Most of the legislation enacted each year is not made by Parliament directly. It is made by other people or bodies under powers delegated to them by Parliament. In this chapter, the term “delegated legislation” is used to describe all types of legislation made under powers delegated by Parliament. Such legislation is also often referred to as “subordinate legislation”. Legislation of this kind may take various forms, which are discussed in detail below.¹

In contrast to the enactment of legislation by Parliament, there are no general procedures for ensuring that delegated legislation is subjected to public debate and scrutiny before it is made. However, some of the statutes that empower the making of delegated legislation require certain procedures to be followed before it is made. For example, there may be a requirement to consult entities uniquely affected by a regulation before it is made.² Statutes may also require a Minister to consult appropriately before recommending the making of certain regulations.³

Generally, neither Parliament nor the House plays any part in the actual making of delegated legislation. Parliament has played its part by passing the legislation conferring the power to make the delegated legislation. The exercise of this power is in the hands of another authority.

MEANING OF DELEGATED LEGISLATION

Delegated legislation may take many forms. Standing Orders use the term “regulation” to describe delegated legislation, and define this as meaning any delegated legislation, including legislative instruments and disallowable instruments within the meaning of the Legislation Act 2012.⁴ The word “regulation” is also defined in the Interpretation Act 1999 and captures the variety of instruments.⁵

In this chapter the term “regulations” is used primarily in respect of the activities of the Regulations Review Committee, as the definition of “regulations” in the Standing Orders governs the scope of the committee’s jurisdiction in respect of the scrutiny of delegated legislation.

² See, for example: Financial Markets Conduct Act 2013, s 549 and Telecommunications Act 1991, s 69N(2).
³ For example: Health and Safety at Work Act 2015, s 222(2) and Climate Change Response Act 2002, s 247.
⁴ SO 3.
⁵ See: Interpretation Act 1999, s 29.
The Legislation Act 2012 does not use the term “regulations”. Instead it introduced the term “disallowable instrument” to describe delegated legislation that must be presented to the House and can be disallowed by the House. Disallowable instruments are legislative instruments, instruments that are stated by their empowering Act to be disallowable and instruments that have significant legislative effect. Legislative instruments used to be referred to as statutory regulations; most are made by Order in Council, and all are published in the annual series of legislative instruments. Legislative instruments are almost always also disallowable instruments, but a few are specified by their empowering legislation not to be.

A unique form of delegated legislation is confirmable instruments. These are instruments made under an empowering provision that specifies that instruments made under it lapse at a deadline unless earlier confirmed by an Act of Parliament. Empowering provisions that authorise the making of confirmable instruments are listed in Schedule 2 of the Legislation Act 2012.

The Regulations Review Committee examines disallowable instruments as a matter of course, but can examine any delegated legislation, regardless of whether or not it is a disallowable instrument. It is for the committee to decide whether an instrument falls within its jurisdiction.

PARLIAMENTARY REVIEW OF DELEGATED LEGISLATION

The importance of delegated legislation, the limited opportunities for its prior scrutiny, and the negligible parliamentary role in relation to it led to an inquiry by a select committee in 1962. (The committee is known as the Algie Committee after its chairperson, Sir Ronald Algie.) In its report the committee recognised that in modern conditions the practice of delegating law-making powers is often necessary in the interests of efficient administration. The committee did not agree that delegated legislation was wholly or even substantially bad in itself; rather, it saw it as an inevitable and necessary aspect of parliamentary government. This fundamental acceptance of the need for delegated legislation has not been challenged.

Nevertheless, although accepting a necessary role for delegated legislation, the committee felt that steps should be taken to guard against its objectionable features. One of these steps was the establishment of a select committee, the Statutes Revision Committee, with an express brief to report on regulations that it considered infringed certain criteria. The Statutes Revision Committee, however, was not a specialist delegated legislation committee. Throughout its life, its work was dominated by the consideration of primary legislation. The House invariably referred bills of a technical legal character (which tended to be criminal, company and courts legislation) to the committee for consideration, whereas between 1962 and 1985 it referred only 11 regulations to the committee. So scrutiny of delegated legislation was a minor and, until the last few years of its existence, almost entirely neglected aspect of its work.

The increasing importance of delegated legislation and the apparent ineffectuality of parliamentary arrangements for dealing with it led to pressure from the

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6 See: Legislation Act 2012, s 38. Significant legislative effect is defined at s 39.
8 See, for example: Remuneration Authority Act 1977, s 12B(9) and Members of Parliament (Remuneration and Services) Act 2013, s 17(3).
9 SOs 3 and 318.
10 Regulations Review Committee Complaint regarding Fisheries (Declaration of New Stocks Subject to Quota Management System) Notice (No 2) 2002 (5 September 2003) [2002–2005] AJHR I.16C at 4 (committee decided a fisheries notice declaring stock subject to the quota management system was a regulation within the meaning of the Regulations (Disallowance) Act 1989).
Delegated Legislation

House for a more focused approach to it. In 1985, following a fresh look at possible arrangements, the House decided to establish a select committee to concentrate on scrutinising delegated legislation. This committee is known as the Regulations Review Committee, and it is the cornerstone of parliamentary oversight of delegated legislation.

At the same time as a specialist delegated legislation committee was established in 1985, the subject select committees were given power to initiate their own inquiries. These committees can therefore examine delegated legislation falling within their terms of reference. A subject select committee, rather than the Regulations Review Committee, is the appropriate medium for the examination of delegated legislation on policy grounds.

REGULATIONS REVIEW COMMITTEE

The Regulations Review Committee is a committee that the House under its Standing Orders establishes at the commencement of each Parliament. The committee examines all regulations and all provisions in bills before other committees that relate to regulations. In addition, the committee may examine draft regulations referred to it by a Minister, consider any matter relating to regulations on which it wishes to report to the House, and investigate complaints made to it about the operation of regulations.

The Regulations Review Committee was the first committee (in 1985) to be chaired by an Opposition member, and such a chairperson has now become an established convention. The committee meets regularly each week when the House is sitting and occasionally during adjournments too. Its committee secretariat includes lawyers from the Office of the Clerk who provide the committee with independent legal advice to enable it to carry out its tasks effectively.

The committee has taken the consistent line that it must strive to act in a bipartisan way in scrutinising regulations on behalf of the House. The House's purpose in setting it up was to ensure that the technical scrutiny of regulations was not neglected by the House. The committee is concerned with how policy is implemented in regulations, but not with the merits of the policy. It is for the House and the subject select committees to address the policy aspects or merits of regulations. The committee therefore does not question the policy underlying the regulations that it scrutinises.

The committee's role regarding the various aspects of parliamentary scrutiny of delegated legislation is examined in this chapter. (A digest of the committee's reports prepared under the auspices of the New Zealand Centre for Public Law is available on the Victoria University of Wellington website.)

14 SO 189(2).
15 SO 184(1)(b).
16 SO 318(1), (3).
17 SO 318(2).
18 SO 318(4).
19 SO 318(5).
22 See <www.victoria.ac.nz> (under "Publications").
JUDICIAL REVIEW OF DELEGATED LEGISLATION

As delegated legislation involves Parliament conferring on another person or body legal power to make legislation, it is appropriate for the House to limit jealously the extent to which it gives such delegated authority, and to monitor its exercise closely. Since the reforms of 1985 the House has endeavoured to make parliamentary control of delegated legislation more effective. But there is another longer-standing method of reviewing delegated legislation—that exercised by the courts.

The courts do not question the validity of a duly enacted Act of Parliament. But delegated legislation can be subject to challenge in the courts on the ground of invalidity. As delegated legislation owes its existence to a statutory power, if its provisions exceed that power (that is, the delegated legislation is ultra vires) it is invalid, and of no lawful effect. Delegated legislation may also be invalid if a special procedure—for example, consultation with interested parties—is prescribed to be followed before its making and this procedure has not been observed.

The courts’ powers to review delegated legislation to ensure that its making complies with the enabling Act may themselves be limited by Parliament. Provisions in Acts of Parliament that seek to inhibit the courts’ power to rule on the validity of delegated legislation may operate directly by prohibiting a court from reviewing the validity of delegated legislation made under the Act, or indirectly by conferring the power to make delegated legislation in such broad and subjective terms that it is difficult to put meaningful bounds on the delegated authority. These legislative practices are now generally regarded as undesirable, and are matters to which the Regulations Review Committee has regard in its work.

HUMAN RIGHTS REVIEW OF DELEGATED LEGISLATION

Delegated legislation that is alleged to offend against the anti-discrimination provisions of the New Zealand Bill of Rights Act 1990 may be made the subject of a complaint to the Human Rights Commission. If the complaint cannot be satisfactorily resolved by the commission, civil proceedings may be brought against the Attorney-General before the Human Rights Review Tribunal.23

The Human Rights Review Tribunal may issue a declaration that delegated legislation is inconsistent with the freedom from discrimination guaranteed by the New Zealand Bill of Rights Act.24 If such a declaration is made, the Minister responsible for the administration of the delegated legislation must report to the House, bringing the declaration to its attention and advising of the Government’s response to it.25 Review of delegated legislation by the Human Rights Commission and the Human Rights Review Tribunal on anti-discrimination grounds may overlap with some of the grounds on which the Regulations Review Committee examines regulations. (See “Grounds for report to the House”, p 480.)

PRIMARY LEGISLATION AUTHORISING THE MAKING OF DELEGATED LEGISLATION

Principles

Parliamentary control of delegated legislation begins with close consideration of the provision that delegates the power to make such legislation. This power is set out in primary legislation and is known as a regulation-making power or an empowering provision. A first question for the House and its committees to address when presented with a proposal to authorise the making of delegated legislation is thus whether the power is necessary and appropriate.

24 Human Rights Act 1993, s 92J.
25 Human Rights Act 1993, s 92K.
The Algie Committee in 1962 established that making delegated legislation is not, in principle, objectionable. The Regulations Review Committee has set out its view of the circumstances in which delegated legislation may be appropriate. In the view of the committee, delegated legislation should be confined to matters of detail and the implementation of policy. It should not be the means of making policy. Specifically, the committee considered that primary, not delegated, legislation should be the means by which:

- an agency is established and has its functions defined
- substantive personal rights are created
- powers of search and seizure are created
- imprisonable criminal offences are created.

These principles have not been specifically endorsed by the House and are not rules that bind those preparing primary legislation or committees considering bills. However, they provide a background against which proposals for delegated legislative powers can be judged in the course of the legislative process, and they are likely to inform the Regulations Review Committee’s contribution to the process. They are also reflected in the Legislation Advisory Committee guidelines.

**Power of the Regulations Review Committee to report on legislative proposals**

In 1986 the Regulations Review Committee was given the power to report, on its own initiative, to any other committee on an empowering provision in a bill before that committee and any matter relating to regulations.

For this purpose the committee examines every bill that has received a first reading and been referred to a select committee. It makes its legal advisers available to subject committees to present and explain the reports and answer questions. The committee thus assumes an advocacy role in the legislative process for the principles of delegated legislation that it has established.

As well as having the right to intervene in the legislative process, the committee is sometimes invited by other committees to comment on regulation-making powers either contained in a bill as introduced or to be introduced into the bill by way of amendment. The committee has also been invited by another committee to comment on a regulation-making scheme in a proposed international treaty that was before the subject committee. The committee has recommended that all committees seek its advice on any new regulation-making powers they are considering recommending for insertion into a bill, and on any significant changes that a committee is considering recommending to a regulation-making power in a bill.

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29 SO 318(3).
The committee’s reports to other committees are summarised or noted in its periodic reports to the House, known as activities reports.

**Outcomes of committee reports**
The committee’s reports to subject select committees on regulation-making powers are merely recommendations. It is for the subject committees to decide whether to adopt them and recommend amendments to the bills to reflect them. Subject select committees may come to a different conclusion from the Regulations Review Committee on a regulation-making provision; though the Regulations Review Committee may ask the committee to reconsider the matter, and has shown some persistence in pursuing issues with Ministers even after its recommendations have been initially rejected by the committees to which they were directed. Ultimately, whether to amend a regulation-making provision is a matter for the judgement of the House. The ability of the Regulations Review Committee to focus committees’ attention on regulation-making powers allows it to raise questions about the propriety of delegated legislation that may not otherwise arise, and has led to a number of changes to legislation passed by the House.

**Regulation-making provisions**
In 1962, the Algie Committee recommended that the precise limits of the law-making power conferred by Parliament should be set out as clearly as possible in the empowering provision. Following this recommendation, a new standard formula for provisions authorising the making of regulations was adopted on the initiative of the Chief Law Draftsman (now Chief Parliamentary Counsel). The formula was designed to conform to the committee’s ideal of a provision that set out the precise limits of the law-making power and left intact the courts’ power to review the validity of regulations made under it.

From time to time the Regulations Review Committee expresses its views on the drafting style of regulation-making powers. The committee examines bills to determine whether the delegation of Parliament’s law-making power is appropriate and clearly defined and represents good legislative practice. Although the committee’s examination is not confined to the scrutiny grounds set out in the Standing Orders, those grounds provide a useful test: would delegated legislation made under the empowering provision under review potentially transgress any of the grounds? The committee’s examination also considers whether regulation-making powers infringe well-established principles applying to delegated legislation, such as those set out in guidelines issued by the Legislation Advisory Committee. Legislative proposals that provide for matters of policy and substance to be enacted by delegated legislation, for an Act itself to be amended, suspended or overridden by delegated legislation (a “Henry VIII” clause; see below), or for law-making powers to be delegated without provision for adequate scrutiny and control of the instrument exercising those powers, are all matters likely to receive attention from the committee.

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36 In the first half of 2014, it recommended amendments to 16 bills. Of the six bills that were enacted, five incorporated at least some of the recommendations made by the Regulations Review Committee.
38 SO 319(2).
Delegated Legislation

Each year, the committee raises concerns about a significant number of regulation-making powers. The grounds on which it has done so have been various. In some cases the committee has been concerned about the process by which powers created by the empowering provision would be exercised. Where the exercise of powers would not be by Order in Council and the committee considered that it should be, it recommended accordingly. On another occasion the committee considered that the regulations to be made under the empowering provision should be subject to express confirmation by Parliament, given their importance (the fixing of levies). Amongst other things, the committee has objected to empowering provisions that would have:

- allowed an Order in Council to override provisions of an Act
- applied the provisions of one Act to another “with modifications”
- had a retrospective effect
- allowed a Government to use regulations to manage the application of an Act throughout its five-year lifetime
- reduced the jurisdiction of the courts to determine the validity of any regulations made under it.

Any of these elements in regulations would constitute grounds for the committee to draw them to the House’s attention.

Delegated legislation changing primary legislation

Parliament may delegate the power to amend, suspend, override or even repeal primary legislation via delegated legislation. Such a regulation-making provision is commonly called a “Henry VIII” clause. It has been said that this designation derives from Henry VIII’s association with autocratic government, specifically because in 1539 Parliament gave him extensive power to amend statutes by proclamation. However, its aptness has been doubted, since Henry VIII ruled (1509 to 1547) well before the concept of parliamentary sovereignty was established. Such provisions are in any case much older than his reign.

The transfer of power from the legislature to the executive that a Henry VIII clause entails has been treated with suspicion as possibly constitutionally inappropriate. The Regulations Review Committee has agreed with the view of the 1932 Report of the Committee on Ministers’ Powers (the Donoughmore Committee) that such powers should be avoided unless demonstrably essential, and has recommended that they be used only in exceptional circumstances. It
has accepted that in the case of transitional provisions in legislation, a Henry VIII clause may be justified to deal with unforeseen contingencies arising during the implementation of a complex reform measure. It has been especially critical of the use of a Henry VIII clause to override legislative amendments made subsequent to the enactment of the clause. It has also considered in detail a special type of Henry VIII clause that allows statutory provisions to be overridden for the purposes of implementing international treaties. (See p 692.) It has continued to pay close attention to regulation-making powers allowing the making of regulations that can amend or override primary legislation during a specified transitional period.

Other matters

The Regulations Review Committee has indicated that it will pay particular attention to regulation-making provisions authorising the making of disallowable instruments that are not legislative instruments (previously referred to as “deemed regulations”). Disallowable instruments that are not also legislative instruments are not generally drafted by the Parliamentary Counsel Office and are not published in the Legislative Instrument series. They are, however, generally required to be presented to the House. The committee has recommended that the provision empowering the making of this type of instrument expressly state both that it is a disallowable instrument and that it is required to be presented to the House.

A further practice that the committee indicated it would pay attention to is the incorporation of material into regulations by reference. Incorporation by reference is a drafting technique that gives legal effect to provisions set out in a document without actually repeating the provisions or the content of the document in the text of the delegated legislation itself. This can cause difficulty accessing the law if the document is not readily available. The committee indicated that it intended to scrutinise as a matter of course provisions in bills authorising this practice, and to ask departments to demonstrate how regulations that incorporate material by reference comply with the best-practice guidelines issued by the former Legislation Advisory Committee. The committee has accepted that there may be circumstances in which such best practice cannot be complied with because of copyright restrictions. The Legislation Act 2012 establishes a regime that applies to most instruments incorporating material by reference, except where the parent Act expressly provides to the contrary. The regime includes consultation and accessibility requirements, and specifies the effect of amendments to material incorporated by reference.

The committee has also held a special inquiry into a general final paragraph that is commonly included in empowering provisions, to the effect that regulations may be made “for such other matters as are contemplated by or necessary for giving full effect to this Act”, which is known as a catch-all provision. The committee satisfied itself that such a provision was acceptable and that its effect was truly limited to subsidiary and incidental matters.

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55 Legislation Act 2012, s 41.
56 Regulations Review Committee Inquiry into the oversight of disallowable instruments that are not legislative instruments (July 2014) [2011–2014] AJHR I.16H.
PREPARATION OF DELEGATED LEGISLATION

Drafting

Legislative instruments are drafted in the Parliamentary Counsel Office. Some 40 per cent of the drafting resources of the office may at any time be committed to drafting delegated legislation rather than primary legislation. Although most of the delegated legislation drafted by the office consists of legislative instruments, it also drafts other instruments, including proclamations and some notices.

Items of delegated legislation that are not legislative instruments are generally not drafted in the Parliamentary Counsel Office. Indeed, one of the principal criticisms of such legislation (along with the difficulty of accessing them) is the variable and often defective quality of their drafting. These instruments are usually drafted by the department or agency responsible for making them.

Consideration of draft delegated legislation

It is unusual for the House to have the opportunity to consider delegated legislation before it has been promulgated, but occasionally, when the House has a bill before it, the Minister presents a draft of delegated legislation proposed to be made under powers to be conferred by the bill. This has been done with sets of draft regulations in the transport sector while the bills concerned were being passed through the House. In one case, proposed amendments to the bill would have enabled new regulations relating to seat belts and child restraints to be made, and a draft of the regulations proposed to be made under the powers sought was appended to the Supplementary Order Paper setting out these amendments. The Supplementary Order Paper was referred to the select committee considering the bill, and the committee also examined the draft regulations. In another case, draft regulations were referred by motion in the House to the select committee then considering a bill to introduce a graduated licensing system, and were considered by the committee along with the bill.

Referral of draft regulations to the Regulations Review Committee

While formal referral by the House of draft regulations to select committees is rare, there is provision under the Standing Orders for the responsible Minister to refer draft regulations to the Regulations Review Committee for its consideration. Until 2008, this was a significant area of work for the committee, which had on average 15 sets of draft regulations referred to it each year from 1999 to 2008. Since 2009, Ministers have made little use of this provision: the committee has had

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61 As defined by the Legislation Act 2012, s 4.
62 Information provided by the Parliamentary Counsel Office, 9 September 2014.
65 SO 318(2).
only three sets of draft regulations referred to it, and none since 2011. The bulk of the draft regulations considered by the committee were land transport, maritime transport and civil aviation rules, which the Minister of Transport referred to the committee from 1998 until 2011.

Where a Minister has referred draft regulations to the committee, the committee has generally confined itself to a briefing from officials of the department concerned and has not held extended hearings. The committee regards its relationship with the referring Minister as an advisory one; for this reason, if the draft of the regulations referred to it has not yet been publicly released, it has considered it appropriate to hear evidence from affected parties in private.

The committee examines draft regulations in the same way as it examines regulations once they have been made and, following its general practice in scrutiny work, it does not comment on policy aspects of the draft regulations. (See “Examination of delegated legislation”, p 479.) Once its examination is concluded, the committee reports formally to the Minister on the draft regulations, and subsequently to the House in its periodic reports on its activities. In its reports to ministers, the committee has raised issues including the unlawful delegation of a law-making power, the adequacy of a consultation process, and the unclear relationship between rules and the accompanying appendices. The fact that the committee has examined regulations in draft does not preclude a further review of them when they are made. Indeed, the committee is likely to monitor whether any changes it has suggested have been made to the final regulations.

The committee may also take the initiative, inviting a Minister to refer draft regulations that it has learnt about, perhaps after being alerted by the receipt of a complaint. It may choose not to conduct a detailed scrutiny of draft regulations if there is too little time to do so satisfactorily, reserving such examination for when the regulations are made. The committee has conveyed its views on draft regulations to the select committee that was considering a bill under which the regulations were to be made. Where it has reported adversely on regulations, it has sometimes invited a Minister to refer any replacement regulations to it in draft. For example, following criticism about fees regulations for identity services and

70 Ibid, at 42.
codes of animal welfare, draft new regulations were referred to the committee for consideration.\textsuperscript{79}

**PUBLICATION OF DELEGATED LEGISLATION**

The publication requirements for delegated legislation vary depending on the type of delegated legislation.

**Legislative instruments**

Legislative instruments must be notified in the *Gazette* and published in an official series.\textsuperscript{80} The annual series of legislative instruments, known as the LI series, is produced by the Parliamentary Counsel Office in accordance with its obligations under the Legislation Act 2012.\textsuperscript{81} There has been an annual series of delegated legislation, previously called the statutory regulations (or SR) series, since 1936.\textsuperscript{82} The SR series became the LI series as a result of the Legislation Act 2012. Legislative instruments are required to be numbered for citation purposes.\textsuperscript{83} The Chief Parliamentary Counsel arranges for reprints of legislative instruments, incorporating any amendments to them that have been adopted since they were first made.\textsuperscript{84} Any legislative instruments drafted outside the Parliamentary Counsel Office that are required to be published in the official series must be forwarded to the Chief Parliamentary Counsel immediately after they are made, so that that officer may arrange for their printing and publication.\textsuperscript{85} Instruments that are not legislative instruments may be published in the official series if the Attorney-General or the Chief Parliamentary Counsel so directs.\textsuperscript{86} These requirements are designed to ensure that legislative instruments are published promptly in an easily accessible form.

**Disallowable instruments that are not legislative instruments**

Disallowable instruments that are not legislative instruments are usually required by the relevant empowering provision to be notified in the *Gazette* and published by the agency responsible for making them.\textsuperscript{87} They are generally available on the agency’s website, and may be available via a link from the website publishing official New Zealand legislation.\textsuperscript{88} Disallowable instruments that are not legislative instruments are not generally submitted to the high-level internal governmental processes of endorsement by the Cabinet and at a meeting of the Executive Council, drafted in the Parliamentary Counsel Office, or subject to the publication requirements for legislative instruments described above.

In 1999, an inquiry by the Regulations Review Committee found that although instruments of this type (then known as deemed regulations) were subject to scrutiny by the committee, they could be difficult to “keep track of”, and varied in the quality of their drafting.\textsuperscript{89} In general, the committee considered that they suffered from inappropriate formats and lack of consultation and accessibility.\textsuperscript{90} The committee therefore recommended that such instruments be authorised


\textsuperscript{80} Legislation Act 2012, ss 6, 11 and 12.

\textsuperscript{81} Legislation Act 2012, ss 6 and 11.

\textsuperscript{82} See Regulations Act 1936, s 3 and Acts and Regulations Publication Act 1989, s 11.

\textsuperscript{83} Legislation Act 2012, s 11.

\textsuperscript{84} Legislation Act 2012, s 6(1)(c) and (5).

\textsuperscript{85} Legislation Act 2012, ss 6(1)(b), 10 and 11(1).

\textsuperscript{86} Legislation Act 2012, s 14.

\textsuperscript{87} See, for example, Biosecurity Act 1993, s 57; Accident Compensation Act 2001, s 44; Food Act 2014, s 398.

\textsuperscript{88} <www.legislation.govt.nz>.


only in specified circumstances that justified an exception to the traditional form of regulation, and that in any event they should be subject to explicit Cabinet endorsement. Furthermore, the committee considered that certain subjects (for example, taxation and criminal offences) because of their importance should never be dealt with by these instruments.91

Because of the issues raised by the committee in 1999, the Parliamentary Counsel Office maintains a list of these instruments, labelled “Other Instruments,” on its website, on the basis of advice from the authorities making them.92 The Parliamentary Counsel Office is also now required to advise the departments and agencies drafting these instruments in order to help them to follow good drafting practice.93

In 2014, the committee re-examined the issues regarding these instruments94 and again found problems with their drafting, and with their notification, presentation to the House and publication.95 The committee recommended the establishment of a register of delegated legislation, similar to the Australian Federal Register of Legislative Instruments, and a requirement to register all delegated legislation.96 In its response to the committee, the Government recognised significant concern about access to these instruments, and said that it had directed the Parliamentary Counsel Office to explore amending the Legislation Act 2012 to provide for the development of a register.97

PRESENTATION OF DELEGATED LEGISLATION TO THE HOUSE

The Legislation Act 2012 requires all legislative instruments and most disallowable instruments to be presented to the House not later than the 16th sitting day after the day on which they are made.98 This is a general requirement, but if specific provisions of other Acts require presentation to the House within a shorter time (or allow a longer timeframe), such provisions prevail over the general provision.99

In general, whether any failure to comply with a statutory requirement invalidates the process of which the requirement is part depends upon the view the courts take of the consequences of non-compliance in the statutory context.100 Factors identified by the court as relevant considerations include the degree and seriousness of the non-compliance, the potential consequences of the non-compliance, and whether prejudice has or is likely to have occurred.101 This test (formulated in respect of a statutory notice to an individual) has been applied by the court to test the validity of a particular regulation presented to the House out of time. In the circumstances of the particular case, it was held that failure to present the regulations to the House within 16 sitting days did not invalidate them.102

The requirement to present legislative and disallowable instruments to the House applies only once an instrument has been made; it is not a step in making the instrument in the first place. Although there is a general practice of not bringing

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92 <www.legislation.govt.nz>. See the “Browse” and “Advanced search” functions.
93 Legislation Act 2012, s 59(1)(g).
94 Regulations Review Committee Inquiry into oversight of disallowable instruments that are not legislative instruments (11 July 2014) [2011–2014] AJHR L16H.
95 Ibid, at 7.
96 Ibid, at 11.
97 Government response to report of Regulations Review Committee on “Inquiry into the oversight of disallowable instruments that are not legislative instruments” (9 December 2014) [2014–2017] AJHR J1 at 3.
98 Legislation Act 2012, s 41.
99 For example, the Epidemic Preparedness Act 2006, s 16.
legislative instruments into force until 28 days after they have been made, this practice is often departed from without any question being raised about the legal effect of such instruments before their presentation to the House.\(^{103}\) Therefore, the view has generally been taken that presentation is a means of ensuring some publicity is given to a legislative or disallowable instrument that has already been made, rather than an essential step in making the instrument or in ensuring its validity or continuing validity; but this requirement has been described as a “feeble safeguard” given the large number of documents presented to the House.\(^{104}\) Where the Regulations Review Committee has noted that legislative or disallowable instruments have been presented out of time, its comments have been limited to expressing its concern that the failure to present the instruments might mean that they were not brought to its attention.\(^{105}\) It is also clear that the House’s power to disallow disallowable instruments is not dependent upon their having been presented to it in the first place.\(^{106}\)

Regardless of the legal effect of failure to present legislative and disallowable instruments to the House within the statutory time limit, failure to do so will attract criticism from the Regulations Review Committee.\(^{107}\)

**PARLIAMENTARY INVOLVEMENT IN MAKING DELEGATED LEGISLATION**

Several procedures involve the House in considering delegated legislation. They are discussed below.

**Consultation with the House**

Statute may require consultation with the House of Representatives before a legal power can be exercised. Regarding delegated legislation, there is provision for consultation with the House and committees of the House before regulations may be made relating to the reporting standards to be observed by departments, certain organisations and Offices of Parliament.

Before any regulations may be made prescribing the non-financial reporting standards for departments, certain organisations or Offices of Parliament and the form in which reported information must be presented to the House, the Minister of Finance must submit such regulations to the Speaker in draft.\(^{108}\) The Speaker presents the draft regulations to the House as soon as reasonably practicable.\(^{109}\) After considering any comments of the Speaker or any committee of the House that considered the draft regulations, the Minister may amend the regulations as he or she sees fit.\(^{110}\) The regulations may then be made. (See Chapter 34.) In the case of regulations relating to Offices of Parliament, the regulations may be made only after they have been approved by resolution of the House.\(^{111}\)

**Validation of delegated legislation by statute**

The validation of a regulation by an Act of Parliament can cure any defect in the regulation or in the way the regulation was made that would otherwise have led to

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\(^{106}\) Legislation Act 2012, s 42(1).


\(^{108}\) Public Finance Act 1989, s 82(1) – (2).

\(^{109}\) Public Finance Act 1989, s 82(3).

\(^{110}\) Public Finance Act 1989, s 82(4).

\(^{111}\) Public Finance Act 1989, s 82(5).
the regulation being regarded as invalid.\textsuperscript{112} Effectively, in validating a regulation, Parliament ratifies and adopts what has been done. The result is the same as if Parliament had itself made the regulation in primary legislation.\textsuperscript{113}

Parliament occasionally passes other legislation that validates regulations about whose legality there is a serious doubt.\textsuperscript{114} The Regulations Review Committee has expressed concern at the retrospective validation of regulations that were made in breach of statutory consultation requirements. The committee examines critically the reasons given for proposing such validating legislation. It considers that consultation procedures prescribed by statute should be strictly complied with.\textsuperscript{115}

\section*{Confirmation of delegated legislation by statute}

A number of statutes empower the making of delegated legislation that lapses at a particular date unless earlier confirmed by an Act of Parliament. Such legislation is referred to as “confirmable instruments”, a term defined by the Legislation Act 2012.\textsuperscript{116} An annual Subordinate Legislation (Confirmation and Validation) Bill is introduced to ensure that confirmable instruments are appropriately confirmed each year.\textsuperscript{117} Where the purpose of a bill is limited to the confirmation and validation of regulations that would otherwise lapse, the House has adopted a streamlined procedure that gives as much time as possible to select committee consideration, on the basis that this is the more effective means of scrutinising this type of legislation.\textsuperscript{118} There is no debate on the bill’s first or third reading, and the House does not resolve itself into committee unless an amendment to the bill is proposed.\textsuperscript{119} There are no particular types of delegated legislation that must be made subject to this confirmation procedure. However, the Regulations Review Committee has suggested that four categories of regulation should be considered especially suitable for statutory confirmation:\textsuperscript{120}

- emergency regulations
- regulations imposing a financial charge in the nature of a tax
- regulations amending the empowering Act or another Act (Henry VIII clauses)
- regulations dealing with issues of policy under the authority of a broad empowering provision.

The fact of proposed regulations falling within one of these categories should prompt a preliminary inquiry as to whether delegated legislation is appropriate at all, since it suggests that the subject matter of the regulations may be important enough for enactment in primary legislation. If a regulation-making power is appropriate, it is a matter of judgement whether statutory confirmation should be employed in any particular case. For instance, it may not be appropriate to require confirmation in every case where regulations merely alter the details in a schedule to an Act. But where such alterations are not limited to minor corrections

\begin{footnotes}
\item[112] \textit{Turners & Growers Export Ltd v Moyle} HC Wellington GP720/88, 15 December 1988 at 68–70, 72.
\item[113] \textit{Boscawen Properties Ltd v Governor-General} HC Auckland M.555/93, 10 December 1993 at 6.
\item[114] For example: \textit{Primary Products Marketing (Regulations Confirmation) Act} 1988, s 3; Subordinate Legislation (Validation) Act 1997; Subordinate Legislation (Confirmation and Validation) Act 1997, s 9.
\item[115] Regulations Review Committee \textit{Activities of the Regulations Review Committee during 1997} \(7\) April 1998 \(1996–1999\) AJHR I.16G at 28–29.
\item[116] Legislation Act 2012, s 47B.
\item[117] Where delegated legislation must be confirmed urgently, it may be that there will be more than one confirmation bill in any particular year.
\item[118] Standing Orders Committee \textit{Review of Standing Orders} \(21\) July 2014 \(2011–2014\) AJHR I.18A at 23.
\item[119] SO 325.
\item[120] Regulations Review Committee \textit{Regulation making powers in legislation} \(4\) February 1987 \(1986–1987\) AJHR I.16A at \(8.1\); Regulations Review Committee \textit{Inquiry into the principles determining whether delegated legislation is given the status of regulations} \(30\) June 2004 \(2002–2005\) AJHR I.16E at 27.
\end{footnotes}
or updating, primary legislation or regulations subject to confirmation will be appropriate.121

Historically, the time for which regulations that are subject to confirmation may run before lapsing or expiring depends on the precise provisions set out in the statute under which they are made. However, from 1 January 2016 a new framework for confirmable instruments was established by the Legislation (Confirmable Instruments) Amendment Act 2015. This Act, which inserted a new subpart 1A into Part 3 of the Legislation Act 2012, replaced the existing confirmation provisions in over 30 statutes with a single standard set of provisions.122 Associated amendments were made to existing statutes to cross-refer to the standard provisions and to set out standard explanatory note requirements for a confirmable instrument.123

Confirmation is the House’s opportunity to consider the policy that lies behind the regulations to be confirmed. It is not an exercise confined to examining regulations for conflict with delegated legislation principles. Once read a first time, a confirmation and validation bill stands referred to the Regulations Review Committee.124 The streamlined House processes allow time for the committee to consider seeking the views of the appropriate subject select committees on the regulations’ policy and drafting.125

Delegated legislation made by the House

Parliament usually delegates legislative powers to the Governor-General or Ministers, but it is perfectly competent for such powers to be delegated to the House itself and in one instance this has been done. It is provided in statute that the House may make rules for the guidance of the Ombudsmen in the exercise of their functions.126 Such rules are made by resolution of the House, and are printed and published as if they were legislative instruments.127 The House has made two sets of rules under this power, in 1962 and in 1989,128 both relating to the publication of reports by the Ombudsmen.

Amendment of disallowable instruments by the House

The House has a general statutory power, by resolution, to amend any disallowable instrument or to revoke and substitute any disallowable instrument.129 Such amendments or substituted disallowable instruments are advised to the Chief Parliamentary Counsel by the Clerk of the House, and are printed and published in the same way as a legislative instrument.130 They come into force on the later of any commencement date expressed in them or the 28th day after a notice advising of the revocation or amendment has been published.131 Any member may give notice of motion to amend or substitute a disallowable instrument. Such a notice stands referred to a select committee, to be allocated by the Clerk.132 A notice for amendment of a disallowable instrument is subject to financial veto by the Government if the amendment or revocation would have more than a minor impact on the Government’s fiscal aggregates.133

123 Legislation (Confirmable Instruments) Amendment Act 2015, sch 3.
124 SO 325.
126 Ombudsmen Act 1975, s 15(1).
127 Ombudsmen Act 1975, s 15(3).
129 Legislation Act 2012, s 46(1).
130 Legislation Act 2012, s 47.
131 Legislation Act 2012, s 46(2).
132 SO 323(1).
133 SO 326(1) and (3).
This amendment and substitution power gives the House a general authority to make disallowable instruments, but only in amendment of or substitution for disallowable instruments that have already been made and not as an initiator of disallowable instruments in its own right. Any amended or substituted disallowable instruments made by the House must themselves, as delegated legislation, be within the terms of the empowering provision authorising the making of the instrument in the first place. The House has exercised this power only once, in 2008, when it resolved to revoke a clause of a notice relating to the scope of practice of enrolled nurses and to substitute it with a new clause.134

Approval of delegated legislation by affirmative resolution of the House
Statute prevents certain types of regulations from coming into force unless the House approves them or approves the Order in Council for their commencement. Effectively, the House is asked to approve the making of the regulations. This is known as the “affirmative resolution procedure”, because unless the House positively approves the regulations they will never come into effect. (The affirmative resolution procedure has also been applied to instruments that are not disallowable instruments, such as instructions on the non-financial reporting standards of Offices of Parliament.135)

The affirmative resolution procedure was first introduced in respect of Orders in Council amending the lists of controlled drugs set out in the schedules of the Misuse of Drugs Act 1975. Where a substance is listed as a controlled drug, criminal penalties apply to its supply or possession, depending upon its classification in those schedules. Substances are classified according to their risk of harm.136 The need for a “fast-track” response to rapid developments in the illicit drug market, with the consequent need to include new substances in the schedules and reclassify others, led to the development of the affirmative resolution procedure whereby the schedules can be amended by Order in Council, but only following explicit parliamentary endorsement.137 A similar procedure has been devised for altering the amount of a controlled drug in a person's possession that automatically raises a presumption that the drug is possessed for the purposes of supply.138 The procedure has since been extended to other regulations.139

Typically, regulations subject to the affirmative resolution procedure can come into force in accordance with a commencement order only after the regulations have been approved by resolution of the House.140 Such regulations lapse if a motion to approve the commencement order is defeated or if no commencement order is approved within one year.141 In the case of regulations prescribing the publication and non-financial reporting standards for Offices of Parliament, the House must be consulted on the regulations in draft first and they may be made only after they have been approved by resolution of the House.142

134 (23 September 2008) 650 NZPD 19223. The resolution was made in accordance with s 9(1) of the Regulations (Disallowance) Act 1989, which was repealed in August 2013 and replaced by s 46 of the Legislation Act 2012. The provision revoked and substituted was cl 4 of the Notice of Scopes of Practice and Related Qualifications Prescribed by the Nursing Council of New Zealand, dated 18 August 2004 and published on 15 September 2004 on pages 2958–2960 of a supplement to the New Zealand Gazette.

135 Public Finance Act 1989, s 82(1) and (2).

136 Misuse of Drugs Act 1975, s 3A.


138 Misuse of Drugs Act 1975, s 4(1B).

139 Dog Control Act 1996, s 78B (breeds or types of dog that may not be imported and must be muzzled); Public Finance Act 1989, s 82(5) (publication of information and non-financial reporting standards for Offices of Parliament).

140 See, for example: Misuse of Drugs Act 1975, ss 4(2) and 4A(1)–(2).

141 See, for example: Misuse of Drugs Act 1975, s 4A(4).

142 Public Finance Act 1989, s 82.
The House has supplemented these statutory procedures by making its own rules for dealing with a motion to approve a regulation or other instrument. A notice of motion to approve a regulation or proposed regulation under any statute stands referred to a select committee for examination. The Clerk allocates the notice to the most appropriate committee.\(^{143}\) (A notice of motion may be given while any statutory waiting time is running. The select committee's examination of the commencement order and the statutory waiting time may run simultaneously.) The committee must report back to the House on the notice of motion no later than 28 days after it was lodged.\(^ {144}\) It is for the committee to determine the depth of its examination (in particular, whether it hears public submissions). Inevitably its examination of the order must be carried out swiftly, otherwise the intent of the legislation to provide a fast-track amendment process would be defeated.

The House's rules prevent any motion to approve a regulation or proposed regulation being moved until the committee has reported back on the notice of motion or 28 days have elapsed since the notice was given, whichever is the earlier.\(^ {145}\) During this time the notice of motion appears on the Order Paper with a note indicating that it cannot be dealt with until one of those events has occurred. When the committee does report on the notice, its report is set down for consideration together with the notice of motion.\(^ {146}\) If the committee reports back within 28 days the motion can be moved and dealt with at any time thereafter; and if, for whatever reason, the committee fails to carry out its obligation to report within 28 days the motion can be moved in the absence of such a report.

The Health Committee in its consideration of controlled drugs orders has adopted a practice of requesting a briefing from the Expert Advisory Committee on Drugs both before an order is made classifying a drug and after a notice of motion has been lodged. The committee itself also undertakes further consultation or examination if it considers it necessary.\(^ {147}\) Evidence from officials of other departments involved in the process may also be heard.\(^ {148}\) The committee scrutinises the process followed by the Expert Advisory Committee in making the recommendations that led to the proposal to classify the drug.\(^ {149}\)

Where, in any case, the House is given power to approve the making of regulations, the House’s approval of them does not exempt the regulations concerned from judicial scrutiny as to whether they were made within the powers conferred by the empowering legislation.\(^ {150}\) It has been said that if regulations have been approved by the House it will be more difficult to persuade a court to intervene on the grounds that the regulations are vitiating by being unreasonable.\(^ {151}\) On the other hand, judges may differ in the weight that they give to the fact that a regulation has received the prior approval of the House.\(^ {152}\)

As the initial applications of the affirmative resolution procedure involved Henry VIII clauses, the dangers of its proliferation for this purpose led the Regulations Review Committee to inquire into the principles regarding its use. The committee, in an interim report, expressed concern at the use of the procedure

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\(^{143}\) SO 322(1).
\(^{144}\) SO 322(2).
\(^{145}\) SO 322(3).
\(^{146}\) SO 250(1)(d).
\(^{151}\) Nottinghamshire County Council v Secretary of State for the Environment [1986] 1 AC 240 (HL).
\(^{152}\) See, for example, Miah v Secretary of State for Work and Pensions [2003] EWCA Civ 1111, [2003] 4 All ER 702 at [34] per Ward LJ (“complete cynicism about the adequacy of parliamentary scrutiny of subordinate legislation of this kind”).
to amend primary legislation by way of delegated legislation in areas that dealt with significant policy matters.\textsuperscript{153} It has also protested at proposals to extend the procedure into new areas, though the subject select committee considering the matter may take a different view.\textsuperscript{154} In its final report on the procedure, the committee concluded that the affirmative resolution procedure should not be used in conjunction with provisions that allow the amendment of primary legislation by delegated legislation. It considered that the procedure is appropriately used to approve regulations that specifically regulate the administration and governance of Offices of Parliament and parliamentary agencies, because the procedure provides parliamentary scrutiny, which helps to preserve the necessary independence from the executive in making such regulations.\textsuperscript{155}

**Disallowance of disallowable instruments by the House**

The House has a general power to disallow any disallowable instrument or provisions of a disallowable instrument by resolution.\textsuperscript{156} (Though it may not disallow amendments to disallowable instruments or substituted disallowable instruments that it has made itself.)\textsuperscript{157} This power is not limited by time. The House does not have to exercise its general disallowance power within any particular time after the instrument in question has been made. When the House resolves to disallow a disallowable instrument or provision of such an instrument, the instrument or provision ceases to have effect on the day the disallowance resolution is passed or on a later date specified in the resolution itself.\textsuperscript{158} The disallowance of a disallowable instrument or provision of a disallowable instrument has the same effect as if the instrument had been revoked.\textsuperscript{159} Thus it does not affect the validity of anything already done or any existing rights. Generally, the revocation of a disallowable instrument or a provision of one does not revive any legislation that was repealed or revoked by that instrument.\textsuperscript{160} But as regards disallowance, the rule is different. Where the disallowable instrument or provision of a disallowable instrument that is disallowed itself amended, repealed or revoked any Act or instrument, that Act or instrument is restored to force with effect from the time when the disallowed provisions cease to have effect.\textsuperscript{161} Any disallowance resolution is printed and published as if it were a legislative instrument.\textsuperscript{162}

Any member may give notice of motion to disallow a disallowable instrument or provision of a disallowable instrument. The procedures for such a notice differ depending on whether the member giving notice is a member of the Regulations Review Committee. If the member giving the notice is not a member of the Regulations Review Committee, the notice stands referred to a select committee allocated by the Clerk.\textsuperscript{163} If the notice is given by a member of the Regulations Review Committee, it is retained on the Order Paper until dealt with by the House.\textsuperscript{164} Since the former Regulations (Disallowance) Act 1989 came into force in December 1989,\textsuperscript{165} notices of motion to disallow regulations have been given

\begin{itemize}
\item \textsuperscript{153} Regulations Review Committee Interim report on the inquiry into the affirmative resolution procedure (12 July 2004) [2002–2005] AJHR I.16F at [29].
\item \textsuperscript{155} Regulations Review Committee Inquiry into the affirmative resolution procedure (30 May 2007) [2005–2008] AJHR I.61 at 11.
\item \textsuperscript{156} Legislation Act 2012, s 42(1).
\item \textsuperscript{157} Legislation Act 2012, s 42(3).
\item \textsuperscript{158} Legislation Act 2012, s 42(2).
\item \textsuperscript{159} Legislation Act 2012, s 44.
\item \textsuperscript{160} Interpretation Act 1999, s 17.
\item \textsuperscript{161} Legislation Act 2012, s 45.
\item \textsuperscript{162} Legislation Act 2012, s 47(5).
\item \textsuperscript{163} SO 323(1).
\item \textsuperscript{164} SO 321.
\item \textsuperscript{165} The Regulations (Disallowance) Act 1989 was repealed and replaced by the Legislation Act 2012, which effectively reinstated the disallowance provisions contained in the earlier Act.
\end{itemize}
on eight occasions, each time by a current member of the Regulations Review Committee.166 Of these notices, one was withdrawn,167 three were debated in the House and not agreed to,168 two lapsed when Parliament was dissolved,169 one was withdrawn, then given again in a modified form before being debated in the House and not agreed to,170 and one regulation was automatically disallowed. (See “Automatic disallowance of regulations”, below.) The House has simultaneously debated four motions to disallow regulations on two occasions.171

A motion to disallow a disallowable instrument or provision of a disallowable instrument, if passed, would have force of law by virtue of the statute under which it is made. Such a motion is therefore subject to financial veto by the Government.172 If the Government considers that the proposed disallowance would have more than a minor impact on the Government’s fiscal aggregates it may issue a financial veto certificate at any time before the motion is moved.173 (See pp 515–519 for the issuing of financial veto certificates.) The consequence of the issuing of a financial veto certificate is that the motion is out of order and no question is put on it, although it can still be moved and debated.174 The House’s general power to disallow disallowable instruments may be abrogated or limited in a particular case. Orders in Council amending the controlled drugs list (which are subject to parliamentary approval before they can come into force) are not subject to disallowance.175 Orders in Council to enable the creation of the National War Memorial Park (Pukeahu) in Wellington had to be disallowed only within 12 sitting days after being presented to the House.176

**Automatic disallowance of regulations**

In one case there is provision for the automatic disallowance of a disallowable instrument or provision of a disallowable instrument. While any member of Parliament may give a notice of motion to disallow an instrument or provision, there is no guarantee that this notice (or any other notice) will be considered by the House. In order to give members a real opportunity to utilise the disallowance power, it is therefore provided in the Legislation Act 2012 that any notice of motion to disallow a disallowable instrument or provision of one that is given by a member of the Regulations Review Committee and is not dealt with by the House automatically takes effect on the expiration of the 21st sitting day after it was given.177 Only a member of the committee at the time notice is given, including a

166 In all, 18 notices of motion to disallow regulations have been given.

167 Notice of motion given on 16 April 2013 to disallow Road User Charges (Transitional Exemption for Certain Farmers’ Vehicles) Regulations 2013.

168 Notice of motion given on 9 September 1998 to disallow Disputes Tribunals Amendment Rules 1998 (not agreed to: (11 November 1998) 573 NZPD 13104–13119); notices of motion given on 8 and 13 November 2001 to disallow Court of Appeal Fees Regulations 2001, High Court Fees Regulations 2001, District Courts Fees Regulations 2001 and reg 5 of the District Courts Fees Amendment Regulations (No 3) 2001 (not agreed to: (21 February 2002) 598 NZPD 14573–14599); notice of motion given on 5 August 2010 to disallow New Zealand (Mandatory Fortification of Bread with Folic Acid) Amendment Food Standard 2009 (not agreed to: (12 October 2010) 667 NZPD 14343–14357).

169 Notice of motion given on 4 September 1990 to disallow Civil Aviation Charges Regulations 1990; notice of motion given on 13 July 1999 to disallow New Zealand Food Standard 1996, Amendment No 11.


172 SO 326(1) and (3); Standing Orders Committee Review of Standing Orders (13 December 1995) [1993–1996] AJHR I.18A at 62.

173 SO 328(4).

174 SO 328(4).

175 Misuse of Drugs Act 1975, s 4(3).

176 National War Memorial Park (Pukeahu) Empowering Act 2012, ss 33 and 36.

177 Legislation Act 2012, s 43(1)–(2).
full non-voting member of the committee, can give a notice subject to the statutory automatic disallowance procedure. A replacement or temporary member or a member made a non-voting member for a particular inquiry cannot give a notice that entails automatic disallowance.

Unless the member withdraws such a notice, the House must attend to it and dispose of it within 21 sitting days of the notice being given. The obvious way to dispose of such a notice is to debate the motion and vote on it at the end of the debate. But a financial veto certificate also disposes of the notice of motion. Where a financial veto certificate is given before the motion for disallowance is moved, no question is put on the motion at the conclusion of the debate, and the motion is ruled out of order without a vote.\(^\text{178}\) At that point the motion has been dealt with by the House. Otherwise a notice of motion that is not disposed of after 21 sitting days takes effect according to its terms. If Parliament is dissolved or expires before this period has fully run, the notice of motion lapses.\(^\text{179}\) (In this case a new notice could be given in the next session of Parliament and the 21 sitting days would begin to run anew from that point.) As business does not lapse on the prorogation of Parliament, a notice given in one session will continue to run in the new session.\(^\text{180}\)

To ensure that the House is aware that time is running towards automatic disallowance of a disallowable instrument or a provision of such an instrument, the Standing Orders provide that a notice of motion for disallowance given by a member of the Regulations Review Committee does not lapse and is not to be removed from the Order Paper until dealt with by the House.\(^\text{181}\)

A disallowance that occurs automatically on the expiration of 21 sitting days takes effect at that precise time or on any later date specified in the notice of motion for disallowance.\(^\text{182}\) An automatic disallowance notice is printed and published as if it were a regulation.\(^\text{183}\) There has been one instance of the automatic disallowance of regulations in New Zealand. Regulations 5(3), 5(4), and 8 of the Road User Charges (Transitional Matters) Regulations 2012 were disallowed at the close of 27 February 2013. This followed an adverse report of the Regulations Review Committee, recommending that these three regulations be disallowed on the basis that they contravened two of the grounds set out in Standing Order 319(2).\(^\text{184}\) The committee chair gave a notice of motion, moving that the three regulations be disallowed, shortly after the committee reported to the House.

At the expiry of 21 sitting days, the notice of motion had not been dealt with, and regulations 5(3), 5(4) and 8 were therefore disallowed.\(^\text{185}\) However, regulation 8 was effectively immediately reinstated, by way of an Order in Council made a few days prior.\(^\text{186}\) The result was that regulation 8 never ceased to have effect. The Regulations Review Committee subsequently reported to the House on the Order in Council that reinstated regulation 8. The committee described disallowance of a regulation as both unusual and of constitutional significance, and considered it unfortunate that the Government had found itself in a position where it considered that a disallowed regulation needed to be immediately reinstated. The committee encouraged the member lodging a disallowance motion and the minister responsible for the regulations in question to discuss the issues underlying the motion and to seek agreement on an appropriate way to proceed.\(^\text{187}\)

\(^{178}\) SO 328(4).  
\(^{179}\) Legislation Act 2012, s 43(1)(b)(iii).  
\(^{180}\) Constitution Act 1986, s 20(1)(a).  
\(^{181}\) SO 321.  
\(^{182}\) Legislation Act 2012, s 43(3).  
\(^{183}\) Legislation Act 2012, s 47(5).  
\(^{185}\) (1 March 2013) 25 New Zealand Gazette 667.  
\(^{186}\) Road User Charges (Transitional Exemption for Certain Farmers’ Vehicles) Regulations 2013.  
The power to initiate the automatic disallowance procedure that is vested in each member of the Regulations Review Committee does not depend upon the disallowable instrument or provision of a disallowable instrument concerned having been the subject of an adverse report from the committee. Nevertheless, a practice has developed of its members acting consistently with the conventions attaching to that committee before initiating such a procedure.

COMPLAINTS RECEIVED BY THE REGULATIONS REVIEW COMMITTEE

The Standing Orders recognise that the Regulations Review Committee may receive complaints from people or organisations aggrieved at the operation of a regulation (as defined in Standing Order 3). Any such complaint received by the committee must be placed on the agenda for its next meeting for the committee to decide whether, on the face of it, the complaint relates to one of the grounds on which the committee may draw a regulation to the attention of the House. The committee must, unless it unanimously decides not to proceed with the complaint, give the complainant an opportunity to address the committee on the regulation. In practice, the committee undertakes some initial investigation of complaints to establish if there is a case to answer before formally resolving whether to proceed with a more substantive inquiry. If, following its initial consideration, the committee considers that a complaint raises a prima facie case on one of the grounds for drawing a regulation to the House’s attention, this is regarded as requiring a formal inquiry.

It is obvious that a complaint has to relate to a regulation in force. But a complaint about a regulation that had not yet been made was still regarded as useful in focusing the committee’s attention on it when it was eventually promulgated. The volume of complaints received by the committee varies. The main reasons that complaints are not pursued by the committee are that they relate to policy issues, or relate to an instrument that is not a regulation as defined.

EXAMINATION OF DELEGATED LEGISLATION

All regulations (as defined in Standing Order 3) are examined by the Regulations Review Committee. But this was never intended to lead to a process of public hearings and submissions in all cases. Instead, the committee has the discretion to decide how it goes about discharging its responsibilities to the House. The committee and its staff regularly peruse new disallowable instruments. Delegated legislation that is not disallowable is rarely considered by the committee unless

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188 See: Making a complaint to the Regulations Review Committee, available at <www.parliament.nz>, for information on how to make a complaint.
189 SO 320(1).
190 SO 320(2).
192 David Caygill “Functions and Powers of Parliamentary Committees” (paper presented to Electoral and Administrative Law Commission Seminar, Brisbane, 1 May 1992) at [4.6].
195 SO 318(1).
it is the subject of a complaint. If the committee has any concerns or wants more information about a regulation, details are sought from the relevant Minister, department or other organisation after consulting any regulatory impact statement relating to the regulation. Such inquiries may lead the committee to seek further written information and may occasionally result in a substantial inquiry involving the hearing of evidence and a report to the House.\textsuperscript{197} In the course of 2013, a total of 462 legislative instruments were examined in this way.\textsuperscript{198} Only one of these regulations was the subject of a separate report to the House.\textsuperscript{199}

This process may also serve to direct attention to a number of regulations raising related issues that can be considered and reported on together.\textsuperscript{200} The comprehensive check on regulations carried out by the committee, supplemented by issues drawn to the committee’s attention by complaints, alerts it to particular regulatory issues that require closer scrutiny.

Once the committee decides to embark on an investigation, the fact that a regulation is revoked during the committee’s consideration of it does not put an end to the committee’s inquiry. The committee is obliged to consider whether to draw the House’s attention to the regulation before it, and this duty can be discharged although the regulation is no longer in force. Revocation is relevant to the practical question of whether in fact the House’s attention needs to be drawn to the regulation, but it does not obviate the question being asked at all.\textsuperscript{201} But if a regulation is revoked before the committee resolves to conduct an investigation into it and the matter objected to is not included in new regulations, the matter is outside the committee’s jurisdiction.\textsuperscript{202}

**GROUNDS FOR REPORT TO THE HOUSE**

In carrying out its work of examining regulations (however they may have come to its attention) the Regulations Review Committee assesses regulations against nine criteria set out in the Standing Orders. A regulation is not necessarily bad because it raises concern in respect of one of these criteria. But if it does so, the committee must consider whether to draw the special attention of the House to the regulation because of its non-compliance.\textsuperscript{203} The committee has a discretion as to whether it should draw the House’s attention to a regulation, even if it finds one of the grounds established. There may be good reasons for not drawing the House’s attention to a regulation—for example, if this would have no practical effect whatever—and the committee must always consider this.\textsuperscript{204}

Since its establishment in 1985, the committee has made reports to the House informing it of its activities over a period (annually since 1994). In this way the committee tends to inform the House of its consideration of all regulations raising


\textsuperscript{199} Regulations Review Committee Investigation into the Marine and Coastal Area (Takutai Moana) Reclamation Fees Regulations 2012 (SR 2012/363) (30 September 2013) [2011–2014] AJHR I.22B.

\textsuperscript{200} Regulations Review Committee Inquiry into Airport Authority By-laws Approval Orders (16 August 1990) [1990] AJHR I.16 at [3.2].


\textsuperscript{203} SO 391[1].

\textsuperscript{204} Statutes Revision Committee Remuneration (New Zealand Forest Products) Regulations 1980 (9 July 1980) [1980] AJHR I.5 at [2]–[3].
issues that it needed to consider, even if the special attention of the House did not need to be drawn to them individually. A separate report drawing the House’s special attention to a regulation is reserved for the few that raise very significant issues.\(^{205}\)

One thing that the committee does not purport to determine is whether the regulation is outside the legal authority delegated by Parliament—that is, if the regulation is ultra vires. Such a question is for the courts, not the House, to determine.\(^{206}\) Indeed, the committee’s grounds for examining a regulation are wider than those of a court.\(^{207}\) From this it follows that while a court may have upheld the legality of a regulation, the committee is not precluded from inquiring further into it and examining its essential fairness.\(^{208}\) Nor is the committee concerned with how a regulation is being administered by a Government department,\(^{209}\) though the Ombudsmen or another committee may be interested in any question of maladministration. However, if a regulation is being applied inconsistently or unfairly this may suggest that there is a defect in the regulation on which there may be grounds for the committee to report.

There are nine grounds on which the committee may draw the special attention of the House to a regulation.\(^{210}\) The grounds are each discussed below. The grounds are also discussed in greater detail in a digest of the committee’s reports.\(^{211}\)

**The regulation is not in accordance with the general objects and intentions of the statute under which it is made**

This ground comes closest to raising questions of ultra vires. Applying this ground to regulations involves construing the objects of the legislation authorising the making of the regulations in question. Thus, the committee took the view that the legislation under which the Reserve Bank was created was intended to constitute a central bank that advised the Government on and implemented monetary policy. It was not the object of the Act to authorise the bank to engage in trading activities and so, the committee concluded, the House’s attention should be drawn to regulations that authorised such activities.\(^{212}\) The committee has also considered the objects of an empowering Act when construing the meaning of a term that was used, but not defined, in it. The Act set down minimum standards for animal welfare, and permitted departure from them only in “exceptional circumstances”. The committee considered that an animal welfare code that permitted departure from these minimum standards extended the meaning of exceptional circumstances too far, because it did not provide for the code to be reviewed until four years after it was issued, and did not fix a date for phasing out the non-compliant cages that it permitted to be used.\(^{213}\)

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210 SO 319(2)(a)–(i).

211 See <www.victoria.ac.nz> (under “Publications”).


A particular concern of the committee has been regulations that impose fees. The committee takes pains to establish that a fee is clearly contemplated in the empowering legislation and that the fee is reasonable. The committee has put forward the view that a fee may be fixed so high that it defeats the purposes of the Act and so is not in accordance with its objects and intentions. In the absence of clear statutory authority, if the fee charged is greater than cost recovery for the service provided, there is a rebuttable presumption that Parliament could not have intended the holder of the delegated legislative power to be able to impose what is in effect a tax.\(^{214}\) This is especially the case where the “service” provided is effectively a monopoly.\(^{215}\) (See also Chapter 32.) The committee considered that access to justice was among the general objects and intentions of statutes empowering the making of regulations that set civil court fees. Access to justice was so fundamental that a move to use fees to ration access would, in its view, require explicit legislative authority. Regulations were inappropriate instruments for implementing such a policy.\(^{216}\)

In another case the absence of any adequate risk assessment before health labelling requirements were imposed on certain food products led the committee to conclude that the statutory preconditions to such labelling were not satisfied. Acknowledging that the Minister had a discretion to impose such requirements, the committee insisted that there must be some evidence to justify them.\(^{217}\) The committee has also found that a formula prescribed by regulations for determining a raw milk price, despite being intended to function so as to support the objects and intentions of the empowering Act, was in fact open to manipulation to an extent that undermined the objects and intentions of the Act and could not be said to be in accordance with them.\(^{218}\)

Finally, powers to vary the commencement date of various provisions of an Act may provoke attention on this ground, if provisions of the Act that might be considered an integral part of the legislative package are not brought into force with the main body of the Act. In this case it may be considered that to bring into force parts of an Act with the omission of important provisions is to use the regulation-making power in a way that is not in accordance with the general objects and intentions of the Act.\(^{219}\)

**The regulation trespasses unduly on personal rights and liberties**

This ground involves a two-part consideration: first, whether the regulations trespass against personal rights and liberties; and, secondly, if any such trespass is “undue.”\(^{220}\)

Trespass on personal rights has been found to be particularly applicable to regulations that affect the way people can earn their living, for example, in cases where restrictions are placed on commercial enterprises. All laws in some respects inhibit freedom of action. Therefore, the fact that freedom is limited is not sufficient of itself to bring a regulation within this ground of complaint. The limitation must

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be balanced against the policy that is being furthered. In order to do this, the committee has examined in some detail the technicalities of the subject matter of the regulations. When regulations totally prohibited the commercial taking of rock lobster by diving or hand picking, the committee considered the purpose of the ban—the preservation of stocks—and weighed this against the infringement of rock lobster fishers’ right to earn a living. It concluded on the evidence that a total ban went further than was necessary to protect stocks and so did trespass unduly on personal rights and liberties. The committee suggested a closed season on taking rock lobster. This suggestion was subsequently implemented by the Government.

The reference to regulations trespassing “unduly” on personal rights and liberties has been interpreted to imply that there must be a serious infringement of personal rights or liberties before the regulation can be seen as objectionable. In the case of civil aviation fee regulations, the committee concluded that it could not be suggested that there should be no fee at all. There was no evidence that the fee levels reflected inefficiencies on the part of the ministry, and such cross-subsidies between different kinds of flying as were apparent were justifiable. The committee therefore found no breach in that case. But court fees regulations may more readily be regarded as unduly trespassing on personal rights and liberties, since access to justice is a fundamental right. The committee has concluded that if court fees are set at a level that discourages potential litigants, without mechanisms such as legal aid, concession rates, and fee waivers being available to a large section of court users, then there would be an undue trespass on personal rights and liberties.

A relevant factor in whether regulations unduly trespass on personal rights and liberties is the policy of the Act under which the regulations are made. It may be the express policy of the legislation to place restrictions on personal rights and liberties. If so, regulations that do nothing other than faithfully implement that policy are unlikely to be found to offend.

The regulation appears to make some unusual or unexpected use of the powers conferred by the statute under which it is made

If the empowering Act itself expressly contemplates what the regulations do, then it is very difficult to take the view that the powers conferred have been used in an unusual or unexpected way.

In the case of regulations made under the Canterbury Earthquake Recovery Act 2011 that amended the Building Act 2004, the committee described the legislative power delegated by the 2011 Act as extremely broad and wide ranging. The committee found that Parliament, in passing the 2011 Act, clearly authorised the making of regulations to provide for significant modifications to primary legislation, and that regulations modifying the Building Act could therefore not be said to be an unusual or unexpected use of the delegated legislative power. The committee considered, however, that, had the modifications made by the regulations continued, there would have been a strong argument that the order had become an unusual or unexpected use of the delegated legislative power, because the empowering provision explicitly tied the exercise of the delegated power to the

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226 Canterbury Earthquake Recovery Act 2011, s 71.
purposes of the 2011 Act. The regulations would arguably have ceased to be in accordance with the purposes of the Act as soon as the regulations were no longer supporting the recovery of the local community from the impacts of the Canterbury earthquakes.\textsuperscript{227} However, in the case of regulations made under the Education Act 1989, the committee found that while the empowering provision authorised the making of the regulations, where those regulations directly thwarted the intention of another provision of the Act they could still fall foul of this ground.\textsuperscript{228} In this case, the impugned regulations made it impossible for an offence to be committed under a provision of the Act. The committee considered that Parliament could not have intended to delegate a power to make regulations that would effectively contradict the explicit effect of the empowering legislation.\textsuperscript{229}

In the case of the regulations authorising the making of tertiary legislation that set requirements for the grant of pilots’ licences, the principal Act specifically authorised such stipulations to be made by tertiary legislation. Regardless of the committee’s views on the desirability of such matters being dealt with under sub-delegated powers, it could not be said that the regulations were open to objection on this ground. The committee did find, however, that in regulations dealing with people’s livelihood it would expect to find provision for appeals against refusals to grant or renew licences, and that the absence of such provision was an unexpected use of the power.\textsuperscript{230} On the other hand, if the empowering Act does not explicitly provide for the matter that is the subject of the regulations, the committee may take the view that the regulations make an unusual or unexpected use of the power. The committee found that it was unusual or unexpected to use a power to set fees and charges to implement an accreditation system for surveyors, as the empowering provision made no reference to such a system.\textsuperscript{231}

Where the empowering Act is drafted in very broad terms, it may be difficult to conclude that something has been included in regulations made under it that could not have been reasonably contemplated. For this reason the Statutes Revision Committee did not find a carless-days scheme and a weekend petrol sales ban to be unexpected or unusual uses of the powers conferred by the Act under which they were introduced. The breadth of the provisions in the Act led the committee to conclude that Parliament had intended to authorise the making of regulations going well beyond matters of administration.\textsuperscript{232} This type of enactment, however, is very much the exception, otherwise the committee’s scrutiny on this ground would be futile. Conversely, the breadth of the provision in a regulation can lead to the conclusion that it does make an unexpected use of the power. So regulations imposing fees for survey services on persons who did not receive those services fell foul of this ground.\textsuperscript{233}

The motivation behind the making of the regulations will often be an important consideration. When regulations were made principally because of a desire to conform to Australian food-labelling standards, and this was not an object specified in the legislation, they were held to make an unexpected


\textsuperscript{228} Regulations Review Committee Complaint regarding the New Zealand Teachers Council (Conduct) Rules 2004 (SR 2004/143) (12 August 2013) [2011–2014] AJHR I.22B.


\textsuperscript{230} Statutes Revision Committee Civil Aviation Regulations 1953, Amendment No 22 (SR 1979/18) (24 July 1980) [1980] AJHR I.5 at [9]–[10].


use of the power. Another important consideration for the committee will be any explanation or justification given to the House for the regulation-making provision in the first place. Any use of the power that departs from such a reason or justification is prima facie unexpected. So, when the explanatory note to a bill justified a power to bring legislation into force on different dates on the ground that regulations to implement the Act had to be drafted, it was an unexpected use of the power to exempt a section from being brought into force because doubts had arisen as to its legal effectiveness.

The committee also found this ground to be triggered when a statutory board made regulations imposing a fee that was effectively an industry-wide levy. The purpose of charging the fee was to fund the cost of bringing prosecutions in the industry regulated by the board; and despite the fact that the legislation required the board to institute prosecutions where appropriate, the committee considered it an unexpected use of the legislative power delegated by Parliament. Parliament ultimately legislated to validate the fees that had been charged by the board from 1 April 2007, and amended the empowering legislation to authorise the board to impose a levy for disciplinary and prosecution purposes.

The regulation unduly makes the rights and liberties of persons dependent upon administrative decisions that are not subject to review on their merits by a judicial or other independent tribunal

This ground principally relates to regulations conferring decision-making power on officials or bodies without making provision for a right of appeal or other review of the decision. Decisions taken under statutory powers are always subject to review by the courts to ensure that the statutory powers have been properly used, in the sense of being exercised within the express or implied terms of the statute. Judicial review can lead to an extensive and probing review of the original decision. But it does not permit the court to substitute its opinion on the merits of the decision for that of the person delegated the statutory power to make the decision. For this reason judicial review is not necessarily an adequate alternative to conferring a right of appeal on which the merits of the decision can be re-examined. The committee will therefore look closely at regulations that do not include provisions for appeal against administrative decisions taken under them. The committee has recommended that regulations relating to domestic violence programmes should include an appeal process, to ensure that decisions made by approval panels were subject to independent analysis on their merits, particularly decisions to remove approvals. It has also recommended review of what it considered a lack of provision in the Legal Services Act 2011 for merits review of a decision to decline out-of-time payment to a provider following a grant of legal aid. The Act was subsequently amended to provide for merits review.

236 Regulations Review Committee Complaints about two notices made by the Plumbers, Gasfitters, and Drainlayers Board relating to an offences fee (30 September 2013) at 6 ([2011–2014] AJHR I.22B at 1162).
237 Plumbers, Gasfitters, and Drainlayers Amendment Act 2013.
241 Legal Services Amendment Act 2013, ss 16 and 17 (see Legal Services Act 2011, ss 51(1A) and 52(3A)).
The distinctive aspect of this ground, then, is that the committee looks for what is not in the regulations rather than for what is present.

The regulation excludes the jurisdiction of the courts without explicit authorisation in the empowering statute

Provisions in legislation ousting the jurisdiction of the courts to review action taken under the legislation (privative clauses) are no longer common, not least because they have been found to be an ineffective means of excluding the courts’ jurisdiction. They are even less likely to be found in regulations. But regulations that do not expressly oust the jurisdiction of the courts may nevertheless have this effect or tendency in practice, and this has attracted the committee’s attention. Thus in one instance the committee reported on the timing of regulations concerning payments for kiwifruit and the effect that they would have on proceedings then before a court. The committee has rejected an argument that this ground of review would apply if increased court fees created a potential barrier to access to the courts.

The regulation contains matter more appropriate for parliamentary enactment

This ground is relied on wherever the importance of the matter in the regulations suggests to the committee that it should have been enacted in primary legislation. The committee takes a pre-emptive approach regarding this ground by subjecting proposed Henry VIII clauses to particular scrutiny when reporting to other committees on regulation-making provisions.

Regulations amending legislation, though authorised (as they must have been) by the empowering provision under which they are made, will still be scrutinised carefully by the committee. Such regulations may be justified, for example, where the legislation to be amended consists of a list of bodies in a schedule that needs to be updated constantly as new entities are created and others abolished. The committee has found that a set of regulations that prescribed an additional factor for assessing the benefit of overseas investments in sensitive land effectively amended primary legislation, but stopped short of finding this ground to be made out. The committee said, however, that the regulations included matters that could be argued to be more suitable for parliamentary enactment. The regulation-making power authorised the making of regulations to add factors to a list, already prescribed in the primary legislation, of matters that ministers had to consider in decision-making.

An area of particular concern to the committee on this ground was producer board regulations. Various producer board Acts conferred wide powers to make delegated legislation to regulate primary industries. But the committee baulked at the breadth of the rearrangements effected by regulation, taking the view that it was more appropriate for such sweeping changes to be introduced by primary legislation.

The committee found this ground to be triggered where Parliament had generally provided for a particular matter in primary legislation but had, in one case, been silent on the matter. In the case of regulations requiring a particular disciplinary tribunal to hold its proceedings in private unless an order to the

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contrary was made under the regulations, the committee observed that Parliament had required the proceedings of comparable disciplinary tribunals to be public, including an explicit requirement to that effect in the primary legislation. On this basis, the committee concluded that the extent to which the disciplinary tribunal’s proceedings were to be public was a matter more appropriate for parliamentary enactment, and noted that the principle of open justice was a matter of fundamental importance.246

The committee has found that this ground could not be made out where Parliament clearly intended that a delegated legislative power could be used to make regulations dealing with matters of substantive policy of a kind that Parliament itself would ordinarily legislate for. The Canterbury Earthquake Recovery Act 2011 authorised the making of regulations granting exemptions from, modifying, or extending any provisions of a list of Acts of Parliament, despite the fact that the decision to alter an Act of Parliament in such a way is one that Parliament ordinarily guards for itself.247 The committee considered that this ground could not be made out because, although the regulations did contain matters more appropriate for parliamentary enactment, they did so with the clear authorisation of Parliament itself.248

The regulation is retrospective where this is not expressly authorised by the empowering statute.

In one case where this ground was considered, the committee held that a regulation that amended existing sharemilking agreements was not retrospective, since the alterations it effected took effect from the date the regulation was made. The fact that the regulation altered the legal context in which agreements that had been negotiated would be played out was not sufficient to engage this ground. Furthermore, the statute clearly authorised retrospectivity in this case.249

In another case, the committee found that a notice made by the Nursing Council of New Zealand retrospectively altered the title of a group of second-level nurses who had begun training or graduated during a specified period. The Act under which the notice was made did not expressly authorise the notice to have such retrospective effect. The committee recommended that the Nursing Council amend the notice to remove the unauthorised retrospective effect.250 The House subsequently resolved to revoke the clause of the notice that had retrospective effect and substitute a new clause for it.251 (See “Amendment of disallowable instruments by the House”, p 473.)

The committee has found that a regulation had the effect of indirectly imposing a retrospective fee, and this was clearly not authorised by the empowering statute. The regulation specified a confirmation procedure, which the committee accepted was intended to prevent the regulations having a retrospective effect. However, the committee considered that the overall effect of the regulation was to require applicants to pay a fee that had not been set at the time it became payable under the empowering Act—in other words, at the time they lodged their applications, before the regulations were made. The committee found that the regulation was indirectly retrospective because of the confirmation procedure’s inconsistency with the scheme of the Act, and expressed concern that the regulation established

251 (23 September 2008) 650 NZPD 19223.
an undesirable precedent of a regulatory mechanism that was specifically designed to avoid the retrospective application of prescribed fees. 252

The regulation was not made in compliance with particular notice and consultation procedures prescribed by statute

A regulation made without compliance with prescribed notice and consultation procedures may be subject to legal proceedings before a court. It is not the committee’s function to determine whether the Act’s requirements in these respects have been complied with. But the committee may assume that consultation is required, even if there is legal doubt about this, and then proceed to judge whether it considers such consultation as took place was adequate. In assessing this ground, the committee has referred to legal standards: that the party consulted must be adequately informed so as to be able to make an intelligent or useful response; and that the consultor, while entitled to have a working plan in mind, must keep an open mind and be ready to change the plan and even start afresh. 253 But the committee may make its own value judgement as to whether, in the circumstances, the consultation that did take place was adequate, regardless of whether it was legally sufficient. 254

The committee has made particular recommendations for the principles for carrying out effective consultation to be followed before making delegated legislation (in that case, deemed regulations as they were then called). The Government responded that it would ask the Legislation Advisory Committee to consider these principles and produce guidance for consultation regarding regulation-making generally. 255

For any other reason concerning its form or purport, the regulation calls for elucidation

“Purport” is taken to mean the literal meaning of the words used in the regulation, rather than its practical effect, which, in so far as it can be considered, would fall under one of the earlier grounds. The committee has stated that this ground is intended to cover situations where the language used in the regulations is ambiguous or so complicated as to be unclear. 256 If the public is expected to comply with regulations, it is reasonable to expect them to be drafted in plain, unambiguous language and for their format to help comprehension. 257 This ground could also be invoked if there is a defect apparent on the face of the regulations that needs to be corrected. 258 But findings of substantive unreasonableness are not appropriate under this ground of review.

Thus, the committee drew the House’s attention to regulations it considered should have included a clear statement of their scope and purpose, and should have specified the criteria to be applied in exercising a discretion to grant permits


Delegated Legislation

Operators to transport people to view marine mammals.\(^{259}\) It also upheld a complaint about rules imposing standards of vehicle window glazing, because it considered sections of the rules to be confusing and ambiguous.\(^{260}\) It has described the meaning of wording in an animal welfare code as needing clarification, and recommended that the authority responsible for recommending the issuing of the code consult on revised wording to amend the code.\(^{261}\)

On this ground, the committee also raised the question of the relationship between a particular regulation and the New Zealand Bill of Rights Act 1990, where the regulation might have had the effect of inhibiting an application for judicial review.\(^{262}\)

**OTHER MATTERS RELATING TO DELEGATED LEGISLATION**

In addition to its brief to examine regulations, draft regulations and regulation-making provisions in bills, the committee is empowered to bring any matter relating to regulations to the notice of the House.\(^{263}\)

This general authority has allowed the committee to conduct inquiries falling outside the other powers it possesses. Significant exercises of this general power have included a general examination of regulation-making provisions when its consideration of individual provisions suggested that this was a desirable project. Among the subjects of important general reports it has made to the House are the following:

- the use of empowering provisions to override primary legislation (Henry VIII clauses)\(^{264}\)
- instruments deemed to be regulations\(^{265}\)
- the constitutional principles to apply when Parliament empowers the Crown to charge fees by regulation\(^{266}\)
- delays in bringing Acts of Parliament into force by Order in Council\(^{267}\)
- the principles to be employed in determining when delegated legislation should be given the status of regulations\(^{268}\)
- the incorporation of material into regulations by reference\(^{269}\)
- affirmative resolution procedures\(^{270}\)
- the oversight of disallowable instruments that are not also legislative instruments.\(^{271}\)


\(^{263}\) SO 318(4).


\(^{266}\) Regulations Review Committee Inquiry into the constitutional principles to apply when Parliament empowers the Crown to charge fees by regulation (25 July 1989) [1987–1990] AJHR I.16C.


\(^{268}\) Regulations Review Committee Inquiry into the principles determining whether delegated legislation is given the status of regulations (30 June 2004) [2002–2005] AJHR I.16E.


\(^{270}\) Regulations Review Committee Inquiry into affirmative resolution procedures (30 May 2007) [2005–2008] AJHR I.16D.

\(^{271}\) Regulations Review Committee Inquiry into the oversight of disallowable instruments that are not legislative instruments (11 July 2014) [2011–2014] AJHR I.16H.
The report on fee charging was used by the Controller and Auditor-General as a reference point in a review of revenue collected by departments from third parties.\textsuperscript{272}

This wide power has also allowed the committee to follow up inquiries it has already conducted, and to report to the House what amendments have been made to regulations to meet concerns expressed by the committee in earlier reports.

**REPORTS**

The Regulations Review Committee is unusual in that it formally reports to the Minister who referred draft regulations to it for consideration, and to select committees about provisions in bills before them, as well as to the House. However, in practice, the committee includes in its periodic reports to the House summaries of its reports to Ministers and other select committees, so that all of its work is eventually recorded and reported on to the House.

Reports from the committee are presented in the same way as other select committee reports. The committee’s reports are set down as Members’ orders of the day.\textsuperscript{273} Like other select committee reports set down for consideration, there is little chance of its reports being debated, and the order of the day is discharged 15 sitting days after the Government’s response to it is presented (if it requires a response) and 15 sitting days after being placed on the Order Paper in other cases.\textsuperscript{274}

**GOVERNMENT RESPONSE**

As with reports from other committees, the Government is obliged to present a response on recommendations addressed to it in a Regulations Review Committee report within 60 working days of the report being presented.\textsuperscript{275}

The committee has sometimes taken issue with a response that did not adequately address the matters contained in its report. It wrote to the Minister concerned expressing its dissatisfaction with a Government response,\textsuperscript{276} and on occasions has launched further inquiries because of the inadequacy of responses to earlier recommendations. Following the committee’s inquiry into geothermal energy regulations, it protested that the Government response totally failed to address the issues it had raised.\textsuperscript{277} Where the Government’s response to a report on Reserve Bank regulations had been presented out of time, the committee reported that this delay had effectively circumvented the work of the committee, since in the meantime legislation had been introduced dealing with the point in issue. The committee also considered that the response had misunderstood the committee’s concerns and was in any event inadequate.\textsuperscript{278} The committee also issued a report following up the Government’s response to its report on Henry VIII clauses, reiterating and elaborating on its views in respect of two of its recommendations that had been rejected by the Government.\textsuperscript{279}

\textsuperscript{273} SO 250(3).
\textsuperscript{274} SO 74(4).
\textsuperscript{275} SO 252(1).
\textsuperscript{277} Regulations Review Committee Report on the Government’s response to the Committee’s inquiry into the Geothermal Energy Regulations 1961 (8 October 1987) [1987–1990] AJHR I.16 at [5.1]–[5.7].