6 April 2011

Dr The Rt Hon Lockwood Smith
Chairperson
Standing Orders Committee

Review of Standing Orders: Regulations Review Committee

The Regulations Review Committee wrote to you recently on two matters. These were:

- Amendments which will need to be made to Standing Orders when the Legislation Bill is enacted.
- Hon Rodney Hide’s proposal to include a proportionality principle in Standing Order 310.

These two matters are now addressed in turn.

Amendments to Standing Orders when Legislation Bill is enacted

The committee wrote to you on 25 November 2010 advising that Standing Orders would need to be amended as a result of the enactment of the Legislation Bill which is currently before the House. The bill will change terminology relevant to the committee’s functions.

The final form of the bill and timing regarding its implementation are now matters for Parliament. However, the proposed commencement date of the bill is 1 July 2011. If this date is retained amendments will need to be made to Standing Orders before then so that the committee’s jurisdiction aligns with the statute at that date.

Currently the committee's functions under SO 309 refer to various matters relating to regulations. “Regulation” is defined in SO 3 with reference to the Regulations (Disallowance) Act 1989 which will be repealed by the Legislation Bill.

“Regulations” will continue to be defined widely in section 29 of the Interpretation Act 1999. As well, a new term “disallowable instrument” in the bill, will define in law the instruments which will be subject to disallowance by Parliament. These terms overlap, however they are not identical.
In relation to some of the committee’s functions, where the remedy of disallowance is relevant, our jurisdiction may be sensibly limited to considering disallowable instruments. This would apply to the scrutiny function under SO 309(1) and the complaint function under SOs 309(5) and 311. This may also be sensible in relation to the draft instruments a Minister can refer to the committee under SO 309(2).

The scrutiny function under SO 309(1) should also probably be limited to instruments which will be presented to the House under clause 40 of the bill. This reflects current administrative practice and any extension in this area would have resource implications.

However, in relation to the committee’s bill scrutiny and inquiry functions (under SOs 309(3) and 309(4) respectively) it may be appropriate to use both of the terms “disallowable instrument” and “regulations”. This approach would provide the committee with a wide jurisdiction to consider issues arising from delegated legislation under these functions.

The disallowance remedy is not directly relevant to these functions and the committee’s view is that it is desirable for these to be available more widely in respect of issues arising from delegated legislation. These functions would continue to be limited by the grounds in Standing Orders and in relation to the bill scrutiny function, by the principles in the Legislation Advisory Committee guidelines.

Suggested draft amendments to Standing Orders are attached in the Appendix.

These include implementing the suggestions made above and also a change to an aspect of the grounds in SO 310(2). Currently paragraphs (a), (e), (g) and (h) of SO 310(2) refer to “the statute”. Adding the words “or other law” simply clarifies that these apply to the committee’s work with delegated legislation made under both primary and other delegated legislation, rather than appearing to relate to that made under primary legislation only.

Proposal to include a proportionality principle in Standing Order 310

Mr Hide has proposed that a proportionality principle be included in SO 310. As proposed this would apply to all delegated legislation that has “the potential to impose costs”. Three issues arise:

- the impact of the Regulatory Standards Bill
- which of the committee’s functions a proportionality principle would apply to
- the potential resource implications of both of these matters.

Regulatory Standards Bill

It is not clear what relationship the proposal may have to the Regulatory Standards Bill which was introduced to the House on 15 March. A question which arises is whether the proposal is a stand-alone measure or whether it will rely to some extent upon the concepts and legal tests proposed in the bill.
If the latter, the proposal may raise quite complex legal and policy issues for the committee. For example, we note that, similarly to the test which is being proposed for Standing Orders, clause 7(i)(j) of the bill provides that one aspect of “good law making” is where benefits outweigh the costs of the legislation to the public or persons.

The bill will require legislation (which specifically includes delegated legislation) to be compatible with certain principles of responsible regulation, including “good law making”. An exception is provided in clause 7(2) of the bill. The compatibility concept and the exception both mirror the legal tests which apply under the New Zealand Bill of Rights Act 1990. The concept of “proportionality” is a key part of the applicable legal tests under that Act. Therefore, if the term “proportionality principle” was used in Standing Orders the wider framework proposed in the bill may become relevant to the committee’s work in this area.

Although we are not in a position to give a fully considered view on these matters, it appears to us that the addition of a proportionality principle in Standing Orders, as proposed in Mr Hide’s letter, might introduce a much more complex process than might first be apparent.

**Which of the committee’s functions would a proportionality principle apply to?**

Another question which needs to be considered is whether the proportionality principle will apply to the committee’s scrutiny function in respect of all regulations and deemed regulations under SO 309(1), or perhaps be limited to one or more of the other functions the committee has, for example, considering complaints from members of the public.

In the committee’s letter to you dated 10 March we said we anticipate resourcing issues will arise if this proposal is implemented.

The resourcing issues would possibly be substantial if a proportionality principle were to apply to the committee’s main scrutiny function under SO 309(1). The potential complexity of the legal framework discussed above which might need be considered by the committee would also impact on resource needs. To provide some context to the discussion we note that in both 2009 and 2010 approximately 400 statutory regulations were considered by the committee and in 2010 approximately 150 deemed regulations were considered by the committee.

It will not necessarily be clear to the committee on the face of any instrument whether there is “the potential to impose costs”. In some cases this would be clear, in others not. To be certain the committee would need to make a written inquiry to this effect in cases where this is not clear. It is difficult to say how often this might need to be done.

The committee currently makes this type of written enquiry in all cases where fees are imposed by regulations. This asks whether the Auditor-General’s guidelines on
imposing fees in the public sector have been complied with. Some time is spent by
the committee and committee staff checking each response against the guidelines.
When doing so the committee generally accepts statements made by the public body
concerned. We do not generally require evidence to substantiate such statements.

Making an enquiry about whether any instrument’s “benefits outweigh the costs”
could therefore also be made by the committee. However, when considering the
responses the committee could be called on to make some reasonably detailed
operational assessments. Again, it is difficult to know how many of the 400
regulations and 150 deemed regulations the committee looks at each year would need
such an assessment.

The resource issues might be more manageable if the proposal was limited to the
committee’s complaint function. If so, members of the public would be provided with
a forum to have any concerns about the balance of costs and benefits considered,
without every regulation and deemed regulation made each year needing to be
assessed by the committee.

Conclusion

Some thought needs to be given to the resources the committee might need to
scrutinise regulations and deemed regulations using a proportionality principle. The
resource implications are likely to vary depending on which of the committee’s
functions this applied to.

However, either way we would expect the time members of the committee would
need to be available for the committee’s work to increase – perhaps substantially –
and this would impact on the time members would have available for other
parliamentary work, including other committee work.

We also think it likely that resourcing issues would arise for the Office of the Clerk.
Currently the Clerk provides the committee with a Clerk of Committee and a
permanent legal adviser. We understand that both positions are almost full-time at
present. We suggest that this issue be raised with the Clerk for her response.

The committee would appreciate your staff continuing to liaise with its legal adviser
on the matters we have raised here.

Yours faithfully

Charles Chauvel
Chairperson
APPENDIX

SUGGESTED AMENDMENTS TO STANDING ORDERS

Standing Order 3(1) be amended by removing the definition of “regulation” and by inserting the following definitions in the appropriate alphabetical order:

- **disallowable instrument** has the same meaning as in section 37 of the Legislation Act 2011
- **legislative instrument** has the same meaning as in section 4 of the Legislation Act 2011
- **regulations** has the same meaning as in section 29 of the Interpretation Act 1999 (as amended by section 72(3) of the Legislation Act 2011)

The functions of the committee set out in Standing Order 309 be substituted as follows:

**309 Functions of Regulations Review Committee**

(1) The Regulations Review Committee examines all disallowable instruments required by section 40 of the Legislation Act 2011 to be presented to the House.

(2) A Minister may refer to the committee for consideration, and the committee may report to the Minister on, a draft or proposed disallowable instrument.

(3) In respect of a bill before another committee, the committee may consider, and report to the committee considering the bill on, either or both of the following:
   (a) any power to make a disallowable instrument:
   (b) any matter relating to disallowable instruments or regulations (whether or not the regulations are disallowable instruments).

(4) The committee may consider, and report to the House on, any matter relating to disallowable instruments or regulations (whether or not the regulations are disallowable instruments).

(5) Under Standing Order 311 the committee investigates, and may report to the House on, complaints about the operation of disallowable instruments.

(6) Nothing in this Standing Order, or in Standing Orders 310 to 312, prevents the committee from applying under Standing Order 193 to the Speaker for a summons for evidence, papers, or records in respect of any disallowable instrument or regulations (whether or not the regulations are disallowable instruments).
(7) For the purposes of paragraphs (2) to (6) a disallowable instrument includes disallowable instruments which are not required to be presented to the House by section 40 of the Legislation Act 2011.

Standing Order 310 be substituted as follows:

310 Drawing attention to a disallowable instrument or regulation

(1) In examining a disallowable instrument or where relevant a regulation (whether or not the regulation is a disallowable instrument), the committee considers whether it ought to be drawn to the special attention of the House on one or more of the grounds set out in paragraph (2).

(2) The grounds are, that the instrument—
   (a) is not in accordance with the general objects and intentions of the statute or other law under which it is made;
   (b) trespasses unduly on personal rights and liberties;
   (c) appears to make some unusual or unexpected use of the powers conferred by the statute or other law under which it is made;
   (d) unduly makes the rights and liberties of persons dependent upon administrative decisions which are not subject to review on their merits by a judicial or other independent tribunal;
   (e) excludes the jurisdiction of the courts without explicit authorisation in the enabling statute or other law:
   (f) contains matter more appropriate for parliamentary enactment:
   (g) is retrospective where this is not expressly authorised by the empowering statute or other law:
   (h) was not made in compliance with particular notice and consultation procedures prescribed by the empowering statute or other law:
   (i) for any other reason concerning its form or purport, calls for elucidation.

Consequential amendments will also need to be made to Standing Orders 311 to 314.