NEW ZEALAND LAW SOCIETY

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Regulations Review Committee Inquiry into oversight of disallowable instruments that are not legislative instruments

04/04/2014

REGULATIONS REVIEW COMMITTEE INQUIRY INTO OVERSIGHT

OF DISALLOWABLE INSTRUMENTS THAT ARE NOT LEGISLATIVE INSTRUMENTS

Introduction

1. The New Zealand Law Society (Law Society) welcomes the opportunity to comment on this inquiry. The Regulations Review Committee's inquiry is an important opportunity to rectify some anomalous law-making practices. We note that the use of disallowable instruments that are not legislative instruments (DINLIs) is widespread and we support initiatives that will improve their identification and publication.

2. We also note that the inquiry raises a significant constitutional issue relating to the separation of powers. The Law Society considers that the Regulations Review Committee (RRC) plays a significant role in maintaining an appropriate balance between legislative and executive powers. Delegation of law-making has been widely accepted as a necessary requirement for a functional democratic state.[1] The Algie Committee noted:[2]

> *If it is accepted that recourse to the use of delegated legislation is inescapable if our parliamentary system is to work efficiently under modern conditions, Parliament in dealing with the great volume of legislation, must confine itself very largely to the enactment of general and essential principles, and it must hand over to others the drafting of those detailed rules and regulations which are needed to put into operation the principles set out in the statute which it has itself enacted.*

3. However, the delegation of powers must be accompanied by appropriate and effective checks and balances. These include safeguards in the law-making process (as set out in the Legislation Advisory Committee Guidelines),[3] administrative law principles and doctrines (such as the doctrine of ultra vires) and constitutional principles (such as the doctrine of parliamentary sovereignty), the latter being the primary basis of the oversight role of the RRC.

4. The role of the RRC in performing a check on the exercise of Executive powers is therefore not only related to disallowance (which is its ultimate remedy), it also plays an important role in influencing the outcomes of delegated law-making. The importance of the RRC role in achieving the right

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1 See *Report of the Committee on Ministers Powers* (Donoughmore Committee) (UK) (1932) Cmnd 4060, and *Report of the Committee on Delegated Legislation* (*Algie Committee*) [1962] AJHR 1.18.

2 See *Report of the Committee on Delegated Legislation* (*Algie Committee*) [1962] AJHR 1.18, 6.

3 Legislation Advisory Committee Guidelines, *Guidelines on Process and Content of Legislation* (2001 – as amended).

balance between the Executive and legislative branches of government cannot be overstated. The risks of not achieving the right balance have been frequently stated.[4]

5. The paper released by the Committee identifies very real problems in identifying whether a particular instrument is a DINLI. Not only do these problems create excessive work for the Committee, they also undermine the checks and balances on delegated legislation-making powers. In simple terms, if instruments are not identified to the Committee as DINLIs, they will not be reviewed.

Recommendation

6. The Law Society recommends that the RRC should note that its inquiry, while specific and particular in nature, touches on significant constitutional issues that require the attention of Parliament and the Executive in ensuring appropriate checks and balances are maintained in the use of delegated legislation.

Definitional issues

7. In part, the problems identified by the Committee are caused by uncertain definitions. The Law Society submission on the Legislation Bill[5] recommended further consideration be given to operative definitions to improve clarity. Subsequent changes to the Bill do not appear to have substantively addressed the concerns noted and would appear to be the cause of some of the issues now identified by the Committee.

8. The issues identified in the Terms of Reference for this inquiry indicate that the recent passage of the Legislation Act 2012 (LA) may have the unintended consequence of diminishing the ability of the RRC to review instruments that are legislative in nature.[6]

9. In particular, the Law Society notes that the distinction of instruments as disallowable but not legislative has the potential to exclude from RRC oversight many instruments that involve exercise of

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4 *Deficiencies in New Zealand Delegated Legislation*, Geoffrey Palmer (1999) 30 VUWLR 1; *Delegated Legislation in Australia*, D. Pearce. S Argument (1999) (2nd ed, Butterworths, Sydney); Report of the Regulations Review Committee *Inquiry into instruments deemed to be regulations – an examination of delegated legislation* [1999] AJHR 1.16R.

5 Legislation Bill, 27 September 2010, available at http://www.lawsociety.org.nz/__data/assets/pdf_file/0019/32167/legislation-bill.pdf.

6 The general proposition is that an instrument is legislative in nature if it involves the exercise of dispensing powers which determine obligations or rights, as opposed to administrative instruments which involve the exercise of decision-making powers by applying the law (as contained in legislative instruments) to the facts/circumstances. See *Commonwealth v Grunseit* (1943) 67 CLR 58, 82. The difficulties in distinguishing the two is widely known – see Philip A Joseph, *Constitutional and Administrative Law in New Zealand* 3rd ed. Thomson Reuters, Wellington, 2011) at 187; and more recently *Sea Shepherd Australia Ltd v The State of Western Australia* [2014] WASC 66.

dispensing powers that are not merely administrative. This distinction is not new. It existed under the Regulations (Disallowance) Act 1989, which was the genesis of instruments described as "deemed regulations" by the RRC in its 1999 inquiry into instruments deemed to be regulations.[7] That inquiry highlighted numerous challenges with checks on such instruments including accessibility, publicity and the need for a central record. While Government made a number of changes to address the concerns of the Committee, practical issues remained.

10. The passing of a new Legislation Act was an opportunity to address some of these issues. However, the very specific practical questions posed in this inquiry demonstrate that this has not been achieved. The authors of *Subordinate Legislation in New Zealand* have already expressed reservations, saying:[8]

> *The House can disallow those instruments that are deemed to be disallowable instruments in the same way that was possible under the Regulations (Disallowance) Act 1989. But given the infrequency with which instruments are actually disallowed by the House, and the fact that rules, codes of practice, instructions, standards and notices do not have the standard law-making safeguards built into them (that is, they are not drafted by PCO, nor are they reviewed by Cabinet, or approved by the Governor-General acting on the advice of the Executive Council) the fundamental concerns raised by Palmer remain.*

11. The Law Society notes that the definition in the Legislation Act 2012 (LA) for "legislative instrument" emphasizes form over substance, thereby creating the need to define concepts further, such as "instrument", "disallowable instrument" and "significant legislative effect" when dealing with subordinate legislation. The risks associated with definitions of this nature have been highlighted by the courts in the past.[9]

12. Notably "instruments" are defined for incorporation purposes as including "any instrument … that has legislative effect …" without defining the latter term, and it is unclear how it differs from the defined term "significant legislative effect" and what relevance that may have to what is disallowable and what is not.

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7 Report of the Regulations Review Committee, *Inquiry into instruments deemed to be regulations – an examination of delegated legislation* [1999] AJHR 1.16R.

8 Ross Carter, Jason McHerron and Ryan Malone, *Subordinate Legislation in New Zealand* LexisNexis, Wellington, 2013, at 112.

9 See *Christchurch International Airport Ltd v Christchurch City Council* [1997] 1 NZLR 573 (HC), 593, *Auckland City Council v Finau* [2002] DCR 839, 848 and *Television New Zealand v Viewers for Television Excellence* [2005] NZAR 1 (HC).

13. The Law Society also notes that traditional terminology such as “Act”, “Regulations” and “rules” are not expressly defined in the LA, but their continued use and definition in other important Acts, such as the Interpretation Act 1999, add to the confusing array of terminology.

14. The difficulty with the various new definitions is that they not only reinforce the challenges relating to safeguards mentioned earlier, they also increase the probability that identification of DINLIs is too difficult for those who make them, those who are affected by them, and those (like the RRC) who are expected to review them.

15. Where empowering legislation or an instrument states that an instrument is disallowable for the purposes of the LA or it falls clearly within the definition of “legislative instrument” the position is clear.

16. However it can be very unclear whether an instrument has “significant legislative effect”, despite the definition in section 39 of the LA. An example of the difficulty is the power of the New Zealand Transport Agency under section 30ZA of the Land Transport Act 1998 to grant an exemption from requirements in the Act: the power could be described as altering or removing obligations and would therefore have significant legislative effect and be disallowable. Nothing in that Act makes it evident that such an instrument is disallowable and although these exemptions must be notified in the Gazette,[10] the absence of express provision for disallowance (as illustrated by the Takeovers Act)[11] increases the likelihood that the status of the instrument is not known.

17. While the criteria proposed in the possible template solution by the RRC may assist, it would depend on the respective agency knowing that the instrument is a DINLI. In the example above, the New Zealand Transport Agency may not conclude that an exemption is a DINLI and may not apply the criteria or notify the exemption as one.

Recommendation

18. The Law Society recommends that the distinction between legislative instruments and disallowable instruments should be removed and that the focus of definitions should be on substantive elements of law-making, as is the case in Australia under the Legislative Instruments Act.[12]

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10 See Land Transport Act 1998, section 166(3).

11 Takeovers Act 1993, section 45.

12 Legislative Instruments Act 2003 (Cth), section 5(2).

The Australian approach

19. While amendments to the definitions will assist in remedying the current problems with identification and review of disallowable instruments, the Law Society considers that further steps are required and commends the Australian approach of requiring registration of disallowable instruments.

20. Australia has, since 2003, adopted a reasonably simple approach to identifying instruments that have legislative effect.[13] The definition is not absolute and enables its interpretation and application through judicial means.[14] To facilitate the oversight of the making of such instruments the Act has an additional safeguard that would significantly address the concerns expressed by the RRC in this inquiry. This is the requirement to have an Australian Federal Register of Legislative Instruments.[15] The register achieves, amongst other things, registration for purposes of notification and ensuring parliamentary oversight. More importantly there are very real consequences for failure to register: where the legislative instrument is made under delegation the body making the instrument is required to lodge the instrument for registration and, subject to limited exceptions, failure to do so results in the instrument not being enforceable.[16]

21. Requiring the registration of all legislative instruments (without distinction between disallowance or not) places the onus on the Executive to fully publicise and register instruments in order to ensure their enforceability. The merits of such a system are self-evident as it eliminates numerous additional steps being placed on an already heavily burdened RRC. It also supports the principles of publication and notification of law.

22. The Law Society commends this approach, as it would provide an incentive on agencies to take care in identifying whether instruments are DINLIs or not. While it could result in more instruments being identified than at present, it will reduce the time and effort currently spent by the RRC and its staff in trying to identify disallowable instruments. There will also be considerable consequential benefits in improving the quality of legislative instruments and public confidence in the law-making process.

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13 Ibid.
14 As illustrated in the *Sea Shepherd* case cited in fn 6 above.
15 Legislative Instruments Act 2003 (Cth), Part 4, Division 1, section 20.
16 See Legislative Instruments Act 2003, section 32.

Recommendation

23. The Law Society recommends that the RRC consider proposing the adoption of a register of legislative instruments (defined more widely than presently under the LA), to ensure enforceability, publicity and notification of legislative instruments.

Comments on the RRC's proposed solutions

24. The RRC inquiry has identified 11 problems with the process for making and changing DINLIs, and a number of possible solutions. The Law Society agrees that the identified defects are real, and that all the options advanced by the RRC could be adopted. Our specific comments on the identified problems are set out below.

Making, publishing and notifying the DINLI

Problems 1, 2, 3, 5 and 9

25. For reasons already noted above, the Law Society agrees that in the absence of empowering provisions containing clear requirements to note that an instrument is disallowable and specify publication requirements (including the title and date on which it is made), problems 1, 2, 3, 5 and 9 raised by the RRC do exist and will practically impact on the ability of the RRC to review these instruments.

26. The Law Society also notes that the RRC proposes:
    (a) amendment to the LA as a possible solution to problem 3 relating to publication, and
    (b) publication of a step-by-step guide and an authoritative list of law-making bodies as a possible solution to problems 4 and 9.

27. The Law Society considers that amendment of the LA is needed to address these problems. However if this is not possible, these proposals are an acceptable alternative.

28. The proposal to create a template for Gazette notification is in principle an acceptable means of addressing the problem of identification. The Law Society supports the proposal but notes that the definitional issues mentioned earlier mean there will be a lack of clarity amongst agencies about categories of instruments and whether or not they are in fact DINLIs. This is likely to result in agencies not utilising the template for all DINLIs, defeating the purpose of notification.

29. Another option to consider is section 14 of the LA which provides for the Attorney-General or Chief Parliamentary Counsel to arrange for an instrument that is not a legislative instrument to be published as if it were one.

Problem 4

30. The Law Society agrees that the principle of prior publicity of law should be applied to law made under delegation, with limited exceptions. However, how that might be achieved may need further careful consideration because the confusing definitions in the LA have the added effect of seemingly applying disallowance to instruments that apply the law in a particular case due to the definition of "significant legislative effect" in section 39 (as illustrated in the transport exemption example mentioned above). This is unlike the Australian equivalent,[17] which expressly excludes instruments that apply the law in a particular case.

31. The difficulty that arises is that the urgency which gives rise to the reason for granting an exemption to a particular party is defeated if a 28 day rule or equivalent were to be applied to such an instrument. (We note that the difficulty is lessened by the proviso that instruments that are wholly beneficial are not subject to the 28 day rule. So, for example, an exemption allowing a disabled person's vehicle to be used does not have to be made 28 days before it comes into force, it can come into force immediately. The situation is however more complicated where something is wholly beneficial but confers an advantage over others.)

Presenting to the House

Problems 6, 7, 8 and 10

32. The Law Society agrees that these problems create an unnecessary additional burden on the RRC which distracts from its primary role. The Law Society considers that legislative amendment as proposed above is the most appropriate way in which to deal with this issue.

33. In the interim the Law Society agrees that the proposed solution to problem 10 would make a significant difference, but it notes that this solution may also have limited effect if law-making bodies are already failing to comply with specific empowering provisions as articulated in problem 9.

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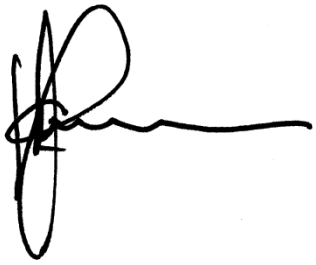
[17] Legislative Instruments Act 2003 (Cth), section 5(2).

Problem 11

34. As noted above, the Law Society supports initiatives that reduce unnecessary burdens on the RRC so that it can focus on its primary role. Subject to comments made earlier about the difficulties in identifying DINLIs, the Law Society considers the solution proposed by the RRC is sensible.

Conclusion

35. The Law Society wishes to appear in support of this submission.



Chris Moore
President
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