very helpful Visio diagrams which plot the course of the decision making and the ongoing interactions we had with the Henry inquiry team.

The second step I took was I also instructed KPMG, in light of the events, to undertake an immediate review of our information management policies and practices, particularly in reference to members’ and Ministers’ information. The interim findings I have received indicate a need for the service to carry out further work to enhance information management policies and to document more clearly and accurately our practices in relation to the information we hold as custodian for members and others who work in and occupy the parliamentary precincts.

I would like to say, from a personal perspective, having been with the service for nearly 2 years, that from my experience the Parliamentary Service is a very risk-averse organisation. The service mentality is ingrained in all the staff, and it is well-understood that we gather and hold large amounts of highly sensitive and confidential information on behalf of members and those who work in the precincts. But, if the KPMG review identifies that we need to embed that ethos more effectively in our operating policies and management processes, then I will make sure we do so.

I personally regret that the service let down customers, through these lapses. My intention with the KPMG review is that I will discuss its findings with the Speaker, as our responsible Minister, and then institute a programme of work to implement them, in conjunction with the learnings from these events. In this respect we will also welcome any guidance this committee may produce in relation to how, in future, such matters should be addressed.

Finlayson Thank you very much, both of you. I’m going to ask all members of the public and members of the media to leave, and we will just have a brief meeting in committee.
Appendix F

Corrected transcript of evidence 22 August 2013

Members
Hon Christopher Finlayson (Chairperson)
Hon David Parker (Deputy Chairperson)
Hon John Banks
Hon Gerry Brownlee
Hon Judith Collins
Dr Kennedy Graham
Chris Hipkins
Rt Hon Winston Peters
Grant Robertson
Hon Anne Tolley
Hon Tariana Turia

Witnesses
Geoff Thorn, former General Manager, Parliamentary Service
Robert Buchanan, Counsel

Finlayson Good morning, Mr Buchanan and Mr Thorn. Thank you very much for coming back. Apparently, we have this large room until about 9.40, so we'll just launch into it, if that's all right with you. Mr Parker, do you want to lead off?

Parker Yes, thank you both for your openness, for a start, and I'm sure we all regret the step that you felt you had to take, Mr Thorn, at a personal level. Can I ask you, firstly—

[Interruption to deal with sound issue]

Parker You said in your opening remarks that you were surprised that you weren’t contacted and that the contact was at the third tier, or the second tier—can you tell me what contact you had personally with the inquiry?

Thorn I personally had no contact at all until it had reached a point where I had made it clear that we were going to provide no further information relating to Ministers, unless the Ministers expressly agreed to it, and that was, I think, after the point that I was aware of the request for Mr Dunne's email content. And I thought I had been reasonably clear about that. I got a phone call from my CIO to say that Mr Holliss was in his office seeking clarification or further information, and he asked me whether he should bring him up. I said “No, I will come down.” I went down to the CIO’s office and I spoke to Mr Holliss and said “Look, I don’t wish to be bureaucratic or put up barriers, but this is the way that it’s going to be played. We’re not providing further information.” I tried to do that in a way
that was conciliatory and to be seen to be providing what assistance we could, but that was the only conversation I ever had with anybody from the inquiry.

Parker Did that conversation take place after you had said that you wanted express authority to release the content of Ministers’ emails?

Thorn From memory, I believe so, yes.

Robertson Can I ask a supplementary on that? In your written evidence, Geoff, it’s clear that Mr Holliss made a lot of contact with your staff and there was a lot of expansion of the requests and so on that were being made. The example you’ve got in paragraph 44 of your thing is that—this is what Mr Parker was just asking you about—Mr Holliss has actually come to the offices and is making requests in person like that. Did you regard that as unusual, or is that the kind of behaviour you were expecting?

Thorn No, it wasn’t. I think if there was a failing on my part, it was by not putting in place formal processes within the organisation to deal with the way the inquiry was being conducted and to manage the information requests. And it wasn’t until after the KPMG investigation that I got a full sense of the scale of the interaction between the inquiry and my own staff. In fact, if you look at the Visio diagrams, you can see that there’s a large amount of activity between the inquiry and my staff and, indeed, Datacom, which I was not privy to at the time.

Parker Did you at the time see a difference between what’s been called metadata and the content of emails?

Thorn I did. I didn’t have a huge comfort level about providing metadata. This is a situation that is unprecedented. In the past, whenever anybody has requested information relating to an MP or a Minister, I’ve always sent that request back to the individual Minister or MP. I’ve never provided it directly to a third person, even on the agreement of the individual account holder. I’ve always provided the information to the account holder and then they make their decision about what they do with it from there.

Parker With the benefit of hindsight and having probably heard me read out what the Clerk of the House said to us in her submission that metadata raises privacy concerns, just the quantity of emails, for example, or the fact that inside that metadata was an appointment time—do you now have more concerns that that division between metadata and other information that might be more private is a bit arbitrary?

Thorn I think metadata does disclose some information. In this case, I believed that I was acting on the authority provided by Mr Eagleson. So as far as I was concerned, I was not prepared to release anything until it had been approved or agreed to by the individual Ministers. Mr Eagleson was able to convince me that he had the authority to say that that had been provided and that Ministers had agreed to that. On that basis I was prepared to release the metadata. I didn’t have a high comfort level with that, but I agreed to it. But as soon as there was a request made for one Minister’s
email content, I immediately put the flag up at that point and said no, that’s too far.

Banks As soon as what?

Thorn As soon as there was a request made for the content of emails belonging to a Minister, I decided that that was simply one step too far.

Banks So the metadata thing you were happy to go along with but a little bit shaky on, but when it came to content, the alarm bells started to ring?

Thorn I certainly was not comfortable at that point. I wanted to revert back to my normal process, which is to send the request directly to the Minister.

Robertson Just to go back a step. It is quite clear from your evidence that when at first Isaac Holliss made the request for the metadata, you said no. When Janice Calvert made the request for the metadata, you said no. Then when Wayne Eagleson made the request for the metadata, that was the point at which you said you were “able to be convinced”, but you didn’t have a high comfort level. Why was Mr Eagleson able to convince you of that?

Thorn I think I went through those points yesterday. Basically, the points that we discussed were that the Prime Minister had agreed or ordered the investigation. Mr Eagleson had written to Ministers about it. Ministers were aware of the terms of reference. The Prime Minister had made his expectations of cooperation with the inquiry quite clear—that no Ministers had come back and said they would not cooperate. So on that basis Mr Eagleson believed that Ministers had, in essence, agreed to the release of the metadata. The other aspect of that is that the metadata—we’re talking about scan records, photocopiers, email logs, and telephone logs—was part of the terms of reference. So when you put all of that together into a package, it seemed to me that Ministers had given their consent to that.

Parker How could the Ministers give their consent through the terms of reference?

Brownlee I think that’s an unreasonable question, Mr Chair. The reality is that the terms of reference were discussed obviously by Cabinet—

Robertson Were they?

Brownlee Therefore Ministers would have known what the matter was.

Robertson I didn’t know that. They discussed it in Cabinet?

Brownlee Oral discussion.

Parker Mr Chair, I think my question is fair. One of the justifications for belief that Ministers agreed to release this data was the terms of reference, but I don’t see how that conveys consent of people to disclosure of information.

Thorn I mean, I can’t comment on that, because I didn’t second-guess where Mr Eagleson was getting his authority from. It’s not unusual for me to deal with chiefs of staff over matters of this nature. So I relied on Mr Eagleson’s authority as a chief of staff.

Finlayson Extensive authority.

Thorn Yeah.
Mr Chair, can I ask a supplementary on that? I guess Parliamentary Service is in the unique position that while you report to the Speaker, you’re a provider of services to Ministerial Services. So where do you see your accountabilities lying, for example, with regard to data held by Ministerial Services? Is that still to the Speaker, to whom you report as Parliamentary Service, or is that somewhere else?

I was accountable to the Speaker for the provision of services. In terms of the accountability for the data, I don’t believe that I ever had an accountability to Ministerial Services for that. I note in Janice Calvert’s email she considered that we were holding it on Ministerial Services’ behalf. I didn’t agree with that and I had that discussion with her. I believe that we were holding that information on behalf of Ministers and members. I have always believed that we only ever hold that information on behalf of the Ministers. We’re providing a service to members although we are contracted to Ministerial Services to provide that, I believed that it was directed to Ministers.

Just to clarify on that, so, ultimately, your accountability therefore is still to the Speaker rather than to the Prime Minister as Minister responsible for Ministerial Services?

The accountability for the provision of the service is to the Speaker. The accountability in terms of the protection of data is to the members and to the account holders, basically.

Just one final question. Are you surprised that the inquiry—having sought very broad levels of information through the Parliamentary Service computer route, when that, about 23 May, was cut off by Mr Dunne—didn’t look at how else it could get that information properly, for example, through the Official Information Act?

It’s verging on a question of law, asking him to interpret that.

Well, I’ll take out the Official Information Act, then. Are you surprised that having sought the information so assiduously through you, it appears that they didn’t try to get it any other way?

And then you’re asking a primary fact witness to give an opinion.

Yeah, and I don’t have a view on that.

That is contrary to you said in our preliminary meeting about just dealing with primary facts.

There was a lot of that yesterday, Mr Chair—more so.

I think we’re entitled to know it passed his mind that that would be another way of getting the information. I think that is not really a question of law. We’ve got someone in front of us. He can give us the answer as a matter of fact or not.

I’ll put it another way, then. Are you aware that it’s not normal for people wanting to get official information to get it through you, but rather to get it under the Official Information Act direct from the Ministers concerned?
Thorn I receive requests from time to time for exactly that information, and my response is always to send it to the Minister. So I didn’t form a view on whether the inquiry had other avenues open to it. As far as I was concerned, I had closed the door on providing that information myself. It was up to the inquiry to decide how it wanted to behave from that point on.

Brownlee Firstly, thanks for the email that you sent clarifying the position for all of the members of the committee with regard to Mr Eagleson’s discussion with you. Secondly, what is the purpose of the swipe card monitoring that is kept by the PSC?

Thorn The security policy is reasonable clear. It is about balancing access along with security of people, property, and information, and the security information is only ever used for examining issues that relate to security.

Brownlee How long is it held for?

Thorn I actually don’t know the answer to that.

Brownlee What was the time lapse between the request for the swipe card information about the persons involved in this case and the provision of that information?

Thorn I’m not sure I understand the question. Are you talking about how long did it take for the service to provide it or how long between the events and when it was asked for?

Brownlee Well, it relates to the first question. I’m really interested in how long you hold all that information.

Thorn I actually don’t know the answer to how long we hold it. We could find that out.

Finlayson That would be helpful.

Brownlee And the purpose is, you say, for security?

Thorn The security of people, property, and information.

Finlayson And you can identify, can’t you, pretty well immediately if someone has gained access to a particular floor. So, for example, I go into my office on a Sunday, and often one of the security officials will come up in about 10 minutes. So you know that there has been an entry.

Thorn Yes, we would. And I think we would know also if there had been an attempt to gain unauthorised entry. So if somebody had used a card at a swipe area that they were not entitled to pass through, that would probably show as a flag.

Brownlee You must get a lot of those with my name of it because I’m always being barred from all sorts of places.

Robertson The cafe is closed on a Sunday.

Brownlee No, no—your office is the one I’ve been trying to get at. The seat of power for the Labour Party.

Finlayson No, no, we’re bipartisan. Dr Graham, I think, had a supplementary.
Graham Two questions, Mr Chair. The first is essentially picking up from this discussion. I'm interested in the relationship between the expectations on the part of the inquiry and what they perceive to be your responsibilities, and how you perceive those responsibilities to be, because it seems to me to have been a catch-22 situation which has landed us in this difficulty. Yesterday we heard from Mr Henry that based on the principle of necessity he felt free to ask whatever he deemed necessary for the inquiry, and he left it to the recipient of that request to determine whether it was appropriate or not. So, in your paragraph 42 you say: “...I was by this time aware that Mr Henry had been asked by the Prime Minister to inquire into access to a sensitive classified report ... and it appeared that the access might have resulted from a security breach within the precincts. I decided I should not second-guess those security implications ...”. So the inquiry sees no limit in what it can ask in terms of what is necessary, and you, because of security implications, do not feel free to second-guess that. That is not an even or principled—and I mean principled in an abstract sense—situation. Now, can I ask you what you perceived those security implications to be; to what extent were they so important that you couldn’t second-guess? The security dimension of this is a domestic political kind, not a national defence kind, and almost by definition of that you ought to have been on notice—and I think also Mr Henry himself, but both parties should be on notice—that there would be natural constraints. Yet on the part of the inquiry they felt no constraints and you felt obliged not to exhibit any constraints. That’s unsatisfactory.

Thorn Yes I understand the point that you’re making. I was surprised, actually, to hear Mr Henry’s testimony yesterday to say that he believed it was Parliamentary Service’s responsibility to decide what was appropriate to provide and that it was Parliamentary Service’s responsibility to seek that authorisation, because I had placed some weight on the fact that he had asked for Andrea Vance’s security records. So I was in a situation where I had to balance security of information against a situation where a person had unauthorised access to classified information. I had not had any conversations with Mr Henry about the theory of his case, what exactly he was intending to do with that information, how that would contribute to his inquiry, so I couldn’t second-guess what he was actually looking for or what he expected from that. So I believed on that basis that it was appropriate to release it. In hindsight, and looking now at his testimony yesterday, I should probably not have put as much weight on his request as I actually did.

Graham So just on that, did it occur to you at that particular point in time that you should, or he should, have communicated with each other?

Thorn It didn’t occur to me at that time, but in hindsight that’s one of the things that I probably should have done, and I think I’ve said that in my submission—that there’s probably at least one point, which is probably at the time that I was aware of the request for Mr Dunne’s email content. But at that point I probably should have picked up the phone, but I didn’t do that.
Yes, OK. Thank you. The second question, Mr Chairman, just picking up in a sense from what Mr Hipkins was exploring—the relationship between the legislature and the executive, which seems to me to underpin all of this, and we have a very messy relationship, especially in this country, I think. In terms of the ministerial responsibility, we have already established that your strict reporting responsibility is to the Speaker, and the Speaker recognises that. He in his own ruling on 11 July refers to himself in the role of Speaker as a responsible Minister, and in his media statement of 30 July he says: “As Speaker I am responsible for the Parliamentary Service and I have instructed the general manager to look at internal controls.” And on 1 August he expresses his regret at your resignation. He says: “I acknowledge that the confidence in Parliamentary Service has been undermined by events, and as general manager Mr Thorn accepts responsibility for this.” Has the Speaker intimated to you at any time his own perception of his responsibility for these events that led to your resignation?

We haven’t discussed that expressly.

Did you have a discussion? Presumably when you were about to make known your resignation—I guess that was your decision—did you discuss that with the Speaker in advance?

Not in advance. I think there had been some conversations with him that became clear to me, as I was trying to provide advice about parliamentary questions, that I was unable to find some of the answers. I felt that that was a failing on my part to put the right processes in place, and, therefore, I offered my resignation.

You offered your resignation—

Can I just—

—just a second—you offered your resignation to the Speaker?

To the Speaker.

Why? Supplementary. We need to know. You offered your resignation to the Speaker because you thought the Speaker was looking for your resignation, or you knew the Speaker was looking for your resignation? How did that work? What discussions did you have about you leaving your job with the Speaker?

The discussion that I had was at the time that I offered my resignation. We had been working through some parliamentary questions. There had been some errors in some of the answers. I had provided advice based on my understanding of the facts at the time. I subsequently found out that those facts were incorrect. I was having difficulty establishing exactly what the facts were and exactly what had occurred within the organisation. When I look back now, actually, at the KPMG material, I now understand why. But I felt that I had let myself and the Speaker down by not putting in place the processes that would have normally been appropriate. So I offered my resignation.
Banks Now knowing what you now know about all the other stuff around this, did you do the right thing or should you still have this job, or do you feel that you have been a scapegoat?

Thorn I don’t believe I have been a scapegoat. I did not put in place the processes I should have put in place. There were two errors made where I believe information was provided. It was provided not authorised. I certainly did not authorise it, but for whatever reason—I don’t know that we can go into the detail of that—that was provided. As I said to an earlier question, I could have picked up the phone and spoken to Mr Henry. I didn’t do that. So I felt that I was responsible for part of the mess that we actually do have here.

Banks But Mr Henry could have come and seen you as well, couldn’t he?

Thorn He could have, and I could have spoken to him, as well.

Banks Have you ever met Mr Henry?

Thorn No.

Finlayson Can I ask one question? In the course of your work in over a number of years, would you have had a number of interactions with, say, the Australian Parliament, Canadian Parliament, and so on?

Thorn I meet once a year with my counterparts with the Australian State and Federal Parliaments. I’ve got a good working relationship with them.

Finlayson And just looking forward as we deal with this issue, are you aware about whether they have policies to deal with these sorts of access issues, particularly for the media? Well, obviously, we are dealing with different factual situations, but it could be a fruitful source of inquiry for us looking forward.

Thorn I’m not sure that they do. I believe that we’re actually in uncharted waters here. This is unprecedented in the way that this has occurred. It’s unprecedented for me to agree to provide material to a third party rather than directly to Ministers or members. I don’t know that anybody has actually dealt with a situation like this in the past.

Peters Yes, they have. Supplementary. Do you have a precedent file in your operation so that past things may be recorded as to how you handle them?

Finlayson Sorry?

Thorn We do record some—

Peters Does he have a sort of precedent file on past activities or actions like this and how they were handled by the prior system or the Speaker at the time? Because I want to know whether you’ve established a sort of working manual based on precedents in your office, or is there one? I’ll give an example. Accessing a person’s swipe card record has been refused by the Speaker in the past, and by Parliamentary Service. Are you aware of that case?

Thorn No, I’m not.
Peters  Well, it’s a case, some of you may recall, of the ACT Party fund-raiser in the rooms of Parliament, and other parties were prying into who came to it—who put it on and when it happened. The Speaker Doug Kidd at the time denied that knowledge to any political party. He denied knowledge at all and any use of the information for the record to get there. So this is a precedent for you.

Brownlee  That’s why the purpose was important.

Peters  Pardon?

Brownlee  That’s why my question about the purpose was important.

Peters  But there is a precedent in the sense of knowing what you—

Brownlee  No, it’s not. It’s not a precedent.

Collins  Mr Thorn, In your written submission you’ve mentioned that you felt that Mr Henry had undermined you by going to, basically, third-tier people. When you knew that he had, why didn’t you speak to him?

Thorn  I don’t have an answer for that, and that’s the one thing I failed to do that I believe I let myself down on.

Collins  OK, so you failed to do it, but then why didn’t you take that issue to the Speaker? Or did you take it to the Speaker?

Thorn  At the time I believed that I had the authority from Mr Eagleson to provide the metadata. If I get requests from various people for information relating to Ministers or members, I provide that request to the Minister or member. It may be that I assist, or that our staff assist—

Collins  No, no, that’s not the question. The question really is that if you were concerned that Mr Henry was going directly to contractors, first off, you didn’t actually raise it with Mr Henry—which I think none of us can think why, including yourself—but then why didn’t you elevate it to the Speaker? And what matters would you elevate to the Speaker?

Thorn  Where I was going with my answer was that I don’t provide the Speaker with all of the incidences where things like that occur. I think if I had decided I needed to elevate it to the Speaker, I would first have made contact with Mr Henry. I actually didn’t do that. This is the one area where I believe I’ve let myself down, so I don’t have an answer for you on that.

Collins  So why did you resign?

Thorn  Because I believe that I let myself down, the service down, and Ministers.

Finlayson  You admit that there was no precedent for this sort of inquiry. In paragraph 41 you say there was no policy or precedent about how to deal with this matter, so it was uncharted territory.

Thorn  Yes it was, but I still had principles that I believe I was trying to uphold, and they had been undermined.

Graham  Your comment just a second ago that “I believe I had authority from Mr Eagleson” seems to me to be the nub of it. Mr Eagleson is not in a position to give you authority. He gives, on behalf of the Prime Minister, directions
to Ministers to do something, but not to you. Essentially, Parliamentary Service is a part of the legislature in an operational sense. You report to the Speaker. He is in a position to ask you for something, not authorise you to do something. That is the distinction.

Thorn I see the distinction slightly differently. What I was looking for was consent from each of the Ministers to release that information. Mr Eagleson, as the chief of staff, I believed and he believed, was in a position to provide that consent. So he wasn’t directing me—

Graham But that’s conveying information to you, not authorising you to do something.

Thorn Yes he was conveying information to me. He was conveying to me that Ministers had consented to the release of that information. But he was not directing me. He was—

Graham You used the word “authorised” here.

Thorn Yeah. When I used that word “authorised”, what I’m saying is that he was providing me with the authority that I required before I would release that information.

Peters The problem is that Mr Eagleson says to you two things: “This is the Prime Minister’s wish.,” and “I’ve cleared it with the Ministers by writing to their secretaries.” Why did you construe that to be consent?

Thorn There were a number of other factors in that. The fact that Ministers were aware of the terms of reference that the request was in line with—

Peters But they can be aware of all those things, but none of that is acknowledgment of “Yeah, I know what you’re asking for, and I’m signing out. You’re right to pick this up now.” That’s what you would have been required of any circumstance. So why did everybody fall short of that?

Thorn My normal process would be to get—and I asked for this on two occasions—express agreement from each of the Ministers involved. The conversation I had with Mr Eagleson was that he was able to provide that consent in a block consent to me. So I didn’t question that any further. I didn’t question his authority to provide that authorisation.

Robertson Well, just on that point, it is quite clear from the email that Wayne Eagleson sent you, which you furnished us with a copy of today, which begins: “Geoff, further to our discussion, this is to confirm that the Prime Minister would like Parliamentary Service to provide … ”. So I think that explains where you’re coming from, but it also raises the concern that Kennedy Graham has raised that you’re not actually responsible in that particular instance to the Prime Minister.

Thorn No, and I didn’t consider that I was doing it at the behest of the Prime Minister. I believed that I was doing it because Ministers had consented, and that was conveyed to me by Wayne Eagleson. So I understand the subtlety of it, but I was looking at it in a different way.
Robertson  I want to ask you a different question about consent, and that’s around why you did not seek Andrea Vance’s consent to release her swipe card records.

Thorn  I believed that this was a security matter, and at the time, I put some weight on the fact that she was a journalist. I also put some weight on the nature of the request—the fact that it was an investigation into unauthorised access to classified material. And I had to balance those factors against themselves. In the end, I came down on the position that it was a security issue, and that it was appropriate to release that information.

Robertson  Why was it relevant that she was a journalist in terms of whether or not you should be seeking her consent?

Thorn  I do understand the role that the media has in the precinct, and I believe that that required some weight. But at the end of the day, I decided that actually the nature of the request, the nature of the investigation, the nature of the issue determined that, in fact, it was a security issue, and that it was appropriate to release that to the inquiry.

Robertson  So you’re not making any differentiation between different types of security issues here—security in terms of physical security versus a security thing around the fact that a journalist appears to have access to a document? I mean, there was nothing at that point to indicate that that access to that document had occurred inside this building, was there?

Thorn  But I was not aware of why the question or the request had been made, and I didn’t have that information from Mr Henry. And as I said, I could probably have picked up the phone, but I didn’t. I didn’t want to second-guess why the inquiry was seeking that particular information.

Robertson  But you had no evidence that Andrea Vance had done anything wrong—to justify breaching her privacy, essentially.

Thorn  I didn’t have any evidence either way.

Robertson  So you just went ahead and did it, because Mr Henry asked you for it?

Thorn  It wasn’t just because Mr Henry asked for it. As I said, I had to balance the unauthorised access to the information. I didn’t know what line of inquiry the inquiry was actually pursuing. I didn’t know where that information fitted into the investigation, and I balanced that against the security of the information.

Robertson  Sorry to harp on, but doesn’t the fact—I’ve just got one more—doesn’t the fact that you didn’t know all of that information, wouldn’t that have been a reason to have stopped and thought: this is about the privacy of someone who works in the complex that I manage. I owe them the duty to seek their consent.

Thorn  I think that was the point at which I probably should have picked up the phone to Mr Henry.

Robertson  Or Ms Vance.

Banks  Can I ask this supplementary? So it was about Ms Vance, one journalist. If it had been two, or three, or four, or half a dozen journalists, do you think
you would have picked up the phone then? Would the alarm bells have rung if it had been more than one journalist or all of the gallery, or would you still have just released the whole lot to this Mr Henry?

Thorn Yes, well, I mean, it’s a hypothetical. I don’t know the answer to that. I don’t know how—it depends on the context.

Peters I’ve got one supplementary to Mr Thorn. Did you think you were investigating a leak or a theft?

Thorn I didn’t know where the inquiry was going to. I had no idea what the theory of the case was that Mr Henry was pursuing.

Peters Well, if it was a theft, you might be able to assert some security issue here that would override anybody’s right to privacy. If you’re in this place stealing some assets or property, you can’t really assert your civil rights and liberties like you would in any other circumstance. That’s my question: were you investigating a leak or the theft? Because if it was a leak, then surely that would have occurred to you that there is something going wrong with the requests here for this information.

Thorn As I said, I probably should have picked up the phone and talked to Mr Henry. I also think that had we had a discussion much earlier in the process, that request may not have actually been forthcoming. I actually wasn’t sure where he was coming from with his request. I relied—and I put some weight—on the fact that he was making decisions about the appropriateness of the request.

Peters And he was the investigator after all, not you.

Thorn And he’s a very senior public servant. I relied on—

Peters That’s a pity about that part. Sham bolic the return of him. He’s been promoted by the present Government to get all sorts of inquiry jobs.

Hipkins Along those lines, I want to come back to the issue of precedent for you, or ask about the issue of precedent. When, with regard to swipe card access records, the police were called in to investigate the theft of the Leader of the Opposition’s emails, were swipe card access records provided to them as part of that investigation?

Robertson Dr Brash, we are talking about.

Thorn I don’t know the answer to that. That was before my time. I think the police would have had an arrangement with the Speaker. There were possibly search warrants involved; I don’t know.

Hipkins Can I ask that that be followed up—that we get that information? So basically, when the police were called in to investigate Don Brash’s email theft, were those records provided—

Collins About 18 months after it occurred.

Hipkins —yes, I know, but were those records provided to the police?
Finlayson: That would be quite interesting. Maybe if someone could pursue that, and if the records are still in existence, and they haven’t been accessed, maybe we could get to the bottom of that.

Peters: Well, that was an inside job, so it wasn’t so difficult.

Collins: Pretty hard to be inside when we have don’t have access to other people’s things. How do you know? He was inside?

Thorn: We’ll take that back and try and find out.

Finlayson: If material has been released, your policy—it can be released if was by consent, so Mr Horan’s phone records were released by consent.

Peters: Yes.

Collins: His consent. And then released all around the press gallery. They were released around the press gallery with his consent too, were they?

Peters: No, no, no. Excuse me, excuse me. Let’s not have this sort of rash statement here. What happened was—

Finlayson: No, I’m asking a question.

Peters: I know, but I’m the one—Mr Horan gave me a written—

Adams: We’re not getting into this now. Come on. We are waiting for questions.

Finlayson: I’m just asking a question about the release of Mr Horan’s phone records, and the witness has said they were released by consent, so that was most helpful.

Peters: I just make one—you know about the allegation of being leaked around the press gallery. The reality is that he said that they could be used to prove his innocence.

Thorn: While we’re discussing that, could I just make a comment on that? Those phone records were released to Mr Horan. What Mr Horan did with them was up to him. I didn’t pass them to anybody other than Mr Horan.

Finlayson: And what happened thereafter was a matter between Mr Horan and his colleagues—his former colleagues.

Thorn: Yes.

Turia: You talked earlier about—you believed that you had been undermined, when you talked about your resignation. Who were you talking about undermining you?

Thorn: I believe that the way that the inquiry was dealing directly with staff and with Datacom developed a level of familiarity that removed what I might have otherwise had in terms of a formal process. But I accept some responsibility for that, because I could very well have put in place a process that ensured that all of that material came through me. But I didn’t do that.

Turia: Do you think, then, that the way in which the investigation was carried out should have required the person who was given the authority—and I’m talking about Mr Henry—should he not have sought your authority before he went to your staff?
I think that would have been an appropriate way to deal with it.

Can I ask a supplementary on that please—which is, do you know, how did Mr Henry know who in your third tier he should go to?

I've got no idea.

You didn’t give him that information? So what was it you think that was wrong in the culture of Parliamentary Service, under your leadership, Mr Thorn, that the third tier person that he went to felt that they could give Mr Henry the information without coming through you?

It didn’t quite happen that way. The third tier person approached his manager, who then came to me, and at that point I instructed him not to provide the information. So, at each of the key points when information was sought, I did make the decision about whether it would or would not be released. So the culture of the organisation was to recognise that there was a high degree of risk, and that that was brought up. Where the errors were made is where I'm almost a victim of my own success, in that I was trying to develop a culture of providing solutions rather than just barriers and saying no. So when people spoke to Datacom, and the email incident, for example, they were told by the inquiry that authorisation will be coming when it came to the content of Mr Dunne’s emails. So in order to facilitate that, and at the request of the inquiry, they continued with trying to dig that out. An error was made, and they knew that that was unauthorised, but it accidentally got attached to the email.

So you didn’t know who gave Mr Henry the details, of whom in Datacom to contact?

I think the understanding of who in Datacom to contact became part of the information that passed through, with the level of contact that there was between the inquiry and my team.

You’re not sure.

I think it just developed over time.

Just essentially a supplementary to all of this in terms of third tier. You said that at no stage did you meet with Mr Henry. So my question is: who in the inquiry, if anyone, did you actually meet with at any time? Did you meet with Mr Holliss at any time? If not Mr Henry, did you meet with Mr Holliss or any other person directly acting on behalf of the inquiry?

As I said earlier, the only conversation I had with anybody from the inquiry was when Mr Holliss turned up in my CIO's office seeking further information. At that point I got a phone call to say he was there. I went down and spoke to him. That's the only conversation I had.

Was he invited by the CIO or did he just arrive?

I don't know.

OK. Mr Chairman, I don’t know if this is the moment, but it would be useful for the committee perhaps to have information pertaining to the
physical movements of all members of the inquiry, including Mr Holliss, in terms of a relationship with Parliamentary Service.

Collins  So you’re wanting his security details?

Graham  Yes. I wouldn’t use the word “security”; I’d use the word “Privileges Committee inquiry”.

Finlayson  Yes, well if we just bear in mind what the first stage of the inquiry is—to get the basic facts so that we really focus on policies that I think will probably be of some assistance to Parliamentary Service. We’re not seeking to find anyone in contempt.

Graham  No, no, I’m just trying to follow up on his point as to whom—

Parker  Mr Thorn, I’m pretty concerned that you still seem to think that accessing Andrea Vance records was a matter of security. I have before me the security policy for the parliamentary precincts and I’ve read it. I’ve read through again the guiding principles, which are set out on page 5, and I can’t see how you can think that that authorised you to provide access details in respect of Andrea Vance. So could you please tell us—perhaps, if you can’t do it now, come back to us—as to how it is you thought that these written principles, because there was a written policy here, authorised you to do what you did? I can understand mistakes are made, but I find it a little bit hard to accept that you think, having had the opportunity to read through the guiding principles that were already out there, that that was the correct decision.

Thorn  Further over in the policy it does talk about, I think, CCTV surveillance, on page 13, and it refers there to security of people, property, and information, and that’s not repeated in the area that relates to security passes. But I consider that’s commensurate with the policy in relation to CCTV.

Parker  But isn’t that dealing with, you know—obviously if a journalist was snooping around offices trying to steal information, that’s wrong. But that’s not what this was about. This is about someone coming in and out of the building. You had no evidence that Andrea Vance had done anything wrong and yet you thought that there was a security interest that enabled you under this policy—well, tell me was it under this policy that you handed over those records, or is there some other authority that you thought you had?

Thorn  It was under the policy and it was under my responsibility for maintaining security in the precincts. What I believed I was dealing with at the time was a situation where a person had unauthorised access to information, and I did not know whether that had occurred on the precinct, but I believed that it was possible. As I said, I did place some weight on the nature of the question asked by the inquiry.

Parker  You’ve made reference to the CCTV reference there, which I think is pretty thin, personally, justification. Can I take you back to the guiding principles, and I’m just going to run through them quickly: “maintain a level of security commensurate with the assessed level of threat at any particular time; to be based on sound intelligence and timely advice; provide a safe and secure...
environment …; define authorised persons, readily identify them and give them access to the precincts; welcome visitors who will be subject to security scrutiny … and … ensure access where possible, and limiting access, only where and when necessary; [to] enable: The House and its committees to conduct their business without disruption;”. You know, it really seems to me to be about protecting the security of people and the premises, including information, from threats rather than authorising you to help others snoop into the practices of the fourth estate.

Thorn But this was a situation where a person had unauthorised access to classified information. From my perspective, there had been or there had possibly been a breach of security—

Parker We've already covered that point. You had no evidence that Andrea Vance did anything wrong.

Thorn And in that respect I was relying on the nature of the request from the inquiry, which I did not believe that I should second-guess.

Finlayson It is interesting when you look at these policies, page 14, there is provision for access to recorded images but there’s not a similar policy for access to information concerning swipe cards. That’s something that we need to look at.

Robertson Can I ask a supplementary on that point, Mr Chair. Can Mr Thorn clarify—you used the CCTV clause before to justify. Were CCTV images handed over?

Thorn No.

Robertson It was only swipe card.

Thorn Yes.

Robertson So you’ve used the CCTV justification, but actually that’s not what was handed over.

Thorn No, I believe that that—the principle—and if you go to the guiding principles if does talk about safe, secure environment for people, systems, assets, and information. So, when you look at that and you look at the CCTV, I don’t know whether that’s now highlighted a gap in the policy, but the principle is the same.

Parker Can I ask one more question?

Finlayson No, because I’ve been—

Parker No, there’s an important principle here. If the Labour Party suffered a leak and the National Party had the information, and we were conducting an inquiry into that, would you—

Collins It happens all the time.

Parker —and it does happen, both ways, all the time.

Finlayson Let’s not get partisan. We’re dealing with an important issue.
Parker  I actually used that example so that I did not make it partisan, Judith. Do you think that that would give you cause, if we were doing an inquiry as to how that information leaked out, for you to provide us with access information either about journalists or members of the National Party?

Thorn  I think there’s a—the distinction that we’re dealing with here is the fact that material was handed to a third party. I’m not quite sure in your hypothetical who is doing the investigation. It may be something that—

Parker  Well, it’s a leak of confidential information on parliamentary precincts. It seems to me the same principle, if you’re going to do this—

Collins  I’m sorry, it’s just like Chris Carter’s situation.

Finlayson  Well, I know. I think that there are a number of hypotheticals we could put to this witness. I think he’s dealt with the issue. There are certain matters going forward that we are going to have to address.

Parker  With respect, Mr Chair, I don’t think he has.

Finlayson  Amy Adams.

Parker  With respect, Mr Chair.

Finlayson  Well, I’ve ruled on the matter.

Adams  Hang on. With respect, I’d like a question.

Parker  Well, you know, you’ve intervened and said—I think there’s the same principle at foot here. Why would it be that you can provide information in respect of Andrea Vance in that situation, but wouldn’t be beholden, if that was a proper principle, to give me that same information if something had leaked from my office to the media and I wanted access.

Turia  It’s not relevant.

Parker  Well, it seems to me to be an equivalent—

Finlayson  No, I think there are a number of good policy questions arising out of this discussion, which we as a committee when dealing with policy can deal with. Whether they can be extracted on the hoof from this witness is another story.

Adams  It’s following on from the same issue, really, and the first question is just one of clarification. To your knowledge, had anyone alleged that the report had been stolen? Had any Minister made an allegation that the report had been stolen, to your knowledge?

Thorn  No.

Adams  So just in terms of this issue around disclosing of swipe card information, I understand that yesterday you were very clear that you thought there were two errors in the way the service handled this matter: one around the content, one around the phone records. But on the issue of the swipe card access that we’re just looking at, I understand you said yesterday that you were aware of issues relating to the gallery’s access in the precincts, which could be relevant as to whether Miss Vance was involved. What did you mean by that?
Over the years the Speaker has removed temporarily, or permanently in some cases, access to various people associated with the gallery because of things that have occurred. I think there was a circumstance where a cameraman was seen photographing documents on an EA’s desk. The EA made a complaint about that, but wasn’t sure who the cameraman was. And that’s a situation where I think—we don’t have security cameras anywhere near MPs’ offices, but if they were in that region you would probably look at that to try and find out who had been involved. I must say that in that case I think the gallery itself actually identified the person and brought the person to the Speaker, so the gallery made a very quick investigation itself to work out who was involved.

So I’m not suggesting that the press gallery is always acting badly. That is not my intention at all. All I am saying is that there have been instances in the past where the Speaker has seen fit to remove access passes. I did not know what the allegation was from the Henry inquiry that necessitated the request of that information. And, as I said, at that point I probably should have picked up the phone.

Adams So in relation to the gallery having to comply with Speaker’s rules, how did you see that relating to this instance?

Thorn I didn’t know what the allegation was that Mr Henry was dealing with when he asked for that information. I placed some weight on the fact that he made that request and that he had considered that it was appropriate.

Adams Can I just have one last punt at that? So I understand from yesterday’s proceedings that Mr Henry was of the view that Ms Vance’s swipe card records actually pertained to Mr Dunne’s movement. Is that something you agree with? Would you see it as a reasonable intrusion into her privacy?

Thorn I didn’t look at Mr Dunne’s movements or swipe card access. I didn’t do any analysis of that information.

Adams No, the question was: do you agree that the release of information relating to Andrea Vance’s swipe card is justifiable evidence of Mr Dunne’s movement, or is it simply in terms of Ms Vance’s movements?

Thorn I don’t know what he was intending to do with it. I can’t comment on that.

Banks Mr Thorn, the Andrea Vance swipe card matters that we are discussing, in your view, were an unfortunate one-off, or is it your knowledge that this has been going on for years with individuals and their swipe cards, and access by third parties to their movements inside these precincts?

Thorn No, it is very unusual to provide swipe card access of any person. We treat information of that nature fairly seriously. We have provided information, I think, on two occasions to individuals who have asked for information about themselves and their own movements. And we have provided information, I think—you had some information about the other occasions. Since 2008, five occasions have they been released, twice at the request of the individual concerned—so, in relation to their own swipe card access. One set was released to the police as part of a criminal inquiry, and two records were released as part of the Henry inquiry, and that was the Andrea
Vance records and Mr Dunne’s, and Mr Dunne’s were released on his own
—

Collins So only those times?

Thorn Yes.

Collins So you didn’t release anything when Chris Carter was—

Thorn No, no, no. There was a rumour floating around that I was aware of that CCTV footage had been used, and I can assure you that actually the areas where it was alleged the CCTV footage showed him, there are no cameras. So that was a rumour floating around in the precinct.

Robertson Never believe those rumours.

Banks So that we can deal with this going forward, because that’s what this inquiry is about. So, does a policeman turn up and say: “Geoff, I want the swipe card movements of these people.” and you hand it over? Or does he bring up some documentation from the High Court, like a warrant, or how does that work?

Finlayson This committee is also looking at the whole question of policing within the precinct, so we’re going to be addressing those issues.

Banks Yeah, but what’s your knowledge about the one case that you talk about—because there’s only one case—where the police rocked up here and you gave them information about individuals and their swipe cards. What legal authority did they have to ask you for that?

Thorn That was a criminal investigation, I think. It involved an EA and allegations of theft. The police were involved. The protocol was brought into play, so there was a conversation between the police and the Speaker.

Finlayson I think we know, yeah.

Robertson This is actually for Mr Stevenson, I think—

Finlayson Oh, no, Mr Stevenson is coming back.

Robertson Oh, you’re coming back. OK.

Finlayson Because Mr Thorn is heading off overseas. Have you got a final final question?

Hipkins Yes, and it’s a very short one, too.

Finlayson Oh, great.

Hipkins You mentioned in your submission the basis on which you made the decision to resign. Did anybody indicate to you prior to that that your resignation was desirable and/or required?

Thorn I think I would prefer not to answer that question.

Banks I asked it before.

Finlayson It’s been asked on a number of occasions.

Peters Sorry, I didn’t get the response—
Banks | I asked the question.
Peters | Yeah, but I’m trying to get Mr Thorn’s answer, because he gave one.
Robertson | He said “I would prefer not to answer that question.”
Banks | So, Mr Thorn, did you jump or were you pushed?
Finlayson | I think he’s indicated very clearly that he would prefer not to answer.
Hipkins | No, no, it’s actually very material to this investigation as to whether he has been forced to resign or not.
Banks | We’re asking questions. This is important because this is the only scapegoat we’ve seen.
Hipkins | So I would like to know whether he was compelled to resign; whether somebody indicated to him that he was required to resign, and, if so, who that person was.
Turia | What’s it got to do with the inquiry?
Hipkins | It’s absolutely material to the inquiry.
Finlayson | How?
Turia | Tell us how.
Peters | I’ll tell you how. I’ll tell you how. We are dealing with information and its dispersion, and the witness has outlined some fundamental principles by which he said he abided by then when he was doing his job and was the reason why he resigned. Now, there were some other people who have been utterly unprincipled in this matter, and they have not resigned. That’s why it’s relevant.
Finlayson | Well, he may prefer to deal with that in another place, I don’t know.
Graham | Mr Chairman—
Finlayson | No, I think we’ve exhausted questions—
Graham | Can I just pick up on that by way of a supplementary question, because in answer to the question of its relevance, it has to do with acknowledgment of culpability, whether Mr Thorn, himself, as general manager, acknowledges culpability himself, or whether the attribution of culpability—
Turia | He said he took responsibility.
Peters | By your criteria, that’s a legal judgment. We’ll put it off until we get to the second round.
Finlayson | He’s talking to his lawyer.
Thorn | I resigned because I believe I let myself down and I let the Parliamentary Service down by not putting in place the processes that should have been in place—
Robertson | That’s not the question you were asked.
Hipkins | Did anybody ask you to resign or suggest to you that it was desirable that you resign?
Finlayson: I think the problem is we are not investigating culpability. The first stage of this inquiry is to deal with particular facts so that it leads on to policy.

Graham: That is a fact.

Hipkins: This is the fact that I’m trying to establish.

Finlayson: I’m ruling it. I’m saying the question is not relevant.

Hipkins: That’s an absolute disgrace. That is absolutely disgraceful.

Finlayson: Well, you can be as disgraced as you like. Thank you very much, Mr Thorn.

Brownlee: Mr Chair, before this all goes, I would just like to say, I have been on and off the Parliamentary Service since 1998—

Peters: There’s a bit of a cover up going on here.

Finlayson: Order!

Brownlee: —and I think in that time you have been the best of the management we had there. This is a very unfortunate circumstance. I think the integrity that you have shown and demonstrated clearly, this committee here, should serve you well in the future and is a hallmark of how you’ve conducted your responsibilities in that role. Thank you.

conclusion of evidence
I.17B INTERIM REPORT ON USE OF INTRUSIVE POWERS

Appendix G

Corrected transcript of evidence 27 August 2013

Members
Hon Christopher Finlayson (Chairperson)
Hon David Parker (Deputy Chairperson)
Hon John Banks
Hon Gerry Brownlee
Hon Judith Collins
Dr Kennedy Graham
Chris Hipkins
Hon Murray McCully
Denis O'Rourke
Grant Robertson

Witnesses
David Stevenson, Acting General Manager, Parliamentary Service
Robert Buchanan, Counsel

Finlayson       Good morning, everyone. Mr Stevenson is going to start. Mr Buchanan, good morning. There are other time constraints, so let’s hit the road.

Stevenson      Good morning, Mr Chair. I have presented a letter containing the two items of further information that the committee sought at last week’s meeting. The committee’s discussion with Mr Thorn last Thursday canvassed his role in the events involving the Parliamentary Service and the Henry inquiry. Mr Thorn gave evidence about his decisions in response to the inquiry’s request, including his refusal to release members’ records without their authorisation but also his decision to release to the inquiry the swipe card records of Ms Vance on security grounds without prior agreement, even though, as he said, he received advice from his security manager about the request and that the security manager was rightly concerned about his decision.

Mr Thorn also accepted responsibility for the administrative errors within the service which led to the wrongful disclosure of two items of information to the inquiry: the records from the Fairfax phone extension and the electronic file containing Mr Dunne’s emails, even though he had no personal involvement.

I am happy now to answer any questions the committee may have, including how the information came to be gathered and how it came to be mistakenly released.

Finlayson      Thank you very much. Can I take you just briefly to paragraph 37 of your statement and its subparagraph iv, and you have three bullet points there.
“The General Manager decided that the information relating to Ms Vance should also be disclosed on the basis that: …[she] was not an MP; the information related to a potential security breach; and it was not for the General Manager to form judgments in relation to that potential breach.” In relation to the first bullet point, do you accept that the whole concept of parliamentary privilege goes wider than members of Parliament, and that people who work in these premises have rights as well?

Stevenson We absolutely do, Mr Chair, and let me draw on our practices around access cards. I mentioned that Mr Thorn did take advice from both myself and the security manager, and we are very clear that with anyone working within the precincts the practice in relation to the access of those records is if it is lawfully requested, or, secondly, if it is authorised by the person to whom the records belong.

Finlayson So coming to that point about being lawfully requested, you say that the information related to a potential security breach; who alleged it was a security breach?

Stevenson Mr Chair, you heard from Mr Thorn his process around his decision-making in relation to that and how he arrived at his decision around thinking of it as a security breach.

Finlayson We'll just take you through it again. Who assesses security and on what basis?

Stevenson In this case the security manager and myself provided advice to Mr Thorn. Security is the responsibility of our security manager, and that advice was sought in this case, and Mr Thorn made his decision based on the advice from both myself and the security manager.

Finlayson But even if you go to the guiding principles, which are annexed to your statement, even if there is no particular policy on access cards—something I do find a bit odd—even if you go to the guiding principles, then I just have difficulty assessing how this particular matter came within the ambit of something that would justify the release of these records.

Stevenson I think Mr Thorn in his evidence, oral statement, details his process of arriving at his decision to release the access records of Ms Vance.

Finlayson Well, if you look—and I'm really just focusing on whether for the future, and obviously you too are looking at the adequacy of these—if you look at the principles governing access to recorded images, on page 14 of the policy, you will see that any images captured by the CCTV system “are only retrieved for the purpose of ensuring the safety and security of members,” and so. Surely those sorts of principles should apply to the release of access card records?

Stevenson I think we identified, Mr Chair, that this policy statement is remiss of details around a statement around the access cards, but from a practice perspective we are very clear that access records should only be released if they are lawfully requested or the individual’s authorisation has been provided.
And certainly it was not obtained here, so you fall back to level 1, “lawfully requested”. You can’t simply rely on someone coming in and asking for them who may be conducting an inquiry; it must go further than that. And your guiding principles would have to be the sort of the lode star by which you operate?

Absolutely.

Can I just ask a supplementary on that and then another question. The question of whether this was a security breach, what was the connection between Andrea Vance and it being a security breach?

The connection between Andrea Vance and a security breach?

You are saying that one of the reasons—

Hold on, Mr Robertson.

Can I just ask a question, Mr Chairman. The question is related to the judgment that Mr Thorn formed that this was a security matter. Is the question directed at an explanation of the judgment that Mr Thorn formed or is it directed at Mr Stevenson’s own view?

Well, we are looking at—you are looking at paragraph 37—

Yes.

—and Mr Stevenson’s role in it. So it wasn’t Mr Thorn operating in a vacuum. He was offering it in his connection with Mr Stevenson.

Mr Stevenson has already told us that he was part of providing that advice—

So it’s sort of teasing out propositions. If he can’t answer the question, he can’t answer it.

The question I’m getting at is: in making a judgment that you could release the access card information you have considered that the information related to a potential security breach. The information was about Andrea Vance. I’m trying to work out what security breach you believed she was guilty of.

Or not even the word “guilty”. What issue of security potentially involved Ms Vance?

Well, I think in this instance Mr Thorn believed that there was—the inquiry believed that there was a security breach.

Well, the question would be: did the inquiry, or the inquiry’s agent, allege that?

No.

So, just to clarify. I am specifically looking at the paragraph that the Chair was mentioning. There is a set of reasons here, and it says that the information related to a potential security breach. While the information itself may hold, and what was—were you confident that Andrea Vance had
a role in a security breach in this building, or was that the inquiry? Where did that come from?

Stevenson I go back to the advice that we provided Mr Thorn in the sense of, you know, the privacy of an individual, and demonstrating those two practices that I mentioned around the test of whether or not a record should be released. It was Mr Thorn who assessed the potential security breach in relation to Andrea Vance’s records.

Graham Just a supplementary on that. It seems to me that the critical thing is—I understand from you that at various stages you discussed with Mr Thorn this issue, including the issue of security breach. My question is: when you were discussing it with Mr Thorn did you discuss together what you took to be the nature of a security breach? It obviously isn’t physical security, it’s obviously not national security; it’s about information security only—

Stevenson Yes.

Graham —and if it is information security, then I would have thought that actually heightens the concern on the part of Parliamentary Service, because of the political sensitivities of an information breach, not diminishes.

Stevenson In answer to your question, the discussion I had with Mr Thorn was purely from a physical security perspective in relation to our principles and the fact that releasing records, access records, on anyone within the parliamentary precinct—there are two practice notes around that, which I have explained, and that I felt uncomfortable that this was a case that justified that release. That was Mr Thorn who put forward his version on how this potentially could be looked upon as a security breach, not me.

Graham Just to reinforce a point. It is not physical in the sense of the physical person—

Stevenson No.

Graham —when you say “physical” you mean the release of information that is of a domestic political character.

Stevenson Absolutely.

Graham So I would put it to you and Mr Thorn together as one unit that heightens the concern on the part of Parliamentary Service not to release it.

Stevenson It could be construed that way, yes.

Finlayson If you just look at the requirement about access to recorded images—and I sort of by analogy apply that to access records—you’re really looking at handing over such records for the purpose of investigating offences and identifying people who exhibit criminal and/or inappropriate behaviour. It’s a pretty high standard for CCTV recorded images, isn’t it?

Stevenson Yes, it is.

Robertson When Mr Thorn went to Australia you had a conversation with Wayne Eagleson after that, didn’t you, about Mr Dunne’s emails, is that right?
Stevenson Mr Eagleson came to me when I was acting in Geoff’s role to request that I speak to Mr Dunne’s office to understand if he was prepared to meet with the inquiry to discuss his emails.

Robertson And that was the only subject of the conversation you did end up having?

Stevenson Absolutely.

Parker Part of the purpose of this inquiry is to look at what went wrong. Something did go wrong. And the other is to give guidance to the Speaker and the House as to where we go forward. You have obviously been giving a lot of thought to these issues since the furore erupted. Have you had the opportunity to read the Clerk of the House’s submission saying that, really, there are privacy issues that arise from metadata; the two obvious ones in this case being 86 emails within a short period is in itself unusual, and the so-called metadata included a luncheon appointment dated at a relevant time. Do you, with the benefit of this inquiry and what’s gone on since, think that metadata should be treated the same as the content of emails?

Stevenson I think I would look to this committee’s input into whether or not that is the case or should be the case.

Parker You don’t have an opinion now? I would hope that the acting General Manager of Parliamentary Service—

Stevenson I believe that metadata should be treated similar to content.

Parker Thank you. And in respect of access information do I take it from your answer to Mr Robertson that you think that the release of access information ought to be in relation to genuine security concerns as the Chair has outlined in respect of CCTV footage?

Stevenson As I have mentioned, that has been a common practice on these precincts for many years, yes.

Parker So yes is the answer.

Stevenson Yes.

Finlayson I think it is common knowledge that you released access records in relation to the investigation of a criminal offence—the theft of an MP’s wallet or something. Have there been any subsequent requests for swipe card information that you’re aware of?

Stevenson We’ve had a question on this, and my recollection is that since 2008 there have been five occasions; two where the individual requested access card records; the criminal investigation that you mentioned; and the two recent, Mr Dunne’s and Andrea Vance’s records, although Mr Dunne’s were released with his consent.

Finlayson You accept that special sensitivity general principles should be adopted when dealing with journalists’ records, because they are not employees of members of Parliament and they are not employees of Parliamentary Service—

Stevenson Absolutely.
Finlayson —and they have every right to be working and present in these premises?

Stevenson Our practice is for everyone that works in these premises regardless of who they work for, which organisation, and whether they are an MP, the general practice principles apply to each and every person.

Collins Can you confirm, if you could, you were acting for a while in the role that Geoff Thorn had during all of this. Did you or anybody else that you are aware of elevate the issue to the Speaker? Mr Thorn said he didn’t. I just wonder if you did.

Stevenson No, and my involvement I’ve just provided the committee with was purely in setting up a meeting between Mr Dunne and the inquiry.

Banks Have you thought about any proposition that you would like to put to this committee in terms of moving forward for the reason that this committee is meeting is to make sure that these things don’t happen again? Have you thought about that?

Stevenson I’ve done more than think about it. I have actually put in place two pieces of work where I have contracted KPMG to provide the committee with a very robust, independent review of the time lines surrounding these events, and also to detail how the unauthorised access of the phone records and emails occurred. Secondly, the second part of that piece of work with KPMG is to look at the adequacy of our processes and procedures, and I think that that is clearly something that we as Parliamentary Service will need to focus on in coming months when we have got the recommendations from KPMG to ensure that this isolated—and I must stress isolated—incident doesn’t occur again.

Banks So in this particular case we have members of Parliament who work here in the Parliament doing parliamentary business, and we have members of the fourth estate who are here undertaking a role on behalf of the public—slightly different, I would have thought—private citizens not members of Parliament, private citizens, contractors doing work, earning a living in here. Do you see a difference between their rights and the rights of members of Parliament, or do you see it as the same?

Stevenson In answer to your question, you know, the Parliamentary Service’s purpose is to provide administrative support and services to those who work on the precinct, so we don’t recognise any difference between whether it is a person working in the press gallery versus a member of Parliament. Our policies and practices are consistent across all of those groups.

Robertson But you quite clearly did with Andrea Vance. You didn’t seek her consent; you did seek Mr Dunne’s consent?

Stevenson Personally—

Robertson I’m not talking about you personally; the service.

Stevenson I mean, as I said, that was a decision that Mr Thorn made based on—

Robertson You’ve just given a statement of principle, though, which is a very laudable one, but that clearly wasn’t what was followed in this case, was it?
For reasons which Mr Thorn has actually outlined, yes.

So here we have Mr Thorn sneaking around this place, getting information on Ms Vance for his inquiry, and the rest of that is history—

Sorry, Mr Henry?

Mr Henry. Mr Henry sneaking around getting information on Ms Vance, who happens to be a worker in this place, not a member of Parliament, doing her job, without her knowledge. I put it to you that this could be a proposition that we decide here at this committee—see if you could buy into this—that the only people who can come into this place and get information should be police officers with a warrant from the High Court, pursuing a criminal offence, as opposed to what we have: an unqualified public servant who made a botch of it, sneaking around this place, getting information illegally, in my view. How would you feel if this committee landed at a place where no access to members of Parliament or anyone else working here is available to any party, except the police operating under a warrant from the High Court, pursuing a criminal office?

I would seek guidance from the committee on that matter, but I think there is also the dimension around the accessing of an individual's information, which we also seek the committee’s guidance. But I think I’m very clear that the ownership issues with regard to information lie with the owner of the information rather than with the service as custodian or agent. I think there are two dimensions, actually. There is the dimension of providing information for a lawful purpose and there is providing information that an individual owns and requests.

So you think that anyone can be nominated by the 9th floor or by the Speaker to come into this place to undertake inquiries of a real or perceived offence without any constraint as they have in the past, or would you see it as a role for the police?

Look, again it is something that this committee obviously is considering, but in the case of the Henry inquiry I think we have heard from the former Parliamentary Service General Manager as to the way in which that inquiry was set up and how in hindsight he would see that there would need to be much more robust processes around the interaction between any inquiry and the service if they were requesting information and the basis of why they are requesting that information or why they are authorised to.

So you don’t sign up to the proposition that only the police, on a warrant from the High Court, should be able to come in here and pursue offences and get metadata, emails, videotape recordings, swipe card mechanism recordings at will?

Well, to a certain extent, Mr Banks, that happens today by our practices that I’ve mentioned. But there is that dimension about the ownership of information and understanding from the service that that lies with the member or their staff, Minister, or anyone working here. I would clearly like to get guidance on the protocols around how that would work going forward. We are very clear that, you know, this is an isolated incident which
occurred. This is not the way that Parliamentary Service operates normally. We work very formally, we take those requests very serious, and, as you can see, the amount of information that was being thrown at us by the inquiry administrator around the changes in the way that the phone records were to be collected clearly took us into a position where the formality of that process became quite informal. Therefore, I think, you know, we’ve got to step back and actually look at what makes sense given that, you know, as far as my time here this is the first instance that I have actually been involved in, and it is definitely not a regular occurrence.

Finlayson No, but, I guess, we are trying to tease out positions, because we want to provide some guidance to Parliamentary Service going forward. That’s fair enough. I understand exactly where you are coming from.

Collins Just in hindsight—and hindsight is a marvellous thing—I’m just wondering whether or not this is a matter where the involvement of the Speaker in these processes—either in hindsight or in the future for matters—is something that should be pursued rather than this situation that we find ourselves in. Was there some particular reason—

Stevenson Absolutely.

Collins —not to involve the Speaker that you are aware of?

Stevenson Not from my perspective. And in the case that we cited around the criminal investigation of an EA, it was the Speaker’s approval to release that information, so there was the involvement of the Speaker’s Office in that decision.

Collins Do you know why the Speaker wasn’t involved in this case?

Stevenson No, I’m not sure.

Finlayson Do you think there is a good understanding in Parliamentary Service about the difference between Parliament and the executive?

Stevenson Yes.

Finlayson Because in this Bowen House, for example, you’ve got one floor and one half of the floor might be Ministerial Services and the next, Parliamentary Services. We are all sort of tossed in here in a pretty haphazard way.

Robertson Looking for a new office, Chris?

Finlayson No, no, I’m very happy in my eyrie on the 19th floor of Bowen House. One wonders whether there is, in a practical sense, an understanding that Parliament is different from the executive, and that it is possible to be a member of the executive and a member of Parliament, and one has to be aware of the differences.

Stevenson I think there is a very strong understanding of that difference within the service.

Robertson Section 6 of their Act. Section 6 of their Act says they are not a branch of executive Government.

Finlayson Oh yes, but there is practical application on a day-to-day basis.
Collins Particularly if it is brought down to third tier, and that is one of the issues, I think, that we’ve worked out.

Finlayson That’s right. Well, that’s been very helpful. As I say, we are not on the hunt for finding a contempt or on a witch hunt. We are trying to get to the bottom of the matter so that we can do our bit to ensure this unhappy episode is not repeated. Unless members have other questions for Mr Stevenson and Mr Buchanan, I will thank you very much for your time.

Buchanan Can I make just a final observation, Mr Chairman, just recognising I act for both Mr Thorn and the service. I did not want to disrupt the flow of questioning, which was obviously helpful, but in relation to Mr Thorn’s evidence about his view that there was a potential security issue relating to, as he put it in his evidence, the misappropriation of a classified document—I think that was the evidence he gave—I would be very happy to prepare some further submissions for the committee drawing that evidence together and drawing out his explanation, together with the service’s—

Finlayson Yes, that would be helpful.

Buchanan —view both on how these things have been dealt with in the past and how the service intends to do it in future. Would that be helpful?

Parker Can I ask, through you, Mr Chair? I find you in a slightly difficult position in that regard, in that you have Mr Thorn advocating for a position which doesn’t seem to be the position of Parliamentary Service, and how can you do duty to both those masters? I don’t know how you can be assiduous in respect of both of those, so I wouldn’t find it very helpful.

Banks I don’t think it would be helpful.

Buchanan OK. I’ve been certainly conscious throughout of the potential conflict of interest. In fact, my engagement for Mr Thorn and for the service was at the request of Mr Speaker, and I would be happy to do that, if necessary. But if the committee would not think it helpful, then we’ll leave it.

Finlayson OK, well, your kind offer has been considered and rejected. Thank you.

Buchanan Thank you, sir.

Finlayson Yes, Dr Graham?

Graham No, it’s all right. The decision has just been made.

Finlayson No, I was just responding to your assiduous nodding. I was only trying to be inclusive—

Graham I would have thought we might have benefited—

Finlayson No, we won’t have the debate; we will just leave it at that.

Graham No.

Finlayson Mr O’Rourke, I’m conscious that you are fulfilling a major role as Mr Peters’ representative. Do you want to say anything?

O’Rourke No, it’s all right.
Finlayson: Thank you very much, everyone.

Conclusion of evidence
Appendix H

Corrected transcript of evidence 29 August 2013

Members
Hon Christopher Finlayson (Chairperson)
Hon David Parker (Deputy Chairperson)
Hon John Banks
Hon Gerry Brownlee
Hon Judith Collins
Dr Kennedy Graham
Chris Hipkins
Denis O’Rourke
Grant Robertson
Hon Tariana Turia

Witnesses
Claire Trevett, Chair, Parliamentary Press Gallery
Katie Bradford, Deputy Chair, Parliamentary Press Gallery
Jane Patterson, Gallery chief reporter, Radio New Zealand

Finlayson Good morning. Thank you very much for appearing. We are sorry you had to wait, but, as you know, there have been other witnesses. And I understand congratulations are in order for a special day yesterday.

Trevett Thank you.

Finlayson The way we do it is that we take the submissions as read, but if you want to emphasise points or have a preliminary statement, we are more than happy for you to do so.

Trevett I do have a preliminary statement. First, introductions. You probably all know Jane Patterson. She is here in her capacity as a former chair. Katie Bradford as my deputy chair—Katie Bradford Crozier. And behind us is Linda Clark, who has been our counsel, and in the interests of full disclosure of donations she has offered her services on a bona fide basis.

Finlayson Pro bono.

Trevett Pro bono. What did I say?

Robertson I’m sure it’s that as well. It will be that too.

Trevett You all knew what I meant.

[Interruption to check sound]

Trevett We are not here on behalf of Andrea Vance herself, as you know, except insofar as she is a member of the wider gallery. In terms of the leak and inquiry we know only what is already publicly available. So, rather, we are
here to speak to the gallery’s interests in the future as regards the information held on us. I will spare you a lecture on the freedom of the press—I know you are all aware of the concept regardless of your own views on the desirability of it sometimes. Should you require a refresher, I refer you to the Media Freedom Committee’s written submission to you, or, should you prefer, Mr Chair, to the apotheosis of constitutional virtue, Sir Geoffrey Palmer, who has also recently made comments on this issue.

Finlayson You had started so well.

Trevett I would like to begin by getting on record the gallery’s concern that an accredited journalist’s information, held by Parliamentary Service, was sought, accessed, and released for use in the Henry inquiry, which had no powers of compulsion, without the consent or even knowledge of the journalist involved. As our written submission goes into in some detail, we believe Parliamentary Service’s actions were contrary to both general principles relating to the role of the media and the legal protections in place which allow it to fulfil those duties. The most pertinent of these is the Evidence Act under which journalists cannot be compelled to produce information that identifies their sources other than in exceptional circumstances and under the orders of a High Court Judge. That provision to allow for the protection of sources also effectively amounts to a reverse duty on the journalist to protect those sources where they have undertaken to do so. It seems perverse and somewhat disturbing that the Parliamentary Service effectively overrode that protection which even a court can only do in limited circumstances, by producing a journalist’s information which could have the exact effect of revealing her source. In normal circumstances, the person or body seeking the information would have had to take the media outlet to court to get it released.

Even without that legal protection we were appalled by the apparently cavalier approach the Parliamentary Service took toward accessing and releasing the journalist’s information. We noted Parliamentary Service required some form of higher authorisation or personal consent before agreeing to the release of information relating to 74 others whose information it accessed in the inquiry. We note that the Henry inquiry did receive rather more than it asked for from Parliamentary Service, but it was of concern that the Henry inquiry does not state that any of the journalist’s own records, including the swipe records which it did request, were accessed and handed over to it while investigating the leak, despite listing in some detail the information it obtained and used on Ministers’ staff and public servants.

We note also that the Henry inquiry claimed it had abided by the principles of natural justice, an arguable claim given subsequent revelations. In terms of Parliamentary Service, Parliamentary Service has statutory and employer obligations to both MPs and staff. It has no such relationship with the press gallery, whose main relationship is directly with the Speaker. In addition, its special position means it is exempt from both the Official Information Act and the Privacy Act, except as regards its own employees. So, a journalist who recently sought information on whether his own swipe cards had ever
been accessed in the past was told it did not have to provide that information.

The relationship with Parliamentary Service is predominantly an administrative one in that it provides phone lines and swipe cards. This is a practical necessity of being based in Parliament for the journalists, and it is a point the Clerk also makes, saying Parliamentary Service is effectively simply an agent for both media and MPs in holding that information, and has no authority to release it of its own accord.

This puts us in a different position to our free-range colleagues in our normal newsrooms, whose information, such as phone logs, is held by our employers. Had the leak gone to a journalist outside Parliament, Parliamentary Services and the inquiry would have had no access to the journalist’s records except in the unlikely event that the employer agreed to release them or the courts ordered it.

As a general principle, we do not believe any of the information Parliamentary Service holds on us should be accessed or released without consent or in other circumstances in which our employer would be required to produce that information by law.

That said, we acknowledge there are responsibilities that come from working in Parliament. In that regard, there are different considerations that apply to the categories of information involved. We would like to see clearer criteria set out governing Parliamentary Service’s role in holding that information.

In terms of the phone records, we do not believe these should be released other than in circumstances our employers would have to release them. We note that the Clerk also again believes that Parliamentary Services is simply the agent which holds the information.

Swipe cards—again, we do not believe that swipe card records should be accessed and released without consent. There are responsibilities attached to our use of the cards, and we not above the law. However, even in circumstances where the police have a warrant for such information, there is an opportunity to object or appeal it in the courts. That right, especially where the purpose is to uncover a source, should not be overridden lightly by Parliament Service. When we sign for the card we agree to abide by the conditions against misuse of the cards. There is no mention on those forms we sign of the possibility the records will be accessed or released, and clearer guidance is needed of the circumstances in which this can occur for all parliamentary inhabitants.

It has been argued that the swipe card records were released because it was considered a security incident. We strongly object to Geoff Thorn’s decision making on this, which was nothing less than arbitrary. In his evidence he said there were no precedents for him to act on, but he was aware of previous incidents relating to the press gallery and the press gallery rules. Those incidents were unrelated to the recent incident, and, had he read further through the rules, Mr Thorn would also have seen that he
should refer all such matters to the Speaker. We also submit that Andrea Vance had not broken any of those rules. We believe in the process of acting without any precedent to guide him, he has set a dangerous precedent, and we would not like to see it used in future cases. We were also concerned the journalist’s full swipe card records for the period in the question were accessed, a situation which could have had ramifications for others, including other MPs, beyond the immediate inquiry.

Press gallery journalists’ emails and internet services are provided by our employers, rather than Parliamentary Service, so it has no access to our own email logs. Communications between journalists and Ministers may be obtained under the Official Information Act in the same way any other information may be obtained under the Official Information Act. We abide by that, and journalists have always been subject to the OIA in that regard, so we believe that was the threshold that should have been applied to the emails, as it was in the end.

In terms of the Inquiries Bill, we do note that the Prime Minister has referred to the Henry inquiry as a reason for the need of the Inquiries Bill, which would give greater powers to compel evidence in such ministerial or Government inquiries. We welcome that the Inquiries Bill does include the Evidence Act protections, such as that relating to protection of sources. However, we would be concerned if that meant an inquiry head could compel a journalist to disclose that information in the same way as a High Court judge. However, had the Inquiries Bill actually been in force during the Henry inquiry, we do not believe that the information would have been able to be used, because of those Evidence Act protections.

In terms of our general position for the future, Parliamentary Service, we believe, should immediately refer any requests for press gallery records to the Speaker, who should then consult with the affected journalist and gallery chair. We do not believe even the Speaker should have authority over the phone logs, which should only be released in circumstances, as I’ve said, in which our employer should have to release them, such as where forced to by the courts.

In terms of the swipe cards, the Speaker should consider what the purpose of the request is. If, like this, it is to use the journalist’s own information to try and uncover their source, the request should be refused outright and the person seeking that told to apply to the courts if they cannot get consent for it. The Speaker should consider the wider legal and constitutional protections that apply to journalists. If it is in relation to another incident, such as a criminal offence, the Speaker should weigh up the gravity of the offence and consult again with the affected journalist and gallery chair, giving an appropriate amount of time to seek legal advice. The information should only be accessed outside any protocol in cases of life and death.

We do not believe that the Speaker’s responsibility as regards members of the press gallery should be able to be delegated. On that issue, we note that the Privileges Committee is also looking at the policing protocol in Parliament. That came up as a result of an incident involving a press gallery
member, and we would appreciate the chance to submit on that on some occasion, at least in a written form, if further changes are proposed. We do note, and especially the provision that allows for the Speaker currently, in cases where the police do want to remove an accredited journalist from somewhere within Parliament’s grounds for something short of an arrest, yet they do have to get authorisation from the Speaker, but the Speaker is also allowed to delegate that back to a range of people, including the police themselves. We do not believe that authorisation is appropriate. That is a side issue.

Brownlee How would you categorise the information that Andrea Vance clearly used to publish her article about the GCSB?

Trevett It was classified as a sensitive document.

Brownlee No, we know that, and that’s important, but once she has that information, how do you categorise it? How do you describe it? What is it? Well, I’ll tell you where I’m going.

Trevett I don’t understand your question.

Brownlee I just find it slightly ironic that you say that the Parliamentary Service can hold records about movements, about phone calls, about everything else—quite rightly—but without the permission of the person whom that information concerns. They should not be releasing it or publishing it or anything else, because it is personal information to that person. Now, here, as you have just said, this was a classified document, clearly not in the public arena, not at that point for public consumption, but the content found its way to Andrea Vance. So what is the difference here?

Trevett Well, it wasn’t personal information. I presume whoever did pass it on to her did have lawful access to it and passed it on to her. I do not know who it came from, but I do note that it wasn’t of a classification in the area of national security. I also note that the Henry inquiry makes it quite clear that the onus on guarding that information is on the person who has original access to it to start with. And to be honest, it was, basically, just politically inconvenient timing. The Prime Minister himself had said when he was going to release it.

Brownlee Well, that’s a supposition on your part. But the issue, though of—you’ve just said it was handed to her by someone who lawfully had it or conveyed it to—

Trevett I said I assume it was. I don’t know who handed it to her.

Brownlee Yeah. But that’s exactly what happened here with the records, so I’m just trying to work out what the difference is. And there must be something that you can say quite categorically that makes a difference or creates that difference.

Trevett They’re completely different areas of information.

Brownlee No, they’re not.
They are. One was a report which was going to be released publicly a week later.

Can I have a supplementary on that? Isn’t that the role of the media? Isn’t that the central role of the media? So long as you haven’t done anything illegal, you can publish anything you want.

Can I ask a supplementary—

Hold on. I’m sure you do, but let her answer the question—if you can, if you want to.

One was a public report which was going to be released within a week. The rest of it is personal information. You know, the report could have been released under the Official Information Act, arguably, had it been sought.

Yep. So where is this—

And now personal information other than certain emails, if we don’t beware—

All right. So that’s exactly my question. So you characterise it as a scoop on information that was going to be in the public arena.

Yes.

Although that’s interesting too—that, you know, it’s a hindsight opinion in some ways. The bit I’m interested in, though, is where is a point where it might be reasonable for PSC to release those movement and telephone records to an investigator of some sort? Is there a type of investigation that it would be acceptable for those records to be released to?

It depends on the circumstances. This related to a journalist’s protection of the source. If they’re required to by the courts, then I’d assume they would have to hand it over, but they can’t just willy-nilly go handing that information out.

You’re not conceding to Mr Brownlee that just because the person who provides information to the press is acting improperly in respect of their duties, that you don’t have a right to your protection of your sources and to do with it as the fourth estate is expected to do with it?

Yes.

Thank you, because—

They’re different categories of information.

I wasn’t asserting anything. I was asking questions.

He was asking questions, actually.

David Parker just asked the question that I was going to ask.

I beg your pardon?

David Parker just asked the question I was going to ask.

Well, I just would like to clarify the position that you’ve proposed—that requests for information concerning journalists should always be made
through the Speaker to you, and then you should respond on that directly back to the Speaker. Would that cover all forms of information—phone logs, swipe cards, content of emails, and metadata, which includes data relating to journalists’ information to or from?

Trevett Information they hold on behalf of the journalists.

O’Rourke Any information?

Trevett So they wouldn’t have the content of our emails unless it was held by an MP or a Minister. So in terms of that, we think the OIA should apply in terms of the content of emails, because they don’t hold our email logs anyway. In terms of the phone logs and swipe card records, yes.

O’Rourke And metadata—anything?

Trevett It is metadata, the phone logs and the swipe cards, that’s all they currently hold on us.

O’Rourke Yes. So any kind of information at all without exception, you would expect to have to consent to?

Trevett Yes.

O’Rourke Just wanted to make that clear.

Robertson Just a supplementary on that—

Brownlee Could have a supplementary for that?

Robertson No, no, Gerry—

Finlayson Mr Robertson, then Mr Brownlee.

Brownlee Well—

Parker He gave him a supplementary first, Gerry. You didn’t hear it.

Brownlee Well, did he?

Finlayson Just spit it out. Get on with it.

Robertson Thank you very much, Mr Chair.

Brownlee There’s not that many voters here. I didn’t think you were that keen for the limelight.

Robertson No, always seeking the truth, Gerry. In reference to the release of the emails that, as you say, could have been dealt with under the OIA, would it be a reasonable expectation that when a decision was being taken to release a Minister’s emails or phone calls to and from somebody, that would involve releasing a journalist’s emails? That would be a reasonable expectation for the people making that decision, wouldn’t it?

Trevett If the emails held by the Minister—

Robertson —were released, it would—

Trevett Yes, if they otherwise met that. We’ve always known it’s—

Robertson And you would expect the people making that decision, Ministerial Services, Parliamentary Service, the Prime Minister’s Office, you would expect that
they would realise that that would involve the release of some information from a journalist?

Trevett Are you talking about this specific case or in general?

Robertson Yes, I am; in this specific case.

Trevett I don’t know without knowing what was in the emails, to be honest. I mean, that depends, as Judith Collins has argued, on the content whether they were within his capacity as a Minister or not.

Brownlee How would you treat swipe card information, emails specifically, telephone logs, and anything else that falls under the category of that first layer of metadata if it came into your possession as members of the press gallery and you felt was relevant to a story? Would you then turn around and phone the person or contact the person about whom that information related and ask if you would use it, or would it simply make its way into a story?

Trevett That would be up to individual media outlets and journalists.

Brownlee So you want us to have a policy but the gallery has no policy?

Trevett We don’t hold that information.

Brownlee No, no, that’s right—

Trevett It’s a matter of who releases it, not whom it is released to.

Brownlee Well, no, you are missing the point, I think. If it is released to you, do you have no duty to find out is it legally released to you, does the person whom it is about know you’ve got it, etc? Your duty stops with receipt?

Trevett It is leaked—I mean, if the information is for public interest, it is our responsibility to cover it. I mean, people make judgment calls on it if they receive, but we don’t hold the information ourselves. We’re not in control of releasing—

Brownlee Nor did the Henry inquiry.

Trevett No, but it got it from Parliamentary Service.

Brownlee Just as you would get it from someone.

Trevett Yes.

Graham Just to follow up on the questions from Grant Robertson and invite you to elaborate a bit more on it. If I understood you correctly, when focusing on emails, email exchange, if I understood you correctly you are saying there would be a distinction between an email between a Minister acting as a Minister and a journalist, and an MP and a journalist. So, the critical distinction, and in the former case it is OIA accessible, and in the latter case it’s not. So, if that’s the distinction, then the critical thing in the case of Mr Dunne and Ms Vance is what the capacity of Mr Dunne was when he was emailing Ms Vance, would you agree with that?

Trevett Yes.
Graham And was your understanding in these particular circumstances of the capacity of Mr Dunne when he was engaging in those emails with Ms Vance—as a Minister or as an MP?

Trevett I don’t know. I know what the content of the emails is.

Graham Do you know whether Ms Vance knew at the time which capacity Mr Dunne was acting in?

Trevett I haven’t spoken to Andrea Vance about the case in preparing for this submission.

Graham Do you think that that point is relevant to establish for the purposes of the committee’s inquiry?

Trevett Whether he was acting as an MP or a Minister?

Graham Correct.

Trevett Well, it is relevant, it’s just that I can’t answer which one he was acting in.

Graham No, no, I understand you can’t. I was just interested in your thought on that.

Parker Two questions. The first is just to follow up on Mr Brownlee’s point. I think Mr Brownlee—and correct if I’ve got this wrong, Gerry—was asking you whether you thought there was some duty of confidence that you received in respect of information because the person who provided you with the information might have had it improperly or owed a duty of confidence. And I don’t think that’s right. Your right and role as the fourth estate is to publish information of public interest that comes into your possession, irrespective of whether the person who gave it to you held it under a duty of confidence. Do you agree with that?

Trevett Yes, I think that was my answer—if it was in the public interest.

Brownlee That’s the answer I—

Finlayson Mr Brownlee was asking questions to tease out some interesting propositions.

Parker OK. Now, the other question of mine was a separate one and refers to your statement verbally and in your written submission, which I think is right about the—if information between a Minister and—

Finlayson Paragraph?

Parker Paragraph 33.6. If the information between a Minister and a journalist is publicly ascertainable through the Official Information Act, well, the fact that it comes from a journalist or from a Minister and is inconvenient to either the Minister or the journalist is irrelevant.

Trevett That’s right.

Parker Then you said, I think, in what you said to us verbally that that’s eventually what happened in this case. My understanding is that we still don’t know whether any of those emails were disclosable under the Official Information Act. We heard from Mr Henry, when you weren’t here, that he didn’t even
check or seek the Official Information Act route to obtain access to those emails. Did I misunderstand your answer—

Trevett My answer referred to the fact that a lot of media organisations have OIA’d those emails.

Parker You haven’t had an answer, have you?

Trevett Yes, we have had an answer, and we were told that it was within his capacity as an MP, not as a Minister.

Parker So you were told that—I mean, that’s very convenient, isn’t it, for someone to say “Oh, look, I sent this from my ministerial email address, but I don’t want to disclose it, therefore it was something that was sent in my personal capacity. How can that be right?

Collins But that’s not true, though.

Parker Well—

Finlayson No, we don’t want to get into arguments. We ask questions and then we can have consideration later on. Ask the question.

Parker OK, I’ll ask the question then. How do you think the authorities should—well, if an email was sent from or to a ministerial address, would it be enough for someone to say “Oh, you can’t see that because it came from my ministerial address or went to a ministerial address, I think it was private.”? Do you think that’s where it should end?

Trevett No, I think that the decision should be made on the content of the emails, not on the email address they were sent to. The replies we were given didn’t say it was because it went to a parliament.govt.nz email address instead of a Minister’s one.

Parker But at the moment it is an assertion that it’s private. A very convenient assertion, if you leaked a document from a ministerial drive. And I haven’t got proof that that’s the case. But if that was the case, it would be very convenient for a Minister to be able to just block it by saying “Oh, that was private.”

Trevett That’s true.

Parker So the way through that then, you would expect that at least—and I’m not saying in this instance, but you would expect in some situations because of the self-interest and preserving you, say, from the consequences of your own inappropriate actions, you might just say “Well, I don’t want to. I’m going to claim its private.” What’s the route through that?

Trevett Whose view? The Minister or the journalist?

Parker The Minister.

Collins She’s not a legal expert. Come on.

Finlayson You’re asking a question about—

Trevett My main point relating to—
With respect, Mr Chair, if you are going to take that point of order, I actually thought that we were actually here—

I’m not taking a point of order at all in this.

Well, then, be quiet.

I would like a question rather than an essay.

Mr Chairman, the gallery, I think, would be more expert in matters of using the Official Information Act than you or I. I am asking this witness, in terms of—

Well, ask it.

Well, I was, if you would—

Carry on.

Through you, Mr Chairman, where the gallery receives an initial rebuff, which is a claim of privacy, where the gallery is suspicious of whether that is an appropriate refusal to provide information, is your route then to appeal to the Ombudsman? Are you aware whether any appeal has been provided to the Ombudsman here?

I don’t know if any of the media outlets have, no. Someone may have but I not—

I’m struck with the—

Jane can answer. Jane.

I just know from our media organisation, we are either in the process or about to appeal to the Ombudsman based on the rejection that we had. That’s our only form of following something—

Judith Collins—

Well, no, just let me finish. Well, it might not be convenient to you, Mr Chair—

No, I just love succinct questions; to the point. We can continue after 9 o’clock by leave, if the committee wants to, but it is 10 to now.

I am struck with the fact that this inquiry got information that it shouldn’t have had access to, yet didn’t even follow to the end of the Official Information Act process whether it could have had access to information under the Official Information Act. Do you, in your capacity, have any opinion on that?

On whether the Henry inquiry should have, if it couldn’t get consent, tried to get it under the Official Information Act—is that what you’re saying?

Yes.

That’s up to the Henry inquiry, but we do believe the Official Information Act was the criteria that should have applied to those emails in the absence of consent or any other form of ability to compel it.
Collins: I just want to get an idea from you, Claire, is there any form of information that is received by journalists of the press gallery that you would consider to be off limits for publishing?

Trevett: Again, it is a matter of judgment for the individual media outlets concerned.

Collins: So the answer is no.

Trevett: Issues related to the children of Ministers or MPs might be one, but it is a matter of judgement for the media outlet.

Collins: So, basically, the answer is it’s a matter of judgment and there are no hard and fast rules?

Trevett: Well, there is basic journalists ethics, but I can’t answer for all media outlets from what they were doing in such cases—

Collins: No, so the answer is pretty much no.

Trevett: That’s the kind of issue where that judgment would come into effect.

Collins: So what about issues of national security?

Trevett: Issues of national security—again, I suspect it would be referred up to the editor—

Collins: Right.

O’Rourke: Just a couple of quick—

Trevett: —yes, and public interest would be weighed up in those cases.

O’Rourke: I just want to ask you in relation to 9.2 of your submission. You set out there four matters which you consider the Speaker should consider when getting a request. Wouldn’t there be a fifth one as to whether it would be in the public interest to obtain the information to assist an inquiry, with the exception of the source from which the journalist obtained the information?

Trevett: That’s up to the committee. It could be included, indeed. But, again, the Evidence Act—if the issue is the protection of sources, and the information source, the journalist’s own information which might reveal who that source is, there is a process to have that released, and it is through the courts.

O’Rourke: But there is a distinction between the information itself and where it came from—that’s what I’m getting at. So there’s a public interest in getting the information, even if the source is not revealed, and that would be a consideration for the Speaker.

Trevett: Such as a criminal investigation, I assume you are talking about here.

O’Rourke: Well, whatever. Anyway, I just put that to you. The other one is in relation to paragraph 17 of your submission. Are you submitting there that information about swipe card usage should not be kept or used at all?

Trevett: No, that’s not what we are submitting there. We are suggesting that a process be put in place to govern that.

Finlayson: Yes, looking at that, that’s right.
Trevett That just simply sets out what we do and don’t know about signing swipe card access, paragraph 17.

Brownlee If you had an incident of vandalism or theft inside the gallery offices themselves, would you expect initially the internal security people to have a look at these things first up, to access information about who came and went over a particular period of time?

Trevett I assume that would be a police matter.

Brownlee Well, it may not be. You don’t have to think back too far for a similar incident being handled exactly in the way I’m suggesting, internally.

Trevett Jane was the chair when that—

Patterson Which one are you referring to—Ian Llewellyn?

Brownlee I beg your pardon?

Patterson Are you referring to Ian Llewellyn?

Brownlee No, I’m not.

Trevett The EA? Or the press gallery wine?

Brownlee Well, in both cases, actually.

Patterson Well, the police, as far as I was aware—with the press gallery wine, the police were called immediately on the night. The police were involved from about 10 minutes after we became aware of it. And I wasn’t involved in the EA because that was an MP’s situation—

Trevett It didn’t involve the gallery.

Patterson And with Ian Llewellyn, the same thing. The police were notified immediately. So in both cases there was immediate consultation with the Speaker, the police, and we were worked with both of those organisations.

Brownlee So a clear test, in other words?

Patterson Yes.

Finlayson Now, I’m conscious—I’ll come back to you. Thank you for the comments you made about the agreement on policing which, as you know, was referred to this committee by the Speaker some time ago, but we thought we would not finalise that until we had dealt with this and so on. I am very happy to invite you to make a submission on that. There is only one other thing I was going to ask, and maybe, for the sake of completeness, I’m not even sure whether it will go anywhere. The swipe cards are not owned by the individuals who hold them but are owned by Parliamentary Service. Maybe your lawyer, in her pro bono role, or bona fide role, could prepare a memorandum for us on your view, provide some guidance to us on the ownership of information.

Trevett On swipe cards?

Finlayson On swipe cards. As I say, it may not go anywhere but I just want to see the issue.
Trevett       That issue was why we separated out the phone—
Finlayson    Exactly right.
Trevett       —records and the swipe card access.
Finlayson    Yes, and I’m just teasing it out. I’m not sure, I’m genuinely not sure
             whether I know the answer to that. But I would be interested in Linda’s
             view.
Brownlee     We should go back to keys.
Finlayson    Well, again, the same principle probably applies to keys—we don’t own
             them.
Brownlee     No one knows you’re using them!
Finlayson    Look, thank you very much. As I say, I will come back to you on the
             policing one. And very grateful for your very helpful submissions.
Trevett       Thank you for your time, as well.

            conclusion of evidence
Appendix I

Corrected transcript of evidence 4 September 2013

Members
Hon Christopher Finlayson (Chairperson)
Hon David Parker (Deputy Chairperson)
Hon Judith Collins
Hon Clayton Cosgrove
Dr Kennedy Graham
Hon Tim Groser
Chris Hipkins
Rt Hon Winston Peters
Hon Dr Nick Smith
Hon Anne Tolley

Witnesses
Mary Harris, Clerk of the House of Representatives
Renato Guzman, Manager (Legal Services), Office of the Clerk of the House of Representatives
Hon Peter Dunne MP
Dr Matthew Palmer, Counsel

Finlayson Good morning, everyone. We are going to start this morning’s hearing with the Clerk of the House. Thank you very much for attending, Ms Harris, and you have Mr Guzman with you. The way we do it is we can launch straight into questions, if you like, but you may wish briefly to say a few things before we begin.

Harris Thank you, Mr Chairman. I have a few brief remarks to make, but I am certainly not intending to read my submission. Just, firstly, to say that I wasn’t involved in the release of the data to the Henry inquiry, so, really, I can’t throw any light on what actually happened. But I have given considerable thought to why the particular turn of events may have occurred. I feel that Parliament has been let down, and that concerns me. I am concerned about what my office can do differently to make sure that we react in a different way in the future, and the knowledge that we have and the experience that we have can be fully brought to bear on these sorts of situations. My submission sets out what I believe is important in considering requests for information, some reflection on what may have led to an environment in the parliamentary agency where parliamentary independence was not of paramount consideration, and then just comment just a little bit on what we as the parliamentary agencies are doing about that.
In terms of what is important in considering information requests, I think there needs to be clarity about the nature of the inquiry to which an agency is responding, the powers of inquirers and the intersection with the powers of the House, and then who owns the information. The investigation of a potential offence—a serious breach of security, for instance—is quite different to dealing with a leak, a political inconvenience. At one end of the spectrum there are no particular powers, and the other may be dealing with the execution of a search warrant.

I've just had a bit of a look. There are a number of bodies that have statutory powers to inquire and obtain evidence that could be used in these circumstances. The new Inquiries Act provides powers, the Human Rights Commission has powers, the Broadcasting Standards Authority, the Ombudsman. I think there is a tendency to seek to use these powers without regard to the powers and immunities of the House. It is more a matter of unawareness and about the need to balance particular powers against parliamentary independence. I acknowledge that Parliament is not above the law, but there are certain powers there to protect its independence; in particular, the power to control its own operations and immunity from proceedings and Parliament being questioned—in other words, free speech. I think that the intersection of the law there with these powers and immunities is where guidance from this committee would be really useful to us.

In terms of access to information, it is complicated, because the Parliamentary Service holds information as an agent. There are many owners of that information and different access arrangements will apply.

The Clerk is the custodian of parliamentary proceedings on behalf of the House. Those proceedings are absolutely protected, but a large amount of them, in the electronic form, is held by the Parliamentary Service. The Parliamentary Service holds ministerial records for DIA, and they are subject to the Official Information Act. It also holds records not protected by privilege and not covered by the OIA, members’ representative and party records, members’ personal records, and then, finally, the administrative records of my office and the Parliamentary Service. While the OIA may apply in some context—or one particular context, really—it shouldn’t be used as a backdoor means of general access. I think, in terms of guidance, the Law Commission has done some very instructive thinking on this and it is worth reflecting on that. Also, the privacy principles—while the Privacy Act does not apply to the Parliamentary Service or members, those principles are really valuable in trying to establish some protocols.

I think it is the category of members’ representative and party information and their personal information which poses most difficulties. It is not protected as if it were proceedings in Parliament and it is not subject to the OIA regime, which has protections, and currently our thinking there is that we should work through a number of steps where there are requests for that sort of information. Firstly, recognising that the Parliamentary Service is an agent and it is holding that information as an agent, and it has no role to disclose that information.
Finlayson: Agent for whom?
Harris: For whoever is the owner of the information. It is variable. It may be Ministers, it may be members, it could be my office, it could be the Department of Internal Affairs. So there are a whole lot of different owners—

Finlayson: So you say it is not determined by who holds the card; like, my card is not owned by me—
Harris: No, I'm talking about electronic information.
Finlayson: Oh, generally?
Harris: Yes, not specifically card information. I think where there are requests for information, the permission of the owner should be sought. It is necessary to clarify a process for access to that information, and I believe the Parliamentary Service should not be the place that access is obtained; it should be the owner who provides the access. It is necessary to advise the owner of the information of the right to claim privilege and possibly have a representative present if they are not present themselves when any sort of search occurs or any examination of information. Where privilege is claimed, for the Clerk, or a representative of the Clerk, potentially, to be present to deal with any issues about proceedings in Parliament, and possibly to have the Speaker ultimately as the determiner of what is a proceeding in Parliament issue a certificate in a way that is suggested by the Law Commission.

I think the committee has the power—or has been given the exercise, really, of looking at a protocol, and working through the existing protocols would be informative. Also, you might want to know that the House has the power to issue guidelines for the Ombudsman, and they may be something that would become a standard more generally, because the Ombudsman does have quite significant powers to examine information where she is looking at a complaint about official information not being supplied.

There is one smaller, I think, more technical issue, and that is around metadata that it would be worthy of looking at. How should metadata be treated? Should it be treated in a different way from the content of an email or other associated documents? From my discussions with members I feel I have reached the conclusion that the metadata around emails at least can provide a lot of information about with whom members are meeting and talking and what they are meeting about, and that is information that probably shouldn't be released. Those sorts of things could be addressed in any protocol.

In terms of the environment that created the climate where an appreciation of parliamentary independence wasn't paramount, there are just a couple of risks that I want to touch on. The first is section 9 of the Parliamentary Service Act, which provides for the service to provide services beyond core parliamentary services—those core services required by the House and members. I think any further expansion there needs some more careful consideration, to the extent that it might dilute that primary purpose for the
Parliamentary Service and the original objective of independent agencies serving the Parliament and responsible to the Speaker. So section 9 does pose something of a risk.

I think it is also important to acknowledge that in the parliamentary environment our processes for dealing with information are probably not as well ingrained as in departments. Because the OIA doesn't cover most of the work that we do, we are not regularly dealing with Official Information Act requests. But we have given considerable thought to this area in the work that we did with the Law Commission review of the OIA, and I think my office probably needs to share that more widely with the Parliamentary Service so that we are aware of some of the difficulties, because they certainly were well canvassed in that work that we did for that review.

So, what are we doing to deal with those risks? You can have all the structures in place, but if the relationships and culture are not right, then they are not going to work. That is something about running an organisation. We are working on some informal governance arrangements that are really focused around getting greater collaboration, more sharing of strategy, and establishing some common outcomes for ourselves and the Parliamentary Service, with the aim of creating a culture where issues are shared and escalated across the agencies if necessary.

We might also take an opportunity to look to see whether there are some better information technology developments that we can harness to help with this. And because of that, we’ve looked at an advisory board that will also have, potentially, an IT specialist on it to help us deal with some of these issues. The idea of the advisory board is that it is an informal group that would be sponsored by the Speaker, and it would help us with our kind of strategic governance setting of outcomes. The Government sets outcomes for departments; we don’t have that process. It is informal at present, but I think it could potentially help with the risk of service expansion proposals under section 9. Even going as far as the independent determination of members’ services to ward off the criticism that is rife about the use of the privilege of exclusive cognisance which underpins parliamentary independence but is often criticised as being self-serving. If the services were set by an independent parliamentary body rather than one appointed by the Government for quite a different purpose and serviced by the Government, that would be a step ahead for Parliament. But that is really another matter, beyond the scope of this inquiry, so I will leave it at that.

Finally, I just think there is some work to do around rebuilding relationships with the media, and our approach to doing that is through the communications strategy that the Standing Orders Committee endorsed us developing, in 2011. There are quite a number of things that we are working on there.

Finlayson Thank you very much. There is nothing in what you’ve said that I have discerned that would necessitate a change to any of the legislation governing this place.
Harris  No, the work that we are doing around the advisory board, as I say, is informal. It is not part of our strict accountability structure, which is from the General Manager or myself to the Speaker, but it involves the Speaker. I think it is important that we keep the Speaker involved in that.

Collins  Thank you, Ms Harris, for your submission and also for this morning. Can I just ask you a couple of questions. The relationship between the General Manager of Parliamentary Service and you as Clerk of the House, could you just perhaps explain how that works and where the interactions are when it comes to matters of protocol or procedures, particularly relating to this sort of matter?

Harris  We are both appointed separately, with slightly different processes, but as chief executives reporting to the Speaker. We are responsible to the Speaker for the administration of our offices. I have more independence. The Speaker doesn’t direct me in the same way as he directs the services that the Parliamentary Service provides, but I don’t think that makes a huge difference to the way that I interact with the General Manager. Our practice with Mr Thorn was to meet every fortnight. Those were informal meetings where we would just discuss how anything was going and any issues that might affect both agencies.

We have, over a number of years, been increasing the number of what we call shared services. The Parliamentary Service now provides almost all of our IS, information services, in terms of our computer hardware, and we provide them with legal services. We are working on more shared policy services. There is quite a lot of common work, and what we are trying to do is formalise that a little bit through the advisory board.

Collins  So in this particular matter you weren’t advised of—

Harris  No.

Collins  —what was going to happen?

Harris  No. I became aware of it through an informal conversation at one of our fortnightly meetings when I was talking to the General Manager about the difficulties I was facing in the House with the position of the United Future party and some of the pressures I was coming under there. It was just an informal conversation that it came up then.

Collins  But that was after the events.

Harris  Yes. It was in June.

Collins  So this protocol that you are suggesting, that will be something that obviously will assist, you think, in the future?

Harris  I think so. To me it is unfortunate that Geoff has gone, because we were making a lot of progress on the shared services. This has had a bit of an impact on that, but we have to continue that work.

Parker  Can I begin by just endorsing your comments around metadata. There seems to have been some sort of false distinction being drawn between some classes of data and others when, as you rightly point out, the quantity
of data and what is in the subject line and what meetings may or may not be contained in the so-called metadata shows that there can be a confidence issue in respect of those. I don’t want to go any further on that. I want to explore this issue about—you said in your presentation that there is a difference between leaks which are political inconveniences and other matters. Am I right in saying that that is a reference to the fact that a political leak, or a leak which might be politically inconvenient, doesn’t give rise to security concerns that would justify access to logs about who is going in and out of buildings? Is that what you meant by that?

Harris  
Well, I think you have to look at what the situation is, the powers of the inquirer, and then balance that against the powers of the House. So you weigh up whether you’ve got a serious security issue or whether it is more of a, as I said in my submission, political—and so there’s going to be various grades of, you’ve got a spectrum, really.

Parker  
Mr Banks in talking to an earlier witness asked the witness whether the line should be a strict line as to criminality and that you should use official processes like warrants to get information, and then the normal privileges that—you know, people understand that if there is a warrant there, then the normal privileges apply to protect against self-incrimination or journalists’ freedoms. Do you have a view as to whether we should be drawing a bright line like that and say “Well, pursue your remedies, and if you haven’t got a legal remedy you can’t have it.”?

Harris  
Well, I don’t know that that is entirely helpful, because if you look at the kind of spectrum of persons that have powers and the nature of those powers, you can cover off a warrant procedure but you’ve still got a number of powers that don’t require a search warrant but are still quite extensive. Looking at the Ombudsman’s power to obtain information when she is investigating a complaint, well they are quite extensive and there is a direct conflict with the powers of the House there. My view is that there isn’t a way—I don’t believe that Parliament should, every time that sort of power is given, legislate for the powers of the House and try to sort that in legislation. I think parliamentary privilege should always speak. What that means is that there needs to be a way of working that out. To me it is getting together with the inquirer and sorting out a process to get through it.

Parker  
Well, there are a couple of points there that I would just like to tease out. One is in respect of the Ombudsman’s powers. If the Ombudsman were to receive a complaint in respect of information that was held by Parliamentary Service on behalf of DIA and/or the Minister, that would be dealt with by her through the Minister in the future, do you think, or do you think she should ever be able to come to Parliamentary Service and try to get an indirect route into the information?

Harris  
I don’t believe so. I can’t prevent her, obviously, approaching the Parliamentary Service, but, as I said, I think the process needs to be to look at who is the owner of the information that is the subject of the inquiry, and direct the inquiry there.
I agree with you in respect of the Ombudsman. In respect of your reference to Parliament's privileges, are you referring to parliamentary privilege in the narrow sense—that which is absolutely privileged—or are you referring to something broader than that, which is what are the rules surrounding what we do as members of Parliament in a way that enables us to go about our business without our parliamentary business being unduly looked into by people who shouldn’t have a right to what is private? Now, can I give you an example. If we had someone coming into an office making an allegation to a member of Parliament of corruption, we want that sort of thing to be brought out through the parliamentary system, and, you know, it can’t always start in Parliament. It has to actually start by someone raising it with a member of Parliament, who might raise it in Parliament and put it into the public in a way that is absolutely privileged. But the background step is the public interest and members of Parliament being able to go about their business privately. Now, I think there is an interest here in privacy that goes beyond absolute parliamentary privilege in that narrow definition of parliamentary proceedings which we nevertheless need to protect. Can I ask you that general question first, and then I have got a particular one. Do you agree with that?

Harris I see parliamentary proceedings as connected to the transaction of the business of the House, not limited to what goes on on the floor of the House or in a committee. As you know from Leigh it can include conversations, material that is provided that relates ultimately to something that is transacted in the House. But it does not include all of the things that members do.

Parker I agree that all of the things that parliamentarians do aren’t subject to absolute parliamentary privilege. In respect of those things that aren’t absolutely privileged—because I think we are pretty clear about what they are, absolute privilege—in respect of other issues, do we then just resort to, well, who owns the information, and if that is information that is private to the member of Parliament, including who is coming to visit them, including their emails and including their access records, that is the information of the member. Is that the appropriate way to look at it? And unless someone has a right to look through that, whether that information becomes public or not is a matter for the member to give consent to. And if the member doesn’t consent, shouldn’t the rule be that no one is entitled to it unless they’ve got a legal right to it and they can force it out of them?

Harris I tend to agree with you on that. That’s the way they handled it in Australia, and in the UK they’ve got slightly different arrangements, where, under their Data Protection Act, they do recognise members as a sort of entity—I think they call it a data controller or something like that. They actually recognise that members themselves have information that is not part of the proceedings. So there are varying ways of doing it. An informal way that involves a protocol does mean that ultimately there could be a test in court. The Australians follow a similar sort of idea, and they don’t release member information. But they say it’s not been tested in court.

Parker We could as a Privileges Committee opine to what we think the rule is—
Harris Yes.

Parker —rather than creating something that is justiciable. The last question is: if you extend that to other participants in the parliamentary process, like people who might be coming into Parliament to make an allegation of corruption, or a journalist who might have interactions with a member of Parliament—both of them have got access trails in our modern communications situation—do you have a view as to similar rules applying there? Who does that information belong to?

Harris To the extent that it is in the member’s possession it belongs to the member. Journalists have other protections that apply to them in terms of their sources and things like that.

Parker Well, can we just tease that out a bit, because I’m not sure that I think it is right that it is within the members of Parliament’s right. Obviously, if member of Parliament knows something, then he or she can say about it, but what about the visiting person making an allegation of corruption or the journalists chasing down information? Where is the principle that lies behind when and if that information ought to be disclosed?

Harris An individual will have protections under the Privacy Act, and I think that’s what would need to be relied on, and journalists have the same protections but they also have other protections around their sources.

Parker Well, is that right? Because we’ve only had a Privacy Act for the last 20 years, and I don’t think that the rights of protecting the way in which Parliament exercises its rights in order to protect democracy—because that is effectively what these things are about—they predate the Privacy Act. Could you give some thought as to what principle—I don’t want to catch you on the hop here, because we’ve been thinking about it and we haven’t got all the answers. I would quite like to see if we can articulate a principle. The MP one, I think, we have virtually agreed with—

Harris Yes. But it’s that step further.

Parker The journalist one, I think, arises from the rights and the importance of the fourth estate. The third party one, I don’t know.

Harris That is something we can certainly give some thought to and come back to it.

Smith In your submission you have rightly pointed out the important constitutional separation between the executive and the Parliament. Have you given consideration—given the natural tension that there will always be, and should be, between the institution of Parliament and the executive—as to whether it is appropriate for the telephone and information systems effectively being integrated completely together? Look, for instance, in the UK, where Ministers’ offices are quite separate, often separate departments. If we look at the US you have a complete constitutional separation of the executive from the Congress. Is it a matter where for convenience’s sake we have the same telephone system, so our journalists in the press gallery and Parliament and Ministers, and, actually, departmental staff who work in Ministers’ offices are all on the same telephone system and they are all on
the same IT system? And then you get a contractor, who doesn’t understand the finer points of constitutional propriety between the two, gets confused, doing an inquiry into what is Minister’s business. Does that raise the question as to whether we actually should have more of a firewall, effectively, between the Beehive and Parliament, and a separate telephone and information system that enables us to maintain that proper constitutional separation down into the system of IT that in today’s world has become so important?

Harris It certainly concerns me. In 1984 when it started out, the idea was that there would be a separation. Information technology development is such that I believe it is impractical—as I say, I think there are risks in the Parliamentary Service providing that service to Ministerial Services and for Ministers. From my point view, what started me addressing me it was around the priorities, because they are also providing an IT service to us, and where does the priority lie. My view is that it should lie with the House. But there is a tension there as well. While we all inhabit the same piece of real estate, it is probably impractical to have separate systems. Ministers and members change places—well, not too often, but reasonably often.

Smith It’s quite often, in my case.

Harris I hadn’t thought of that—sorry. So you don’t want to have to get a new phone every time something like that happens. It’s inconvenient. That’s something that could be looked at. But in terms of providing a service right across the parliamentary complex, the Parliamentary Service has endeavoured to provide services to the executive and Parliament, and I think that has caused some tensions.

Smith Have you had a look, though, internationally at Parliaments that have got the same dilemma of this healthy tension that exists between the executive and Parliament, and how many of them actually have the integrated system that we do? The informal contact I’ve had with parliamentary colleagues around the Commonwealth that have parliamentary systems like us is that, actually, they don’t have—

Harris Mostly they don’t.

Smith —Ministers’ systems right into the parliamentary system, and I wonder whether that has been at the core of what has gone so wrong in this instance.

Harris In fact, in Australia it is almost the other way round, the Government actually deals with members’ services through a department. They have a Parliamentary Service department. The service delivery of members’ services is mainly handled by their department of finance and administration, or something like that. So it is almost the opposite way round. Our position of having us all on the same piece of real estate creates some difficulties. That is why I think we maybe need to look at whether there are some smarter IT solutions to help kind of create that separation but without creating inconvenience, particularly for Ministers.
Smith  You see, if you take Ministers, we change payrolls. When you are a back-bench member of Parliament you run on a different pay, it comes through different rations, as compared with being a Minister. If it is important enough for your payroll, why would it not be as important as the sensitive information that ends up on your IT systems and, that being said, where there are far greater sensitivities?

Harris  That’s really the reason why I draw attention to section 9, because it was under section 9 that the services to Ministerial Services were developed. I think a bit more thought needs to go into the way in which section 9 of the Parliamentary Service Act is used.

Collins  Isn’t the situation, really, here, Ms Harris, that the IT and the need or the wish to be able to get information out and share information, whatever, that simply was not put beside the constitutional issues? So if this issue had been raised with you or with the Speaker—you can’t speak for the Speaker, obviously—if it had been raised with you as “This is what I’m being asked for. Is there any issue?”, is that something that you would have said “I feel there is an issue here.”, and taken some steps?

Harris  Well, those issues have to be raised with the Speaker, because section 9 can only be used—

Collins  But they weren’t.

Harris  Oh, in terms of this particular event, the Henry inquiry, no, they weren’t. I do raise those issues, but there are cost savings and economy of scale issues that I get told about, so—

Collins  No, no, I’m not thinking about generally; I’m thinking about this particular inquiry, this particular issue. If you had been alerted to it as the Clerk of the House, the person who has an understanding of the constitutional issues that my colleague Dr Smith has raised, what would you have said? Do you think hypothetically—

Harris  With the benefit of hindsight, what I would have done—because this is my usual practice—is the thing about “Well, do we have any precedents here?”. Well, we don’t’ have a direct precedent but we do have some protocols, particularly the search protocols that were developed very quickly to deal with the search of the Hon Taito Phillip Field’s office. I think it does provide some very good principles, and it provides for the Speaker to be informed at every step of the way. That, I hope, would have been my starting point, but that is with the benefit of hindsight.

Graham  On the issue that we have been in part focusing on, which is the common IT platform that Parliamentary Service gives to all of Parliament including the executive branch. As I understand it, that is a fairly recent development, somewhere around late 2011, and before that they were separate.

Harris  I’m not sure of the exact date. You would need to ask the Parliamentary Service.

Graham  Well, my understanding is that it was late 2011. And the rationale for that appears to be in the Parliamentary Service statement of intent for the 5-year
period 2012–17, and it explicitly rationalises that on the basis of economies of scale within tight financial constraints. I am just quoting from that statement: “The Service has continued to expand its partnerships with other agencies to realise economies of scale, particularly in the provision of its ICT network which it has expanded to include Ministerial offices. This network expansion reduced the cost of services overall and avoided the cost of a network upgrade for the service previously provided to Ministerial Offices. The Service is now looking to expand its provision of network services to other agencies on the precinct with a view to further reducing costs through achieving economies of scale. Over the next three years, the Service will continue to seek to share services where there are clear savings to be realised.” The whole rationale is focused in on economies of scale within tight financial constraints. This is late 2011, thereabouts. At that stage were you or anyone else to your knowledge brought in on any discussion about the constitutional implications of that change?

Harris If I recall rightly, I did have some informal discussions with the Speaker about the advisability of this. My view was to be careful, because there are issues in terms of—the way I approached it was around, because I wasn’t thinking of this particular circumstance, how do you determine priorities when you expand a service like that, when, if you look at section 7 or 8 of the Parliamentary Service Act, the service is there to provide services to the House and members. That was the approach I was taking, and those were my concerns at that time.

Graham I understand and accept it. You are effectively saying, however, that one has to be careful as opposed to not proceeding. I do see that this currently operative statement of intent still remains: “Over the next three years, the Service will continue to seek to share services where there are clear savings to be realised.” In light of what has happened, would you now advise that that not proceed?

Harris I think in 2011 that probably referred to more sharing with the Office of the Clerk. I don’t think there are risks there, because we are both agencies servicing Parliament. I think the work we are doing on shared services does not pose the same sorts of risks, so it is quite possible that that statement in the Parliamentary Service statement of intent refers to—

Graham It’s in the same paragraph that refers to Ministerial Services.

Harris The Parliamentary Service provides some services to the Parliamentary Counsel Office, but I’m not aware of any other expansion except in terms of the services that it provides for the Office of the Clerk.

Peters Could I ask you with respect to your bottom paragraph, page 2 and it goes on to page 3. You were saying that people might perceive themselves not to be acting as Ministers but as leaders or as MPs. What is their determinant factor here as to how they were acting? I’ll put it this way. If you were an MP you would not be sitting on, for example, a serious ministerial body getting this serious information like the GCSB and SIS and that sort of information, and then trying to say “Well, I’m just a simple MP and I’m not
therefore responsible like a Minister was.” What is the determinant factor that you would consider with respect to that paragraph you wrote?

Harris Well, I guess the way I would look at it is Ministers have particular responsibilities. They have warrants that cover particular portfolio areas. So that is where their responsibilities exist. The other things that they do are likely to be constituency things or they may have formal roles on, say, the Parliamentary Service Commission, which are not necessarily related to being a Minister. On the Intelligence and Security Committee you have to look at how that committee is established to determine whether or not a member may or may not be there in a ministerial capacity, I guess. I don’t think there is any actual dividing line, except to me you look, really, at: what are the Ministers’ portfolios; to what do they relate; and, if there is some other activity, well, then, it is quite possible that a Minister might be dealing with that other activity as a member or a party leader.

Peters You would accept that that committee is a pretty exclusive, privileged committee that most members of Cabinet would love to be on.

Harris But it does have members who are not Ministers on it. If you are talking about Mr Dunne and you look at his ministerial responsibilities, I don’t see a connection with the GCSB there or the SIS, really.

Parker Can I have a supplementary on that, Mr Chair? I think that’s perhaps a bit too narrow, because if you just look at it from a Minister’s warrant route, you are ignoring the fact that they see everyone else’s ministerial information when they sit on Cabinet committees. So the duty of confidence that arises from a Minister arises from the things that come to that person, not just through their own warrant but through what is their ministerial business, which is a lot broader than that.

Harris Yes. True. I mean, to a large extent I don’t think there is a dividing line. From a parliamentary point of view, I would take the member’s word on how did the member consider he or she was operating at the time. I don’t think there is a particular way of defining it.

Peters Do you not think that one of the determining factors is the nature of the information that they have acquired themselves, and that is—

Harris Well, it might be, as Mr Parker suggests, if it came through a Cabinet process. That relies on your being a Minister. But Ministers get information from other sources as well.

Peters Can I ask you this. In your second full paragraph on page 3, you talk about “A serious security breach involving a potential criminal offence may occasion the release of personal information to the police” etc, etc. “but leaks are rarely of this nature.” This is a bit of a chicken and egg situation, isn’t it? If you complain to the police that a serious crime has been committed and you itemise the statute that you allege, and it is, in some people’s view, a crime to leak a State secret. If the police position is “Well, show us the proof”, then where do you get them to actually do their duty by the statute that you are seeking action on? By chicken and egg I mean if you are going to wait until the police get involved before you demand this
information, you are then consigning to an outside institution a range of
decisions which should be the preserve of this House.

Harris

Criminal offences are investigated by the police, but the House has certain
powers to deal with other matters, and it has got extensive powers to
require its members to give information and others to give information. I
don’t see a conflict there. My point really is about when you are dealing with
this as someone who holds information you need to look at what is the
nature of the inquiry and what powers the inquirer has, and that is really
what I am getting at. In this instance, I think it is instructive that the
inquirer had very few powers—no powers, really. But if you were dealing
with the police, on the other hand, they may well come with a search
warrant, then we have protocols to deal with that and put some safeguards
in place for members to deal with it.

Peters

Just one last question. You go to your conclusion, which is that we have got
an evolving situation that there are certain risks that we have to manage into
the future. But it appears that there is no precedent for what you are saying
here. Now, I find it very hard to believe that there is no precedent, because
there has been precedent in this matter on the access of private information
of an MP or of a Minister. Therefore, why would you suggest that there is
no precedent?

Harris

I don’t think I’ve said there’s no precedent—

Peters

Hang on, you said “We don’t have any precedent here.” That is an exact
quote.

Harris

We haven’t confronted, as far as I know, an inquiry of that exact nature
where there are no powers but information is being sought. We have
confronted a number of different situations where there have been request
for information from members about themselves. We’ve confronted a
search warrant. There are relevant examples of similar sorts of things.
There’s probably not a direct precedent for this particular circumstance. To
me, that’s why I would always look at what else has happened and what can
I learn from those experiences, and they are important.

Peters

Can I just suggest that there is precedent. The fact is that you were sitting
there as a person on the committee some years ago when the very same
request was made of an MP. There was no demur back then from anybody.
No one in this whole institution thought that was wrong. So why is it not a
precedent now?

Harris

But that was, if I know what you are talking about, a committee that has
powers to call for persons, papers, and records, asking for information. This
was an inquiry, the Henry inquiry, with no powers. This committee has very
extensive powers, which no other select committee has. The Speaker has
similar powers if a select committee requests him to exercise them. This
committee has significant powers to call for persons, papers, and records
and to deal with people who don’t meet their requests. I say that is a
different situation.
But you would accept that it is within the Government’s control to have an inquiry with all the requisite powers that you say were absent in this inquiry?

It could have been. I think that, perhaps, is instructive.

Thank you.

Any other questions, folks? No. Thank you very much. It raises as many questions as you have answered. But that’s by the by.

Good afternoon. I think I should begin because I don’t think you were here at the opening hearing on 21 August. I began by making a brief statement under Standing Order 221, and the essence of it is that in this hearing what we are doing is focusing particularly on gathering information concerning the circumstances which led to the release of information from the parliamentary information and security systems to the authors of the inquiry. We are speaking to some of the key entities and individuals involved in this release, those who were involved in the request, those who responded. That was what we were doing on 21 August.

We have not been asked to investigate this matter as a contempt. Our overall aim is not to establish personal culpability or hold individuals to account; we are looking at this matter in detail only in so far as it is a practical example of how any policies and procedures which govern the access and release of information from parliamentary information and security systems are to be applied. We expect the information we gather will help inform us about where the main issues of this area lie, whether there are problems with the policies and the procedures themselves and, if so, what the gaps are, or whether the problem has arisen due to their application.

So we are quite a long way down the track, but it is helpful just to emphasise those points to you this afternoon as we begin this part of the committee’s deliberations. Over to you.

Thank you, Mr Chairman. I’m accompanied by Dr Matthew Palmer this afternoon. I would like to make a brief statement, then perhaps take some questions if that is acceptable.

Mr Chairman, the Henry inquiry established the dates of 27 March to 9 April as being the dates critical to its investigation. That inquiry was commissioned by the chief executives of the DPMC and the GCSB, but was to be carried out independently of both agencies. It was serviced by an official from the DPMC. The inquiry was established on 15 April 2013. My first meeting with Mr Henry was not until 23 May, when he advised me that he was interested in the period 27 March to 9 April only, and that events outside that period of time were not part of his inquiry.

The inquiry’s terms of reference included “reviewing communications and copying equipment and records, logbooks, and any other material considered relevant” of those who had access to the Kitteridge report.

Emails released by the DPMC show that on 8 May the inquiry requested cellphone records and external mail data for Ministers, but excluding me.
Ministerial Services then indicated that such information could be provided for the relevant Ministers, including me. However, Parliamentary Service asked for written confirmation from individual Ministers before authorising access to those records. I am unsure why I was excluded from the original list of members whose records the inquiry sought, while being on the list of names that Ministerial Services said information could be obtained for.

In any event, no request was ever made by Parliamentary Service, Ministerial Services, or the inquiry seeking authorisation to access my data. Yet when I met Mr Henry on 23 May he was able to tell me of the number of emails that Andrea Vance and I had exchanged between 27 March and 9 April. At the same meeting he sought my approval, which I declined on privacy grounds, to access the full content of those emails. I further advised him that I did not have Ms Vance’s approval to release her emails, a point which Mr Henry disputed. On 31 May he told me that under employment law there was no legal reason why I could not release her emails to me. Yet this contradicted his advice to me at the 23 May meeting that he needed my approval to access the content of my emails because Ministers were not considered to be employees and therefore were not subject to normal employment law. What is clear is that at no point did the inquiry have my authorisation to access even my email metadata, let alone the content of my emails.

Yet I now know from information released by the DPMC on 2 August that all my inwards and outwards email metadata to my parliamentary inbox, not just those relating to Ms Vance and me but all my email data for the period 22 March to 15 April, were provided to the inquiry and to the DPMC on 16 May. Moreover, the email trail released by the DPMC on 2 August shows that a file containing the full emails between Ms Vance and me had been provided by a Parliamentary Service contractor to the inquiry on 21 May. It was returned unopened, according to the inquiry, approximately 45 minutes later, following advice from Parliamentary Service that it had been forwarded in error. However, that file had also been available on the Parliamentary Service server for some 5 hours 35 minutes earlier that day. It is not clear whether the file was accessed during that time, and, if so, by whom.

I have written separately to Mr Speaker seeking his assurance that the emails were not accessed by any staff member of, or contracted to, the Parliamentary Service during that time, but I am yet to receive a reply.

Later in the 23 May meeting Mr Henry asked me about a telephone conversation with Ms Vance on the evening of 15 April, outside the period of time that he had previously nominated as being the only dates he was interested in. I am now aware that on 17 May Parliamentary Service had provided the inquiry and the DPMC with my full mobile phone records for the period 25 March to 25 April. At no point was my approval sought by anyone for access to those records.

On 31 May Mr Henry requested access to my office landline data, with specific reference to calls to Ms Vance’s office landline, office extension,
and mobile number for the period 27 March to 9 April. As I was overseas between 30 March and 7 April I was prepared to agree to this request. I distinctly recall his saying that he wanted them for the purposes of comparison. This strongly suggests to me he had already viewed Ms Vance’s phone records. Emails released by the DPMC on 2 August also make it clear Ms Vance’s phone records had been provided to the inquiry for a 3-month period. I do not know the period of time over which my records were provided.

At the same meeting Mr Henry requested my swipe card records for 7 April. I agreed, solely because I was returning to New Zealand that day so was nowhere near the parliamentary complex. I am now aware that my swipe card records were provided to the inquiry and the DPMC for 3 days—6 to 8 April.

In summary, therefore, my email metadata and mobile phone records were accessed without my approval, my swipe card details were provided for a period longer than that to which I had agreed, and while my landline records were accessed with my approval I do not know for what period of time or whether records of all my calls, other than those to Ms Vance, were handed over.

Overall, this is a very unsatisfactory situation for the following reasons. The protocols governing access to Ministers’ electronic data are, at best, unclear and, at worst, non-existent. In this instance, what existing protocols there were were clearly unknown to most of the agencies involved and applied in a very haphazard way.

The inquiry was established by the DPMC and the GCSB but conducted independently of both, yet critical data relating to me personally and presumably similar data relating to other persons of interest to the inquiry were either obtained by or provided to the DPMC apparently during the period of the inquiry. The DPMC says that it had not shared such data with any other organisation or entity including the Prime Minister or his office. It is not clear to me why the DPMC as one of the commissioning agencies of an apparently independent inquiry was being provided with data relevant to that inquiry apparently during the period of the inquiry.

Despite Mr Henry being specific that his focus was the period 27 March to 9 April, the information appears to have been provided on an almost random basis for a range of dates between at least 25 March and 25 April, and quite possibly wider. Again, the reason for this is unclear.

Little or no regard was given by the inquiry or any of the agencies involved to legal rights of privacy or confidence in terms of communications between members of Parliament and the general public, including constituents, journalists, political and confidential contacts, and others. In my case my email metadata and mobile phone records covered all my emails and phone calls for the period 22 March to 25 April—well beyond the scope and the period of interest identified by the inquiry.
Nor was there any regard for members of Parliament’s basic right to freedom of movement, speech, and privacy in and around the parliamentary precincts. It was, for example, for the inquiry to determine from my swipe card records the frequency of my visits to the toilet.

Under section 26 of the Parliamentary Service Act 2000, control and administration of the parliamentary precincts are vested with the Speaker. Even the police need a protocol with the Speaker to exercise policing powers within parliamentary precincts. The privileges and immunities of the House of Representatives to control parliamentary precincts, to ensure freedom of speech of members and, in particular, to resist the demands of executive Government are matters that are core to the constitutional position of Parliament. These principles were hard-fought and won in Westminster centuries ago and inherited by our House of Representatives. Mr Chairman, they must not be lightly cast away.

Finlayson Thank you very much. Just to confirm, you have read the statement by Mr Henry?

Dunne I saw via live stream the evidence that he gave.

[Discussion regarding supplying a copy of Mr Dunne’s statement]

Smith My question was in respect of the differences in the roles of Ministers as compared with members of Parliament. I think the points about the privacy and the separation of Parliamentary Service is absolutely well made, and there have clearly been breaches in that regard with both the press gallery and in respect of issues with MPs. But as a Minister of the Crown, one of the most important oaths that you swear is in respect of respecting the confidence of the ministerial process. I am interested as to your view as to whether in fact there is an important distinction between the rights as a member of Parliament, in terms of the privacy issues, as compared with someone who is a Government Minister.

Dunne I don’t think there is, actually. I think that in a number of instances, and those are referred to in my statement, contacts with members of the public, be they constituents, advisers, journalists, or otherwise—and this was really the point of principle on which I resigned—I think there is a right of confidentiality of those communications. I think there is a legitimate expectation on the part of those with whom the communication occurs that, unless otherwise acknowledged, those communications will not be disclosed to the public.

Smith But isn’t there an equally important public interest in the processes of Cabinet being able to occur with a high degree of confidence and confidentiality, particularly when they are dealing with issues as sensitive in relation to the SIS, and that where there are leaks of sensitive documents, and you are going to have an inquiry into where they occurred, surely it is an onus on Ministers, including those who at this table, that if there is going to be an inquiry it should not just be of ministerial staffers, of public servants, but it should actually be of Ministers as well? I understand there is the delicate differentiation between us who have roles as a member of
Parliament as a Minister and that they are separate, but in terms of roles as a Minister, shouldn’t it be within the ambit of Ministerial Services and the Prime Minister to be able to inquire, including into the actions of Ministers, for him to be able to have confidence as the person who is ultimately responsible for the integrity of Government?

Dunne Well, that’s really what this particular inquiry is about in determining where those boundaries should be. I’ve put forward a view as to where I see the boundary being drawn, and I think I would come down on the side of an absolute protection of the rights of communication. But, frankly, I’m not sitting around this committee table, I’m not hearing all of the evidence. That’s something that you’ve got to resolve ultimately and put in place, I think, clear rules. I think the clear lesson of this particular case has been that such rules as there were were unclear, that those who were charged with administering them didn’t quite know where the boundaries were, and that a lot of the problems that apparently occurred were as a result of that uncertainty. I think some greater clarity would be helpful.

Smith But could I be clear again. Do you accept there is any difference in the rights of a member of Parliament to absolute privacy as compared with a member of the executive, or are you putting to the Privileges Committee that those rules should be absolutely the same for both?

Dunne Well, I think where Ministers are concerned in relation to the exercise of their portfolio responsibility, there are obviously certain restrictions that need to apply, but we have a very diverse Parliament where members perform a variety of roles. I think to protect the right of communication as a member of Parliament, as a party leader—roles that are not ministerial—I think it is very important to protect those rights. If you start to draw absolute boundaries, then you will get to a position ultimately where no one will dare contact their member of Parliament for fear of the disclosure of the information that they provide to the member of Parliament, which I think would be something we would all say was utterly wrong.

Cosgrove Could I ask you to clarify—I haven’t got time to read your statement—that you declined, if I am correct, full access to the contents of your emails to the Henry inquiry. Am I correct in assuming that at no time you provided any emails or any part of emails to the Henry inquiry?

Dunne No, I offered Mr Henry—it would be around 31 May—access to an edited version of my emails but not the responses to them, and I took out references that were clearly not relevant to the matters he was interested in. And that’s recorded in his report.

Cosgrove You have articulated a principle of absolute privacy. I would ask you how you would reconcile that with providing—to me, the rule of absolute privacy is you either do or you don’t. You’ve provided an edited version. I suppose my question goes to this also. Presumably the only objective of the Henry inquiry was to ascertain the leak. If you had provided full information and full emails to the Henry inquiry, there was no interest, I assume, in the Henry inquiry publishing or making public any peripheral issues of any kind that may have been part of the emails you provided, had
you provided them in totality. So, in doing so, you could have cleared yourself by providing the full information and still protected the content of any other issues, parliamentary or otherwise, that may have formed part of that disclosure. But I just find it difficult to reconcile how you can, on the one hand, support absolute privacy as a principle, but provide edited narrative, on the other hand.

Dunne Well, I think the short answer to the question is twofold. Firstly, I think that’s getting a little bit beyond the scope of the inquiry. The second point, and substantively, I would say that I made the call because of his persistence, really, in simply saying “I must have access to the full emails.” He said that on a number of occasions. I was not prepared to go down that path for the reasons that I’ve stated publicly. I felt that a compromise was to give him access to a version of my emails which contained their main substance. He found that unsatisfactory, and that’s where the cards fell. The point I would make, Mr Cosgrove, is that in that instance the call was mine, because it was my material. But I think, as a general principle, I would come back to the absolute privacy of those communications.

Cosgrove So, is it your view that if you had taken the decision to provide Mr Henry with all the information he sought in respect of emails, that would have lifted any question over yourself as the person who potentially leaked?

Dunne I think that is getting into territory that is beyond the scope of the inquiry.

Finlayson I come back to my preliminary statement. We are focusing on—we are not setting out to find people guilty of contempt or anything—

Cosgrove Sure. And I wasn’t making any allegation; I was simply exploring the view.

Dunne Look, I can just make this observation. I didn’t make the call to withhold access lightly. Over 20 years ago I drafted what became the Privacy Act. I have a very strong interest in protecting personal privacy and making sure that information gathered about people is not misused. I guess in the end that principle, to my cost frankly, was the one that I fell back on.

Finlayson But it can’t be an absolutist principle. I don’t want to thrust these on you if you haven’t read them, but there is a security policy for parliamentary precincts and it deals with access to recorded images under the CCTV system that is operating around here. But even there that material can be released for security or safety questions or other permissible purposes—other legitimate purposes, i.e., recording images following a security or criminal incident. That information, which is in a similar category to access records, at least can be released in certain circumstances.

Dunne And I wouldn’t argue with that in those circumstances.

Cosgrove Just finally. So the rationale for you partially releasing material, as I understand your response, was purely motivated by Mr Henry’s persistence, would that be a good characterisation?

Dunne Yes. Correct.
Cosgrove So the principle of absolute privacy sort of went out the door because Henry put the pressure on. I agree with you your absolute principle, but I just have difficulty in reconciling your principle with your action.

Dunne No, I wouldn’t agree with your choice of words, and again I would say this is beyond the scope of the inquiry. But my point was simply that faced with someone who wouldn’t take no for an answer I tried to be magnanimous.

Parker I just want to continue with what Dr Smith was asking you about. It seems to me a little bit convenient for Ministers to be able to say “I obtained information in my capacity as a member of Parliament and therefore it is for me to decide what capacity I receive it in and who I disclose it to.” I suggest to you that is a little bit too general, that perhaps the way in which we should be looking at the ministerial information is whether that was legally disclosable through means other than the Henry inquiry, such as, for example, the Official Information Act.

Dunne I wouldn’t use the words that you used because I don’t think it is quite as all-encompassing as that. I think it comes down, as someone once said in another context, to the hats that people wear. People do wear a series of hats, and different hats at different times.

Parker If you are a Minister and you write emails on your ministerial computer that showed—and I’m not saying you did here, because you are not on trial—if you are a Minister and you wrote emails on your ministerial email account that showed that documents were being leaked to someone, that seems to me you can’t prevent access to that just because you happen to be a Minister and a member of Parliament.

Dunne No, and in that hypothetical instance I would agree with you. But the point I would make—again we are getting off the point—is that all of the emails in question were on the parliamentary server.

Parker Well—

Smith But there isn’t a Ministerial Service server.

Dunne They were on the parliamentary address—

Parker Well, let’s drill down on that. All ministerial emails are on the parliamentary address.

Dunne What I mean by that, Mr Parker, is the @parliament.govt address, not the @ministers.govt.

Smith But Ministers use that address too.

Dunne It is an interesting side issue.

Finlayson That is an interesting question that we may need to explore at some stage.

Parker Well, yes, but I would explore that now. If you are saying that all emails are—actually, can you repeat what you said then?

Dunne You made a suggestion that using your ministerial in-box to email sensitive data to whoever would be something that would be of concern. My retort
was to say that if you were particularising it to me, the emails in question were not sent from my ministerial in-box. That is all I was saying.

Parker But it would be a matter of fact, I would have thought, to be determined under the Official Information Act ultimately by the Ombudsman, as to whether a ministerial document—be it embarrassing or not to the person who didn’t want it disclosed—

Dunne That may well be so.

Parker Yes, OK. The second question. You said that you were surprised that information was coming from Parliamentary Service and DPMC—if I heard you correctly. Do you have any suspicions as to whom they might have given the information to?

Dunne No, I don’t. My point was simply that you had the two bodies, the GCSB and the DPMC, that commissioned an independent report. I was a little surprised to discover that some of the information that the inquiry was seeking—

Parker During the inquiry.

Dunne —during the inquiry was apparently being provided to both. No, I don’t have any—I am not making any allegation, neither do I have any suspicions as to whom and why, but it did strike me as a wee bit odd if you are having an independent report.

Parker Did you or your chief of staff, following those communications to DPMC, have representations from Mr Eagleson asking you to disclose more information?

Dunne No, and this is also not part of this inquiry.

Finlayson We’ve got to be very careful about what we are focusing on in terms of this stage of the inquiry. We are not conducting a hearing into contempt.

Parker I’m not, but Mr Eagleson was here giving evidence about what happened. He’s just said no, anyway, so he’s answered the question.

Finlayson Miss Collins.

Parker I have a third question.

Finlayson Hold on, you can just wait. I'll come back to you.

Collins Mr Dunne, thank you for your statement today. You’ve also made some comments in your statement alluding to a concern that this file of your details was held on the parliamentary server for 5 hours or whatever. You have also written to the chair of the committee regarding statements made by the Rt Hon Winston Peters alluding to seeing or knowing the contents of your emails. Do you have any further information—

Peters Point of order, Mr Chairman.

Finlayson Yes.

Peters Do you have any difficulty with this line of questioning, given your last comment to Mr Parker?
Finlayson Well, the question has not finished yet.
Peters No. Have you thus far determined this line of questioning, right, having regard to your last comment and your reference to others as to the nature of this inquiry—I am not in front of this committee, I am a member of the committee, and I would have thought given the speed with which you have acted in the past on such matters—
Finlayson No, I'm trying very carefully to listen, Mr Peters.
Peters You've written a letter back to Mr Dunne on this question, have you not?
Finlayson I have.
Peters Exactly. So which part of this question are you allowing in now?
Finlayson Well, it is a compound question, so—
Collins It is a compound question. Thank you, Mr Chair. Mr Dunne, do you have any concerns that other people than those who have been identified as part of the inquiry have had access to the information that you sought to claim as your own information?
Dunne Potentially yes, which is why I wrote, I think from memory, on around 7 August to the Speaker seeking assurances for that 5 hour 35 minute period that the data was not accessed by anyone at all.
Collins And you have received a reply or not?
Dunne I have not received a reply at this stage.
Finlayson Mr Parker, you have a supplementary and then your third question?
Parker No, it's really a point of order for us, really. We should be able to get that information for the purposes of our inquiry.
Finlayson Well, we can deal with that in committee later on.
Parker You made reference, and your colleague that you have next to you might be able to help you on this, about how we should be concerned to protect the freedoms of speech of Parliament including the ability of Parliament to maintain control of the precincts of Parliament, because this is important to the functioning of Parliament, holding the executive to account, and democracy. I agree with that. You were probably in the room, I think, at the back when I asked the Clerk of the House as to what is the principle that underlines this that goes beyond parliamentary privilege in the narrow sense, which is the absolute privilege including against defamation suit for what happens in the Chamber and some things that surround that. I would like to better understand, and wonder if you can help us articulate what it is these underlying freedoms of Parliament, our privileges of Parliament, that this sort of thing infringes.
Dunne Well, in part I have referred to it already with the comments regarding the protections around email correspondence. The second element, though, is the much more basic one of the swipe cards—the fact that is possible, and in this instance did happen, that people's movements in and around this complex were being traced, for reasons which were not to do with a
criminal matter, not to do matters of personal safety, but really to do with proving a theory, I think, impinges quite dramatically—

Parker And hand it to the executive.

Dunne And hand it to the executive, effectively, through the provisions of the DPMC. I made the comment that wasn’t flippant, because I have seen the records. Given the structure of Bowen House it is actually possible to record trips to the bathroom. Now, I find that deeply offensive, frankly, that someone should even be thinking they can gain access to information which might provide that level of detail to them about someone’s movements around the building. All of you should just think how often during the course of a day, so to speak, you would come in and out around this complex and use a swipe card.

Parker I’m not sure if it is important but I am wondering whether these rights to privacy or privileges of Parliament are privileges of individual members or privileges of the protection of Parliament. Are we trying to protect Parliament by protecting the rights of individual MPs or—

Dunne I would say that they are for the institution. So that is all of the members and people who are within the institution. My own view is that where you compromise those, it is where you are investigating a criminal matter or there is a matter of serious personal safety involved. I heard Mary Harris make the point about political matters, and I think this issue comes in—

Finlayson I’m sorry, I didn’t quite hear. You heard Mary Harris say what?

Dunne She made the distinction about matters that were inherently of a political nature. If I heard her correctly, she was saying that they shouldn’t really form part of the consideration. If that was the view she was expressing, I agree with her.

Parker So, how this is given effect to in practice, if someone wants this information, is that in respect of a member of Parliament it should be for the member of Parliament to give up their right to privacy and for no one else to do it on their behalf unless there is some legal right—a warrant.

Dunne In principle, yes.

Parker And in respect of journalists, have they got a separate right under the auspices of Parliament or under their rights as the fourth estate? Have you given any thought to that?

Dunne Well, I think journalists and other employees who are working within the complex ought to have a right or some confidence that their rights of free movement around the place aren’t going to be abused. I think by checking, particularly with journalists, who they are going to see, when they might be going to see them, where they might be going to see them, etc., etc., starts to get into this whole area of tracking what the fourth estate is up to.

Parker I agree with that. I’m interested in whether—because we are trying to articulate some principles here—that arises from Parliament’s privileges or that journalist’s privilege. I am not expecting an instant answer—
Dunne: My suspicion—not suspicion, my sense would be the rule should apply to the institution as a whole.

Parker: And that would then cover some third party coming to try to say that some corrupt things happening elsewhere in society—it’s not just journalists.

Dunne: Potentially, yes. The rights of people who are dealing with Parliament, yes.

Hipkins: Do you accept that it is the content of information rather than the means of storage or transmission that will determine whether or not it is in fact official information?

Dunne: Yes, I think that is correct.

Hipkins: You made the distinction earlier on that you had used a parliamentary email address not a ministerial email address in the exchange of information. Do you think that by virtue of using a parliamentary address rather than a ministerial one, it made it less official information than if it had been exchanged using a different email address?

Dunne: I think the test for official information is whether it is being held by a Minister in a ministerial capacity. The vehicle by which it is being transmitted or stored is really secondary.

Hipkins: The reason I get into this is because if Ministers have Gmail accounts or Hotmail accounts or something that is completely off the grid and used that to exchange Cabinet papers or to discuss Cabinet papers, that would still meet the test of being official information because it is held by them and they are Ministers.

Dunne: Yes.

Hipkins: So the transmission mechanism, whether it is your parliamentary address or your ministerial address, does not matter.

Dunne: It is the nature of the responsibility that is being exercised.

Hipkins: The reason that I get to this is because ultimately someone needs to make the judgment as to whether it is a parliamentary piece of information or a ministerial piece of information. And then if it is a ministerial piece of information, whether there are grounds to withhold it or whether it should be released. The ultimate arbiter of that is the Ombudsman—

Dunne: Correct.

Hipkins: —in the event of complaint.

Finlayson: In an official information sense.

Dunne: Yes.

Hipkins: In an official information sense. And in making those judgments should a third party—most notably the Ombudsman—be able to access, say, your parliamentary email address to assess whether you have been transmitting information through that, that could be deemed to be official information.
Look, I’m not going to comment on that. I think that’s really a matter between the Ombudsman and the parliamentary authorities. And the Ombudsman is an officer of Parliament, anyway.

And he’s not here to give legal advice.

I have just the one question, and forgive me if you have addressed it, but it remains unclear in my mind. At the beginning of your testimony you say you were unsure why you were excluded from the original list of Ministers whose records the inquiry sought while appearing on the list of the names of the Ministerial Services subsequently, which you were on. In your perception then and now was that, in your mind, because of your particular status as a Minister outside Cabinet? Did you raise the matter then or subsequently to discuss it with anybody to clarify that?

I think it is probably more a case of oversight, to be frank. I didn’t become aware of this until well after the events. A lot of the information started to become available, I think, in the last month or so. The answer to your second part of the question is no, I didn’t because it was historical at that point.

So at that stage you did not see any distinction between yourself as a Minister outside Cabinet and the other Cabinet Ministers.

No, no. My assumption—and I put that point in the statement simply, I guess, to highlight a point which I made later, which was that there was inconsistency. I think that in that particular instance they just didn’t line up the records the right way. That’s my assumption, and I don’t think it is anything more sinister than that. It is just symptomatic of a pretty shoddy, haphazard approach, that’s all.

The last sentence in paragraph 4 and then the first sentence in paragraph 5 which says: “…at no point did the Inquiry have my authorisation” etc., etc. At what time did you advise the Prime Minister that this was a case—

Sorry?

I want to know, because we are looking at the process here—

Is this the first page, Mr Peters?

Yes.

What’s the passage—I’m sorry.

I’m with you up to—ask the question again.

If you look at your submission which you’ve read out with some verbals added to it as well. Paragraph 4, the last sentence, which Mr Graham has raised with you, and then the first sentence in paragraph 5. What is clear is that “…at no point did the Inquiry have my authorisation” etc., etc. My point is that the Prime Minister had put out an edict to all Ministers. When did you become aware that it applied to you, and when did you demur?

That’s not really part of the inquiry, Mr Peters.
Peters    With respect, Mr Chairman will decide that, not you. I’m asking you—
          because we want to know about the process of proper or improper
          disclosure, which is what we are talking about now.

Finlayson  What we are trying to do is that we are not holding individuals to account,
          we are not investigating, having a rehash of the Henry inquiry—

Peters    No, no, I’m not—

Finlayson  What we are trying to do is look forward—

Peters    I’m trying to find out when it was that his rights were infringed.

Finlayson  I’m not trying to chop you off at the pass, I am just trying to focus on my
          statement at the start of the hearing.

Parker    Speaking to the point of order. Mr Peters’ questions aren’t going to what
          was disclosed or not by Mr Dunne. His questions are going to what were
          disclosed of Mr Dunne’s emails by Parliamentary Service, and that is exactly
          what this inquiry is about.

Dunne     Well, I have set out in the statement the dates that I’m aware of where
          certain things happened. In respect of Mr Peters’ question, if you are asking
          me when was I asked to provide the full content of the emails—

Peters    No, no, I’m asking when did you become aware that the Prime Minister’s
          edict to Ministers, which you said didn’t come to you—when did you
          become aware that it was relevant to you?

Dunne     Oh, that would have been around 30 or 31 May.

Peters    And you contacted the Prime Minister then and said, look, it doesn’t apply
          to me.

Dunne     No, I did not.

Peters    You didn’t say anything at all.

Dunne     I did not—I mean, again, we are getting into detail that is probably beyond
          the scope of the inquiry. If you will bear with me one moment—

Peters    Well, we will decide on what the scope of the inquiry is, with respect. You
          are a witness here.

Dunne     Mr Peters, I’m actually trying to be helpful, and if you will just bear with me
          one moment, I can give you some information that may be of assistance.

Peters    And I won’t be lectured to by you, either.

Dunne     In fact, Mr Peters, I can tell you that on 22 May I was asked to agree to the
          release of the emails. I indicated that the answer to that question would be
          no. That led to the meeting with Mr Henry on 23 May, which I’ve referred
          to.

Peters    So, 22 May. Who asked you?

Dunne     It came via my chief of staff.

Peters    Who asked him?
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Dunne I believe he had had an inquiry from Mr Eagleson.

Peters OK. But you did not, in any way, formally or informally, advise the Prime Minister that you did not agree.

Dunne I did not discuss this issue with the Prime Minister at the time, no.

Peters You said, and these are your words, “compromise those where there are criminal matters involved”—that is, fundamental rights that you were asserting.

Finlayson What page are you referring to, Mr Peters?

Peters No, I'm not. He said it in his oral evidence. I wrote it down.

Finlayson Can you elaborate on—

Dunne I’m not sure what the question is.

Peters Well, my question is this. It was in relation to a question where something might shade into criminality, and you said in a conclusion “Well, those might be compromised where there are criminal matters involved.”

Dunne What I think I was referring to was where there was a criminal investigation—this was about access to records—under way or—

Finlayson Was that in response to my question about CCTV footage?

Dunne Yes, or matters relating to personal safety.

Peters Should, whatever the rule we eventually evolve here, we have as our objective to get at the truth?

Dunne Well, I think that probably underpins all rules, doesn’t it?

Peters Well, do you think that the rights of Ministers in all cases are identical to the rights of journalists?

Dunne Differing people have differing rights and differing circumstances.

Peters Well, can a Minister’s rights be compromised by their actions?

Dunne This is hypothetical, Mr Peters, and I’m not really going to comment on that.

Graham Just a supplementary on one of the previous questions where you responded that through your chief of staff the request had come from Mr Eagleson. In light of your earlier comment that you were surprised that the head of DPMC, who was a co-commissioner, was none the less actively receiving information during the inquiry, does it strike you as odd that in fact it was not just DPMC but, actually, the Prime Minister’s office that was actively involved in this?

Dunne No, I think the background to that situation was very particular. The Prime Minister’s office had given approval on behalf of National Ministers for the release of or access to certain information. They had declined to give approval in respect of both Mr Banks and me because we were not members of the National Party. So, the courtesy, if you like, was to come to
us to say “Well, we can’t do it for you. What’s your answer?”, and I gave my answer.

Peters Just to put on the record, because you did answer this question from Mr Cosgrove, but in terms of future process or the fact of the issues that we are looking at now, is it to be understood by us that there is nothing in those redacted and disclosed emails or the non-disclosed emails that will have any bearing on the Henry inquiry or this hearing?

Finlayson Not relevant.

Dunne This is outside the scope, Mr Chairman, and—

Finlayson It is outside the scope of the inquiry.

Dunne —given that my stand was made about privacy, to start discussing the emails somewhat compromises that.

Peters Well, he did say—

Finlayson I’ve ruled it is outside the scope. Not relevant.

Peters Well, you can say that, but I don’t happen to agree with you and I want to contest it. We’re not having you sit here like some legal potentate and make the rules up as you go along.

Finlayson No, but I’ve chaired—next question.

Peters Because it’s already been admitted by the chair—

Finlayson The chair determines the questions of relevance.

Peters —that he could talk about the redacted emails, so it is inside the scope, is it not, already?

Finlayson No.

Peters Well, I will ask you again. Are you saying that nothing you’ve done whatsoever that you’ve not disclosed would have, if disclosed, a bearing on this inquiry, or the Henry inquiry?

Finlayson No, don’t answer that. It’s all irrelevant. We are now getting into the Henry inquiry, take 2.

Peters Mr Peters, I’m answering questions related to the purposes of this inquiry. I’m not going to go beyond those.

Dunne Can you answer this question then? Is it your contention that there should never have been an inquiry in the first place because you didn’t make the leak?

Dunne I can repeat my answer or?

Finlayson No, no. We are doing a job that the Henry inquiry botched up, Mr Chairman.

Finlayson No, that’s why I read the statement under Standing Order 221, not as a legal potentate but as the chair, so that we know exactly where we are headed. You can ask as many questions along those lines as you like, but they are outside the scope of the inquiry, and at the end of the day I have to, and
this committee has to, do what the House has asked us to do, and I refer to the reference—

Peters Can I ask you then, why did you allow any questions on the—

Finlayson Order!

Peters —redacted emails, if you want to be consistent?

Finlayson I am neither a legal potentate nor a witness, and the reference to this committee by the Speaker is very clear, and I suggest you read it.

Peters I've read it.

Finlayson Oh, that’s great.

Peters So why did you allow the redacted email conversation?

Collins He doesn’t have to answer that.

Peters You do have to. If you want to be consistent—

Finlayson I’m not entering into some kind of Socratic dialogue with you.

Peters —and have respect in a fairly minded chairmanship you have to answer questions like that.

Finlayson Are there any other questions?

Cosgrove The witness is free to answer any questions though, Mr Chair, if they so choose, in the interests of truth, as Mr Dunne referred to.

Finlayson Yes, but I am concerned with questions of relevance and with focusing on the future processes, particularly in relation to journalists, which seems to be common ground here that something went pretty badly wrong, and other such matters and some important matters of principle have arisen—

Peters Well, that’s true. I asked him about whether or not he thought his rights were the same as a journalist’s. He did not agree, so I asked him could those rights be compromised by behaviour, whereupon he appealed to you, and you agreed with him.

Smith But it would be awfully odd, Mr Chairman, for an inquiry into the inappropriate disclosure of information to then itself, as a committee, to get into the business of breaching the very privacy rules that we are trying to protect Parliament against.

Finlayson Exactly.

Peters With respect, this matter began at a select committee where your colleagues did their best to shut down the inquiry back then—a different committee. Now you are trying to get away with it in front the public now. You are not going to succeed for the very reasons that one of your fellow colleagues mentioned at the start of this very hearing.

Finlayson Well, I’ve ruled on the question of the relevancy of these questions, and that is the end of it.
Can I just ask a simple question? Mr Dunne, thank you for appearing here today. When you talked about the information that went to the DPMC, and you were surprised by that, do you know who it went to?

No, I don’t. It just went to the organisation.

Thank you very much, Mr Dunne, Dr Palmer. Thank you for your helpful contribution.

Thank you.

*conclusion of evidence*
Question of privilege regarding use of intrusive powers within the parliamentary precinct

Report of the Privileges Committee

Fiftieth Parliament
(Hon Christopher Finlayson QC, Chairperson)
July 2014

Presented to the House of Representatives
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Question of privilege regarding use of intrusive powers within the parliamentary precinct

Summary of recommendations

We recommend that the House adopt the Protocol for release of information from parliamentary information and security systems (page 14).

We recommend that the Government update the Cabinet Manual to reflect that where an inquiry is established under the Inquiries Act 2013, the exercise of powers in relation to members of Parliament and the parliamentary agencies will require recognition of parliamentary privilege; and develop some standard terms of reference for use in any inquiry where it appears that powers may be exercised in relation to members and the parliamentary agencies (page 16).
1 Introduction

On 11 July 2013 the Speaker ruled that a question of privilege arose from issues raised in a letter to him from Dr Russel Norman. The issues related to the exercise of intrusive powers against members, and the release of information from parliamentary information and security systems. The question consequently stood referred to this committee. The ruling is appended to this report.

The particular incident involved the release of information held on parliamentary information systems to the author of Inquiry into the unauthorised release of information relating to the GCSB compliance review report: The leak of the Kitteridge report. We were not asked to investigate this matter as a contempt of privilege. Nor were we asked to determine who was responsible for the release. Instead, we were tasked with examining the particular incident involving the release of information from parliamentary information and security systems that led to the question of privilege being referred, and the more general issue of appropriate principles for access to and release of information from parliamentary information and security systems.

In December 2013 we presented to the House our interim report on this question of privilege. Our interim report set out a summary of the facts surrounding the particular incident leading to the referral, which we ascertained following a request for submissions from interested parties and the hearing of oral evidence.

We also set out in our interim report key issues highlighted by the incident, which we signalled we would need to consider further when developing our guidance in this area. The incident raised important questions about protecting the privileges and immunities of the House, including the freedom of speech of members, and the ability of Parliament to maintain control within its precincts.

We have now considered these issues further, and set out in this report the principles and protocol we recommend should apply to such requests for information from parliamentary information and security systems.
2 Considerations relating to release of information

While on its face the question of who should have access to information held on parliamentary information and security systems, and when, may seem straightforward, it is not. The constitutional status of Parliament as an institution, the variety of roles that members of Parliament have, and the different types of information the systems contain, must all be considered carefully.

The complexity is exacerbated by the operating arrangements which exist in the New Zealand Parliament, where the Parliamentary Service is responsible for administering all information systems relating to members (including where members are acting in a Ministerial capacity, as part of the Executive), and all information for agencies operating in the parliamentary complex. It is not simple to discern which material held on the systems relates primarily to Parliament, which relates primarily to the Executive, and which relates primarily to other matters, such as parliamentary agencies, or individuals on the complex acting in a personal capacity.

Proceedings in Parliament

One important category of parliamentary information is proceedings in Parliament. Proceedings in Parliament are comprised of material which is integral of the work of the Parliament itself. These proceedings are protected by parliamentary privilege; the set of powers, rights, and immunities which exist to ensure that Parliament can function effectively. These privileges are grounded in the notion that Parliament must be able to exercise control of its own proceedings, and that the work of the Parliament must be free from external interference or influence. Proceedings in Parliament must not be inadvertently released, or otherwise dealt with, in a way that does not accord with the protection afforded them by parliamentary privilege. Proceedings protected by parliamentary privilege must never be casually released.

The protections accorded from parliamentary privilege belong to Parliament as an institution, not its individual members. While members of Parliament often experience the protection of privilege, it is notable that not only parliamentarians generate, receive, or possess, proceedings in Parliament. Parliamentary proceedings can comprise information generated by, for example, ministerial staff, or staff specifically assisting Parliament or parliamentarians to carry out their parliamentary duties. Whether material is protected by parliamentary privilege is determined by the content and purpose of the information, not by who received it or generated it.

Other parliamentary information

Proceedings in Parliament are only one of the types of information contained in the parliamentary information and security systems. The systems also contain a range of other types of information which is not protected by parliamentary privilege. While this information is not entitled to the same level of protection as proceedings in Parliament, release of it still needs to be considered carefully, and in the context of how it contributes to a functioning democracy.
Information generated or received by Members

Not all information created, received, or possessed by members of Parliament will be a proceeding in Parliament. Aside from their duties as parliamentarians, members may also have roles in the Executive as Ministers, as electorate representatives, as political party members, and as private individuals. Parliamentary information and security systems include information generated for or by members in each of these capacities. The suitable level of protection for each of these different sets of information may differ, according to the nature of the information.

However, the office to which members are elected has a considerable amount of legal freedom guaranteed to it so that members themselves have the capacity to carry out the duties of the office as they see fit.1 While not all information generated, received, or possessed by members will be entitled to the high level of protection accorded to proceedings in Parliament, it will still require protection from arbitrary release, if members are to be able to carry out the duties of their office.

Information relating to the media

Given the facts of the incident that led to the referral of this question, we have considered closely the special status of the media, and how information held on parliamentary security and information systems which relates to them should be treated. The media have an important role in ensuring transparency and accountability in our democracy; they are the primary conduit through which the public receive information about Parliament and the Executive. Their ability to act as the “fourth estate” should not be hindered by offhand release of information relating to them as they undertake this function.

Other parliamentary information

There is a wealth of other parliamentary information also held on parliamentary information and security systems. For example, the staff or others operating in the parliamentary precinct may generate information, held on these systems, which relates to only their particular organisation, or to matters unrelated to Parliament directly. Again, this information will not be protected by parliamentary privilege. But, again, protection may be necessary because of either the special nature of the precinct and the institution it houses, or other considerations such as privacy concerns.

Understanding the context and applying principles

In our interim report, we expressed our grave concern at the seeming lack of regard that those involved in the release seemed to have for the separation of the Executive from Parliament, the need for confidentiality of parliamentary proceedings and sensitive information, or the freedom of the press. Good decisions about the release of information from parliamentary information and security systems can only be made where these matters have been considered carefully. While we accept that the question of who should have access to information held on parliamentary information and security systems, and when, is not a straightforward one, it is clear to us that the answer is not that it should be at the sole discretion of a Chief Executive or a staff member of the organisation that holds this information. Decisions about release must be based on sound principle.

We continue to be troubled that the incident arose, particularly as there are clear protocols guiding the release of information from these systems to the New Zealand Police, the New

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Zealand Security Intelligence Service, and the Minister in charge of the New Zealand Security Intelligence Service. It seems peculiar to us that information from these systems was more easily accessed through a request from the Executive (which the Parliament is responsible for holding to account), than it would have been had the New Zealand Police been investigating a criminal act.

The incident drew attention to significant gaps in the policies and principles guiding the Parliamentary Service in relation to the information it holds. The principles and protocol we set out in this report will assist the Parliamentary Service to determine the appropriate response when approached with requests to release information from these systems.
3 Protocol for the release of information

We have developed a protocol which takes account of the distinct roles and functions of all key groups who operate within the parliamentary precinct, and the different categories of information held on parliamentary information and security systems. A copy of our recommended protocol is attached to this report. In developing the protocol, we have considered the principles underlying legislation relating to the release of information (such as the Official Information Act 1982, the Privacy Act 1993, and the Evidence Act 2006). While these Acts do not apply to Parliament, the principles underpinning them are relevant to this question.

We have also developed a set of key principles that we consider should guide any release of information from parliamentary information and security systems. These principles are set out in this chapter, along with an explanation of our protocol: how it works, when it applies, and how it addresses key issues.

Key principles

Members must be able to perform their duties in order to advance the interests of democracy, and the interests of Parliament and protection of its proceedings must be paramount. To this end, we consider that:

- There should be a presumption that information held on parliamentary information and security systems should not be released.
- Individual members should retain complete control over the release of any information that relates to them. That is, material relating to individual members should only be released where that member specifically agrees to its release.
- Journalists working in the parliamentary precinct should retain complete control over the release of any information that relates to them. That is, material relating to a journalist or group of journalists who work in the parliamentary precinct should only be released with their specific authorisation.
- For information requests that do not relate to an individual member, the Speaker of the House of Representatives should be the ultimate decision-maker.

We acknowledge that these principles, and the protocol, must be subject to any statutory requirement, court order, or other lawful authority to release information. They must also be subject to arrangements set out in other protocols guiding the release of information in particular circumstances. However, in the absence of other specific guidance or lawful authority we expect these principles, and the protocol, to be the primary reference point from which to determine whether or not information should be released.

Protocol for the release of information from the parliamentary information, communication and security systems

While the issues underlying the protocol are complex, our protocol is simple, clear, and straightforward. One of its key features is a requirement for written consent from the affected individual or party to be given prior to information release.
It specifically sets out the presumption that information about members of Parliament and the members of the Parliamentary Press Gallery must not be released unless one of the following applies:

- the individual concerned has consented in writing to the release of his or her information; or
- disclosure of the information is required or compelled by law, for example, by a search warrant, a court order, or under an enactment such as the Inquiries Act 2013 or the Ombudsmen Act 1975.

The protocol would apply to every request for information about or in relation to a member of Parliament, including in his or her capacity as a member, or as a member or leader of a parliamentary party. It also applies to requests for information in relation to a parliamentary party; a member of the press gallery; proceedings in Parliament; and parliamentary administration.

However, it would not apply to requests for official information under the Official Information Act 1982 or those for personal information under the Privacy Act 1993 (which does not apply to Parliament).

Information requests concerning identifiable individuals or parties

Under the protocol, where a request is made for information concerning particular members of Parliament, a parliamentary party, or a member of the press gallery, the information requested could not be disclosed without the written consent of the member, leader or whip of the party, or journalist concerned.

This requirement for written consent ensures that the affected individual or party retains control over release of information that relates to them. The protocol makes no distinction between the type of information being requested; so—for example—requests for the metadata of emails or security pass records which relate to a member would be treated in the same way as a request for that member’s emails. This addresses our concern about arbitrary decisions being made about different types of information sets, based not on principle, but on the particular information sets being requested. The protocol also draws no distinction between information generated by a member, or information generated by others. As long as the material in question relates to an identifiable member of Parliament, a parliamentary party, or a member of the press gallery, the consent of that particular individual (or party leader or whip in the case of a parliamentary party) will be required.

Consent will not be required where disclosure of this information is compelled by law; in these circumstances (such as where access to information is sought subject to legal authority such as a search warrant, a court order, or an enactment), the protocol suggests that the request should be treated in accordance with the Protocol for the Execution of Search Warrants on Premises Occupied or Used by Members of Parliament[^2] in so far as it is possible.

Information requests concerning journalists

The issues leading to the referral of this question of privilege arose regarding requests for information related to a journalist: who she had been in contact with, when, and how, in the days leading up to the release of the Kitteridge report. In making its decisions about

[^2]: An agreement between the Speaker of the House of Representatives of New Zealand and the Commissioner of Police, October 2006.
release, the Parliamentary Service made some effort to treat information relating to a member differently, initially attempting to seek the consent of the member involved before agreeing to a release. However, the Parliamentary Service made no attempt to seek consent of the journalist involved, and did not seem to consider the role of a journalist when making its decisions about releases.

Journalists have a special role in our democracy. They report on the matters of the day, informing the public about the issues that might affect them as they arise. Their role in sharing information makes Parliament more transparent and accountable. To allow them to carry out this role effectively, journalists can claim certain protections; under the Evidence Act 2006, and in common law, they have a right to protect their sources. This journalistic privilege allows sources to share information of public interest freely with journalists without threat of reprisal. The Search and Surveillance Act 2012 recognises that journalists may claim this privilege in relation to a search executed by the Police under warrant (section 136).

Our protocol acknowledges the special role of journalists in strengthening democracy. It provides that, where information is requested regarding an individual member of the press, the consent of the journalist will be required before the information is released. Furthermore, where disclosure of information relating to an identifiable member of the press gallery is required or compelled by law, the protocol requires that regard be given to the rights of journalists at law to protect certain sources. Where disclosure is required, the right of a journalist to claim privilege, as set out in the Search and Surveillance Act, must be acknowledged.

We note that the New Zealand Police have operational guidelines to steer their actions when executing search warrants or court orders in respect of information held by a media organisation. Among other things, these guidelines require the rights of journalists in law to be acknowledged, and oblige the Police to offer the media organisation (or its lawyer) an opportunity to claim journalistic privilege in accordance with the Search and Surveillance Act. We have not included reference to these operational guidelines in our protocol, but we note that the protocol indicates that the Parliamentary Service should devise its own detailed guidelines for dealing with requests for information about parliamentary administration. We consider that the operational guidelines of the New Zealand Police might be a useful reference document for the Parliamentary Service when developing its own detailed guidelines, where these guidelines touch on the way information relating to a journalist should be treated.

Role of the Speaker of the House of Representatives: requests for general information or requests made under lawful authority

In our examination of the incident leading to the referral of this question of privilege, we were surprised and disappointed to find that the Speaker of the House was not consulted or informed about requests and releases of parliamentary information.

As the Minister responsible for the Parliamentary Service, where the information was held, it seems appropriate that the Speaker be involved. The Speaker is also the representative of members of Parliament, and could have given considered advice on whether requests and releases were appropriate.

The role of the Speaker is an important one; the Speaker is the highest officer elected by the House. Electing a Speaker, to preside over the House, is the first task of members in a
newly elected Parliament. The Speaker embodies the House in its relations with the Crown, laying claim before the Governor-General to the House’s privileges. While the Speaker does not become a non-member of a political party when appointed, they do not play a politically partisan role, and they must be prepared to assert an independence from the Government so as to ensure that the rights of all sides of the House are protected in the course of the parliamentary process.

As the elected officer of the House, the embodiment of the House in its interactions with others, and the Minister responsible for the agencies that are responsible for parliamentary information and security systems, the Speaker of the House is the most appropriate point of contact for decisions needed about how to treat material held on those systems where the information is not identifiable to any particular member, party, or member of the press gallery. The protocol affirms our view that the Speaker should play a part in relation to such requests.

Requests for general information

In the case of an information request that relates generally to members, parliamentary parties, or members of the press gallery, the Speaker of the House of Representatives will be the decision-maker. He or she would be assisted by the parliamentary agencies (through both advice, and administrative support) when considering how to deal with such a request.

Requests made under lawful authority

The protocol suggests that, where access to information is sought subject to lawful authority, the request must be treated in accordance with the Protocol for the Execution of Search Warrants on Premises Occupied or Used by Members of Parliament (“search warrants agreement”) to the extent possible. A request under a lawful authority would include a request made under the Commissions of Inquiry Act 1908, the Ombudsmen Act 1975, and the Inquiries Act 2013. It would also include requests made under a court order, a search warrant, a rule of law, or any other lawful authority.

An indication of the procedure that could be followed is set out in our protocol as a guide for how we expect a request might be treated in accordance with the search warrants agreement. The process involves the Speaker of the House being notified, a member being able to claim parliamentary privilege over certain information, and the issue of a certificate by the Speaker of the House indicating that the claim of privilege is sustainable (which allows this information to be excluded from release). However, the inclusion of the process steps we set out in this protocol is not intended to limit other elements of the search warrants agreement being applied, wherever appropriate.

The search warrants agreement recognises clearly that some information is definitively protected from release by parliamentary privilege. A member concerned can claim privilege, and a signal from the Speaker that a matter is privileged determines the matter conclusively. We believe that these approaches are appropriate to apply to any request for information made under any lawful authority.

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3 Constitution Act 1986, s.12.
6 An agreement between the Speaker of the House of Representatives of New Zealand and the Commissioner of Police, October 2006.
Administrative requests

The protocol also contains a short direction, to the parliamentary agencies, that they should develop guidance for dealing with requests for information about parliamentary administration. This provision would apply to the small set of potential requests for information held on parliamentary information and security systems that would not be covered by the provisions discussed above. Such requests might include a request for information about organisation policies for the agencies which operate within the parliamentary precinct, or the like. This guidance should be developed with a view to balancing openness and transparency, privacy principles, and parliamentary independence.

Our protocol provides that any guidance developed should be approved by the Speaker of the House.

Recommendation

We recommend that the House adopt the Protocol for release of information from parliamentary information and security systems.
4 Requests under certain lawful authorities: the Inquiries Act and the Ombudsmen Act

As discussed in our previous chapter, where a request for information is made under lawful authority, we consider that the request should be treated in accordance with the search warrants agreement, to the extent possible. There are two particular types of lawful authority that we make additional recommendations in regard to. These are discussed below.

Inquiries Act 2013

The Inquiries Act 2013 reformed and modernised the law relating to inquiries, following recommendations made by the Law Commission in 2008. The Act replaces the Commissions of Inquiries Act 1908 and provides for two types of inquiries: public inquiries and government inquiries. All types of inquiries will have the same level of powers and protections available to them. These are similar to the powers and protections previously contained in the Commissions of Inquiries Act 1908.

Section 20 of the Inquiries Act 2013 gives an inquiry broad power to obtain information, including requiring any person to produce documents or other information in that person’s possession or control. An inquiry may also examine any information for which privilege or confidentiality is claimed, or refer the information to an independent person to determine whether there is a justifiable reason for maintaining the privilege or confidentiality, or whether the information should be disclosed.

How this broad power interacts with parliamentary privilege and the approach we recommend to the release of information from parliamentary information and security systems, needs to be clarified. We note that, had the Inquiries Act been in force at the time, the Henry Inquiry (as a government inquiry) would have had the broad powers conferred by section 20.

Parliamentary privilege is not referred to in the Inquiries Act. This is not surprising as parliamentary privilege is part of the general law of New Zealand and is to be taken notice of by the courts without being specifically pleaded. As with other requests made under lawful authority, we expect that requests made under the auspices of the Inquiries Act will also be treated, in so far as possible, in accordance with the processes set out in the search warrants agreement. However, we intend to examine again the search warrants agreement in the light of the Inquiries Act, as we consider the existence of this Act may warrant either a change to the agreement itself, or the development of additional, separate, guidelines which set out the process for external authorities to follow where statutory powers are exercised in respect of parliamentary information.

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8 Section 20(a).
9 Section 20(c).
10 Legislature Act 1908, s. 242.
In addition, we recommend that the Cabinet Manual be updated to reflect that where an inquiry is established under the Inquiries Act, the exercise of powers in relation to members of Parliament and the parliamentary agencies will require recognition of parliamentary privilege and confidential communications between members and constituents, and that inquiries should ensure they follow a process to allow for such claims of privilege and confidentiality to be dealt with.

Our final recommendation is that the Government develop some standard terms of reference for use in any inquiry where it appears that powers may be exercised in relation to members and the parliamentary agencies. Section 14 of the Inquiries Act provides that an inquiry may conduct its inquiry as it considers appropriate, unless otherwise specified in its terms of reference. Where an inquiry might involve accessing information held by members, a general provision could be inserted into the terms of reference requiring notification of the Speaker of the House and the Clerk of the House. This approach allows the broad power of an inquiry to sit comfortably with the processes we consider should apply to requests for release of information from parliamentary information and security systems.

**Recommendation**

We recommend that the Government update the Cabinet Manual to reflect that where an inquiry is established under the Inquiries Act 2013, the exercise of powers in relation to members of Parliament and the parliamentary agencies will require recognition of parliamentary privilege; and develop some standard terms of reference for use in any inquiry where it appears that powers may be exercised in relation to members and the parliamentary agencies.

**Ombudsmen Act 1975**

During the course of our consideration, it came to our attention that there is the possibility of tension between the powers available to the Ombudsman under section 19 of the Ombudsmen Act 1975, and the protection afforded by parliamentary privilege and the fundamental principles and protocols we consider should apply to requests for information from parliamentary information and security systems.

The Ombudsman handles complaints and investigates the administrative conduct of state sector agencies, including in relation to official information requests. The Executive, including Ministers of the Crown and state sector departments and agencies, are within the jurisdiction of the Ombudsman. Section 19 of the Ombudsmen Act gives the Ombudsman extensive powers to require information and documents to be produced, where in the Ombudsman’s opinion it may relate to a matter under investigation. This section also applies where that information is held on parliamentary information and security systems.

In the protocol, we have tried to reconcile this broad power of the Ombudsman with the principles we suggest must be applied in a parliamentary context. Our ability to do so is specifically provided for in section 15 of the Ombudsmen Act.

Our protocol therefore provides guidance for an Ombudsman when deciding whether to exercise his or her powers under section 19 of the Ombudsmen Act, where a Minister claims information that he or she holds is not held in an official capacity as a Minister. Under the protocol, the Ombudsman would need to be satisfied that the requested information has a reasonable connection to the member’s official capacity. Where urgent access to information is required, the approval of the Speaker of the House and the
member concerned could need to be obtained for access to this information on a sitting day (without it amounting to a contempt). In such instances, the procedures for urgent access set out in the *Agreement covering Policing Functions within the Parliamentary Precincts*\(^{11}\) should be followed. We consider this approach should resolve any potential uncertainty about how the Ombudsman’s power interacts with the approach to requests we recommend.

\(^{11}\) An agreement between the Speaker of the House of Representatives of New Zealand and the Commissioner of the New Zealand Police, December 2007.
5 Guidance to supplement search warrants agreement

Our protocol suggests that the application of principles and processes from the search warrants agreement are appropriate to guide more generally releases of information from parliamentary information and security systems. However, we note that the search warrants agreement is a specific accord entered into by the Speaker of the House of Representatives and the New Zealand Police. While the processes it sets out are certainly capable of more general application, this particular agreement binds only the current signatories to it, but not other agencies who may exercise powers of search and seizure.

This situation reveals an opportunity; we suggest that the Speaker of the House consider whether general guidance for others who possess intrusive powers by law could be drawn up, in a way that is consistent with the principles and processes contained in the search warrants agreement.
Appendix A

Committee procedure
We have been meeting on this matter since July 2013. The evidence and advice received by the committee has been published on www.parliament.nz.

We received advice from Debra Angus, Deputy Clerk of the House of Representatives.

Committee members
Hon Christopher Finlayson QC (Chairperson)
Hon Gerry Brownlee
Dr Kennedy Graham
Chris Hipkins
Hon Murray McCully
Hon David Parker
Rt Hon Winston Peters
Grant Robertson
Hon Anne Tolley
Hon Tariana Turia

Committee advisers and staff
Debra Angus, Deputy Clerk of the House
Meipara Poata, Clerk of the Committee
Appendix B

Speaker’s ruling

I have received a letter from Dr Russel Norman raising as a matter of privilege statements made by Rt Hon John Key, Prime Minister, in the House in reply to supplementary questions to question 4 on 2 July 2013, concerning the release of information from parliamentary information and security systems.

Standing Order 400 requires an allegation of contempt to be formulated as precisely as possible so as to give the member or person against whom it is made full opportunity to respond. An allegation of contempt against the Rt Hon John Key in regard to the statements made is not clearly made out.

However, the member’s letter raises serious issues.

The exercise of intrusive powers against members threatens members’ freedom to carry out their functions as elected representatives and the House’s power to control its own proceedings and precincts, without outside interference.

The release of information from parliamentary information and security systems relating to the movements of journalists within the parliamentary precincts has also been questioned. Although the media do not necessarily participate directly in parliamentary proceedings, they are critical to informing the public about what Parliament is doing and public confidence in Parliament. Actions that may put at risk journalists’ ability to report freely are a significant concern.

The parliamentary precincts are also a workplace for both parliamentary employees and the employees of government departments. Access to parliamentary information and security systems data of any sort must, therefore, also have regard to the respective rights of employers and employees, and the role of the Speaker as a responsible Minister, and the Prime Minister and his ministers.

I believe some sort of common understanding is required to ensure on the one hand that the functioning of the House and the discharge of members’ duties is not obstructed or impeded, but on the other that the maintenance of law and order and the ability to investigate and prosecute offences committed within the parliamentary precincts is preserved.

The concerns raised are ones that should be looked at by the Privileges Committee. It is the body the House has established to investigate such matters. It has the power to hear evidence and formulate recommendations for the House that will provide guidance for the future.

Consequently I have determined that a general question of privilege does arise. The question therefore stands referred to the Privileges Committee.
Appendix C

Protocol for the release of information from the parliamentary information, communication and security systems

Part 1—Introduction

Background

Openness and transparency in public affairs have an important role to play in balancing the power of executive Government. In the parliamentary environment, however, openness and transparency must be balanced against parliamentary independence. It is the collection of powers, rights, and immunities known as parliamentary privilege that underpins the independence of Parliament.

Parliamentary privilege is generally recognised to be so fundamental to our system of representative parliamentary democracy that it takes priority when balanced against competing public interests. It operates to enable the House, its committees and its members to fulfil their functions without fear of coercion or punishment and without impediment. It is part of the law of New Zealand. The courts have regard to it, without it being specifically pleaded. There are three fundamental privileges: freedom of speech, the right of the House to control its own operations, and the power to punish for contempt.

This protocol addresses the balance between parliamentary privilege and the public interest in Parliament's openness and transparency. It has its genesis in on-going calls for Parliament to be subject to the Official Information Act 1982. In 2011, the Standing Orders Committee addressed the issue and considered that high-level freedom of information principles might be established in legislation, but that their implementation be a matter for Parliament through rules adopted by the House or published by the Speaker. In the following year, the Law Commission recommended that the Official Information Act be applied to the parliamentary agencies, but with a limited definition of official information that mitigated concern about any adverse effect on the ability of the House to maintain control of its own proceedings and safeguarded member and party information.

This protocol brings together these earlier considerations into a series of principles for the disclosure of parliamentary information. It is expected that the parliamentary agencies (the Office of the Clerk of the House of Representatives and the Parliamentary Service) will develop detailed policies to assist their staff and members’ staff in dealing with requests for information held in the parliamentary information, communication and security systems.

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2 Legislature Act 1908 s.242(2).
4 The Public’s Right to Know: Review of the Official Information Legislation, NZLC R125.
Coverage

Members of Parliament perform a central role in New Zealand’s system of representative parliamentary democracy. They dedicate much of their time and effort to concerns and issues raised by the community or the general public. In the course of their work, they receive and handle a great deal of information, some of which may be personal information about their constituents and other New Zealanders, or information relating to proceedings in Parliament. Members may also retain information in relation to their roles as members of parties recognised for parliamentary purposes.

Members of the Parliamentary Press Gallery perform an important role in ensuring the transparency and openness of New Zealand’s system of democratic government. Subject to any applicable rules, such as the Rules of the Parliamentary Press Gallery and the Protocol for interviewing members, filming, and photographing in Parliament Buildings, they have free general access to most public areas within the parliamentary precinct for the purpose of carrying out their functions and duties.

The parliamentary agencies are not generally covered by the Official Information Act 1982 but this protocol recognises that ministerial information is also held in the parliamentary information, communication and security systems, and that such information will be subject to the Official Information Act. The protocol also recognises that much of the information held is held by the parliamentary agencies in the capacity of an agent on behalf of others.

Statutory and Other Disclosures

The public interest in the proper functioning of New Zealand’s system of representative parliamentary democracy must, on occasions, be balanced against the need for openness and transparency in public life, in particular in relation to the expenditure of public funds. In this regard, the Members of Parliament (Remuneration and Services) Act 2013 requires the periodic disclosure of members’ expenses, and the Standing Orders require annual disclosure of members’ pecuniary and other interests. In addition, the parliamentary agencies are required to provide information on their Votes, appropriations, and operating intentions.

Furthermore, as the Standing Orders Committee noted in 2011, a great deal of parliamentary information is already available to the public through Hansard, the broadcasts of parliamentary proceedings, and the proactive release by select committees of all evidence received on an item of business.

This protocol does not limit or affect any of these disclosures of parliamentary information.

Other Legal Authority for Access to Information

The principle of exemption from legal liability for parliamentary conduct does not mean that criminal acts committed in a parliamentary environment are exempt from prosecution. The protocol for execution of search warrants within the parliamentary precinct applies where access to information is required under a search warrant.

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6 Protocol for the Execution of Search Warrants on Premises Occupied or Used by Members of Parliament, An agreement between the Speaker of the House of Representatives of New Zealand and the Commissioner of Police, October 2006.
Where access to information is sought subject to other legal authority, the request for access must also, to the extent possible, be treated in accordance with the protocol for the execution of search warrants. This way the public interest in parliamentary independence can be balanced against the interest of maintaining the rule of law.

**Part 2—Information protocol**

**Application of protocol**

1. This protocol applies to every request for the disclosure of any information (including metadata) that is about, or in relation to,
   
   - a) a member of Parliament in his or her capacity as such a member, or as a member or leader of a recognised parliamentary party
   - b) a recognised parliamentary party
   - c) a member of the Parliamentary Press Gallery
   - d) proceedings in Parliament
   - e) parliamentary administration.

2. This protocol does not apply to requests for official information under the Official Information Act 1982 or requests for access to personal information under the Privacy Act 1993.

**Guiding principles**

3. The fundamental principle is that the functioning of Parliament should not be interfered with. Members of Parliament must be able to perform their roles as democratically elected representatives and members of recognised parliamentary parties without impediment.

4. Other principles that must be taken into account in applying this protocol are as follows:
   
   - a) parliamentary privilege provides the House with exclusive control of its operations, and protects parliamentary proceedings from questioning outside Parliament. Members of Parliament must have the ability to raise claims for parliamentary privilege in relation to requests for the disclosure of information:
   
   - b) the House may punish for contempt any action that obstructs or impedes the House or a member of Parliament in the performance of their functions or has the tendency, directly or indirectly, to produce such a result:
   
   - c) members of the Parliamentary Press Gallery must be able to carry out their functions and duties in order to advance the interests of democracy:
   
   - d) members of Parliament and members of the Parliamentary Press Gallery should have complete control over the disclosure of any information held in the parliamentary information, communication and security systems that is about, or in relation to, them unless the disclosure is required or compelled by law:
   
   - e) leaders or whips of recognised parliamentary parties should have complete control over the disclosure of any information held in the parliamentary
information, communication and security systems that is about, or in relation to, their parties unless the disclosure is required or compelled by law:

f) if a request for information relates to members of Parliament, recognised parliamentary parties, or members of the Parliamentary Press Gallery generally and does not relate to an identifiable member of Parliament, a particular recognised parliamentary party, or an identifiable member of the Parliamentary Press Gallery, the Speaker of the House of Representatives should be the ultimate decision-maker as to whether the requested information is to be disclosed.

Requirements for requests for information

5 No information about a member of Parliament, a recognised parliamentary party, or a member of the Parliamentary Press Gallery may be disclosed unless—

a) the disclosure, —

i. in the case of a request for information about, or in relation to, an identifiable member of Parliament, is made with the written consent of that member of Parliament; and

ii. in the case of a request for information about, or in relation to, a particular recognised parliamentary party, is made with the written consent of the leader or whip of that party; and

iii. in the case of a request for information about, or in relation to, an identifiable member of the Parliamentary Press Gallery, is made with the written consent of the relevant member of the Parliamentary Press Gallery; or

b) the disclosure is required or compelled by—

i. a court order:

ii. a search warrant:

iii. an enactment (including, for example, the Commissions of Inquiry Act 1908, the Ombudsmen Act 1975, and the Inquiries Act 2013):

iv. a rule of law:

v. any other lawful authority that authorises access to or the disclosure of any information or compels the production of any evidence, documents, papers, or things.

Disclosure of information required or compelled by law

6 Any disclosure of information under clause 5(b) must, to the extent possible, be in accordance with the applicable procedure for the execution of search warrants on premises occupied or used by members of Parliament (as set out in the agreement between the Speaker and the Commissioner of Police dated October 2006).

7 Without limiting the procedure for the execution of search warrants set out in the agreement referred to in clause 6, the applicable procedure under that agreement includes, among other things, the following steps:
a) notifying the Speaker and the Clerk of the proposed access to information:

b) informing the relevant member of Parliament that access to information is
    being sought under legal authority:

c) allowing the relevant member of Parliament to be present or represented
    while access to the information is occurring:

d) allowing the relevant member of Parliament to claim parliamentary privilege
    and making arrangements for any information in respect of which
    parliamentary privilege is claimed to be excluded and held by the Clerk:

e) allowing the relevant member of Parliament to seek a certificate from the
    Speaker that proceedings in Parliament are in fact involved and the claim of
    privilege can be sustained:

f) ensuring that access to the information does not take place at a time when
    the House is actually sitting or when a committee on which the relevant
    member of Parliament serves is actually meeting, so that the member can
    give full and undivided attention to parliamentary business.

8 Where urgent access is required at a time when the House is actually sitting or when
a committee on which the relevant member of Parliament serves is actually meeting, the
approval of the Speaker of the House of Representatives and the member involved must
be sought, and the procedures for service of legal process contained in the Agreement between
the Speaker of the House of Representatives and the Commissioner of New Zealand Police should be
applied.

9 Where information required or compelled under clause 5(b) relates to an identifiable
member of the Parliamentary Press Gallery, regard should be given to the rights of
journalists to protect certain sources conferred under section 68 of the Evidence Act 2006.
Any disclosure must, to the extent possible, be done in a way that recognises those rights
and the requirements of the Search and Surveillance Act 2012 to allow a journalist who
believes he or she may be able to claim a privilege, a reasonable opportunity to claim it.

Speaker to determine general requests for information

10 If a request for information relates to members of Parliament, recognised
parliamentary parties, or members of the Parliamentary Press Gallery generally and does
not relate to an identifiable individual or a particular recognised parliamentary party,—

    a) the Speaker must be promptly notified of the request; and

    b) the parliamentary agencies must provide the Speaker with any assistance
        that may be required to enable the Speaker to deal with the request
        (including the provision of advice and administrative support)

    c) the Speaker may, where he or she considers it appropriate, consult
        members of Parliament, leaders of recognised parliamentary parties or the
        chairperson of the Parliamentary Press Gallery about such requests.

11 The Speaker must decide whether a request for information referred to in clause 10
should be granted or refused.
Requests for information relating to parliamentary administration

12 As soon as practicable after the commencement of this protocol, the parliamentary agencies must—

a) develop detailed guidelines for dealing with requests for information about parliamentary administration that balance openness and transparency, privacy principles, and parliamentary independence; and

b) submit those guidelines to the Speaker for approval.

Guidance for Ombudsman exercising powers under section 19 of the Ombudsmen Act 1975

13 If an Ombudsman proposes to undertake an investigation into a complaint under the Official Information Act 1982 in respect of information held by a Minister of the Crown where the Minister is claiming that the information is not held in his or her official capacity as a Minister and is therefore not subject to that Act, the Ombudsman must, before exercising his or her powers under section 19 of the Ombudsmen Act 1975,—

a) be satisfied that there is a reasonable likelihood that the information is held by the member of Parliament in his or her official capacity as a Minister of the Crown; and

b) have regard to the following:

i. that a Minister’s official capacity does not include matters that are carried out by the Minister in his or her capacity as a member of Parliament, a member of a recognised parliamentary party, or a leader of a recognised parliamentary party; and

ii. that the Official Information Act 1982 does not apply to members of Parliament or the parliamentary agencies generally, and that this protocol is based on the principle of member consent; and

iii. that the exercise of the power to require production of information under section 19 of the Ombudsmen Act 1975 cannot be used as a means of widening the scope of the Official Information Act 1982 to cover the parliamentary agencies.

Commencement and review

14 This protocol—

a) comes into effect on the date of the Speaker’s signature, following adoption by the House; and

b) continues in force until termination.

15 This protocol—

a) must be reviewed every three years by the Speaker; and

b) may be amended, following consultation with the chairperson of the Parliamentary Press Gallery, with the agreement of members of Parliament.
REPORT ON THE USE OF INTRUSIVE POWERS

Signed by:

Rt Hon David Carter

Speaker of the House of Representatives

DATED this ______ day of ______ 2014
Question of privilege concerning the agreements for policing, execution of search warrants, and collection and retention of information by the NZSIS

Report of the Privileges Committee

Fiftieth Parliament
(Hon Christopher Finlayson QC, Chairperson)
July 2014

Presented to the House of Representatives
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Question of privilege concerning the agreements for policing, execution of search warrants, and collection and retention of information by the NZSIS

Summary of recommendations

We recommend to the House that it take note of the committee’s suggested amendments to the agreements for policing, execution of search warrants, and collection and retention of information by the NZSIS (page 7).

We recommend that the House note our suggestion that agreements of this kind be made available publicly, for example through the parliamentary website (page 7).

We recommend that the agreement on policing functions within the parliamentary precincts be reviewed by the parties to it to update terminology and legislative references, and to provide for a dispute resolution process between the Speaker of the House and the Commissioner of Police for disagreements about the interpretation or application of the agreement (page 9).

We recommend that the agreement on the execution of search warrants provide for a system of “chaperoning” the examination of electronic evidence, and the attendance of an information technology specialist to assist with the execution of search warrants in relation to documents stored electronically (page 11).

We recommend that the agreement on the execution of search warrants contain a single procedure to be followed when material is subject to a claim of parliamentary privilege, based on “Procedure A” in the draft agreement (page 11).

We recommend that the agreement on the execution of search warrants assert that the Speaker determines when a document or information is subject to parliamentary privilege (page 12).

We recommend that clause 6.1(e) of the agreement on the execution of search warrants provide for a default period of 24 hours for the member, the Speaker, and the Clerk of the House to seek legal advice in relation to the execution of the search warrant, but that it allow this period to be lessened or extended by agreement (page 12).

We recommend that the agreement on the execution of search warrants refer to the definition of “proceedings in Parliament”, as set out in the Parliamentary Privilege Bill, and set out practical examples of material likely to be privileged (page 13).

We recommend that the agreement on the execution of search warrants provide for a dispute resolution process for disagreements about the interpretation or application of the agreement (page 13).

We recommend that the agreement with the New Zealand Security Intelligence Service be amended to include a statement of principles and purpose (page 15).
We recommend that the agreement with the New Zealand Security Intelligence Service be amended to require that the Speaker be consulted in relation to any interception or seizure warrant to be executed on the parliamentary precincts or in a member’s constituency office; and in advance of such a warrant being issued, the Director of the New Zealand Security Intelligence Service should provide a written memorandum to the Speaker of the House setting out the actions done or information held by a member which in their opinion constitute an issue of security concern (page 17).

We recommend that the agreement with the New Zealand Security Intelligence Service specify that the Inspector-General has a role in overseeing the actions of the NZSIS in relation to the agreement (page 18).

We recommend that consideration be given to whether it is necessary for the Speaker of the House to enter into a separate agreement with the Government Communications Security Bureau, in the light of the organisation’s potential role in assisting others in exercising their lawful authorities (page 20).
1 Introduction

On 18 September 2012 the Speaker advised the House that he was referring to us for consideration three agreements\(^1\) he had entered into as Speaker, as they involve a question of privilege.\(^2\) In this report we summarise the content of each agreement and any issues raised in relation to it. We also suggest several changes to the agreements that we would like to see pursued.

**Recommendation**

We recommend to the House that it take note of the committee’s suggested amendments to the agreements for policing, execution of search warrants, and collection and retention of information by the NZSIS.

Each of these documents seeks to record a mutual understanding about the checks and balances that apply between the protection of the privileges of the House and the ability of enforcement and surveillance agencies to undertake their duties. They do not propose new powers for the agencies or new protections for the House. They provide a framework to help these agencies to ensure they can go about their lawful functions and do not breach the existing protections that apply to parliamentary proceedings.

There is a constitutional basis for having formal agreements between the Speaker and enforcement and intelligence agencies. A legislative body must be able to conduct the business of the governance of the country without disruption or hindrance by coercive or intrusive powers of the State and without interference with the legitimate activities of its elected representatives. In some other countries the effective functioning of the legislature has been impaired where a separation between the legislature and enforcement authorities has not been maintained.

The Speaker has entered into these agreements on behalf of the House, using the Speaker’s statutory authority to control the parliamentary precincts under section 26(1) of the Parliamentary Service Act 2000. This is an appropriate way to ensure the interests of the legislature are taken into account.

We would like to see the agreements made easily accessible to the public, and suggest this could be achieved by creating a dedicated area for them on the parliamentary website.

**Recommendation**

We recommend that the House note our suggestion that agreements of this kind be made available publicly, for example through the parliamentary website.

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\(^1\) The agreements are an agreement with the Commissioner of the New Zealand Police regarding policing functions within the parliamentary precincts; an agreement with the Commissioner of the New Zealand Police regarding the execution of search warrants on premises occupied or used by members of Parliament; and a memorandum of understanding with the New Zealand Security Intelligence Service and the Minister in Charge of the New Zealand Security Intelligence Service, which covers the collection and retention of security intelligence information about sitting members of Parliament.

\(^2\) See Appendix B for the Speaker’s reasons for referring the agreements to us.
Experience in other jurisdictions

We considered the approaches taken in other similar countries to these matters. We note that agreements on policing functions and the execution of search warrants are not uncommon, but the agreement with the New Zealand Security Intelligence Service appears to be unique amongst comparable Commonwealth states. Both of the agreements with the Police draw on similar agreements in Australia.

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3 A briefing paper prepared by the Parliamentary Library outlining the experience in other jurisdictions is available on the parliamentary website along with other papers relating to our consideration of this matter.
2 Policing functions within the parliamentary precincts

This agreement, between the Speaker and the Commissioner of the New Zealand Police, was entered into in December 2007. It sets out guidelines for the exercise of police powers in investigating offences and maintaining the law within the parliamentary precincts, particularly in relation to entering the buildings.

The Privileges Committee of the 47th Parliament considered a draft of this agreement, and the final agreement included amendments proposed by that committee.

Both the New Zealand Police and the Parliamentary Service told us that the agreement is working well. The agreement ensures the Police understand the importance of ensuring that members of Parliament are not impeded in carrying out their duties while the Police are also carrying out functions within the parliamentary precincts.

We note that some of the terminology and legislative references in the agreement need to be updated. We also suggest the inclusion of a mechanism for resolving any disagreements about the interpretation or application of the agreement. We expect that this mechanism would be most likely to involve the Speaker and the Commissioner of Police.

As for the unlikely case of any disagreement under this agreement regarding whether or not something is a parliamentary proceeding, or is a matter of parliamentary privilege, we suggest a process might be better agreed on a case-by-case basis, depending on the nature of the disagreement.

We discuss in chapter 5 the potential need to update this agreement further following the enactment of the Government Communications Security Bureau Amendment Act 2013.

Recommendation

We recommend that the agreement on policing functions within the parliamentary precincts be reviewed by the parties to it to update terminology and legislative references, and to provide for a dispute resolution process between the Speaker and the Commissioner of Police for disagreements about the interpretation or application of the agreement.

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4 Report of the Privileges Committee on the draft agreement on policing functions within the parliamentary precincts, I.17E, March 2004.
3 Execution of search warrants on premises occupied or used by members of Parliament

This interim agreement, between the Speaker and the Commissioner of the New Zealand Police, was entered into in October 2006 during the Police investigation into Taito Phillip Field. The agreement on policing functions within the precincts did not cover the execution of search warrants on premises occupied or used by members of Parliament. The interim procedure was needed for the Police to follow when executing a search warrant on any place where records and documents relating to the member’s activities as a member of Parliament might be stored or held.

The agreement is drafted in terms that could apply in any situation, not just those of the Field investigation for which it was created initially. It is based upon a draft protocol of the New South Wales Parliament from June 2005, and a memorandum of understanding on the execution of search warrants drawn up in the Australian Commonwealth Parliament in February 2005.

The agreement is designed to ensure that the Police execute any search warrant in a way that does not amount to a contempt of Parliament, and that gives proper opportunity for claims of parliamentary privilege to be raised and resolved.

Many parliaments have a memorandum of understanding or agreement with enforcement agencies about the execution of search warrants within the parliamentary precincts or in members’ offices. We consider it would be appropriate for a permanent agreement to be adopted for New Zealand.

We suggest additions to the agreement that we consider would assist in its operation. Several of them are based on changes made in New South Wales subsequent to the drafting of the New Zealand interim agreement. We discuss in chapter 5 the potential need to update this agreement further following the enactment of the Government Communications Security Bureau Amendment Act 2013.

Access to electronic documents

The first addition we suggest relates to the execution of a search warrant in relation to documents stored electronically. When enforcement agencies wish to access such material, their preferred approach is often to seize computer hard drives and remove them in order to clone them so that their content can be examined later, after the hard drives have been returned. Our concern is that such a process is not appropriate where there is any possibility of material covered by parliamentary privilege being on the computer hard drive or other device in question. While the mere act of seizure would not necessarily amount to questioning parliamentary proceedings, it is difficult to reconcile such an approach with the principle that the House has the exclusive right to control its own proceedings. For the House’s authority to be upheld, there needs to be an opportunity to identify any matters which might be covered by parliamentary privilege, and to make a claim of privilege. This issue is exacerbated further when material is held on servers which store information for multiple users.
This matter has been considered in the United Kingdom, where a system of “chaperoning” the examination of electronic evidence has been devised, and employed successfully. The system involves making a forensic image or copy of the material being created (by the police, or by parliamentary ICT); this image is then opened in the presence of both parties, and examined using search terms to find any material that might be so closely connected to parliamentary proceedings as to raise an issue of privilege. When such material is identified, it is tagged in the presence of both parties to indicate a possible claim to privilege, and is put to one side. We consider a similar approach should be adopted in New Zealand.

We consider that the agreement should provide for a technical expert to attend the search to help access information stored on a computer or server. The New Zealand Police agreed it would be appropriate for the Parliamentary Service to provide such support in isolating material falling within the scope of a search warrant and subsequently sorting such material according to whether or not it was subject to parliamentary privilege.

**Recommendation**

We recommend that the agreement on the execution of search warrants provide for a system of “chaperoning” the examination of electronic evidence, and the attendance of an information technology specialist to assist with the execution of search warrants in relation to documents stored electronically.

**Assessing claims of privilege**

We consider the agreement should be clearer about the consequences of the application of parliamentary privilege during the execution of a search warrant. The procedure in the interim agreement suggests that seizing material covered by parliamentary privilege may amount to a contempt, but it does not clearly state that material cannot be seized if it is covered by parliamentary privilege. We consider this should be addressed in the final agreement by stating that material covered by parliamentary privilege cannot be seized, and that any material taken that is later found to be covered by parliamentary privilege must be returned to the member in question.

The agreement sets out in clause 8.1 two procedures to be followed where a claim is made that material is covered by parliamentary privilege. “Procedure A” is to be followed if the officer executing the search warrant considers there is a reasonable basis to the claim for privilege; “Procedure B” is to be used when the officer believes the claim is vexatious or frivolous.

We do not consider that officers executing search warrants are likely to have the appropriate knowledge to determine the correctness of a claim of privilege. We consider that “Procedure B” should be removed, and that a single procedure should apply to any material where a claim of privilege is made. We discussed this with the Commissioner when he appeared before us and he agreed that this procedure should be removed from the final agreement.

**Recommendation**

We recommend that the agreement on the execution of search warrants contain a single procedure to be followed when material is subject to a claim of parliamentary privilege, based on “Procedure A” in the draft agreement.
We also considered how any claim of parliamentary privilege would be appropriately assessed. In his evidence to us, the Commissioner agreed that the role of finally determining whether a document is properly subject to parliamentary privilege rests with the Speaker. We suggest that the final agreement should clarify this point.

The Commissioner also suggested that the agreement could provide for a process for managing claims of privilege similar to those used under a search warrant where other types of privilege are claimed (for example, where the Police execute a search warrant on a solicitor’s office and material might be subject to legal professional privilege). We note that under “Procedure A” the disputed documents or information would be held by the Clerk of the House or an agreed third party until the matter is resolved. It is a matter for the member of Parliament to decide in which forum to seek a final ruling on the claim of privilege. We also note that the most recent protocol of the New South Wales Parliament provides for the presiding officer of either House to give written reasons for any dispute and for the issue then to be determined by the appropriate House.

In our view it is appropriate that a parliamentary solution be found for assessing claims of parliamentary privilege, and apart from the recommendations already discussed, we do not propose any further changes for the process.

**Recommendation**

We recommend that the agreement on the execution of search warrants assert that the Speaker determines when a document or information is subject to parliamentary privilege.

**Access to legal advice**

The agreement requires that a period of 24 hours be allowed for obtaining legal advice, if the search location is secured adequately. We asked the New Zealand Police whether it would support changing this to a “reasonable time”, but the Police Commissioner told us he was happy with the current provision, as he was concerned less specific wording could lead to a longer delay than 24 hours.

In practice a search warrant is usually executed without delay in order to preserve evidence. The act of sealing a member’s office for the purposes of the execution of a search warrant will draw immediate attention. If the member, the Speaker, and the Clerk of the House have been informed, have a reasonable opportunity to obtain legal advice, and have a representative present, the search can proceed. Similar agreements entered into by other parliaments provide for a “reasonable time”.

We understand the Commissioner’s concern, but consider that at times a period of less than 24 hours could be appropriate. We would like to see clause 6.1(e) of the agreement reworded to provide for a default of 24 hours, which period could be lessened or extended with the agreement of the member, the Speaker, and the Clerk.

**Recommendation**

We recommend that clause 6.1(e) of the agreement on the execution of search warrants provide for a default period of 24 hours for the member, the Speaker, and the Clerk of the House to seek legal advice in relation to the execution of the search warrant, but that it allow this period to be lessened or extended by agreement.
Meaning of “proceedings in Parliament”

In his submission, the Commissioner noted recent uncertainty about the interpretation of this phrase, which effectively provides the scope for the agreement. We discussed these issues in our report on the question of privilege concerning the defamation action Attorney-General and Gow v Leigh,\(^5\) and we recently reported the Parliamentary Privilege Bill to the House. The bill responds to the issues we raised in our report, and includes a definition of “proceedings in Parliament”. We would expect the protocol to be updated to reflect this definition, should the bill be enacted.

We consider there is also scope to provide further clarification in the agreement itself about the type of material to which parliamentary privilege may apply, and to give more practical examples of material that is likely to be privileged, and of material that is unlikely to be covered. We note the approach taken in New South Wales, which we believe could provide a useful model for the New Zealand agreement.\(^6\) This agreement provides a general description of the type of material to which parliamentary privilege may apply, and gives examples of material that is likely to be privileged, and of material that is unlikely to be covered. We believe this approach, based on the use to which material is put rather than its content, should be explored for the New Zealand agreement.

**Recommendation**

We recommend that the agreement on the execution of search warrants refer to the definition of “proceedings in Parliament”, as set out in the Parliamentary Privilege Bill, and set out practical examples of material likely to be privileged.

Disagreements and non-compliance

We note the submission of the New Zealand Police that the final agreement should provide for a process to manage any disputes about the interpretation of the agreement, or non-compliance with the agreement.

As we noted in relation to the policing functions agreement, this would be appropriate for circumstances where the disagreement involved the interpretation or application of the agreement.

In the case of any disagreement regarding whether or not something is a parliamentary proceeding, or is a matter of parliamentary privilege, we suggest that any such process might be better agreed on a case-by-case basis, depending on the nature of the disagreement.

**Recommendation**

We recommend that the agreement on the execution of search warrants provide for a dispute resolution process for disagreements about the interpretation or application of the agreement.

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\(^5\) Report of the Privileges Committee on the question of privilege concerning the defamation action Attorney-General and Gow v Leigh, I.17A, June 2013.

\(^6\) Memorandum of understanding on the execution of search warrants in the premises of members of the New South Wales Parliament between the Commissioner of Police, the President of the Legislative Council, and the Speaker of the Legislative Assembly, 2010.
4 Collection of information on a sitting member of Parliament

This memorandum of understanding is between the New Zealand Security Intelligence Service (NZSIS), the Minister in Charge of the New Zealand Security Intelligence Service, and the Speaker; it was entered into in December 2010.

In 2009 the Minister in Charge of the New Zealand Security Intelligence Service requested that the Inspector-General of Intelligence and Security investigate and report on the NZSIS’s policies and practices relating to the creation, maintenance, and closure of files on New Zealand citizens and its compliance with those policies. The inquiry report raised a particular issue as to whether special rules were needed about collecting and retaining information on sitting members of Parliament. This agreement arose as a result.7

The agreement provides that the NZSIS will not generally direct the collection of information against any sitting member of Parliament. If it has a file on a person who becomes a member, it will be closed immediately and access to it prohibited for the duration of the member’s term in Parliament (except for access by the member under the Official Information Act 1982 or the Privacy Act 1993). It may be reactivated once the member leaves Parliament only if the Director of Security is satisfied that this would be consistent with statutory obligations, and under express, written authorisation.

Collection of information against a sitting member of Parliament will be permitted only where the particular member is suspected of activities relevant to security, the collection is personally authorised by the Director of Security, and the Speaker is briefed confidentially about the proposed collection and the reasons for it. If it is necessary to obtain an interception or seizure warrant against a sitting member, the Director will brief the Speaker in confidence on the existence of and reasons for the warrant, and any conditions made in the warrant to protect parliamentary privilege. The Speaker can discuss the matter with the Minister in Charge of the New Zealand Security Intelligence Service.

Powers of the NZSIS

The New Zealand Security Intelligence Service Act 1969 provides for the NZSIS to obtain, correlate, and evaluate intelligence relevant to security. The NZSIS obtains such intelligence using various sources and methods. Information can be obtained by interception, and seizure can be undertaken, only in accordance with an interception warrant issued under the Act. Interception warrants for New Zealand citizens are issued jointly by the Minister in Charge of the New Zealand Security Intelligence Service and the Commissioner of Security Warrants. Other collection methods (such as observations) do not require formal, external authorisation such as a warrant.

If the legislative requirements have been met, the NZSIS has the power to carry out covert surveillance of members of Parliament. The Act makes provision for the gathering of security intelligence generally and does not contain any special provisions relating to

7 For further detail about the background to this agreement, see the Interim report of the Privileges Committee on the question of privilege concerning the agreements for policing, execution of search warrants, and collection and retention of information by the NZSIS, June 2013.
members of Parliament. In his 2009 report, the Inspector-General found that the NZSIS was not prohibited from collecting information about a member of Parliament, nor should members be protected from the proper exercise of the NZSIS’s powers and functions, which are set out in statute. The Inspector-General noted, however, that as a general rule sitting members of Parliament should not be the proper subject of investigation by the NZSIS because of their functions and standing. Exceptions from the general rule would be better achieved through an understanding than by legislative amendment. The agreement we are considering is the result of that recommendation.

We note that the agreement respects the need for confidentiality in relation to such surveillance, but would equally expect to see respect for parliamentary proceedings expressed in it. We consider that the agreement should set out clear principles and its purpose, in place of its current historical introduction.

**Recommendation**

We recommend that the agreement with the New Zealand Security Intelligence Service be amended to include a statement of principles and purpose.

**Role of the Speaker**

There are two sets of circumstances set out in the agreement in which the Speaker would be briefed. The first is covered by clause 1.3 of the agreement, which states that the only circumstance in which collection of information may be directed against a sitting member of Parliament is where a particular member is suspected of undertaking activities relevant to security, the collection is personally authorised by the Director, and the Director provides a confidential briefing to the Speaker about the proposed collection and the reasons for it.

The decision of the NZSIS to commence collection of information about a sitting member might lead to the next step of obtaining a warrant for surveillance or interception. The requirement to inform the Speaker of the commencement of an investigation allows the discussion of issues about parliamentary privilege at an early stage. While the legal powers exist for the NZSIS to undertake its investigation, the actions of the NZSIS should be carried out with full regard to parliamentary privilege where members and the House are concerned. The Speaker, with advice from the Clerk of the House, will ensure that matters of parliamentary privilege are discussed with the NZSIS.

The second set of circumstances is covered by clause 1.4, which provides that if it becomes necessary to obtain an interception or seizure warrant against a sitting member of Parliament, the Director will brief the Speaker in confidence on the existence of and the reasons for the warrant, and any conditions contained in the warrant to protect parliamentary privilege.

While there is legal authority to obtain an interception or seizure warrant against a sitting member of Parliament, the execution of the warrant should be carried out with full regard to parliamentary privilege.

Section 4B of the New Zealand Security Intelligence Act 1969 requires that the warrant set out certain matters. They include the specific type of communication or document to be intercepted or seized, the identity of the people whose communications are to be intercepted, the place or facility where the documents or things are to be seized or located, and, where electronic tracking is undertaken, a description of the thing or the identity of
I.17D QUESTION OF PRIVILEGE CONCERNING THREE AGREEMENTS

the person to be tracked. The warrant may also include any terms and conditions that the
Minister and Commissioner both consider advisable in the public interest. The Minister
and Commissioner must also consider whether to include any conditions in the warrant to
minimise any risk that the warrant may affect third parties.

The Speaker is briefed by the NZSIS to ensure that the execution of the warrant and the
conditions in it properly recognise parliamentary privilege. This is consistent with the
approach taken in the memorandum of understanding for the execution of search warrants
issued by the Police. We consider that in advance of such a warrant being issued, the
Director of the New Zealand Security Intelligence Service should provide a written
memorandum to the Speaker of the House setting out the actions done or information
held by a member which in his or her opinion constitute an issue of security concern.

Some of us consider that we should make it clear that the Speaker should not be prevented
from discussing the matter, as appropriate, with the Leader of the Opposition or other
leaders of parliamentary parties. Others of us consider that, were this to happen, it may
compromise the ability of the Speaker to receive a full briefing on the security matter at
issue. However, all of us have confidence in the Speaker to protect the interests of
members and the institution of Parliament.

Alternative processes considered

The briefings provide the Speaker with the opportunity to raise issues regarding
parliamentary privilege; the Speaker does not have the power to decide whether or not an
interception or seizure may proceed. We believe the Speaker should have this power, and
that this matter needs to be rectified in the upcoming review of the security legislation. We
considered whether such briefings should be limited to the Speaker only, as the
representative of Parliament’s interests in relation to ensuring parliamentary privilege.

Other options we considered included

- briefing someone connected with the House as well as the Speaker, such as the
  Leader of the Opposition or leaders of political parties
- briefing an external agency as well, such as the Inspector-General of Intelligence and
  Security or the Intelligence and Security Committee.

A difficulty with these options is that the briefing might include details about an
operational matter involving a particular person which need to be closely held. Oversight
of sensitive operational matters is generally beyond the authority of a body such as the
Inspector-General of Intelligence and Security or the Intelligence and Security Committee.
The purpose of the briefing is also to ensure that the NZSIS is made aware of matters of
parliamentary privilege, and these bodies do not have expertise in this area. Some existing
provisions in the legislation regulate the conduct of the NZSIS in its dealings with
members of Parliament generally. Section 4AA of the Act requires the NZSIS to act in a
way that is politically neutral and provides for regular consultation with the Leader of the
Opposition to keep him or her informed about matters relating to security.

On balance, we agree that the protection of parliamentary privilege is appropriately vested
in the Speaker. Upon taking up the role, the Speaker lays claim to the privileges of the
House. He or she is the House’s representative, and acts on behalf of the House in matters
that may impact on it. Informing the Speaker about a matter that might impede or obstruct
a sitting member from performing their duties is a recognition that the Speaker embodies the House itself.

We also discussed the wider issue of whether there was a need to enhance the protections against surveillance of members being undertaken inappropriately. The NZSIS drew our attention to its statutory obligation to maintain political neutrality. Section 4AA of the New Zealand Security Intelligence Act 1969 provides that the Director of Security must take all reasonable steps to ensure the NZSIS is kept free from any influence that is not relevant to its functions and that it does not take any action for the purpose of furthering or harming the interests of any political party. The Director must also consult the Leader of the Opposition regularly to keep him or her informed about matters relating to security.

The oversight of the security agencies and their governing legislation is not within the scope of the agreement referred to us. However, the ability of members to undertake their duties free from inappropriate interference from other branches of government is a matter of concern. Members of Parliament must act lawfully, and this agreement provides a mechanism for the security agencies to undertake their duties if there is evidence that a member is of security concern. What would not be appropriate is misuse of this process for political ends. Any action by the state that has a chilling effect on the freedom of speech of members would be unacceptable.

These are serious issues, which we expect to see considered whenever the legislation governing the security agencies is reviewed.

**Extent of agreement**

We note that the NZSIS is not prevented under this agreement from directing the collection of information against a constituent or other person with whom a particular member is associated or in contact. Further, we note that the agreement does not extend to members’ staff. We are concerned that any interception or seizure directed at a member’s staff could incidentally result in the capture of material that was subject to parliamentary privilege, as some staff have access to such material. Accordingly, we would like to see the agreement adjusted to ensure that the Speaker is consulted in relation to any interception or seizure warrant to be executed on the parliamentary precincts or in a member’s constituency office. We consider this would be in the interest of protecting Parliament’s proceedings.

**Recommendation**

We recommend that the agreement with the New Zealand Security Intelligence Service be amended to require that the Speaker be consulted in relation to any interception or seizure warrant to be executed on the parliamentary precincts or in a member’s constituency office; and in advance of such a warrant being issued, the Director of the New Zealand Security Intelligence Service should provide a written memorandum to the Speaker of the House setting out the actions done or information held by a member which in their opinion constitute an issue of security concern.

**Disputes and disagreements**

We considered what the Speaker could do if he or she were not satisfied that parliamentary privilege was being protected adequately. In the first instance, we expect any concerns would be discussed between the Speaker and the NZSIS at the briefing. If necessary, a new warrant should be sought to ensure that parliamentary privilege was adequately recognised.
One way to minimise conflict would be for the agreement to provide for obtaining the Speaker’s view on any terms and conditions that should be inserted as advisable in the public interest in advance of a warrant being sought.

In our interim report on this matter, we recommended that the Inspector-General’s role in overseeing the activities of the NZSIS and other security agencies be clarified. In order to maintain the appropriate constitutional boundaries, the oversight of the NZSIS’s activities under this agreement should not be subject to the Inspector-General having to obtain the agreement of the Minister in Charge of the New Zealand Security Intelligence Service. To provide the assurance we are seeking in relation to this agreement, we consider the agreement should specifically provide that it also falls within the oversight of the Inspector-General in so far as it relates to the activities of the NZSIS. It would not be appropriate for the agreement to extend to the Inspector-General questioning parliamentary proceedings.

**Recommendation**

We recommend that the agreement with the New Zealand Security Intelligence Service specify that the Inspector-General has a role in overseeing the actions of the NZSIS in relation to the agreement.

**Previous practice**

We asked the NZSIS to what extent former and current members of Parliament may have been the subject of investigation by the NZSIS. The NZSIS informed us that it holds information about some people who have become members of Parliament, mostly collected before their election. Much of this information relates to the NZSIS’s functions in relation to security clearances, for example where someone has been the subject of a security vetting or has acted as a referee for another person’s security clearance.

The NZSIS told us that approximately 65 percent of the files it holds in relation to sitting members relate to vetting matters, 23 percent relate to matters of security interest (either the member was of security interest or they were in contact with a person of security interest), and the remaining 11 percent relate to various other matters, such as Official Information Act requests.

The NZSIS assured us that all hard-copy files relating to sitting members were stored securely, and only a single person had access to them.
5 Relationship between the enforcement agencies

In March 2013 Rebecca Kitteridge presented her report *Review of Compliance at the Government Communications Security Bureau*, which raised an issue in respect of the actions of the NZSIS that is relevant to the matter before us. The report identifies a long-standing practice, even prior to the enactment of the Government Communications Security Bureau Act 2003, of the GCSB’s providing assistance (such as specialist capabilities) to the NZSIS on the basis of NZSIS warrants. The understanding within GCSB was that in such cases, section 14 of the Act (the restriction on intercepting communications of New Zealand citizens or permanent residents) did not apply, because the GCSB was acting as the agent of the requesting agency and was therefore operating under the legal authority of the warrants. If the NZSIS, with the authority of an intelligence warrant, requested the GCSB to provide assistance in cases involving New Zealand citizens or permanent residents, the GCSB provided assistance. The report documents the fact that in response to the issues leading to the review, the Director of the GCSB directed that almost all GCSB support for domestic agencies was to cease until the relevant legal issues have been resolved.

The enactment of the Government Communications Security Bureau Amendment Bill 2013 addressed issues arising out of this report. The Act provides legal authority for the GCSB to assist the New Zealand Defence Force, the New Zealand Police, the NZSIS, and other departments specified by an Order in Council in performing their lawful functions. The Explanatory Note of the bill as introduced noted that “In providing such assistance, GCSB will be confined to activities that the other entity is lawfully able to undertake itself (though it may not have the capability), and will be subject to any limitations and restrictions that apply to the other entity.”

This amendment raises the issue of the extent to which the NZSIS or the New Zealand Police might involve the GCSB in respect of any surveillance, interception, or search warrant involving a member of Parliament. None of the agreements before us contemplate a situation where another agency might carry out or assist with functions on behalf of the agency entering into the agreement. As knowledge of this practice has only become public since the Kitteridge report, it is unlikely that the issue was contemplated by the Speaker at the time the agreements were entered into.

It may be prudent for all three agreements to require that any other organisation carrying out or assisting with functions under the agreement on behalf of another agency must also have regard to the authority of the Speaker as expressed in each of the agreements. Alternatively, the Speaker may wish to consider whether it might be necessary to enter into a separate agreement with the GCSB. On balance, we believe the latter approach is preferable.
Recommendation

We recommend that consideration be given to whether it is necessary for the Speaker of the House to enter into a separate agreement with the Government Communications Security Bureau, in the light of the organisation’s potential role in assisting others in exercising their lawful authorities.
6 Question of privilege regarding the use of intrusive powers within the parliamentary precinct

We delayed making our report on this matter because part-way through our consideration we were referred a *Question of privilege regarding use of intrusive powers within the parliamentary precinct*. The issues associated with the question are also relevant to these agreements.

The incident leading up to the referral of that question concerned a request arising from a ministerial inquiry. While the ministerial inquiry did not have the power to compel the production of information, in the course of our consideration it came to our attention that there are a range of other powers in law, beyond those covered by these three agreements, where the production of documents or information can be compelled or required. For example, the Ombudsman has the power to compel the production of official information, and the Serious Fraud Office has a general power to require information to be produced. Like the powers of the New Zealand Police and the NZSIS, these powers of compulsion could be exercised within the parliamentary precinct.

In our report on the *Question of privilege regarding use of intrusive powers within the parliamentary precinct*,[^8] we have recommended adopting a protocol which sets out how requests for information from parliamentary information and security systems should be dealt with. Where disclosure is not required or compelled by law, the protocol provides a process for dealing with information requests. Where disclosure is required under lawful authority, the protocol suggests that the process for the release of information should be based on the procedures set out in the search warrants agreement; that is, the opportunity to claim privilege must be provided.

We do not consider it practical or wise to develop individual agreements for the exercise of every possible coercive power within the precinct. We believe that generally the procedures set out in the search warrants protocol should be applied, to the extent possible. However, we also see scope for the Speaker to issue general guidance for agencies where information may be required or compelled to be produced at law. This guidance would sit alongside the search warrants protocol, and would fill the gap should clarification of the correct process to follow be needed for any particular agency.

Appendix A

Committee procedure
We met between September 2012 and June 2014 to consider the question of privilege. We received evidence from the New Zealand Security Intelligence Service, the Parliamentary Service, and the New Zealand Police.

We received advice from Debra Angus, Deputy Clerk of the House of Representatives.

The evidence and advice received by the committee has been published on www.parliament.nz.

Committee members
Hon Christopher Finlayson QC (Chairperson)
Hon Gerry Brownlee
Dr Kennedy Graham
Chris Hipkins
Hon Murray McCully
Hon David Parker
Rt Hon Winston Peters
Grant Robertson
Hon Anne Tolley
Hon Tariana Turia

Committee advisers and staff
Debra Angus, Deputy Clerk of the House
Meipara Poata, Clerk of the Committee
Appendix B

Speaker’s ruling

In recent years Speakers have entered into a number of agreements that have implications for the House and its members. On 24 March 2004, the House noted a report from the Privileges Committee on its consideration of a draft agreement on policing functions within the parliamentary precincts. Following the Privileges Committee’s report, the Speaker and the Commissioner of Police signed a formal agreement, which was presented to the House on 24 June 2004. The agreement continues until termination, but is required to be reviewed every three years and may be amended by mutual agreement of the two parties. A revised agreement was signed on 12 December 2007. A further review is now due.

On 7 November 2006, the Speaker presented to the House a paper setting out interim procedures for the execution of search warrants on premises occupied or used by members of Parliament, and indicated to the House that she would seek to have the Privileges Committee consider it once the police investigation into the activities of Taito Phillip Field and any subsequent action was completed. A final order for repayment was made on 3 September 2012 and the proceedings are now at an end.

On 21 December 2010, I entered into a draft memorandum of understanding with the New Zealand Security Intelligence Service on the collection and retention of information on members of Parliament, the need for which arose from a 2009 report from the Inspector-General of Intelligence and Security following complaints from members.

All three of these agreements have the potential to raise issues affecting the privileges of the House.

Consequently, I have determined that they involve a question of privilege and, therefore, the question stands referred to the Privileges Committee.
Review of Standing Orders

Report of the Standing Orders Committee

Fiftieth Parliament
(Rt Hon David Carter, Chairperson)
July 2014

Presented to the House of Representatives
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Review of Standing Orders

Part 1

Summary of recommendations

The Standing Orders Committee makes the following recommendations.

Recommendations to the House

We recommend to the House that the amendments to the Standing Orders set out in Part 2 of this report be adopted, with effect from the day after the dissolution or expiration of the present Parliament.

We recommend to the House that it refer to a select committee an inquiry into Parliament's legislative response to future national emergencies.

Recommendation to the Government

We recommend to the Government that financial provision be considered for full implementation of webcasting of hearings of evidence from any select committee meeting room in the parliamentary precincts.

Introduction

One of the functions of the Standing Orders Committee is to conduct a review of the Standing Orders, procedures, and practices of the House.¹ The committee typically conducts one such review in each parliamentary term. In Part 1 of this report, we discuss the issues that have arisen in the review of the 50th Parliament, clarify a number of matters of practice and procedure, and explain our recommended amendments to the Standing Orders. Part 2 sets out these recommended amendments, which are to come into force before the opening of the 51st Parliament.

A regular review of the rules and practices of the House is essential to ensure the House and its committees continue to operate effectively, and Parliament remains relevant. We recognise that the Standing Orders are akin to constitutional rules, and seek to arrive at a package of proposals that enjoys the overwhelming support of members around the House, even if unanimity cannot always be reached. This process involves “give and take” among parties, to ensure that changes do not confer unfair advantage.

We would like to record our appreciation of the thought-provoking submissions we received from the public and members.

¹ Standing Order 7(a).
Summary of recommended amendments

Our more significant recommendations include the following:

- Enabling the Business Committee to make arrangements for State occasions, including provision for foreign leaders to address the House, and exploring ways in which to enhance the visibility of the relationship between the Sovereign and the House.

- Incorporating provisions regarding the attendance and absence of members.

- Recognising the proposed provisions in the Parliamentary Privilege Bill regarding communications of proceedings in Parliament.

- Rationalising the financial review process (to be known as “annual review”) to enhance overall scrutiny and accountability within sectors.

- Acknowledging the right of members to address the House in New Zealand Sign Language.

- Promoting select committee scrutiny of apparent inconsistencies with the New Zealand Bill of Rights Act 1990.

- Streamlining the procedure for Revision Bills.

- Clarifying the purpose of and the expectations on members regarding the Register of Pecuniary and Other Specified Interests.
1 General provisions and office-holders

Definitions

Working day

We recommend modifying the definition of working day to reflect the Holidays (Full Recognition of Waitangi Day and ANZAC Day) Amendment Act 2013.

Amendment 1

Modify the definition of working day in the Standing Orders so that if ANZAC Day or Waitangi Day falls on a Saturday or Sunday, the following Monday is not a working day.

State occasions

The separation between the Governor-General and the House of Representatives signals the appropriate restraint exercised by the Sovereign in our modern constitutional monarchy. However, there is scope for more engagement in some special instances. We note that until 1984, each annual session was opened with a speech from the Throne, but each term of Parliament now tends to consist of a single session.²

In light of upcoming events, such as the ANZAC Centenary and the 150th celebration of Wellington as the capital, we looked at State occasions and how foreign leaders who visit New Zealand, on the invitation of the Government, might address the House, where appropriate. In 2011, the Hon Julia Gillard, Prime Minister of Australia, addressed members in the Chamber, but not during a sitting of the House. The Clerk’s submission discussed how such addresses might become part of the proceedings of Parliament and in some contexts might also involve the Governor-General. This would enhance the visibility of the relationship between the Sovereign and the House, which since 1984 has become largely limited to a State opening every three years.

We believe that the Business Committee is well placed to consider arrangements for such occasions, which would be initiated by a proposal from the Prime Minister. Depending on the nature of each occasion, it may be appropriate for it to occur either in the Chamber, or in the Legislative Council Chamber with members being summoned from the Chamber to attend. In any event, we believe that the Standing Orders should provide for the arrangement of such occasions, and for the Speaker to maintain order when they are taking place. We do not propose setting out specific procedures, but rather to leave matters such as the location and the arrangements for participation by members to the Business Committee to determine.

The Governor-General does not enter the House; when he or she attends for the State opening to deliver the speech from the Throne, this occurs in the Legislative Council Chamber. This demonstrates the appropriate separation between the two component parts

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² The 41st, 42nd and 43rd Parliaments (1984–1993) each consisted of two sessions. In the last case, the second session was precipitated by the prorogation of the Parliament to allow the House to be recalled early, on the outbreak of the first Gulf War in January 1991.
of Parliament and we do not wish to unsettle this tradition. However, the Governor-General could be involved in State occasions, for instance if a special message from the Queen were to be delivered to her subjects in New Zealand through her representative, or if a non-political Head of State, such as another monarch, were to visit New Zealand. On other occasions, such as when a visiting leader has a political role, the Governor-General’s involvement might not be appropriate. The nature of any participation by the Governor-General in such occasions needs further consideration and we recommend that the Clerk and the Secretary to the Cabinet discuss these matters further.

**Amendment 2**

Amend the Standing Orders to enable the Business Committee, after receiving a proposal from the Prime Minister, to arrange a State occasion, which could include a speech from a foreign leader, and to provide that such an occasion is reported in *Hansard* and is subject to the maintenance of order by the Speaker.

**Communication of proceedings**

The recommended amendments to the Parliamentary Privilege Bill, which has recently been reported to the House, would alter the language for legal protection of parliamentary publication: the phrase “by order or under the authority of the House of Representatives” would no longer be used. Instead, the amended bill refers to “communicating proceedings in Parliament”.

Therefore, for the communication of proceedings to be protected, it will need to be published “under the House’s or a committee’s authority”.

For this reason, we recommend amending Standing Order 3 to include a general definition that clarifies that all provisions in the Standing Orders that authorise or require the publication or circulation of proceedings, or the making of proceedings available to the public, are to be read as authorising the communication of those proceedings. Any direction by the House or a committee for its proceedings to be communicated must be implemented without fear of civil or criminal action.

**Select committee evidence, advice, and other proceedings**

Standing Order 236(1) provides that select committee proceedings, other than submissions, are not open to the public and remain strictly confidential to the committee until it reports to the House. This does not amount to an explicit authority to publish such proceedings once they cease to be strictly confidential.

We consider that there is a strong public interest in advice being published as it enhances the transparency of select committee decisions, and we recommend that once proceedings cease to be confidential they are made available to the public. It is important to note that secret evidence would never become available to the public unless ordered by the House.

**Oral questions**

Oral questions are posted to the Parliament website and there is high demand for this, yet no provision in the Standing Orders requires or authorises this. Consequently, we

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3 Parliamentary Privilege Bill (179–2) (5 June 2014), Part 1B.
4 Ibid, cl. 15(1) and (2).
recommend amending Standing Order 378 to require the circulation of oral questions once they are accepted.

**Amendment 3**

Amend Standing Order 3 to include a general definition that provides that, whenever proceedings are published, circulated or made available to the public under the Standing Orders, or otherwise by order of the House, this is to be regarded as a communication of those proceedings under the House’s or a committee’s authority.

Amend Standing Order 239 by adding a paragraph providing that select committee proceedings become available to the public when they cease to be confidential under Standing Order 236.

Amend Standing Order 378 to require the circulation of oral questions once they are accepted.

**Recognition of parties**

Concern was raised regarding the application of Standing Order 34, after a party had ceased to be registered under Part 4 of the Electoral Act 1993 and was later recognised again for parliamentary purposes following its re-registration.

The recognition of parties is a mechanism for reflecting the results of elections in the proportional basis of House and committee procedures, and in the allocation of funding and services. It therefore has a different emphasis from the registration of parties by the Electoral Commission, which anticipates future electoral processes. We note that the House concerns itself only with membership of the parliamentary party, and not with the general membership of political parties.

It is important for parties to attest their continuing representative capacity by registering under the Electoral Act 1993, but a reasonable opportunity should be given for parties to register if seats have been won in their interest but their registration subsequently ceases. This approach is consistent with the principle that the results of an election should be reflected in the procedures and administration of Parliament where possible.

To balance these interests we suggest providing in Standing Order 34 for the Speaker to permit a party that has won seats in an election, but subsequently ceased to be registered under Part 4 of the Electoral Act 1993, to be recognised on a temporary basis while an application by the party to be registered again is being dealt with. In these circumstances, temporary recognition would be for a reasonable time to allow an application to be made to the Electoral Commission and for the commission to consider it. This proposal reflects the way the Speaker dealt with the lapse in registration of United Future in 2013.

**Parties registered after election**

This temporary recognition should not be applicable to parties that had been formed after an election by members defecting or being expelled from other parties. We suggest such parties not be recognised until they are registered with the Electoral Commission, and then only if they have six or more members. This would ensure they met the criteria for recognition as a new party under Standing Order 34(2)(b), or as a component party if they were elected as such. Similarly, parties formed before an election but unable to obtain
registration before the election takes place should not be recognised unless they meet the criteria for a new party.

**Amendment 4**

Amend Standing Order 34 to give the Speaker the authority to continue to recognise a party for parliamentary purposes on a temporary basis, for a reasonable period; but, once a party has ceased to be recognised, to recognise it again only if it meets the criteria for recognition as a new party or a component party.
2 Sittings of the House

Members’ attendance

On 10 December 2013, the House adopted a sessional order regarding the attendance and absence of members. The order requires the Clerk to record the attendance of members at parliamentary business, and has been operating since the first sitting day of 2014. It is used for determining when members have been absent without permission and thus potentially liable under the Members of Parliament (Remuneration and Services) Act 2013. The sessional orders were adopted following the passage of the Act, which established significant penalties for members who do not attend the House. Given the penalties they face, members require certainty about the way attendance is recorded and the penalties that may be applied.

The adoption of the new rules for attendance and absence by way of a sessional order means that they have been subject to a trial period lasting until the election. Over the last five months, no issues have been raised about the system’s operation and only one member has been recorded in the Journals as not attending. We consider that the sessional order regarding the attendance and absence of members should be incorporated into the Standing Orders.

It is intended that the Speaker may grant members permission to be absent for compassionate reasons, or for a family purpose, such as parental leave. Discretion may also be used to allow a member to be absent for all or part of a day to breastfeed or care for an infant or child.

**Amendment 5**

Incorporate the rules and procedures for members’ attendance in the Standing Orders.

**Urgency**

It was suggested that question time should be held automatically when the House is under urgency. Most of us do not support this proposal, as the holding of question time is a significant element of negotiations about the expected progress of business under urgency. In recent times, the Business Committee has regularly supported the granting of the leave of the House for question time to be held during urgency. We believe that the Business Committee should be empowered to determine whether question time will be held during urgency without the leave of the House having to be sought. We note that Standing Order 378 allows the acceptance of oral questions for this purpose.

**Amendment 6**

Amend the Standing Orders to provide that the Business Committee may determine that oral questions or other business are to be taken at any time during a sitting that is extended by urgency.
Prayers

We acknowledge that not all members identify with the practice of reading a Christian prayer at the opening of a sitting of the House, although it is a tradition of very long standing. The prayer itself is not set out in the Standing Orders; Standing Order 60 simply requires the Speaker, on taking the Chair, to read a prayer to the House. The current prayer was adopted by the House in 1962. However, at the time it was recognised that its wording is not binding on the Speaker. We consider that the Speaker should consult members in the new Parliament about the prayer.

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5 (1962) 330 NZPD 337 (Rt Hon Keith Holyoake, Prime Minister).
3 General procedures

Arrangement of sittings by Business Committee

The Business Committee plays a fundamental role in constructive negotiations about arrangements for the sittings and business of the House. We suggest that the Business Committee be provided with the authority to make minor adjustments to the timing of particular sittings. Examples of such minor adjustments include delaying the dinner break until completion of maiden or valedictory statements, adjusting times for an extended sitting, or starting a sitting on the ringing of the bells following a State banquet.

Provided that such decisions are fair and not oppressive to minor parties this would facilitate the committee’s broad negotiations about the arrangement of business. For example, the determination of a time for the suspension or adjournment of the House could form part of a political solution for the arrangement of business. We note that the Business Committee reaches decisions on the basis of near-unanimity as determined by the Speaker.

Amendment 7

Amend the Standing Orders to provide for the Business Committee to make minor adjustments to the timing of particular sittings.

Anticipating discussion

The long-standing anticipation rule is derived from the United Kingdom’s House of Commons, where the rule still applies though it is not always strictly enforced. Over time the rules of the House have changed considerably, bringing the rules regarding relevance into question. For example, the length of most debates is now tightly constrained, with a set time or number of speeches. Therefore the anticipation of other business does not offer a means to stonewall progress. We note that members are not prevented from asking questions about legislation currently before the House, and regularly do so.

We consider that there should be further discussion in the new Parliament regarding whether it is time to abolish Standing Order 110, as there are limited opportunities for back-bench members to contribute, and if they wish to use the general debate for this purpose then there should be no obstacle to their doing so. The requirement that all contributions should be relevant to the question before the House would still apply to other debates.

New Zealand Sign Language

New Zealand Sign Language (NZSL) is an official language of New Zealand, and we support the idea of members being able to use the language to address the House. However, a number of practical considerations must be taken into account: advance notice would be needed to allow the provision of a simultaneous interpretation service so other members and the public could understand what was being signed. We believe that, as no member has yet sought to address the House extensively in NZSL, it would not be cost-effective to have
such an interpretation service always at the ready. This position would need to be reconsidered if a member were elected for whom NZSL was the preferred language.

In the meantime, the Speaker could permit a member to have extra time to give a spoken translation from NZSL if prior arrangement had not been made for a simultaneous interpretation service. In this case, it would be helpful if the Speaker knew in advance that a member intended to use NZSL extensively and then to give a spoken translation, so that extra time could be allowed.

**Amendment 8**

Amend Standing Order 105 to recognise that a member may address the House in New Zealand Sign Language.

**Parliament’s legislative response to national emergency**

A reasonable time has now elapsed since the Canterbury earthquakes, the most destructive February earthquake occurring more than three years ago. It is now timely for the House to refer to a select committee an inquiry into Parliament’s future legislative response to a national emergency.

New Zealand is vulnerable to several kinds of natural disaster and it is important that Parliament is prepared for a timely legislative response to disasters. The inquiry report should essentially provide a framework for legislating for the powers necessary for recovery after the lifting of a state of national emergency. In the aftermath of the Canterbury earthquakes, legislation was passed that raised some significant issues in terms of parliamentary oversight and constitutional matters. It would be preferable for such high-level considerations to be settled before they need to be reflected in legislation in the wake of the next national emergency.

**Recommendation to the House**

We recommend to the House that it refer to a select committee an inquiry into Parliament’s legislative response to future national emergencies.

**Proxy votes**

Problems with infrastructure and members attending to the welfare of themselves, their families, and their constituents following a major disaster will affect the ability of members to get to Wellington, or if necessary to an alternative place of meeting. Therefore, to ensure the effective functioning of the House it would be prudent to waive the limit on proxy votes when a state of national emergency has been declared. We note that after the February 2011 earthquake all members from the affected area were regarded as present for all parliamentary business.

**Amendment 9**

Amend the Standing Orders to waive the limit on proxy votes when a state of national emergency has been declared.
Election of Speaker

A few submitters suggested that the Speaker should be elected by way of a secret ballot, as occurs in some other Westminster Parliaments, to ensure that the Speaker has the confidence of the House. The Green Party also proposed a review of the process for electing the Speaker, to reflect the Mixed Member Proportional (MMP) environment. It was suggested that the review should draw upon examples from overseas parliaments, such as a secret ballot, and fair representation of parties in candidacy for the positions of Deputy and Assistant Speakers.

It is not unusual for the election of a Speaker to be a party-political process, because of natural tensions arising from the re-allocation of power in the wake of a general election. There is a strong tradition in New Zealand that, once he or she is elected, the impartiality of the Speaker is not questioned by members except through a formal motion, with the corollary that the Speaker earns such a reputation from the way he or she chairs proceedings. Over the last one hundred years there has never been a successful vote of no confidence in the Speaker.

Moving to a secret ballot system would not necessarily have a radical effect on the political character of the process for electing a Speaker. The benefit of doing so would not seem to outweigh the value of transparency and the public’s right to know how members have voted. We also note that since the inception of MMP it has not been unusual for an Opposition member to be appointed as the Deputy Speaker or an Assistant Speaker, as has been the case in this Parliament.
4 Select Committees

Human rights committee
A number of submissions sought the establishment of a human rights committee as a way to strengthen parliamentary oversight of human rights, with functions including human rights analysis of primary and secondary legislation, and advocacy on human rights matters, especially women’s rights and gender equality. It could be difficult to maintain the membership of such a committee, and, in principle, this proposal could potentially marginalise important matters that already seem to be too confined to legal and academic circles.

Later in this report, we propose that papers raising matters relating to the New Zealand Bill of Rights Act 1990 (NZBORA) stand referred to select committees, which should promote better engagement by members of Parliament. However, there is another part of the equation: as well as drawing the attention of members to Bill of Rights matters, there should be an increased emphasis on expressing these issues in ways that are comprehensible, not only for members, but for the public in general. The answer is not to shut NZBORA matters away in a specialist committee, as that could in fact be counter-productive.

New Zealand has a well-regarded system of subject select committees that have multiple functions and exercise general oversight of policy, legislative, and administrative matters within their subject areas. Bill of Rights scrutiny should be part of a mainstream discussion about legislative quality that takes place in all subject select committees and is applied in all policy contexts. The challenge for the legal community, and for relevant non-governmental organisations, is to express these ideas more accessibly.

Select committee subject areas
The 13 subject areas of committees are designed to broadly reflect ministerial portfolios, and allow a fair and sensible division of workload between committees. The grouping of subject areas also helps to ensure that committees have a complete view of the scrutiny cycle for appropriations. The aim, as far as possible, is for the committee responsible for examining a Vote also to be responsible for the financial review of the department administering it.

The Government has adopted a sector approach to defining desired outcomes and measuring their achievement. Ten sectors have been identified to provide a subject grouping of Votes and departments that reflect broad Government intentions.

We believe that some consideration of the sector groupings and the committees’ subject areas is now warranted to improve the match between sectors, departments, and Votes to align the examination of Votes and financial reviews more consistently, and to address any imbalances between committees’ workloads. Therefore, during the next Parliament we expect detailed consideration to be given to revising the subject areas, with the option of adopting a sessional order to implement any changes that are decided upon before the next Review of Standing Orders.
Members’ access to committee proceedings

We believe that every member of Parliament and immediate support staff should be given access to all select committee papers in the electronic committee system, with the exception of secret evidence. This would improve members’ ability to perform their representative roles, by allowing members to inform themselves more readily about matters to be considered in advance of meetings and hearings of evidence.

Additional benefits of widening access to the electronic system include allowing smaller parties, with limited committee membership, to engage more fully on issues as they arise, and making it easier for whips and party leaders to plan cover for meetings, as they would have continuous access to committee timetables and agendas.

We caution members and staff that committee proceedings, other than public hearings of evidence and released submissions, are confidential until committees report back to the House, and unauthorised disclosure to any person could result in a charge of contempt. Therefore, all immediate support staff must be thoroughly briefed on the confidential nature of the documents and the serious repercussions of unauthorised disclosure.

Webcasting

Pilot

In 2012, we asked the Office of the Clerk to implement a pilot for the webcasting of select committee proceedings. The pilot began on 6 November 2013 and is still operating successfully; it comprises the live webcasting, on the Parliament website, of public hearings of evidence from two select committee meeting rooms equipped for this purpose. On a few occasions, committees have specifically chosen not to webcast public hearings, mostly because of the sensitive nature of the topic under discussion. Only one witness at a hearing that would otherwise have been webcast has signalled a strong preference not to be webcast, and no confidential proceedings have inadvertently been webcast.

We consider that webcasting makes the hearings of evidence by select committees more accessible to the public, and makes parliamentary processes more transparent. During the pilot, streamed content has been accessed 6,765 times, and public feedback has indicated support for webcasting, and a strong desire for the rolling out of webcasting to the other select committees.

Future implementation

The Office of the Clerk informed us that webcasting does not seem to have had a chilling effect on witnesses as feared, and it has helped select committee hearings to flow smoothly, by allowing submitters appearing via teleconference to keep abreast of the discussion. Departmental advisers also commented that it allows them to continue to work while listening to hearings, and to keep abreast of submissions related to their particular area of expertise.
The pilot indicated that a full roll-out of webcasting to all committees will require
- significant capital investment for cameras, encoding equipment, servers, and control panels (in the committee room and outside it)
- website development work
- changes to network capability and capacity
- establishment of a test environment
- changes to the audio system for select committees (to respond to members’ feedback)
- development of audio or visual signals to indicate when webcasting is taking place.

We were advised that developing a system will require significant resources and time, and the cost of a full roll-out would be beyond the current funding of the Office of the Clerk and the Parliamentary Service. In the interim, the Office of the Clerk intends to carry on with the pilot, making improvements wherever possible, and collecting data and information to support the development of a robust system. We support the commencement of work to develop a webcasting system that will allow multiple committees to webcast hearings at the same time from any select committee meeting room in the parliamentary precincts.

**Recommendation to the Government**

That financial provision be considered for full implementation of webcasting of hearings of evidence from any select committee meeting room in the parliamentary precincts.
5 Legislative procedures

Legislative quality

Parliament is the supreme law-making body in New Zealand, but it operates within a larger constitutional framework. Our democracy requires respect for the rule of law and avoiding the arbitrary deprivation of rights and freedoms. Care should be taken to ensure that proposed legislation passed by the House is appropriate in this context. Since 1987, principles for good legislation-making have been expounded by the Legislation Advisory Committee (LAC) in the form of *Guidelines on Process and Content of Legislation*. These guidelines have been applied, in varying degrees, in the formulation of policy and legislation. In the guidelines, the LAC observed that

Parliamentary democracy is not simply the proposition that anything a majority decides must be always right and good. Rather it proceeds upon a presumption that when the majority vote for a law which constrains individuals or takes away any of their freedom of person or property it will only be for a good reason.  

Cabinet procedures require consideration of legislative quality matters in the context of regulatory impact analysis to ensure the costs and benefits of proposals are properly weighted. Explanatory notes for bills now include information about how regulatory impact statements may be obtained.

The Government has also directed that disclosure statements be prepared for all Government bills, Supplementary Order Papers, and disallowable instruments to help ensure the production of legislation that is robust and consistent with good legislative practice. Disclosure statements must cover the quality assurance work undertaken to test the content of the legislation, and any significant or unusual provisions in the legislation. The Government announced last year that it intended to introduce a bill to establish disclosure statements as a legislative requirement, and this policy was reflected in the Legislation Amendment Bill introduced on 20 May 2014.

We consider that disclosure statements provide an initial basis for select committees, when examining bills, to consider whether principles of good legislative practice have been followed in the drafting. We encourage select committees to examine legislative quality issues, with a particular focus on matters of constitutional and administrative law, when preparing their reports on bills. This would encourage policy-makers to give more thought to legislative quality during the policy development process, and would align with the Government’s proposal in the Legislation Amendment Bill for more disclosure of legislative quality matters.

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9 Ibid, para. [8].
We note that the Office of the Clerk has advised us that it is working to enhance its support for scrutiny to improve legislative outcomes, and will provide more analytical support to members in carrying out this work.

**New Zealand Bill of Rights**

We considered advice and a number of submissions on the House’s responsibility to consider matters with Bill of Rights implications during the legislative process. A distinctive feature of the New Zealand Bill of Rights Act 1990 (NZBORA) is that it imposes a statutory obligation on the House. Section 3(a) of the NZBORA declares that the Bill of Rights applies to acts done “by the legislative, executive, or judicial branches of the Government of New Zealand”. The legislature is enjoined by section 5 of the NZBORA to subject the rights and freedoms in the Bill of Rights “only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society”. To facilitate the legislature’s consideration of such matters, section 7 of the NZBORA requires the Attorney-General to indicate to the House when a bill is introduced that appears to be inconsistent with the Bill of Rights.

**Disclosure statements**

Notably, the previous Standing Orders Committee recommended to the Government that Cabinet guidelines should require Bill of Rights reporting on substantive Supplementary Order Papers.11 We are pleased that this has been reflected in the development of requirements for disclosure statements on Government amendments that involve material policy changes.12

Some disclosure statements include information about whether advice has been provided to the Attorney-General about the limitation of rights under the NZBORA. Amendments that are judged not to be material policy changes, but which have particular legislative features, require the provision of “short-form” disclosure statements.

We note that short-form disclosure statements do not directly address the question of whether advice has been provided about possible inconsistencies with the NZBORA. We suggest that the committee examining the Legislation Amendment Bill should consider whether NZBORA matters should be addressed as a standard feature of all disclosure statements.

Disclosure statements are made available on the Legislation website13 and we encourage committees and members to utilise the material provided, both in committee consideration and in debate. We recommend that the Clerk of the House ensure that this material is available to members in the Chamber and through the electronic committee information system. We will watch these developments with interest.

**Enabling members to judge whether limitations are justified**

In 1999, two bills were passed that gave rise to criticisms by the courts of the inadequacy of Parliament’s scrutiny of amendments for consistency with the NZBORA.14 In particular,

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14 The Crimes (Home Invasion) Amendment Bill and the Criminal Justice Amendment Bill (No 6) included provisions to implement the “home invasion” amendments to the Crimes Act 1961 and the Criminal Justice Act 1985.
the Chief Justice expressed concern about the passage of the amendments, stating that “It is inconceivable that Parliament would have acted so casually had it appreciated the implications”.15

Such cases demonstrate the risk to the relationship between Parliament and the courts that can arise if legislation is passed without the House being informed of Bill of Rights matters at different stages of the parliamentary process. However, it should be noted that the amendment that gave rise to the above inconsistency was not a Government amendment, and therefore would not have been subject to a disclosure statement.

The ordering of civil society requires Parliament to enact legislation that limits or affects rights, and the New Zealand Bill of Rights Act 1990 does not prevent this. However, the legislature is obliged by section 5 of the Act to make rights subject “only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society”. To meet this obligation, the House should ensure that members are equipped to make an informed judgment when a question arises as to whether a limitation of rights meets this important test.

We consider that papers presented by the Attorney-General under section 7 of the NZBORA should receive detailed consideration by being referred automatically to select committees. We encourage committees to invite officials or Ministers to assist them in their consideration of these issues. As discussed previously, we also urge committees to address broader legislative quality matters that are drawn to their attention.

The increased emphasis on legislative quality matters that is manifest in the Legislation Amendment Bill and the publication of disclosure statements on substantive Government amendments will facilitate the provision of information to members about potential rights implications of Supplementary Order Papers.

Some of us consider that the Attorney-General should examine amendments proposed to be moved in a committee of the whole House, and present papers where it appears that amendments raise inconsistencies with the NZBORA. Others of us are concerned about the implications that further reporting requirements for the Attorney-General could have in terms of the collective responsibility of Ministers.

We acknowledge that there is no guarantee that committees will address inconsistencies identified by the Attorney-General, or that inconsistencies would be dealt with even if raised later in the legislative process. We suggest that future reviews of the Standing Orders consider how developments have contributed to the House’s scrutiny of legislation. The House should provide mechanisms for these issues to be duly considered, so that the decision as to whether a limitation of rights is demonstrably justified is taken as a conscious exercise of the collective political and moral judgment of members.

Amendment 10

Amend the Standing Orders to provide that a paper presented by the Attorney-General about the inconsistency of a provision with the New Zealand Bill of Rights Act 1990 stands referred to a select committee for consideration.

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Revision bills
The Legislation Act 2012 empowers the Parliamentary Counsel Office to prepare revision bills that “revise the whole or part of one or more Acts, and for that purpose combine or divide Acts or parts of Acts”. While revision bills will usually create new principal Acts, there is some limited potential for them to make amendments to adjust the wording of other principal Acts, and therefore to become in effect omnibus bills. In this instance, they could potentially be introduced under Standing Order 260(a), as they could be regarded as implementing a single broad policy (the revision of the statutes concerned).

House procedure
We consider that the narrow purpose of revision bills and the restrained pre-introductory process justifies a procedure to ensure that revision bills do not unduly occupy the Government’s time in the House. However, this consideration must be balanced by regard for proper process and scrutiny.

We endorse a streamlined procedure to enable the House to pass revision bills more quickly. Under this procedure, a certified revision bill would
- be read a first time without debate and stand referred to a select committee nominated in the explanatory note
- be considered by a subject select committee
- be debated only at the second reading
- have a committee stage only when the Minister in charge of the bill required an amendment to be considered or a member gave notice of an admissible amendment, and only for the consideration of that amendment
- be read a third time without debate.

Once a revision bill was reported from a select committee, the Business Committee would consider its passage, determining
- the number and length of calls for the second reading debate
- whether the order of the day for the second reading should be considered during an extended sitting
- if necessary, how the committee of the whole House would consider any proposed amendments, the length of time for the committee stage, or the number of calls and their allocation
- whether the third reading should be held forthwith, following the second reading or the committee stage, or should be delayed to take account of other bills requiring assent and the time necessary to prepare the assent copies of the bill.

Such a procedure would facilitate the passage of a revision bill, as it would allow amendments recommended by a select committee to be properly adopted, and provide a safety net should further amendments seem necessary. The procedure would allow the Government to retain its control over the sequence of Government orders of the day on the Order Paper. It would also provide for agreement to be reached, by near unanimity, on the use of extended sittings for the consideration of revision bills, and on the time to be spent on any debates.

We acknowledge concern expressed by the Parliamentary Counsel Office that delays arising from the debate of revision bills could affect the timely passage of the legislation, and thus
the delivery of the revision bill programme. However, the use of extended sittings for the consideration of non-controversial bills has proved particularly successful. We encourage the Business Committee to take a constructive approach to ensuring revision bills are passed in good time, because of the public interests that they serve.

**Scope of revision bills**

At the point of introduction the content of a revision bill is tightly constrained under the Legislation Act 2012, but the House may nevertheless amend a revision bill for any purpose. However, the previous Standing Orders Committee expressed a strong view that the scope of revision bills should be very narrow:

> While the House is not prevented from amending a revision bill in any way, amendments proposed will need to be relevant to the bill. A revision bill is one that restates the existing law and may clarify its intent. Its scope is limited to that purpose. Amendments that are relevant to that purpose would be admissible, but amendments that go beyond that purpose, for instance, that significantly change the effect of the law, may be outside the scope of a revision bill. Such an amendment would require an instruction from the House. This would effectively limit the nature of amendments that committees could make and militate against the temptation to bring in new policy considerations.

We would like to reiterate this view; adopting this rule would prevent committees, of their own initiative, recommending or adopting amendments that would stray significantly from the revision powers set out in section 31 of the Act. The restricted remit of this process should be explained in advertisements calling for submissions to reduce the prospect of attracting substantive proposals about policy matters that committees would be powerless to implement.

**Amendment 11**

Amend the Standing Orders to set out a streamlined procedure for revision bills.

**Confirmation and validation bills**

Towards the end of each calendar year, the House considers a Subordinate Legislation (Confirmation and Validation) Bill. The main purpose of these bills is to confirm, or in some cases confirm and validate, certain pieces of subordinate legislation that, by virtue of the Acts under which they are made, will lapse unless confirmed or validated by an Act of Parliament.

The Regulations Review Committee noted that the time available for the committee to consider Subordinate Legislation (Confirmation and Validation) bills each year is problematic. The bills must, under the statutory deadlines, be passed before the end of the calendar year, otherwise a number of instruments could lapse. The timing of the introduction of Subordinate Legislation (Confirmation and Validation) bills, combined with the end-of-year deadline, results in a limited time for select committee consideration. In particular, the Regulations Review Committee considers that the tight timeframe restricts its ability to obtain evidence or to seek opinions from other select committees.

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16 Legislation Act 2012, section 34(2).
Streamlining of House procedure

The Regulations Review Committee suggested establishing a streamlined procedure for the House’s consideration of Subordinate Legislation (Confirmation and Validation) bills, along similar lines to the procedure proposed for revision bills. The rationale for this suggestion is that as much of the time as possible should be devoted to select committee consideration, as it is the more effective means of scrutinising this type of legislation.

We agree with the committee’s views, but consider that the streamlined process should not be triggered if a bill includes provisions that make substantial validations of illegal regulations and related actions. Instead of precluding Subordinate Legislation (Confirmation and Validation) bills from incorporating substantial validations of this sort, we suggest that the streamlined procedure be associated with a confirmation and validation bill. This term would be defined in descriptive terms as any bill whose purpose is limited to the confirmation or validation of regulations that will lapse unless confirmed or validated by an Act of Parliament. In this context, “confirmation” and “validation” are largely synonymous, but the phrase “confirm and validate” is used in some older statutes and it is intended that the word “validate” should be covered when used in this limited sense.

We suggest the following procedure for a confirmation and validation bill:

- Set the bill down for its first reading without debate.
- When the bill is read a first time, it automatically stands referred to the Regulations Review Committee.
- Debate the bill’s second reading in the usual way.
- Set the bill down for consideration in a committee of the whole House only if the Minister in charge requires an amendment to be considered, or if a member lodges an amendment with at least 24 hours’ notice before the time that the House meets on the day on which the bill is read a second time.
- The bill is taken for its third reading without debate.

Like revision bills, confirmation and validation bills would be appropriate business for consideration during extended sittings. We expect members to work cooperatively and constructively to ensure that these bills do not remain on the Order Paper unduly or take up too much House time.

Amendment 12

Adopt a new Standing Order to permit a streamlined legislative process for confirmation and validation bills.

Define a confirmation and validation bill as any bill whose purpose is limited to the confirmation or validation of regulations that will lapse unless confirmed or validated by an Act of Parliament.

Delegated legislation

At present, Standing Order 3 defines regulations by reference to the Regulations (Disallowance) Act 1989. However that Act was repealed by the Legislation Act 2012. The Legislation Act 2012 does not include a definition of “regulations”, but instead refers to “disallowable instruments” and “legislative instruments”.

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We consider that the term “regulations” is the term best understood by the public to refer to such instruments, and should therefore be retained in the Standing Orders. Regulations should be defined broadly to mean any delegated legislation, including legislative instruments and disallowable instruments within the meaning of the Legislation Act 2012.\textsuperscript{18} Such a definition would provide the Regulations Review Committee with a broad jurisdiction that would be consistent with its existing discretion to decide the precise boundaries of its jurisdiction case by case.

However, any motion by a member of the Regulations Review Committee to disallow an instrument may be lodged only in respect of a “disallowable instrument” as referred to in section 43(1) of the Legislation Act 2012. The Act’s provisions are referred to in this situation because the process of disallowance has legal effect only by virtue of the law.\textsuperscript{19}

\textbf{Amendment 13}

Continue to refer to “regulations” in the Standing Orders.

Define regulations broadly as meaning any delegated legislation, including legislative instruments and disallowable instruments within the meaning of the Legislation Act 2012.

Omit Standing Order 314(3)(b).

Update Standing Order 317 to refer to any notice of a motion to which section 43(1) of the Legislation Act 2012 applies.

Amend Standing Order 315(2) by replacing “statute” with “enactment” wherever it occurs.

\textbf{Introduction under urgency}

The Māori Party proposed amending Standing Order 281(3), which allows urgency to be accorded to the first reading of a bill despite the bill not being available to be set down for first reading. The Māori Party recognises that some circumstances will require an urgent legislative response, but it believes the provision raises serious concerns as parties are not given the opportunity for an informed and adequate response to the proposed legislation.

This provision was added following a recommendation by the Standing Orders Committee in 2011, to encourage the Government to release bills before they are presented under urgency for their first reading. Before this provision was introduced the Government would be penalised for introducing a bill ahead of time by not being able to include it in an urgency motion until the normal stand-down period had elapsed. This usually resulted in the Government not introducing the bill until urgency had been accorded.

We note that the use of urgency has evolved over recent years, and the element of surprise features less prominently, with the exception of Budget legislation and a few other bills. In some cases the nature of the business to be accorded urgency is also set out, and urgency is often signalled in advance. For these reasons, we wish to retain Standing Order 281(3), so that urgency may be accorded to the first reading of a bill despite the bill not being available to be set down for first reading.

\textsuperscript{18} Some legislative instruments are made without requiring a delegation, such as instruments made by Royal prerogative. However, the intention is that only legislation made under powers delegated by Parliament are scrutinised on behalf of the House.

\textsuperscript{19} Legislation Act 2012, s 42.
6  Financial procedures

Financial veto

It has been suggested that the Government’s financial veto be abolished. The Crown’s financial veto was introduced in 1996, with the intention of replacing a number of procedural rules that prevented proposals for taxation or increases in expenditure unless they were initiated or recommended by the Crown. The change resulted from dissatisfaction that these rules were inconsistent, did not protect the Crown’s overall financial position, and operated unfairly in preventing members from moving proposals that, even incidentally, involved the smallest amount of expenditure.\(^{20}\)

The financial veto procedure enables the Government to veto proposals that it considers would have “more than a minor impact” on the fiscal aggregates.\(^{21}\) The Standing Orders Committee, in recommending the procedure, recognised that the Government is responsible for the Crown’s financial performance and position, and therefore needs to have control over the fiscal aggregates.

From the outset it was recognised that the financial veto procedure was “not consistent” with section 21 of the Constitution Act 1986, which required bills involving appropriations or charges on the public revenue to have the consent of the Crown. The Standing Orders Committee proposed remedying this inconsistency by repealing or modifying section 21;\(^{22}\) this recommendation was reiterated in 2003,\(^{23}\) and section 21 was repealed in 2005.\(^{24}\) However, this repeal does not justify the removal of the financial veto procedure—it was predicated on the procedure remaining intact.

We consider that the financial veto procedure is highly important. It recognises that Parliament, whilst being the supreme legislative body in New Zealand, exists within a constitutional framework that charges the Government of the day with the administration of the country. The Government has ultimate responsibility for the Crown’s financial performance and position, and could not maintain this responsibility if fiscal decisions were to be foist upon it. If the legislature wished to change an important aspect of government policy, without agreement from the Executive, the alternative for the House would be to change the Government, rather than attempt to force the Executive to carry out, and thus accept responsibility for, policies it does not agree with.

Use of the procedure has in fact been relatively restrained, and Governments have generally sought to muster the numbers to vote down proposals with financial implications in preference to vetoing them. For all these reasons, abolishing the veto would be highly undesirable.

\(^{21}\) SO 321(2) and (3).
\(^{24}\) Constitution Amendment Act 2005, s 5.
Financial scrutiny

Changes to Public Finance Act 1989

In 2013, amendments were passed to the State Sector Act 1988 and the Public Finance Act 1989, to improve financial flexibility and performance reporting, and to facilitate innovation and different ways of working in government. The amendments specify the information that is required to be presented to Parliament regarding state-sector spending and performance. The proposed amendments to the Standing Orders take into account the following specific changes:

- The introduction of multi-category appropriations so that an entity can use an appropriation, or a category of a multi-category appropriation, administered by another department.
- A new requirement making most appropriations subject to end-of-year reporting on what has been achieved with them, rather than simply reporting what services have been provided from output expense appropriations.
- The ability to establish departmental agencies, which will produce their own reports.
- The flexibility for a number of agencies to present annual reports and statements of intent in the same document as long as each annual report is distinct.

We recommend shortening the Appropriation (Supplementary Estimates) Bill and Imprest Supply Bill debates and the debate on the Prime Minister’s statement, and redirecting the time to the Budget debate and the Estimates debate, allowing more in-depth discussions of Votes. This would also enable members to participate in the debates with the benefit of their prior participation in detailed select committee scrutiny.

Improving financial scrutiny

As the changes to the Public Finance Act did not come into force until 1 July 2014, their impact is being anticipated, and a reasonably flexible approach is being suggested. We encourage members to reflect on the impact of the Act’s changes on financial scrutiny during the next Parliament and, if necessary, consider future amendments to the Standing Orders.

How select committees and the House conduct financial scrutiny should be a specific focus of any future consideration. Committees already review a considerable number of entities and the changes to the Public Finance Act have the potential to result in a growth in entity reporting. There is a challenge in ensuring that the many reports of committees are adequately reflected in financial review debates. One possible measure to address this concern would be to group entities by sectors or themes to provide more focus to committee and House consideration. We consider that the Finance and Expenditure Committee’s general power to allocate and group scrutiny activities is sufficient to enable the allocation of standalone reports on appropriations. We therefore recommend that Standing Order 341 be deleted.

The Finance and Expenditure Committee may consider this approach in its allocation of Votes and entities to subject select committees, while the Business Committee may arrange debates in the House along these lines. We encourage the Finance and Expenditure and Business Committees to use their existing powers in a concerted effort to improve parliamentary financial scrutiny.
Amendment 14

Increase the Budget debate from 14 hours to 15 hours.

Increase the Estimates debate from eight hours to 11 hours.

Shorten debates on the second reading of an Appropriation (Supplementary Estimates) Bill and on the second reading of an Imprest Supply Bill from three hours to two hours.

Reduce the debate on the Prime Minister’s statement from 15 hours to 13 hours.

Change “financial review” to “annual review” everywhere the term occurs in the Standing Orders.

Delete Standing Order 341.

Statement on long-term fiscal position

The statement on the long-term fiscal position is a significant accountability document, addressing the fiscal position over the next 40 years. While the statement stands referred to the Finance and Expenditure Committee, the committee is not required to report on it. Nor is there provision for an automatic debate on any committee report on the statement.

Financial scrutiny at present focuses on just one year’s activities. A committee report, and debate, focused on the statement would encourage consideration of the long-term economic picture, and members would be able to take the knowledge they gain from such a debate into account during annually-focused scrutiny. As the statement is produced only once in each term of Parliament, allowing a committee report on the statement to be debated in a similar way to the report on the Budget policy statement would not significantly affect House time. This procedure would improve the House’s scrutiny of the Government’s long-term approach.

Amendment 15

Require the Finance and Expenditure Committee to report on the Statement on long-term fiscal position (with a report date of six months from referral of the statement), and for the statement to be debated in the House in a similar way to the Budget policy statement.

Investment statement

In 2010, the Government produced an Investment Statement of the Government of New Zealand.25 The investment statement describes and states the value of the Crown’s significant assets, changes to them, and forecast changes over the next two years. The Finance and Expenditure Committee of the 49th Parliament, using its inquiry function, examined the investment statement and reported on it to the House. In its report, the committee noted that

We consider this new document an important addition to the Government’s disclosure documents. It contributes usefully to a clearer picture of the country’s financial position, and of the thinking underlying the Government’s strategy for Budget 2011 and beyond.26

The Public Finance Act 1989 now requires the Government to present an investment statement to the House from 2017, and at least once every four years thereafter. Given the important role the investment statement plays in providing a complete picture of the financial position, it would be desirable to formalise its examination by the Finance and Expenditure Committee. As the investment statement is expected to be produced only once each Parliament, towards the end of its duration, a report date of two months from presentation should enable the committee to report within the same Parliament.

The important long-term implications of the investment statement would justify the setting aside of House time to debate the statement once each term of Parliament, as proposed for the statement on the long-term fiscal position.

Amendment 16

Provide for the investment statement to stand referred to the Finance and Expenditure Committee for examination and report within two months of the date of presentation, and for the investment statement to be debated in the House in a similar way to the Budget policy statement.

Entities eligible for review

The State Sector Act 1988 and Public Finance Act 1989 were amended during the 50th term of Parliament, providing for the establishment of a new type of entity, a departmental agency. Departmental agencies would typically undertake operational functions on behalf of a host government department and are subject to similar reporting requirements to departments. While none have yet been established, a new agency should be subject to the same parliamentary scrutiny as departments; for example, it should become eligible for annual review on presentation of its annual report to the House, and its annual review allocated to a subject select committee by the Finance and Expenditure Committee. We therefore recommend a minor amendment to the definition of department in the Standing Orders to bring departmental agencies within the scope of annual reviews by select committees.

Select committees also conduct annual reviews of Crown entities, public organisations, and State enterprises under Standing Order 339. Schedule 4A of the Public Finance Act lists a number of non-listed companies in which the Crown is a majority or sole shareholder. Examples include Crown Asset Management Limited and Health Benefits Limited. Although many of the powers and obligations of Crown entities apply to these companies, they are not currently eligible for annual review as they are not listed in Schedule 1 or 2 of the Crown Entities Act 2004. Consequently, we recommend a minor amendment to the definition of Crown entity in the Standing Orders to bring Schedule 4A entities within the scope of annual reviews by select committees.

Emphasis on coherent grouping of reviews

We recommend that the approach to conducting annual reviews should be to group reviews where possible, so that committees are not overwhelmed by a vast plethora of organisations to scrutinise. For example, a departmental agency should not necessarily be subject to the same accountability arrangements as its host department. While a departmental agency might be separately allocated, it is just as likely that a departmental

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27 Public Finance Act 1989, s 26NA.
agency will be allocated with its host department as part of a package of reviews that will be reported together and potentially debated together. Similarly, reports on appropriations may well also be included in groupings to provide a coherent picture of the results of spending within a sector.

We consider that this is a matter for the Finance and Expenditure Committee to decide on a case-by-case basis when it allocates reviews. The committee to which each group of entities is allocated also has discretion about how it should target its efforts, and committees will continue to receive advice in this regard from the Office of the Controller and Auditor-General.

Amendment 17

Amend the definition of department in Standing Order 3 to read, “means a department or departmental agency within the meaning of the Public Finance Act 1989”.

Amend the definition of Crown entity in Standing Order 3 to read, “means an entity named or described in Schedule 1 or 2 of the Crown Entities Act 2004 or Schedule 4A of the Public Finance Act 1989, and includes Crown entity subsidiaries”.

Appropriation (Financial Review) Bill

Standing Orders 342 to 344 and Appendix A currently refer to the Appropriation (Financial Review) Bill. This bill is the House’s vehicle to consider the results of select committee scrutiny of the performance and current operations of the Government and departments.28 It has been proposed that the bill be renamed the “Appropriation (Annual Review) Bill” to align with the change in terminology from “financial review” to “annual review” elsewhere in the Standing Orders.

The Treasury has suggested that a more appropriate and accurate name would be the “Appropriation (Confirmation and Validation) Bill”. This would reflect more clearly the intent and scope of the bill, as set out in Standing Order 342(1), which states that it contains “provisions solely concerned with the confirming or validating of expenditure incurred in respect of any previous financial year.”

Amendment 18

Replace “Appropriation (Financial Review) Bill” with “Appropriation (Confirmation and Validation) Bill” in all places in which the term appears in the Standing Orders.

7 Non-legislative procedures

Petitions and online engagement

Submissions proposed detailing in the Standing Orders the procedure for select committees to follow when considering petitions. In particular it was suggested that petitioners automatically be required to make submissions, without selective individual invitation from committees. An automatic process for seeking submissions and hearing petitioners could be considered, but this should be done cautiously as trends in petitioning behaviour can change dramatically. For example, whilst so far in the 50th term of Parliament fewer than 150 petitions have been lodged; during the 43rd Parliament 3,670 petitions were lodged.

We believe that the presumption should be that principal petitioners will be invited to make written submissions on their petitions; but if a committee is dealing with a large number of petitions it is up to the committee to determine whether to invite written submissions and whether to hear from each petitioner. It could also revive the practice of promoting many petitions on the same topic, rather than obtaining as many signatures as possible for a single petition. Ideally, committees should include some reasoning in their reports on petitions; presenting pro-forma reports with little content should be uncommon.

e-Petitions

We were advised that the electronic submission of petitions has been implemented in other jurisdictions with varying success, and in some cases the subject matter of popular petitions has been trivial or a matter over which a legislature has no influence. Concern has been raised that e-petitions create expectations of action that is unlikely to eventuate, leading to disenchantment with the process.

We understand that the immediacy of social media campaigns and petitions can have a powerful impact on policy debates, and we see merit in considering how e-petitions might work effectively in the New Zealand context. At present we have a paper-based petition system, and an electronic system that mirrors the existing system would improve the accessibility of this particular parliamentary process. Clear guidelines would still be needed as to the topics a petition could cover, and each petition would still require sponsorship by a member of Parliament, to guard against the risk of frivolous or vexatious petitions.

Most of us do not favour a signature threshold to trigger special consideration of a petition, as the subject matter of a petition signed by a few people may be just as worthy of the House’s consideration as one signed by many thousands. We therefore propose maintaining the existing system, while investigating how the process for submitting a petition might be made more accessible for people. A useful comparison could be made with the Queensland Parliament, which operates parallel paper and electronic petition systems.

Promoting online engagement with representative democracy

Public engagement is crucial to keeping Parliament relevant. We acknowledge that tensions between representative democracy and direct democracy have emerged, particularly
regarding the considerable potential offered by technology and social media to harness direct popular engagement in public policy.

New Zealand has a statutory process for the public to have its say on certain issues—the Citizens Initiated Referenda Act 1993. However, the procedure for triggering a referendum is time-consuming and costly, and the threshold is difficult to achieve. The end result of a successful petition is a referendum that is non-binding on the Government and involves electors simply answering “yes” or “no” to a specific question.

A referendum on a specific question may provide a broad indication of how the public feels on a particular issue, but it limits the opportunity for nuanced debate and the balancing of competing interests. We envisage that in the future the public could be able to engage with their representatives via electronic channels, with controls in place to ensure systems were not open to manipulation. An online petition process might support the introduction of a bill, or the holding of a debate on a particular matter sponsored by a member.

### Written questions

We note that frequently Ministers do not meet the sixth-working-day deadline in responding to written questions; when this happens, the practice is for interim replies to be given stating that the question will be answered as soon as possible.

The Green Party’s submission included examples of substantive answers not being received for many questions, or being unacceptably delayed, after interim replies were received. The Green Party argued that this process has been abused, and proposed tighter rules to ensure Ministers respond substantively to written questions in the allocated time.

**Interim replies**

Interim replies can be used when considerable research needs to be undertaken to prepare an answer, but should not be used simply because the Minister’s office has a large number of replies to deal with on the same day. If an interim reply is lodged, Ministers are obliged to follow up with a full reply as soon as possible thereafter. Technically, interim replies are the replies in terms of the Standing Orders, and the full reply is a direct communication between the Minister and member concerned. The Speaker will not intervene regarding the content of replies, except in some cases when a point of order is raised about compliance with the Standing Orders.

We suggest an alternative approach to increase the accountability of Ministers. The practice for replies would be adjusted so that an interim reply is provided when a question cannot be answered on time; the interim reply is not regarded as meeting the requirements of the Standing Orders, and in effect the question remains unanswered. An interim reply should include a reason for an answer not being available and be published in the Questions for Written Answer system. The final reply is then lodged and made available through the system in the normal way, including the dates on which the question was asked and answered, and the reason for the delay, as stated in the interim reply.

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29 (2000) 582 NZPD 1162 (Hunt) (SR 180/2).
30 (1995) 547 NZPD 7195 (Tapsell) (SR 180/1(2)).
31 (1995) 546 NZPD 6366–67 (Tapsell) (SR 180/1(1)).
32 (1983) 450 NZPD 388 (Harrison) (SR 181/3(1)).
This practice would mean the actual time taken to reply to questions would be public knowledge, along with the Minister’s explanation; this would enable the public to judge the performance of Ministers in answering questions.

**Amendment 19**

Adjust the practice for written questions so that interim replies may be received, but are not regarded as replies for the purposes of the Standing Orders, and the time taken for final replies, and the reasons for delay, are made public.

**Set-topic debates**

Submitters felt that the general debate serves little parliamentary purpose, and proposed retaining it in every second sitting week, with the alternate time slots allocated to a debate on a specific issue or policy area. It was suggested that the Business Committee could determine the topics, or this could be done proportionally by parties or select committees.

We would welcome opportunities to debate select committee inquiry reports or topics of special interest to members. However, we value the general debate as an opportunity for members to raise issues of importance to them and their constituents. The Business Committee can already arrange set-topic debates, as occurred, for example, in the case of a report on an inquiry by the Health Committee that garnered cross-party support. A three-hour debate was also held to mark a Pacific Parliamentary Forum being held in Wellington.

While it is pleasing to see the Business Committee using its powers to arrange such debates, we believe that it could make greater use of them. The debate on the Pacific Parliamentary Forum was determined by the committee as part of cross-party negotiations required for an extended sitting. Extended sittings provide good opportunities for extra House time, some of which could be accorded to set-topic debates, rather than their taking place instead of the general debate. We encourage the Business Committee to be creative in how it arranges debates and sittings. We also encourage members to write to the committee with proposals for suitable set-topic debates, for example select committee chairpersons suggesting a debate on an inquiry report.

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34 (18 April 2013) [2011–2014] JHR 461. The debate was held on a Thursday afternoon after an extended sitting that morning to progress Government business, following determinations of the Business Committee (13 February and 10 April 2013).
Appendices to the Standing Orders

Appendix B—Pecuniary and Other Specified Interests

We were pleased to receive a submission from Sir Maarten Wevers, Registrar of Pecuniary and Other Specified Interests of Members of Parliament. Sir Maarten recommended replacing clause 1 with a detailed clause setting out the purpose of the register, to provide valuable guidance to electors, members, and the Registrar as new or unforeseen situations might arise. Sir Maarten believed that it would also highlight the role of the register in building public trust and confidence in the conduct of members, parliamentary processes, and decision-making by promoting transparency and accountability, while encouraging high standards of behaviour by members.

Amendment 20

Replace clause 1 with a new clause setting out that the purpose of the register is to facilitate the transaction of business by the House by promoting the highest standards of behaviour and conduct by members, and thereby strengthening public trust and confidence in parliamentary processes and decision-making.

Trustee relationships

At present, clause 5(1)(d) of Appendix B requires members to declare the name of any trust of which they are a trustee or beneficiary. Members are not required to specify whether they are a trustee, beneficiary, or both. There is a substantial difference between a member's being a trustee or a beneficiary, as a trustee is the holder of property at law, but cannot benefit from the trust property unless he or she is a beneficiary.

Amendment 21

Require members to specify whether they are a beneficiary or trustee (or both) of any trust they have declared in the register.

Real property held in personal superannuation schemes

Sir Maarten drew our attention to the inconsistency in the way the Standing Orders currently treat property held in trusts, which must be declared, and property held by superannuation trusts, which is not required to be declared. We consider that members belonging to large-scale public superannuation schemes should be required to declare the names of the schemes, but not the real property or other assets held in such schemes. This is because members could not be expected to know precisely the property held in large, diverse superannuation portfolios, and to collate such information would be burdensome. Further, members of such schemes have no decision-making powers or influence over investment decisions such as the purchase of real property by the schemes.

On the other hand a superannuation scheme that is not open to the general public and that has been established as a trust particularly for the benefit of the member of Parliament should be treated differently; a member should be required to declare in the register their beneficial interest in the real property held by the scheme.
Amendment 22
Amend clause 5(1) to require any member who belongs to a registered superannuation scheme established for his or her benefit to declare any real property held in that superannuation scheme.

Unit trusts
The Registrar sought external legal advice on the need to disclose interests in unit trusts and their assets. The advice stated that the law does not differentiate between a unit trust and any other trust. Therefore, it is our view that holders of units in a unit trust are beneficiaries of the unit trust, and the name of the trust should be declared in the register.

On a similar note, holding an interest in a unit trust should not require real property held by a unit trust to be declared, as holders of interests in unit trusts delegate investment decisions to the managers of such trusts.

Amendment 23
Amend the definition of business entity in clause 2, and amend clause 5(1), to clarify that members declaring an interest in a unit trust do not have to declare the real property or other property of the unit trust.

Description of real property
Sir Maarten noted that the current requirement for each parcel of land to be identified can be unduly onerous in cases where a piece of land comprises several different titles. He proposed that members should be required to declare the description and location of any real property in which a member has a beneficial interest and the description and location of any trust-owned real property in which a member has a beneficial interest, except for real property held by a unit trust, or by a registered superannuation scheme that is open to the public.

Amendment 24
Amend clause 5(1) to simplify the wording for the declaration of real property.

Definition of “gift”
Recently the matter of funding pledges offered to members who are seeking political office within their party has arisen. We consider it desirable to amend the definition of gift to make it clear that members must declare any donation received unless it has already been declared under the provisions of the Electoral Act 1993.

We also consider that the threshold, currently $500, should be automatically reviewed every three years, as part of the Review of Standing Orders.

Amendment 25
Amend the definition of gift in clause 8(3) to clarify that it includes donations in cash or kind, other than donations disclosed under Part 6A of the Electoral Act 1993.
Multiple gifts from the same donor

Sir Maarten was concerned that the $500 threshold for the declaration of gifts may not deal adequately with a series of gifts of lesser monetary value, such as a number of dinners or cases or bottles of wine, which cumulatively provide a benefit to the member, or may be perceived as intended to gain influence. To alleviate this concern, we agree that members should be required to declare any gifts below the $500 threshold that have been received from the same donor over the period covered by the return, if the cumulative value of the gifts exceeds $500.

The intention is for members to declare gifts that cumulatively have a value of more than $500 while each having a value of less than that amount. Individual gifts with a value of more than $500 are declared separately.

Amendment 26

Amend clause 8(1)(b) to require members to declare the gifts and the name of the donor, when gifts are received from the same donor in the same year that cumulatively exceed the $500 threshold, excluding the value of gifts worth more than $500, which are declared separately.

Overseas travel costs

Clause 8(2)(e) of Appendix B states that travel contributions do not need to be declared if the primary purpose of the travel was in connection with an official parliamentary visit, and the contribution was received from any government, parliament, or international parliamentary organisation. However, if a third party, such as a foreign national, sub-national government, international organisation, educational or research institution, private entity, labour union, media organisation, or non-governmental organisation contributes to a Minister’s travel or accommodation expenses, this should be declared in the register.

We believe the provision for the declaration of overseas travel costs, and what is meant by “official parliamentary visit”, needs clarifying—only members participating in the official inter-parliamentary relations programme are exempt from the disclosure requirements. This programme is approved by the Speaker and is for members, rather than Ministers.

Amendment 27

Amend clause 8(2)(e) to clarify that members must declare contributors to overseas travel unless they are participating in the official inter-parliamentary relations programme funded by the Office of the Clerk.

Discharged debts

We were made aware of a present inconsistency whereby members do not have to disclose gifts over $500 from close family members, but if a close family member discharges a debt of over $500 for a member, for example by paying off a credit card balance, then this is declarable under the current rules. We consider that there is little public interest served by requiring members to declare debts discharged by close family members.

Amendment 28

Amend Appendix B by inserting a new clause 8(3A) to provide that, for the purposes of subclause (1)(c), debt excludes debts discharged by family members (that is, any of the following: the member’s spouse or partner or any parent, child, stepchild, foster-child, or grandchild of the member).
Report of Registrar of Pecuniary and Other Specified Interests

The Registrar of Pecuniary and Other Specified Interests may report to the House under the Registrar’s inquiry function, but the mechanism for such a report is not specified. In particular, the Standing Orders do not explicitly state that a report of the Registrar is published under the authority of the House, meaning that it would require an order of the House to obtain the legal protection that applies to parliamentary papers. The Registrar recently presented the first inquiry report to the House and the Speaker designated it a parliamentary paper under the authority provided for in Standing Order 369. It would be desirable for Appendix B to explicitly state that a report of the Registrar is published under the authority of the House.

Amendment 29

Amend Appendix B by inserting a new clause 16(9) stating that a report by the Registrar is presented by the Speaker to the House and published under the authority of the House.

Updating reference to legislation

Clause 8(1)(d) currently refers to the Civil List Act 1979, which has now been repealed and replaced with the Members of Parliament (Remuneration and Services) Act 2013. Therefore, the Standing Orders need to be updated to reflect this change in legislation.

Amendment 30

Amend clause 8(1)(d) of Appendix B to reflect the passage of the Members of Parliament (Remuneration and Services) Act 2013 and the repeal of the Civil List Act 1979.
Part 2—Recommended amendments to the Standing Orders

STANDING ORDERS
OF THE
HOUSE OF REPRESENTATIVES

Amendments recommended by the Standing Orders Committee

July 2014

NOTES:

References are to numbered amendments as set out in Part 1 of the report.

The Standing Orders will be fully renumbered when they are reprinted to incorporate the amendments as agreed by the House.

Recommended amendments are shown as follows: struck-out and inserted text.
CHAPTER 1
GENERAL PROVISIONS AND OFFICE-HOLDERS

INTRODUCTION

... 
3 Definitions
(1) In these Standing Orders, if not inconsistent with the context,—

Crown entity means a statutory entity, or a Crown entity company,
an entity named or described in Schedule 1 or 2 of the Crown
Entities Act 2004 or Schedule 4A of the Public Finance Act 1989,
and includes Crown entity subsidiaries

department means a department or departmental agency within
the meaning of the Public Finance Act 1989

... 
regulation means a regulation within the meaning of the
Regulations (Disallowance) Act 1989

regulation means any delegated legislation, including legislative
instruments and disallowable instruments within the meaning of
the Legislation Act 2012

... 
working day means any day of the week other than—

(a) a Saturday, a Sunday, Good Friday, Easter Monday,
ANZAC Day, Labour Day, the Sovereign’s birthday,
Waitangi Day, and the day on which Wellington
Anniversary is observed, and

(ab) if ANZAC Day or Waitangi Day falls on a Saturday or
Sunday, the following Monday, and

... 
(4) Whenever proceedings are published, circulated or made available
to the public under the Standing Orders, or otherwise by order of
the House, the communication of those proceedings is under the
House’s or a committee’s authority, as applicable.

... 

OPENING OF PARLIAMENT

... 
13 Further provision for Swearing-in of members

...
PARTIES

34 Recognition of parties

(1) Every political party registered under Part 4 of the Electoral Act 1993, and in whose interest a member was elected at the preceding general election or at any subsequent by-election, is entitled to be recognised as a party for parliamentary purposes, subject to paragraph (2A).

(2) Independent members, or members who cease to be members of the party for which they were originally elected, may be recognised, for parliamentary purposes,—

(a) as members of an existing recognised party if they inform the Speaker in writing that they have joined that party with the agreement of the leader of that party, or

(b) as a new party if they apply to the Speaker and their new party—

(i) is registered under Part 4 of the Electoral Act 1993, and

(ii) has at least six members of Parliament, or

(c) as members of a component party in whose interest those members stood as constituency candidates at the preceding general election if they inform the Speaker in writing that they wish to be so recognised.

(2A) If a party that has been recognised as a party for parliamentary purposes ceases to be registered under Part 4 of the Electoral Act 1993, the Speaker may continue to recognise that party for parliamentary purposes on a temporary basis, for a reasonable period. A party that ceases to be recognised as a party for parliamentary purposes may subsequently be recognised only as a new party under paragraph (2)(b) or as a component party under paragraph (2)(c).
CHAPTER 2
SITTINGS OF THE HOUSE

SECTION 37—SEATING AND ATTENDANCE AND ABSENCE

(1) As far as practicable, each party occupies a block of seats in the Chamber.

(2) The Speaker decides any dispute as to the seats to be occupied.

(3) A member is recorded by the Clerk as being present in the House on a sitting day if, during that sitting day, the member—
   (a) attends the House, or
   (b) attends a meeting of a select committee, or
   (c) attends other official business approved by the Business Committee, or
   (d) is participating in the official inter-parliamentary relations programme funded by the Office of the Clerk.

(4) At the time that a member is outside the parliamentary precincts attending or participating in business under paragraph (1)(a) to (d), that member is regarded as present within the parliamentary precincts for the purposes of the Standing Orders.

SECTION 37B—PERMISSION TO BE ABSENT FROM THE HOUSE

(1) The Speaker may grant a member of a party consisting of one member, an Independent member, or any other member (following a request from a member’s party leader or whip) permission to be absent from the House—
   (a) on account of illness or other family cause of a personal nature;
   (b) to enable the member to attend to public business (whether in New Zealand or overseas).

(2) A leader or whip of a party consisting of more than one member may grant any member of that party permission to be absent from the House.

SECTION 37C—ABSENCE FROM THE HOUSE

If a member is not recorded as being present in the House on a sitting day and that member did not have permission to be absent on that day, the member’s name and the sitting day on which the member was absent are recorded in the Journals.
SITTINGS

51 Interruption deferred when vote in progress
Whenever, at the time for the Speaker or the chairperson to interrupt business, a question is being put to the House or a vote is in progress or the closure is carried, the interruption of business is deferred until—
(a) the question (in the case of the closure, the main question) is determined:
(b) any further question, which is required to be put without debate, is dealt with.

56A Business transacted after urgency accorded
(1) After urgency has been accorded, the House may transact only the business to which urgency was accorded, except by leave, and subject to any Standing Order that provides otherwise.
(2) The Business Committee may determine that oral questions be taken at any time during a sitting that is extended by urgency.

58 Effect of extraordinary urgency
(2) Whenever extraordinary urgency has been accorded,—
(a) a sitting which has been extended is suspended between 8 am and 9 am, 1 pm and 2 pm, and 6 pm and 7 pm, and
(b) on a Saturday, the provisions of Standing Order 46 apply, and
(c) the transaction of business is subject to Standing Order 56A.

59 No other business except with leave
Except where otherwise provided, whenever urgency or extraordinary urgency has been entered upon, no business other than the business for which the urgency was accorded, may be transacted by the House except with leave.

BUSINESS OF THE HOUSE

64 General business
(1) General business is taken in the following order:
1. announcement of the presentation of petitions, papers, and reports of select committees, and the introduction of bills
2. questions for oral answer—oral questions (including urgent questions)
3. debate on a matter of urgent public importance (if allowed by the Speaker)
4. a general debate (on Wednesdays only)
5. consideration of reports of the Privileges Committee.
BUSINESS COMMITTEE

77 Business of House
The Business Committee may determine—
(aa) that a minor adjustment is to be made to the hours of a specified sitting day;

STATE OCCASIONS

79A State occasions

(1) After receiving a proposal from the Prime Minister, the Business Committee may determine arrangements for a State occasion.

(2) A State occasion may include an address from a foreign leader.

(3) Proceedings during a State occasion are reported in Hansard.

(4) The Speaker maintains order during a State opening or a State occasion.
CHAPTER 3
GENERAL PROCEDURES

MAINTENANCE OF ORDER

83 Members to be seated
(1) Members must be seated when they are in the Chamber except when speaking in debate or voting.
(2) As far as practicable, each party occupies a block of seats in the Chamber.
(3) The Speaker decides any dispute as to the seats to be occupied.

Amendment 5

86 Disorderly conduct
(1) The Speaker may order any member whose conduct is highly disorderly to withdraw immediately from the House during the period (up to the remainder of that day’s sitting) that the Speaker decides, except that a member ordered to withdraw before or during questions for oral answer oral questions may not return to the Chamber to ask or answer a question and no other member may ask a question on that member’s behalf.
(2) Any member ordered to withdraw from the House may not enter the Chamber but may vote.

Amendment 5

92 Rights forfeited by suspended member Effect of suspension
(1) A member who is suspended from the service of the House may not enter the Chamber, vote, serve on a committee, or lodge questions or notices of motion.
(2) The Journals record the suspension of a member from the service of the House, and state the day or days on which the member is suspended from the service of the House.

Amendment 5

RULES OF DEBATE

105 Speeches in English or Māori Languages
A member may address the Speaker in English or in Māori. English, Māori or New Zealand Sign Language.

Amendment 8
PUTTING THE QUESTION

140 Procedure for party vote

(2) Any member absent from the parliamentary precincts—
   (a) attending a meeting of a select committee held outside the
       Wellington area with the agreement of the House or the
       Business Committee, or
   (b) on official parliamentary travel funded by the Office of the
       Clerk, or
   (c) attending other official business approved by the Business
       Committee—
       is regarded as present for the purposes of paragraph (1)(c).

152 Casting of proxy vote

(2) In the case of a party vote, proxies may be exercised for a
    number equal to no more than 25 percent of a party’s
    membership in the House, rounded upwards where applicable;
    but at least one proxy may be exercised for a party.

(2A) A proxy may be exercised for a member, in addition to the number
      of proxies that may be exercised under paragraph (2), while that
      member is absent from the House with the permission of the
      Speaker granted under Standing Order 37B(1).

(3) In the case of a party vote, proxy votes may be exercised for a
    party consisting of two to up to five members, or an Independent
    member, only if at least one of the members of that party or that
    Independent member is—
    (a) present within the parliamentary precincts at the time, or
    (b) absent from the House with the permission of the Speaker
        granted under Standing Order 37B(1).

(4) In the case of a party vote, a proxy may be exercised for a party
    consisting of one member and for any Independent member only if
    the member concerned is—
    (a) present within the parliamentary precincts, or
    (b) absent from the parliamentary precincts attending a meeting
        of a select committee held outside the Wellington area with
        the agreement of the House or the Business Committee, or
    (c) absent from the parliamentary precincts attending other
        official business approved by the Business Committee, or
    (d) absent from the parliamentary precincts with the permission
        of the Speaker granted—
        (i) for illness or other family cause of a personal nature,
        or
        (ii) to enable the member to attend to other public
            business (whether in New Zealand or overseas).

(5) Despite paragraph (2), there is no limit on the number of proxy
    votes that may be exercised in the period from the declaration of a
    state of national emergency until that state of national emergency
    is terminated or expires.
RESPONSES

156 Application for response

(1) A person (not a member) who has been referred to in the House by name, or in such a way as to be readily identifiable, may make a submission may apply to the Speaker in writing—
(a) claiming to have been adversely affected by the reference or to have suffered damage to that person’s reputation as a result of the reference, and
(b) submitting a response to the reference, and
(c) requesting that the response be incorporated in the parliamentary record.

(2) A submission—An application must be made within three months of the reference having been made.

157 Consideration by Speaker

(2) In that consideration, the Speaker—
(a) may confer with the person who made the submission application and with the member who referred to that person in the House, and
(b) takes account of the extent to which the reference is capable of adversely affecting, or damaging the reputation of, the person making the submission application.
CHAPTER 4
SELECT COMMITTEES

SUBJECT SELECT COMMITTEES

186 Functions of subject select committees
(1) The subject select committees specified in Standing Order 185 consider and report to the House on the following types of business referred by the House or otherwise under the Standing Orders:
   (a) bills:
   (b) petitions:
   (c) financial reviews and reviews of reports on non-departmental appropriations, annual reviews:
   (d) Estimates:
   (e) Supplementary Estimates:

MEETINGS OF COMMITTEES

191 Meetings within Wellington area
(1) When meeting within the Wellington area, a select committee may not meet—
   (a) during questions for oral answer oral questions:
   (b) during a sitting of the House except by leave of the committee:
   (c) during an evening (after 6 pm) on a day on which there has been a sitting of the House.

GENERAL PROVISIONS FOR EVIDENCE

213 Return of evidence
A select committee may return, or expunge from any transcript of proceedings, return or expunge any evidence or statement that it considers to be irrelevant to its proceedings, offensive, possibly defamatory, or suppressed by an order of a New Zealand court.

215 Private evidence
(3) Evidence heard or received in private is confidential to the committee until it reports to the House or otherwise concludes its consideration of the item of business to which the private evidence relates.
HEARING OF EVIDENCE

219 Public attendance at hearings
(1) The proceedings of any select committee during the hearing of evidence on a bill or other matter, which is the subject of consideration by the committee, are open to the public, unless the evidence is private or secret.

... IN INFORMATION ON PROCEEDINGS ...

239 Information on committee’s proceedings ...
(3) Select committee proceedings that cease to be confidential under Standing Order 236 become available to the public.

Amendment 3

REPORTS ...

247 Reports set down
(1) Following their presentation, reports of select committees are set down as follows:
...
(c) reports on the Budget policy statement, the fiscal strategy report, and the economic and fiscal update, the statement on the long-term fiscal position, the investment statement, the financial statements of the Government, Estimates, Supplementary Estimates, financial reviews, and reviews of reports on non-departmental appropriations and annual reviews are considered as set out in Standing Orders 327, 330, 335, 343, and 345 or as determined under Standing Order 346:

Amendment 15 and Amendment 16

Amendment 14

249 Government responses to select committee reports ...
(2) No response under this Standing Order is required in respect of select committee reports on bills, Supplementary Order Papers, questions of privilege, Estimates, Supplementary Estimates, and financial-annual reviews of departments, Offices of Parliament, Crown entities, public organisations, or State enterprises.
CHAPTER 5

LEGISLATIVE PROCEDURES

... GENERAL PROVISIONS ...

262 New Zealand Bill of Rights
(1) Whenever a bill contains any provision which appears to the Attorney-General to be inconsistent with any of the rights and freedoms contained in the New Zealand Bill of Rights Act 1990, the Attorney-General must indicate to the House what that provision is and how it appears to be inconsistent with the New Zealand Bill of Rights Act 1990.
(2) An indication by the Attorney-General to the House concerning the New Zealand Bill of Rights Act 1990 is made by the presentation of a paper,—
   (a) in the case of a Government bill, on the introduction of that bill, or
   (b) in any other case, as soon as practicable after the introduction of the bill.
(3) Where the House has accorded urgency to the introduction of a bill, the Attorney-General may, on the bill’s introduction, present a paper under this Standing Order in the House.
(4) A paper presented under this Standing Order is published under the authority of the House.
(5) When a paper is presented under this Standing Order, it stands referred to a select committee for consideration. The paper is allocated by the Clerk to the most appropriate select committee. Amendment 10

... 267A Revision bills ...

(1) A Revision Bill is a bill that is certified under section 33 of the Legislation Act 2012. When a certificate given under that section is presented to the House on the introduction of a bill, the procedures set out in this Standing Order apply to the bill.
(2) There is no amendment or debate on the question for the first reading.
(3) Following the bill’s first reading, the question is put, without amendment or debate, that the bill be considered by a subject select committee nominated in the explanatory note to the bill.
(4) Following the presentation of the committee’s final report on the bill, the Business Committee determines arrangements for the passage of the bill.
(5) Following the bill’s second reading, the House proceeds to the third reading forthwith, unless— Amendment 11
(a) the Business Committee determines otherwise;
(b) the Minister in charge requires the House to resolve itself into committee to consider an amendment;
(c) an amendment has been circulated on a Supplementary Order Paper, or has been lodged with the Clerk, at least 24 hours before the House meets on the day on which the bill is read a second time, and the amendment is in order, in which case the House resolves itself into committee to consider that amendment.

(6) There is no amendment or debate on the question for the third reading.

DELEGATED LEGISLATION
314 Functions of Regulations Review Committee

(3) In respect of a bill before another committee, the committee may consider—
(a) any regulation-making power, and
(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.

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 enactment 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 enactment 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 enactment under which it is made:
(f) contains matter more appropriate for parliamentary enactment:
(g) is retrospective where this is not expressly authorised by the empowering statute enactment under which it is made:
(h) was not made in compliance with particular notice and consultation procedures prescribed by statute applicable enactments:
(i) for any other reason concerning its form or purport, calls for elucidation.
317 Disallowance motion does not lapse
Any notice of a motion to which section 6(1) of the Regulations (Disallowance) Act 1989 applies (being a motion for the disallowance of a regulation under that Act given by a member who is, at the time of the giving of the notice, a member of the Regulations Review Committee) does not lapse and is retained on the Order Paper until dealt with by the House.

(1) A notice of a motion for the disallowance of a disallowable instrument or any provisions of a disallowable instrument, as referred to in section 43(1) of the Legislation Act 2012, does not lapse and is retained on the Order Paper until dealt with by the House.

(2) This Standing Order applies only to a notice of motion given by a member who, when giving the notice, is a member of the Regulations Review Committee.

320A Confirmation and validation bills

(1) Where the purpose of a bill is limited to the confirmation and validation of regulations that otherwise would lapse, the procedures set out in this Standing Order apply to the bill.

(2) There is no amendment or debate on the question for the first reading. Following its first reading, the bill stands referred to the Regulations Review Committee.

(3) Following the bill's second reading, the House proceeds to the third reading forthwith, unless—
   (a) the Minister in charge requires the House to resolve itself into committee to consider an amendment;
   (b) an amendment has been circulated on a Supplementary Order Paper, or has been lodged with the Clerk, at least 24 hours before the House meets on the day on which the bill is read a second time, and the amendment is in order, in which case the House resolves itself into committee to consider that amendment.

(4) There is no amendment or debate on the question for the third reading.
CHAPTER 6

FINANCIAL PROCEDURES

... IMPREST SUPPLY

326 Imprest Supply bills
(1) All stages of an Imprest Supply Bill may be taken on the same
day within the normal hours of sitting, and may be included in a
motion for extended sitting if the bill is to be taken together
with an order of the day for an Appropriation Bill.

... THE BUDGET ...

329A Budget papers and Estimates
(1) After delivering the Budget or introducing an Appropriation Bill,
or at any time prior to that time on the same day, a Minister may
present the Estimates or any other papers relating to the Budget
or the bill.
(2) Such papers are published under the authority of the House.

330 Fiscal strategy report and economic and fiscal update
(1) The fiscal strategy report and the economic and fiscal update stand
referred to the Finance and Expenditure Committee.
(2) The Finance and Expenditure Committee must, within 2 months of
the delivery of the Budget, report on the fiscal strategy report and
the economic and fiscal update presented to the House on the day
the Budget was delivered.

331 Half-year economic and fiscal updates and statement
on long-term fiscal position
Half-year economic and fiscal updates and the statement on the
long-term fiscal position stand referred to the Finance and
Expenditure Committee.

330 Economic and fiscal reports
(1) The following reports stand referred to the Finance and
Expenditure Committee:
(a) fiscal strategy report;
(b) economic and fiscal update;
(c) half-year economic and fiscal update;
(d) statement on the long-term fiscal position;
(e) investment statement.
(2) The committee must, within 2 months of the delivery of the
Budget, report on the fiscal strategy report and the economic and
fiscal update presented to the House on the day the Budget was
delivered.

Amendment 15
Amendment 16
(3) The committee must report on the statement on the long-term fiscal position within 6 months of the presentation of that statement.
(4) The committee must report on the investment statement within 2 months of the presentation of that statement.
(5) A debate on the statement on the long-term fiscal position, or on the investment statement, is held in place of the first general debate after the committee’s report on that statement is presented. The chairperson of the Finance and Expenditure Committee (or, in the chairperson’s absence, another member of the committee) may move a motion relevant to the report and speak first.

SUPPLEMENTARY ESTIMATES

336 Examination of Supplementary Estimates
(1) Following the introduction of an Appropriation (Supplementary Estimates) Bill, the any associated Supplementary Estimates stand referred to the Finance and Expenditure Committee. The committee may examine a Vote itself or refer it to any subject select committee for examination.
(2) Each select committee to which a Vote is referred examines the Vote and—
   (a) determines whether to recommend that the appropriations in respect of the Vote be accepted, and
   (b) may recommend a change to the Vote.

FINANCIAL ANNUAL REVIEW

339 Allocation of responsibility for conducting financial annual reviews
(1) As soon after the commencement of the financial year as it thinks fit, the Finance and Expenditure Committee allocates to a subject select committee (or retains for itself) the task of conducting a financial annual review of the performance in the previous financial year and the current operations of each individual department, Office of Parliament, Crown entity, public organisation or State enterprise.
(2) When the annual report of each department, Office of Parliament, Crown entity, public organisation or State enterprise is presented to the House, its financial annual review stands referred to a select committee as allocated by the Finance and Expenditure Committee.

340 Select committees to conduct financial annual reviews
(2) Each select committee must, within one week of the first sitting day in each year, conduct and finally report to the House on a financial annual review of the performance and current operations of every department and Office of Parliament allocated to it.
341 Review of reports on non-departmental appropriations

(1) When reports on non-departmental appropriations are presented to the House, the reports stand referred to the Finance and Expenditure Committee.

(2) The Finance and Expenditure Committee may review a report itself or refer it to any subject select committee for review.

(3) Each select committee must, within six months of the relevant annual report having been presented, conduct and finally report to the House on a financial annual review of the performance and current operations of every Crown entity, public organisation or State enterprise allocated to it.

Amendment 14

342 Appropriation (Financial Review, Confirmation and Validation) Bill

(1) An Appropriation (Financial Review, Confirmation and Validation) Bill is an Appropriation Bill containing provisions solely concerned with the confirming or validating of expenditure incurred in respect of any previous financial year.

(2) There is no amendment or debate on the question for the first reading or the second reading of the bill.

Amendment 18

343 Financial annual review debate

(1) The consideration in committee of the Appropriation (Financial Review, Confirmation and Validation) Bill is the financial annual review debate. The financial annual review debate is the consideration of—

- the financial position as reflected in the report of the Finance and Expenditure Committee on the annual financial statements of the Government for the previous financial year, and
- the financial annual reviews of the performance in the previous financial year and the current operations of individual departments and Offices of Parliament, and
- reviews of reports on non-departmental appropriations.

(2) When the financial annual review debate commences, the question is proposed that the report of the Finance and Expenditure Committee on the annual financial statements of the Government for the previous financial year be noted.

(3) The committee then proceeds to consider reports of select committees on financial annual reviews and reviews of reports on non-departmental appropriations as determined under Standing Order 346. As each report is reached, the question is proposed that the report be noted.

(4) At the conclusion of the total time for the financial annual review debate, the provisions of the bill and any amendments proposed by the Minister in charge of the bill that are notified on a Supplementary Order Paper are put as one question. There is no amendment or debate on the question.

(5) The financial annual review debate must be held no later than 31 March.
344 Passing of Appropriation (Financial Review) (Confirmation and Validation) Bill

(1) When the report of the committee of the whole House on the Appropriation (Financial Review) (Confirmation and Validation) Bill is adopted, the bill is set down for third reading forthwith.

(2) There is no amendment or debate on the question for the third reading.

345 Consideration of financial annual reviews of Crown entities, public organisations, and State enterprises

(1) Consideration of the financial annual reviews of Crown entities, public organisations, and State enterprises may be set down as a Government order of the day in the charge of a Minister. Consideration is given in committee to the performance in the previous financial year and the current operations of Crown entities, public organisations and State enterprises.

(2) When the order of the day is reached, the House resolves itself into committee, and the committee considers financial annual reviews of Crown entities, public organisations, and State enterprises as determined under Standing Order 346.

(3) As each financial annual review is reached, the question is proposed that the report of the select committee on the financial annual review be noted.

DETERMINATION OF VOTES AND FINANCIAL ANNUAL REVIEWS FOR DEBATE

346 Determination of Votes and financial annual reviews for debate

(1) The Government may select any day (other than a Wednesday on which Members’ orders of the day take precedence) for the Estimates debate, the financial annual review debate, or the debate on the financial annual review of Crown entities, public organisations and State enterprises.

(2) The Government determines which Votes, financial reviews, or reports on non-departmental appropriations Votes or annual reviews are available for debate on a particular day and how long in total is to be spent on the debate that day. This information is to be included on the Order Paper.

(3) The Business Committee may determine the order in which the Votes, financial reviews, or reports on non-departmental appropriations Votes or annual reviews are to be considered on a particular day and how long is available for considering each or any of them.
CHAPTER 7
NON-LEGISLATIVE PROCEDURES

STATEMENTS IN THE HOUSE

355 Response to misrepresentation during time for oral questions
(1) A member may apply to the Speaker,—
   (a) claiming to have been misrepresented during the time for questions for oral answer oral questions, and that that misrepresentation may adversely affect the member or damage the member's reputation, and
   (b) requesting to respond to that claimed misrepresentation.

PAPERS AND PUBLICATIONS

372 Budget papers and Estimates
After delivering the Budget or introducing an Appropriation Bill, or at any time prior to that time on the same day, a Minister may present any papers relating to the Budget or the bill. Such papers are published under the authority of the House.

QUESTIONS TO MINISTERS AND MEMBERS

376 Questions to other members

(2) Questions for written answer—Written questions may be put to the Speaker relating to any matter of administration for which the Speaker is responsible.

377 Content of questions

(3) A question for written answer written question must not repeat the substance of a question already lodged in the same calendar year.
(4) Questions must not refer to proceedings in committee at meetings closed to the public until those proceedings are reported to the House or (subject to Standing Order 112) to a case pending adjudication by a court matter awaiting or under adjudication in, or suppressed by an order of, any New Zealand court.
378 **Lodging of oral questions**

(1) Notices of questions for oral answer oral questions are lodged by members in writing to the Clerk. A notice of a question for oral answer an oral question must be—

(a) signed by the member or by another member on the member’s behalf, and

(b) delivered to the Clerk between 10 am and 10.30 am on the day the question is to be asked.

(2) Twelve oral questions to Ministers may be accepted for oral answer each day. Questions will be allocated on a basis that is proportional to party membership in the House. The Business Committee decides the weekly allocation and rotation of questions.

(3) Oral questions that have been accepted are circulated.

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379 **Lodging and publication of written questions and replies**

(1) Subject to paragraph (2), during a session of Parliament notices of questions for written answer written questions may be lodged no later than 10.30 am on any working day.

(2) Notices of questions for written answer written questions may not be lodged after the last day on which the House sits in any calendar year or before the first day on which the House sits in the following year.

(3) Notices of questions for written answer written questions and replies to them (including both interim and final replies, if applicable)—

(a) may be lodged with the Clerk only in electronic form, and

(b) must be signed by way of an electronic signature by a member of Parliament or by another member on the member’s behalf, and

(c) are published electronically,—

(i) in the case of questions, on the day they are accepted:

(ii) in the case of replies, on the third working day following the day on which they are lodged.

(4) The reply to a question for written answer written question must be lodged no later than the sixth working day following the day on which the question is published.

(5) The Speaker may, in exceptional circumstances arising from the operation of the electronic system for questions for written answer written questions, authorise the lodging or publication of questions or replies in a form or within a time other than that specified in this Standing Order.

380 **Time for oral questions**

(1) Subject to the Standing Orders, oral questions are taken at the time appointed by Standing Order 64.

(2) The House deals with all questions for oral answer oral questions lodged each day.
381 Asking question for oral answer oral questions
(1) When a question for oral answer an oral question is called by the Speaker, the member in whose name it stands indicates the Minister or member to whom it is addressed and reads it to the House.
(2) A member may ask a question for oral answer an oral question on behalf of a member who is absent when authorised by that member to do so.

382 Replying to question for oral answer oral questions
(1) When a question for oral answer an oral question has been asked, the Speaker then calls upon the Minister or member to give a reply.

383 Content of replies

384 Supplementary questions
(1) At the discretion of the Speaker, a supplementary question may be asked by any member to elucidate or clarify a matter raised in a question for oral answer an oral question or in an answer given to a question.

385 Urgent questions

387 Announcement and debate
(1) Immediately after questions for oral answer oral questions and before the next business of the day is entered upon, the Speaker announces what applications for debate that day have been received.
APPENDIX A

TIME LIMITS OF SPEECHES AND DEBATES

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<thead>
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<th>Times for speeches or debates</th>
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<td>On second reading—</td>
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<td>Each member</td>
<td>10 minutes</td>
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<tr>
<td>Whole debate</td>
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<td><strong>Budget policy statement debate</strong></td>
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<td>Debates on Budget policy statement,</td>
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<td>statement on long-term fiscal position, and investment statement</td>
<td>Amendment 14</td>
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<td>Other members</td>
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<td><strong>Estimates debate (committee of the whole House stage of Appropriation Bill)</strong></td>
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<td>Minister in charge of the Vote</td>
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<td>Other members speaking on each Vote</td>
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<tr>
<td>Whole debate</td>
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<td><strong>Third reading of main Appropriation Bill (including with second reading of an Imprest Supply Bill)</strong></td>
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<td>Each member</td>
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<td><strong>Appropriation (Supplementary Estimates) Bill (including with second reading of an Imprest Supply Bill)</strong></td>
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<td>On second reading—</td>
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<td>Each member</td>
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<td>Whole debate</td>
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<td>(committee of the whole House stage of Appropriation (Financial Review Confirmation and Validation) Bill)</td>
<td>Amendment 14 and 18</td>
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<td>Item of business and member speaking</td>
<td>Times for speeches or debates</td>
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<td><strong>Consideration of financial annual reviews of Crown entities, public organisations, and State enterprises</strong></td>
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**NON-LEGISLATIVE PROCEDURES**

... 

**Debate on Prime Minister’s statement** | Amendment 14 |
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APPENDIX B
PECUNIARY AND OTHER SPECIFIED INTERESTS

1 Introduction
This Appendix establishes the Register of Pecuniary and Other Specified Interests, and sets out requirements and arrangements for members to make returns declaring specified financial, business and personal interests.

1 Introduction
(1) This Appendix establishes the Register of Members’ Pecuniary and Other Specified Interests.
(2) The Appendix sets out requirements for members to make returns declaring interests that—
(a) are financial, business, or personal; and
(b) are specified in this Appendix; and
(c) are held by a member at the effective date of the return or have been received by a member in the period covered by the return, as appropriate.
(3) The purpose of the register is to facilitate the transaction of business by the House by promoting the highest standards of behaviour and conduct by members, and thereby strengthening public trust and confidence in parliamentary processes and decision-making.
(4) A person making a decision in the course of complying with this Appendix must be guided by the register’s purpose.

PART 1
2 Definitions
(1) For the purposes of the return and registration of pecuniary and other specified interests, unless the context otherwise requires,—

business entity means any body or organisation, whether incorporated or unincorporated, that carries on any profession, trade, manufacture, or undertaking for pecuniary profit, and includes a business activity carried on by a sole proprietor

business entity—
(a) means any body or organisation, whether incorporated or unincorporated, that carries on any profession, trade, manufacture, or undertaking for pecuniary profit, and
(b) includes a business activity carried on by a sole proprietor, and
(c) does not include a unit trust
5 Contents of return relating to member's position as at effective date of return

(1) Every return must contain the following information as at the effective date of the return:

(b) the name of every other company or business entity in which the member has a pecuniary interest, other than an interest as a unit holder in a unit trust, and a description of the main business activities of each of those companies or entities, and

(d) the name of each trust of which the member is aware, or ought reasonably to be aware, that he or she is a beneficiary or a trustee, except trusts disclosed under subclause (1)(e) where the member is a trustee and registered superannuation schemes disclosed under subclause (1)(g), and

(d) the name of the trust, and whether the member is a trustee, a beneficiary, or both, for each trust to which the following apply:

(i) the member knows or ought reasonably to know that the member is a beneficiary or a trustee or both of it, and

(ii) it is not a trust whose name is disclosed under subclause (1)(e), and

(iii) it is not a registered superannuation scheme whose name is disclosed under subclause (1)(g), and

(f) the location of each parcel of real property in which the member has a legal interest in the fee simple or leasehold or stratum estate, or in which any such interest is held by a trust that the member knows (or ought reasonably to know) he or she is a beneficiary of, but does not include land held by a member as a trustee only or property held by a superannuation scheme disclosed under subclause (1)(g), and

(f) the location of real property in which the member has a legal interest, other than an interest as a trustee, and a description of the nature of the real property, and

(fa) the location of real property, and a description of the nature of the real property, held by a trust to which the following apply:

(i) the member is a beneficiary of it, and

(ii) the member knows or ought reasonably to know that the member is a beneficiary of it, and

(iii) it is not a unit trust whose name is disclosed under subclause (1)(d), and

(iv) it is not a registered superannuation scheme whose membership is open to the public and whose name is disclosed under subclause (1)(g), and

...
6 Relationship property settlements and debts owed by certain family members do not have to be disclosed

A member does not have to disclose—

(a) a relationship property settlement, whether the member is a debtor or creditor in respect of the settlement, or

(b) the name of any debtor of the member and a description of the debt owed by that debtor if the debtor is the member's spouse or domestic partner or any parent, child, stepchild, foster-child, or grandchild of the member.

...

8 Contents of return relating to member's activities for period ending on effective date of return

(1) Every return must contain the following information for the period specified in clause 9:

... 

(b) a description of each gift received by the member that has an estimated market value in New Zealand of more than $500 and the name of the donor of each of those gifts (if known or reasonably ascertainable by the member), and

(b) a description of each gift, and the name of its donor if the member knows the name or can reasonably ascertain it, that the member receives in the period covered by the return and—

(i) that has an estimated market value in New Zealand of more than $500, or

(ii) that has an estimated market value in New Zealand of $500 or less, is given by a donor who gives the member more than one gift in the period, and contributes to a total value of gifts to the member from the donor in the period of more than $500 not counting a gift declared under subparagraph (i), and

... 

(d) a description of each payment received, and not previously declared, by the member for activities in which the member was involved, including the source of each payment, except that a description is not required of any payment that is—

(i) paid as salary or allowances under the Civil List Act 1979, Members of Parliament (Remuneration and Services) Act 2013 or the Remuneration Authority Act 1977, or as a funding entitlement for parliamentary purposes under the Parliamentary Service Act 2000:

(ii) paid in respect of any activity in which the member concluded his or her involvement prior to becoming a member (that is, before the commencement of a period set out in clause 9(2)(b) or (d), as applicable).

(2) The information referred to in subclause (1)(a) does not have to be included in the return if the travel costs or accommodation costs (as the case may be) were paid by the following or any
combination of the following:

(a) the member;
(b) the member’s spouse or domestic partner;
(c) any parent, child, stepchild, foster-child, or grandchild of the member;
(d) the Crown;
(e) any government, parliament, or international parliamentary organisation, if the primary purpose of the travel was in connection with an official parliamentary visit.

(3) For the purposes of subclause (1)(b), gift—

(a) includes hospitality and donations in cash or kind other than donations made to cover expenses in an electoral campaign disclosed under Part 6A of the Electoral Act 1993;
(b) excludes gifts received from family members (that is, any of the following: the member’s spouse or domestic partner or any parent, child, stepchild, foster-child, or grandchild of the member).

(3A) For the purposes of subclause (1)(c), debt excludes debts discharged by family members (that is, any of the following: the member’s spouse or partner or any parent, child, stepchild, foster-child, or grandchild of the member).

...
Appendix A

Committee procedure
At its meeting held on 8 August 2013, the Standing Orders Committee resolved to commence a review of the Standing Orders. The conduct of a review of the Standing Orders, procedures, and practices of the House is a function of the committee under Standing Order 7(a). The committee invited public submissions on the review, with a closing date for submissions of 10 October 2013. Submissions were received from 18 people or organisations, as listed in Appendix B. Evidence from submitters was heard in public in the Parliament Buildings.

Mary Harris, Clerk of the House of Representatives, was our principal adviser on the review.

Committee members
Rt Hon David Carter (Chairperson)
Hon Gerry Brownlee
Hon Peter Dunne
Te Ururoa Flavell
Hone Harawira
Gareth Hughes
Sue Moroney
Denis O’Rourke
Grant Robertson
Hon Anne Tolley
Appendix B

List of submitters
ACT New Zealand
Amnesty International Aotearoa New Zealand
CEDAW Coalition of NGOs Aotearoa New Zealand
Clerk of the House of Representatives
David Farrar
Graeme Edgeler
Graham Hill
Green Party of Aotearoa New Zealand
Human Rights Foundation of Aotearoa New Zealand
Jack Cowie
Lindsay Tisch
Malcolm Harbrow
Māori Party
Neale McMillan
New Economics Party
New Zealand First
Regulations Review Committee
Republican Movement of Aotearoa New Zealand