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**SUBORDINATE LEGISLATION IN NEW ZEALAND:
ISSUES, ASIP, AND OPPORTUNITY**

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Abstract

In 2015 the Parliamentary Counsel Office commenced the Access to Subordinate Instruments Project (ASIP) which aims to improve access to subordinate legislation in New Zealand. Chief among steps to improve access is the proposal to gather together all subordinate instruments onto the New Zealand Legislation website to form a complete collection of legislation. This paper considers some of the existing problems and issues with subordinate legislation in New Zealand, and the potential impact of the changes proposed as part of ASIP. It is suggested that the establishment of a complete statute book on the New Zealand Legislation website could be a pivotal step in the development of the legislative system as it provides an opportunity for consideration of the organisational structure of the system and perhaps the first steps towards development of a code.

Word length

The text of this paper (excluding abstract, table of contents, footnotes and bibliography) comprises approximately 7103 words.

SUBORDINATE LEGISLATION IN NEW ZEALAND: ISSUES, ASIP, AND OPPORTUNITY

I Introduction

It is a fundamental principle of the rule of law that the law should be accessible and so far as possible intelligible, clear and predictable.¹ Yet some of New Zealand's subordinate legislation is difficult to find at best, and unavailable at worst. This problem has been identified by academics, the Regulations Review Committee (RRC) and the Parliamentary Counsel Office (PCO) and in 2015, following a Government direction, the PCO commenced the Access to Subordinate Instruments Project (ASIP) to address aspects of this issue.²

In addition to consideration of the proposed changes contained in ASIP, this paper suggests that the project presents an opportunity for further organisation, and possibly partial codification of, the New Zealand statute book. It is not suggested that a complete codification by subject of the New Zealand statute book is appropriate at this time. Rather, one of the stated aims of ASIP is to create a comprehensive source of New Zealand's legislation and this presents an opportunity to consider how the law should be organised in digital format.

To explain this proposition, this paper is divided into three parts: a background section describes some of the theory behind delegation of law-making power and the current state of subordinate legislation in New Zealand, an overview and discussion of the proposals for the ASIP project, and an analysis of how the ASIP project presents opportunities for partial codification.

II Background

As in many comparable jurisdictions, the amount of legislation in New Zealand is growing and there is a trend towards increasing length in statutes.³ In addition, there is a large body

¹ Tom Bingham *The Rule of Law* (Allen Land, London, 2010) at 37.

² < www.pco.parliament.govt.nz >.

³ Geoffrey Palmer "Law-Making in New Zealand: Is There a Better Way?" (2014) 22 Waikato L Rev 1 at 4.

of subordinate legislation in force, including an unknown quantity of “tertiary” legislation made by the approximately 106 agencies authorised to do so.⁴ These points all raise issues of accessibility to the law both in terms of physical access, and in comprehensibility. A further problem identified by the Law Commission is that excessive amendment of Acts over a long period can fragment the structure of an Act thus reducing its comprehensibility.⁵

Legislation is the body of rules used to control and regulate our society. While the most recognisable examples of legislation are Acts of Parliament (or primary legislation), there exists a range of other types such as rules made under the Royal Prerogative, and rules made under authority delegated by an Act of Parliament. In addition, there are rules which are not legislation, but which still may affect the interpretation or application of the law. Each of these types of legislation has different characteristics and features and potentially, a range of different legal effects. This paper is concerned with the type of legislation sometimes identified as “subordinate”.

A Defining subordinate legislation

Subordinate legislation may be defined as legislation made under an empowering law, such as an Act, an instrument under an Act, or the Royal prerogative.⁶ This type of legislation is “subordinate” because its existence is derived from, and is dependent on, the empowering provision in the primary Act under which it was created. As a higher level source of law, the primary legislation may override subordinate legislation insofar as it is inconsistent with the empowering Act.⁷ In practice, the term “subordinate legislation” covers a wide range of instruments of varying character and legal effect. In New Zealand, this may include regulations, deemed regulations, disallowable instruments, rules, standards, and bylaws.

The identification and naming of subordinate legislation and other instruments in New Zealand is particularly problematic and is a likely contributor to some of the difficulties with access to subordinate legislation. The form of subordinate legislation that is most familiar is “regulations”. However, even the definition of this well-known term is unclear

⁴ <www.pco.parliament.govt.nz>.

⁵ Law Commission *Presentation of New Zealand Statute Law* (NZLC R104, 2008) at [3.32].

⁶ R I Carter, R M Malone and J S McHerron *Subordinate Legislation in New Zealand* (LexisNexis, Wellington, 2013) at [1.1.2].

⁷ At [1.1.2].

as it is defined differently for different purposes and its meaning has changed over time. Currently, definitions of “regulations” are provided in s 29 of the Interpretation Act 1999 and in the Cabinet Manual.⁸ Section 29 of the Interpretation Act provides:

regulations means—

- (a) Regulations, rules, or bylaws made under an Act by the Governor-General in Council or by a Minister of the Crown:
- (b) An Order in Council, Proclamation notice, Warrant, or instrument, made under an enactment that varies or extends the scope or provisions of an enactment:
- (c) An order in Council that brings into force, repeals, or suspends an enactment:
- (d) Regulations, rules, or an instrument made under an Imperial Act of the Royal prerogative and having the force of law in New Zealand:
- (e) An instrument that is a legislative instrument or a disallowable instrument for the purposes of the Legislation Act 2012:
- (f) An instrument that revokes regulations, rules, bylaws, an Order in Council, a Proclamation, a notice, a Warrant, or an instrument, referred to in paragraphs (a) to (e).

This definition shows that the meaning of “regulations” has been expanded to include legislative instruments and disallowable instruments for the purposes of the Legislation Act 2012 (LA2012).⁹ The use of the term “regulations” or “deemed regulations” to identify the controls, publication requirements and legal force of instruments ceased in 2013 when the LA2012 entered into force and introduced a new scheme for the categorisation of subordinate legislation. However, the term remains in common use and is still used in many examples of delegated legislation. The scheme of the LA2012 introduced a new method for distinguishing categories of subordinate legislation based on the legislative nature of an instrument and whether it was disallowable.¹⁰ This in turn has resulted in the identification of four categories of subordinate instrument:¹¹ instruments that are disallowable and legislative, instruments that are not disallowable and are legislative, instruments that are disallowable and are not legislative, and instruments that are not disallowable and are not legislative.

⁸ Cabinet Office *Cabinet Manual 2008* at [7.78].

⁹ Legislation Act 2012, s 29(e).

¹⁰ Sections 38 and 39.

¹¹ Regulations Review Committee *Inquiry into the oversight of disallowable instruments that are not legislative instruments* (July 2014) at 6.

A slightly different approach to the categorisation of subordinate legislation is provided by Robert Baldwin writing in 1995.¹² Baldwin described secondary legislation as being an exercise of a power to legislate conferred by or under an Act of Parliament,¹³ and tertiary rules as being governmental rules that are not directly enforceable through civil or criminal proceedings but may still produce indirect legal effects.¹⁴ It seems that on this analysis, the distinction between secondary and tertiary rules is tied to whether an instrument has legislative effect. However, Baldwin acknowledged that this distinction may not always be clear.¹⁵ The distinction between secondary and tertiary legislation in New Zealand is described slightly differently in that “regulations” are legislative instruments that have been made by the Governor General by Order in Council.¹⁶ Whereas tertiary legislation is legislation made by other means, such as by an agency or a minister.¹⁷ While this distinction may seem small, it demonstrates that the issue of the exact distinctions within subordinate legislation and the basis for those distinctions is not clear or precise.

B Why delegate?

One of the main reasons for delegation of law-making power is that Parliament does not have the capacity to legislate on matters of detail,¹⁸ as the proper role of Parliament is to focus on questions of broad principle and the establishment of frameworks under which ministers or agencies can be authorised to make more precise provisions.¹⁹ Baldwin’s view is that delegated legislation serves a valuable purpose in keeping primary legislation as clear, simple, and as short as possible, allowing Parliament to focus on essential points, policies and principles.²⁰ A second reason for delegation is that in some cases, the issue to be legislated may be very technical and therefore unsuitable for debate in Parliament.²¹ In these cases it is supposed that it is better to allow ministers or agencies to consult with experts to produce considered rules,²² and in some instances, constituencies (such as trade associations, specialists and unions) may need to be consulted and this is more effectively

¹² Robert Baldwin *Rules and Government* (Oxford University Press, Oxford, 1995).

¹³ At 60.

¹⁴ At 60.

¹⁵ At 78.

¹⁶ Legislation Act, s 29(a).

¹⁷ John Burrows “Legislation: Primary, Secondary and Tertiary” [2011] 42 VUWLR 65 at 70.

¹⁸ Baldwin, above n 12, at 63.

¹⁹ At 63.

²⁰ At 63.

²¹ At 63.

²² At 63.

achieved by the executive than by Parliament.²³ A further reason for delegation is that the flexibility of delegated legislation is a useful feature that it may be used to accommodate circumstances which were unforeseen at the time the primary legislation was enacted, or to provide rapid legislative responses to emergencies.²⁴ These advantages show that the main benefit of the use of delegated or subordinate legislation is a practical one, and that it facilitates effective law-making and operation of the Legislature.

The delegation of law-making operates to transfer power from the Legislature to the Executive as represented by ministers and agencies. This shift in orthodox constitutional function theoretically poses a risk that legislation may be made this way to avoid the scrutiny of the Legislature, that legislation will be made ultra-vires, or that other abuses of delegated power may occur. At a practical level, those areas of legislation which have been delegated to the control of ministers or agencies are more vulnerable to changes in policy and thus may be more susceptible to change.

There are several mechanisms in place to provide control and oversight of subordinate legislation and delegated law-making. Firstly, subordinate legislation is vulnerable to review by the courts as it is an exercise of a statutory power. Secondly, in many cases, the Legislature and/or the RRC are empowered to undertake scrutiny of a proposed subordinate instrument. This currently occurs via the provisions of a specific Act which may provide that for the purposes of the LA2012, the instrument is to be treated as a regulation, that the instrument is a legislative instrument, that it is of significant legislative effect, or it is a disallowable instrument for the purposes of LA2012. Thirdly, disallowance is a process by which the Legislature may repeal a subordinate instrument that does not comply with the empowering provision under which it is made or that breaches standards for subordinate legislation. While it is used infrequently, it is likely that the prospect of disallowance would operate to encourage the production of compliant subordinate legislation.

C Primary or subordinate legislation?

Most legislative regimes include both primary and subordinate legislation. Regimes can be complex as they may in addition to regulations, incorporate other instruments such as rules, notices and standards.²⁵ Despite their names, some of these instruments may also be

²³ At 63.

²⁴ At 63.

²⁵ Carter, McHerron and Malone, above n 6, at [3.2.1].

considered to be subordinate legislation because their empowering provisions may state that they are to be disallowable,²⁶ that they may be deemed regulations, or they may have a significant legislative effect according to s 39(1) of the LA2012. As noted in Carter, McHerron and Malone, it is difficult to distinguish categorically between matters that should be enacted by Parliament and those which are suitable for delegation as there would be may be exceptions to any rule.²⁷ However, some factors point towards the use of primary legislation including matters of:²⁸

- very significant policy;
- protection of fundamental rights;
- entitlements to state assistance;
- changes to the common law;
- imposition of taxes;
- repealing or altering statute law;
- creation of offences;
- creating public bodies or offices; and
- retrospective law change.

Those matters which may be more suited to delegated legislation include the administrative and machinery functions of a legislative scheme such as forms, fees, processes and procedural matters. However, the nature and scope of what functions that can be delegated will be dictated by the provisions of the empowering Act itself.²⁹

The scope of provision for regulations included in a statute also varies. For example, the Fisheries Act 1996 makes extensive provision for the creation of regulations in relation to fishing, including prescribing offences and infringement notices.³⁰ An example of a more restrictive power to make regulations is demonstrated in section 108 of the Commerce Act 1986 where it is provided that regulations may be made on the procedure for making applications and giving notices to the Commerce Commission and the procedures of the Commission and procedures in relation to the payment of fees.³¹

²⁶ See the Building Act 2004, s 362.

²⁷ Carter, McHerron and Malone, above n 6, at [3.2.3].

²⁸ At [3.2.4]-[3.2.12].

²⁹ At [3.2.13].

³⁰ At [3.2.13] referring to the Fisheries Act 1996, s 297.

³¹ Carter, McHerron and Malone, above n 6, at [3.2.13] referring to the Commerce Act 1986, s 108.

Therefore it can be seen that delegation of powers under an Act is more appropriate in some circumstances than others, that primary legislation varies in the degree to which law-making power is delegated and for what purposes, and that the regime or scheme can be adapted to fit the circumstances. However, there are common factors that will generally indicate that primary or subordinate legislation is more appropriate for a particular purpose, and these factors should inform the design of the legislative scheme.

D Examples

To demonstrate some of the difficulties that arise with the current scheme of subordinate legislation in New Zealand, two examples may be considered. The Animal Welfare (Llamas and Alpacas) Code of Welfare 2013 is available via a link on the New Zealand Legislation website (NZL) and is hosted by the Ministry for Primary Industries.³² The Code states that it is made under the Animal Welfare Act 1999, and that failure to meet the minimum standards in the code may be used as evidence for prosecution under the Animal Welfare Act.³³ At the time it was published in 2013, the code is deemed to be a regulation for the purposes of the (now repealed) Regulations (Disallowance) Act 1989 and is subject to the scrutiny of Parliament's Regulations Review Committee.

In contrast, the Retirement Code of Practice 2008 is not accessible via the link from the NZL website and is instead available on the New Zealand Government website.³⁴ The Authorising Act is the Retirement Villages Act 2003 and s 89 provides that the Minister may approve a draft code of practice and if the rules are approved, they must be published in the *New Zealand Gazette*. However, there is no express statement about the status of Codes of Practice made under this Act or whether they are intended to be disallowable.

These examples show that there is wide variation in the way that subordinate instruments are presented, both in the language used (if any) to describe the character of the instrument and the methods used to access them. There is also inconsistency in the level of information provided (such as the legal effect of the instrument) and the empowering provisions under which the instrument is created.

³² <www.mpi.govt.nz>.

³³ Animal Welfare (Llamas and Alpacas) Code of Welfare 2013, at [1.4].

³⁴ <www.beehive.govt.nz>.

E Summary

Currently, there are some difficulties with subordinate legislation in New Zealand. There are issues of accessibility in relation to certain types of instruments, particularly those which are not required to be published in the *Gazette*, and instruments administered by agencies. As there is no standardised publishing process or publishing point, and many instruments are administered by agencies, it can be difficult for the public to locate and access subordinate legislation. The preceding section shows a second aspect to the issue of accessibility is that of comprehensibility. The language used to describe various subordinate instruments is unclear and in many cases, has become separated from the nature of the instrument it seeks to describe. There have also been changes to the terminology used, and the terms used to refer to instruments across legislation is inconsistent. The seriousness of these problems relating to access is underlined by the fact that subordinate legislation is the source of many of the rules and procedures that affect us individually, every day.

A second area of difficulty has been highlighted by the Rules and Regulations Committee (RRC) in its recent report on the *Inquiry into the oversight of disallowable instruments that are not legislative instruments*.³⁵ Here, the RRC identified several factors that prevent efficient Parliamentary scrutiny of a sub-group of subordinate instruments, those that were disallowable but were not legislative (DINLIs).³⁶ The RRC expressed concern that due to the difficulty of identifying instruments of this type, it could not be said with certainty that all those that were required to be presented to the House, had been presented.³⁷ Scrutiny of subordinate legislation by the RRC and Parliament is an important control on delegated legislation. Therefore, deficiencies in this process have the potential to undermine the integrity of the delegation. The RRC also identified that there were inconsistencies in both the empowering provisions and publication requirements for some subordinate legislation,³⁸ which in turn affects the clarity and accessibility of subordinate legislation.

While there are clear deficiencies in subordinate legislation within New Zealand's current legislative scheme, the effective use of this type of legislation can play an important role in creating a robust and efficient legislative system. Like a series of cog-wheels, the various types of legislation function together with different characteristics and levels of precision. Given that New Zealand, along with much of the world, is experiencing an increase in the

³⁵ Regulations Review Committee, above n 11.

³⁶ At 8.

³⁷ At 6.

³⁸ At 7.

amount of primary legislation enacted, the efficient use of subordinate legislation may have a vital role in managing both the quantity and the quality of the Acts passed. For this reason, it is important to facilitate more effective use of delegation in legislation to ensure that the legislative options available are used to create a design and distribution of provisions that effective, efficient and user-friendly.

III Looking ahead – the Access to Subordinate Instruments Project

Following the Government’s direction to the PCO to explore options to respond to the concerns raised by the RRC after its inquiry into oversight of disallowable instruments that are not legislative instruments,³⁹ the Access to Subordinate Instruments Project (ASIP) was established in September 2015.⁴⁰ ASIP’s stated objective is to improve access to legislation by publishing all subordinate instruments on the New Zealand legislation website.⁴¹ The proposed changes include three main components: legal and procedural changes, development of an authoring and publication system, and collecting subordinate instruments to establish a complete set of subordinate instruments.

A Proposed changes

1 Changes to terminology

As discussed above, one of the identified problems with subordinate legislation in New Zealand is the use of multiple terms to describe different types of subordinate legislation and the apparent separation between the terms used to describe instruments and their inherent character.

To address this issue, the PCO has proposed changes to the terminology used to describe subordinate legislation. It is proposed to reduce the number of categories of legislation to two: Acts of Parliament, and subordinate instruments.⁴² The term “subordinate instrument” would include both legislative instruments (which largely overlaps with the well-previous concept of “regulations”) and agency-made instruments (which broadly aligns with what is now sometimes referred to as “tertiary legislation”) including instruments made under

³⁹ Regulations Review Committee, above n 11.

⁴⁰ < www.pco.parliament.govt.nz>.

⁴¹ < www.pco.parliament.govt.nz>.

⁴² Parliamentary Council Office *Legal and Procedural Changes, ASIP stream B* at B4.

the Royal Prerogative rather than an Act.⁴³ The third proposed category is not legislation but instead consists of instruments termed “administrative documents.” These are instruments that do not have “legislative effect”.⁴⁴

It appears from the information available that following ASIP, the definition of “legislative effect” in LA2012 would also be modified. The current equivalent provision in s 39 of the LA2012 provides:⁴⁵

39 Instruments that have significant legislative effect

- (1) An instrument has a **significant legislative effect** if the effect of the instrument is to do both of the following:
- (a) create, alter, or remove rights or obligations; and
 - (b) determine or alter the content of the law applying to the public or a class of the public.

However, the ASIP proposal documents provide that an instrument would have legislative effect if it:⁴⁶

1. Modifies existing legislation; or
2. Makes or modifies the law that applies to the public, a class of the public or a person.

The extension of the definition of “legislative effect” to instruments that make or modify law that applies to a person (rather than only to the public or a class of the public) may mean that if enacted, this proposal would catch a wider range of instruments as being of legislative effect than are currently caught under s 39 of the LA2012. The effect of this would be to require a broader range of instruments to be brought to the attention of the RRC. Although the proposed scheme of controls under ASIP would be different from the current one, if an instrument were caught by the “legislative effect” test, the instrument would be subject to the publication requirements of ASIP, it must automatically be presented to Parliament, and the instrument would automatically be disallowable unless it fell within one of the exceptions.⁴⁷

⁴³ Parliamentary Council Office *Legal and Procedural Changes, ASIP stream A* at A3.

⁴⁴ At A3.

⁴⁵ Legislation Act, s 39(1).

⁴⁶ Parliamentary Council Office *Legal and Procedural Changes, ASIP stream B* at B5.

⁴⁷ At B6.

Under ASIP it is proposed that all subordinate instruments are to be disallowable unless expressly identified as an exception on the ground that disallowance would be constitutionally inappropriate.⁴⁸ It is proposed that those instruments excepted from disallowance would be included or identified in a Schedule to the Legislation Act. This new regime would be very simple; relying on one definition (subordinate instrument) in determining whether disallowance applies, and all exceptions would be listed or identified.

As shown, the proposed ASIP changes would clarify the distinction between those instruments that would have legislative effect and should be subject to controls and publication on the NZL website, and those instruments that are administrative in nature and do not form part of the law. These divisions reflect the distinctions made by Baldwin between secondary legislation and tertiary rules.⁴⁹ Although the distinction may not be clear in every case, it seems that this is an intuitive distinction. Disallowance is no longer used as a means of identifying or categorising legislation, but is returned to its original role as a method of control which may be exercised by Parliament over subordinate legislation. However, the extension of application of scrutiny and publishing requirements to a broader range of instruments raises an issue previously noted by Asimow; that the increased requirements for compliance has the potential to deter agencies from making rules.⁵⁰ This issue should therefore be taken into consideration when determining whether the proposals have struck the right balance between control and delegation.

2 Changes to empowering Acts and provisions

As discussed in the previous section, there are currently several types of wording used to provide for delegation in empowering Acts. Use of multiple forms of empowering provisions together with the various names used to describe the instruments themselves mean that the nature of the instrument that can be created under the provision may not be clear. Likewise, the extent of power that can be delegated, and the legal effect of the delegation may not be apparent. Under ASIP it is proposed to simplify the way empowering provisions are drafted by introducing more standardised wording that describes the delegation and its associated controls and publication requirements more explicitly. The ASIP proposal documents provide an example of commonly used wording in an empowerment provision in s 174 of the Crown Entities Act 2004:

⁴⁸ At B10.

⁴⁹ Baldwin, above, n 13 at 60.

⁵⁰ Michael Asimow “Nonlegislative Rulemaking and Regulatory Reform” (1985) 2 Duke LJ 381 at 381.

174 Minister of Finance instructions

- (1) The Minister of Finance may issue instructions to Crown entities that,—
- a. Prescribe minimum requirements concerning the publication of information that Crown entities must publish by or under this Act;
 - b. Prescribe the non-financial reporting standards that Crown entities must apply and the form in which Crown entities must provide the information that they are required to present to the House of Representatives by or under this Act.
- ...
- (5) The instructions are a disallowable instrument, but not a legislative instrument, for the purposes of the Legislation Act 2012 and must be presented to the House of Representatives under section 41 of that Act.

The documentation on the PCO website shows that after ASIP, it is proposed that provisions of this type would state:⁵¹

174 Minister of Finance instructions

- (1) The Minister of Finance may issue instructions to Crown entities ...
- ...
- (5) The instructions must be drafted and published in accordance with section X [or Y] of the Legislation Act 2012.

However, it is not clear whether it is intended that further expression of the nature of the instrument should be described, such as whether the instructions are a legislative instrument or whether they are disallowable. Even if this information is not required in order to identify the category the instrument belongs to or the controls to which it would be subject, it is helpful to include an express statement of the intended nature and legal effect of the instrument created.

The new provision of the Legislation Act would provide:⁵²

Section X [or Y], Legislation Act 2012

The PCO [administering agency] is responsible for drafting and publishing all subordinate instruments whose empowering provision states that it is to be drafted in accordance with this section.

⁵¹Parliamentary Council Office *Legal and Procedural Changes, ASIP stream B* at B7.

⁵² At B7.

A different scheme is proposed for those instruments which are not legislative and instead fall into the new “administrative documents” category. The example provided by the PCO relates to s 70A of the Education Act 1989 which currently provides:

70A Minister may declare land to be no longer needed for educational purposes

(1) The Minister may, by notice in the *Gazette*, declare any land of the Crown to be no longer needed for educational purposes.

...

It is proposed under ASIP that sections of this type would expressly state that they are administrative documents and the effect of this designation would be that publication on the PCO website was not required, and drafting restrictions would not apply. Controls over such instruments would be limited because there would be no automatic requirement for the instrument to be subject to the scrutiny of the House or the RRC, and the instrument would not be disallowable. It is proposed that an addition to the LA2012 would provide that the nature and effect of administrative documents cannot be altered by publication as an official version of legislation.⁵³ This is important because it helps to strengthen the association between the inherent character of an instrument and its legal treatment and clarifies that this is not affected by changes to publication procedures.

3 *Publication*

It is proposed that subordinate instruments would only have effect after publication on the NZL website. However, there would be some limited exceptions to the publication requirements it is suggested that exclusions may apply for confidential matters, where publication is impracticable, where the format of the subordinate instrument is incompatible or where the subordinate instrument consists of material that has been incorporated by reference.⁵⁴ Where a publication exception does apply, it is proposed that minimum requirements must still be met as to publication in order to ensure that the online statute book is complete. Minimum requirements include that the existence of an excepted subordinate instrument must still be recorded in the statute book, as much as possible of the subordinate instrument must be published, the instrument must explain what material

⁵³ At.B8.

⁵⁴ At B10.

is missing and why, and the instrument must identify missing material and where it can be seen.⁵⁵

B Australian Capital Territory – an example?

In its update of 29 September 2015, the PCO stated that the system operated by the Parliamentary Counsel's Office in Australian Capital Territory (ACT) appeared to be preferable to other models providing a single public source for legislation.⁵⁶ While this comment was made at an early stage of the project, a consideration of the features of the ACT website helps to envisage how complete online statute book may operate.

The structure of the Australian legislative scheme is reflected in the ACT legislation register which provides for three main divisions: Acts, Legislative Instruments, and Bills. The Legislative Instruments category includes subcategories such as subordinate laws (regulations, rules and by-laws), disallowable instruments, notifiable instruments, approved forms, and commencement notices.⁵⁷ This structure reflects the different categories of subordinate legislation recognised in Australia. However, it appears that there are fewer types of subordinate legislation in Australia than there are in New Zealand.

The ACT Register provides for searching of subordinate legislation by name, and each instrument states the source of its empowering provision.⁵⁸ Links are provided both from the instrument's page to its empowering Act, and from the Act to all related instances of subordinate legislation. The "legislative instruments" category is further divided to show the different sub-categories of instrument such as subordinate laws, disallowable instruments, notifiable instruments, forms and fees. The effect of this is to provide an overview on one page of the primary and delegated legislation that constitute the law in relation to that statute, as well as to show other non-legislative instruments made under the Act. Because the subordinate legislation is listed on the same page as the primary Act, it is easy to see the different instruments that constitute the law under that Act and the hierarchy between them. Therefore, while the presentation and placement of the information on the webpage may seem like an insignificant aspect of the ACT Register, it has a great deal of

⁵⁵ At B10.

⁵⁶ <www.pco.parliament.govt.nz>.

⁵⁷ <www.legislation.act.gov.au>.

⁵⁸ For example, see the Building (Fees) Determination 2016 (No1) DI2016-124 which states that the instrument is made under the Building Act 2004 (ACT), s 150.

potential to communicate information about the structure of the legislation, and to facilitate access.

C Conclusion

The proposed changes under ASIP address many of the identified issues with subordinate legislation in New Zealand. Broadly, an expansion of the controls of disallowance and Parliamentary scrutiny to a wider range of instruments should strengthen the integrity of delegation within the legislative system. A strong and reliable system of delegation is necessary to justify increased use of subordinate legislation in the future, should this occur. The return to a simpler system of categorising subordinate legislation, aligning application of the controls with the characteristic of legislative effect, and the use of terms that are conceptually closer to the instruments they signify, are all steps that will assist in improving accessibility to subordinate legislation.

However, the most profound change, not just for subordinate legislation but for New Zealand's legislative system as a whole, is the proposed publication of subordinate legislation on the NZL website. This will greatly increase access to these instruments by providing a centralised point of access. There are broader implications for the legislative system as a whole as a result of the challenges that will arise in organising this new information. As suggested in the next section, this may prompt consideration of the structure of New Zealand's legislative system and potentially, innovations in the way statutes are organised and accessed.

IV Analysis - time for codification?

In 2008, the Law Commission in conjunction with the PCO released a report in on the "Presentation of New Zealand Statute Law".⁵⁹ Among the issues considered was that of codification – in this sense meaning to collect and order the statute law, rather than replacing or supplanting the common law.⁶⁰ The Law Commission concluded that this type of codification of New Zealand law would be beneficial,⁶¹ but because of the size and complexity of the task, codification could only be achieved following, or towards the end of, a review of legislation.⁶² As noted previously, one of the goals of ASIP is to from a

⁵⁹ Law Commission, above n 5.

⁶⁰ At [8.12].

⁶¹ At [8.24].

⁶² At [8.24].

complete online collection of New Zealand legislation, in effect, a statute book. The practicalities of achieving this task require consideration of how legislation is to be ordered, which in turn raises the issue of codification. Given that New Zealand is on the threshold of creating a complete statute book, should the introduction of a code be considered?

1 What do codes do and who uses them?

A code of the type referred to by the Law Commission can be distinguished from a civil code such as used in some European legal systems. Civil codes are designed to replace the common law, they generally consist of succinct and broad statements of principle, and are intended to form a coherent system of law.⁶³ In New Zealand, the term “code” is sometimes used to describe a single Act (for example, the Crimes Act 1961) that abolishes the common law on a particular topic and replaces it with a set of statutory rules that become the exclusive and exhaustive source of law on that topic.⁶⁴ However, a “code” for the purposes of this analysis is of a different type, and resembles those used in the United States at both federal and state level where all the codes of a jurisdiction are arranged in ordered form, under subject headings.⁶⁵ Individual Acts are published as they are passed⁶⁶ and are then republished as part of the code.⁶⁷ The Law Commission in its report uses the following definition of a code of this type from Lord Scarman:⁶⁸

A Code is a species of enacted law which purports so to formulate the law that it becomes within its field an authoritative, comprehensive and exclusive source of that law.

In considering whether a code of this type should be adopted in New Zealand, the Law Commission identified several positive features of codification:⁶⁹ that it would bring some order to the statute book because Acts would be arranged in logical subject groupings, it would be easier to detect where there is overlap and duplication in the law and to eliminate them, and gaps in the law would be more apparent. It was also thought that codification

⁶³ At [8.5].

⁶⁴ At [8.9].

⁶⁵ At [8.12].

⁶⁶ At [8.12].

⁶⁷ At [8.12].

⁶⁸ At [8.1] referring to Lord Scarman “Codification and Judge-Made Law: A Problem of Coexistence” (1967) 42 *Ind L J* 355 at 258.

⁶⁹ At [8.16].

would facilitate the development of consistent principle in our law, and that consistency and “fit” with the system as a whole would be more readily considered when designing legislation.⁷⁰ In short, codification might be the first step towards a more coherent body of law.⁷¹

However, it was also considered that there were some potential drawbacks: the task of producing the code would be of such complexity and magnitude that it would distract efforts from more practical and achievable options like revision,⁷² it could be difficult to order New Zealand’s existing statutes under headings or categories because of their diversity,⁷³ and that classification itself is a somewhat subjective exercise given that it is dependent on the perspective of the classifier.⁷⁴ The Law Commission ultimately concluded that while codification was desirable, that it should only be undertaken in the context of legislative review.⁷⁵

In the eight years since the Law Commission’s report was published, much has changed in electronic publishing and online access to legislation, both in New Zealand and globally. When the Law Commission concluded that codification should be undertaken in conjunction with review of legislation, it seems likely that this was on the basis that New Zealand’s statute book would be either a book in print, or an electronic copy of a book in print. For practical reasons, reordering of the statute book in either of these formats would best be undertaken in conjunction with review as it would be necessary to make overarching decisions about taxonomy and it would be and such changes would be of no value if major changes as the result of a review were to follow. However, the changes proposed under ASIP would mean that New Zealand’s statute book, and the complete record of legislation, would not be in print but would be online. This draws into question some of the assumptions made about the difficulty of implementing a code in New Zealand.

The electronic environment affects the presentation of legislation and this should be taken into consideration when determining how that information should be accessed and organised. The first important difference is that it is possible to have multiple organising systems in place simultaneously. This means that a document may belong to more than one

⁷⁰ At [8.16].

⁷¹ At [8.17].

⁷² At [8.17].

⁷³ At [8.17].

⁷⁴ At [817].

⁷⁵ At [8.24].

category and that there may be a hierarchy between those categories. Thus, an Act could be organised simultaneously under a subject heading and alphabetically according to its title. The second difference is that there is almost unlimited capacity, both in terms of size and number, of documents that may be held and accessed electronically. This means that in digital media, organisation of documents is even more important than in print and codification is not a “print-only” concept. Thirdly, documents in electronic format are searchable and a user is free to construct their own parameters for a search, and finally, humans are not computers – we need our information to be ordered so that we can find what we need and understand it, and that order needs to be of a type that is accessible.

2 Codification and subordinate instruments

In order to codify a statute book, a taxonomy must be developed to provide categories for classification. Most examples of codification refer to categories based on identified subjects which when viewed as a whole, encompass the scope of the entire statute book. While this way of ordering law seems logical, it is not without problems. The question of whether an Act belongs in one category or another can be difficult and in many instances, it may properly belong to more than one, and the distinction may be somewhat subjective. Another issue that is relevant in New Zealand is that legislation includes both Acts and subordinate legislation. Following the definition of a code as used by the Law Commission, that a code is an authoritative, comprehensive and exclusive source of law, this suggests that the code will not be complete without subordinate legislation. Given the right structure and presentation, the inclusion of subordinate instruments in the online statute book would provide a better overview of the legislative scheme, as a whole, in relation to a piece of primary legislation. Many of the same benefits as would arise from a more traditional code that groups the law by subject, would also apply here. Irregularities in the way power is shared between subordinate and primary legislation would be more easily detectable, it would be possible to compare legislative schemes at a structural level which may result in better choices as to the types of structures to be used, and the law itself may become more accessible as its meaning is clarified through its presentation in context. Codification of this type may mean in order to protect the integrity of the online statute book, that not only the text of the legislation will need to be protected, but also the structure and order of the documents and how they are related.

3 Current arrangements

At a user level, the current version of the NZL website provides a main window in which the legislation is displayed with three tabs above the window providing access to views by

section, whole document, and to access to a list of versions and amendments with links to those documents. A link to the full PDF copy of the Act is also provided. The tab system is a good way both to associate the main document with related information, and to provide access to that information. It would seem a useful and logical step to provide in the future, a link to subordinate legislation and other non-legislative instruments via a similar system. However, it would be important to maintain some distinction between those instruments which constitute the law, and those which do not.

In effect, this would be to replicate the system used by the ACT Federal register, albeit in a way that is familiar to users of the NZL website. This system reflects the conceptual associations and hierarchies between the different levels of legislation and can operate as a type of code to collect together the complete law in relation to a specific Act. In a sense, this would constitute an intermediate step towards full codification of the New Zealand statute book. Because of the nature of online information, any steps towards creating a complete statute book will necessitate development of some type of code and an index to organise this information. This presents a challenge to the Law Commission's conclusion that codification must wait until a full review of legislation is undertaken. Instead we have a profound change of format and this may present an ideal opportunity to consider the issue of codification.

V Conclusion

As the legislative system grows and becomes ever more complex, it is essential to develop a sophisticated and practical system of allocating powers, tasks and responsibilities across Acts and instruments. To fail to do so would mean that our legislative system would become increasingly cumbersome and unworkable as the law continued to develop. It is therefore in our interest to refine and promote the use of effective and accessible subordinate legislation. It seems that the ASIP proposals would remove many of the barriers to the efficient operation of this kind of legislation that exist currently and that they represent a formative step in the development of New Zealand's legislative system. However, while the planned publication of subordinate legislation on the NZL website is clearly a logical and useful step in this process, it also provides an opportunity for consideration of the organisation and presentation of New Zealand's legislation.

The addition of subordinate legislation to the NZL website will increase the site's significance as the repository of New Zealand's law. A consequence of this change is that it will be necessary to develop organisational systems to facilitate access to the statutes and

instruments contained on the site. Therefore, this change in format presents an opportunity for consideration of the structure and organisation of legislation, and potentially for the development of a code that will facilitate development of New Zealand's legislative system.

VI Bibliography

Legislation

Animal Welfare (Llamas and Alpacas) Code of Welfare 2013

Building Act 2004 (NZ)

Building Act 2004 (ACT)

Fisheries Act 1996

Legislation Act 2012

Regulations Disallowance Act 1989 (repealed)

Resource Management Act 1991

Books

Robert Baldwin *Rules and Government* (Oxford University Press, Oxford, 1995).

Tom Bingham *The Rule of Law* (Allen Land, London, 2010).

R I Carter (ed) *Burrows and Carter Statute Law in New Zealand* (5th ed, LexisNexis, Wellington 2015).

R I Carter, R M Malone and J S McHerron *Subordinate Legislation in New Zealand* (LexisNexis, Wellington, 2013).

Dennis Pearce and Stephen Argument *Delegated Legislation in Australia* (3rd ed, LexisNexis, Sydney, 2005).

Linda Pearson, Carol Harlow and Michael Taggart (eds) *Administrative Law in a Changing State: Essays in Honour of Mark Aronson* (Oxford, Portland (USA), 2008).

Journal Articles

Stephen Argument “Quasi-legislation: Greasy Pig, Trojan Horse or Unruly Child?” (1994) 1 *Australian Journal of Administrative Law* 144.

Michael Asimow “Delegated Legislation: United States and United Kingdom” (1983) 2 *OJLS* 253.

Michael Asimow “Nonlegislative Rulemaking and Regulatory Reform” (1985) 2 *Duke LJ* 381.

John Burrows “Legislation: Primary, Secondary and Tertiary” [2011] 42 VUWLR 65 at 70.

Ross Carter “Disallowable Instruments” [2014] NZLJ 235.

Geoff Lawn “Improving Public Access to Legislation: The New Zealand Experience (So Far)” (2004) 6 UTS L Rev 49.

Gilles Létourneau and Stanley A Cohen “Codification and Law Reform: Some Lessons from the Canadian Experience” (1989) 10 Statute L Rev 183.

Geoffrey Palmer “Deficiencies in New Zealand Delegated Legislation” (1999) 30 VUWLR 1.

Geoffrey Palmer “Law-Making in New Zealand: Is There a Better Way?” (2014) 22 Waikato L Rev 1.

Michael Taggart “From ‘Parliamentary Powers’ to Privatization: The Chequered History of Delegated Legislation in the Twentieth Century” (2005) 55 U Toronto LJ 575.

Greg Weeks “The Use and Enforcement of Soft Law by Australian Public Authorities” (2014) 42 Fed L Rev 181.

Reports

Committee on Ministers’ Powers *Report on Ministers’ Powers 1932*, Cmnd 4060 (1932) [*Donoughmore report*].

Law Commission *Presentation of New Zealand Statute Law* (NZLC R104, 2008).

New Zealand Productivity Commission *Regulatory Institutions and Practice* (Wellington, 30 June 2014).

Regulations Review Committee *Inquiry into the oversight of disallowable instruments that are not legislative instruments* (July 2014).

The United Kingdom House of Commons Political and Constitutional Reform Committee *Ensuring standards in the quality of legislation* (HC 85, 9 May 2013).

Other

Cabinet Office *Cabinet Manual 2008*.

LDAC Guidelines: 2014 ed, ch 13 “Delegating law-making powers to the executive
<www.ldac.org.nz>.

Parliamentary Council Office *Legal and Procedural Changes, ASIP stream A*.

Parliamentary Council Office *Legal and Procedural Changes, ASIP stream B*.

Standing Orders of the House of Representatives 2008.

Websites

<www.beehive.govt.nz>.

<www.legislation.act.gov.au>.

<www.mpi.govt.nz>.

< www.pco.parliament.govt.nz>.