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POST-LEGISLATIVE SCRUTINY IN NEW ZEALAND

Challenging the Status Quo

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I Introduction

Every year more and more legislation is passed to give effect to government policy. This increasingly vast body of law regulates almost every aspect of day-to-day life. Yet, while there are established systems in place to scrutinise proposed legislation,[1] too often, it seems, Parliament passes laws and then assumes no further responsibility for their effect.

It is widely accepted that post-legislative scrutiny can have a number of benefits for existing legislation and future lawmaking. It is trite to observe that consideration of how legislation works in practice may reveal that what was anticipated is not what has resulted. Thus, the "headline reasons" for systematic post-legislative scrutiny have been identified as follows:[2]

- To see whether legislation is working out in practice as intended;
- To contribute to better regulation;
- To improve the focus on implementation of policy aims;
- To identify and disseminate good practice so that lessons may be drawn from the successes and failures revealed by the scrutiny work.

It is arguable that without systematic post-legislative scrutiny the true efficacy of a legislative response may be largely unknown. Amendments or law reform may take place without careful examination of the success (or lack of success) of the existing response to the problem, and routine maintenance of the stock of legislation may not occur on a regular basis, notwithstanding the changing social and economic landscape.

Despite compelling reasons for such scrutiny, New Zealand has been reluctant to adopt a "systematic mechanism to assess and test the effects of Bills after they are passed."[3] In 2014 the Productivity Commission found that New Zealand had a largely "set and forget" approach to regulation.[4] It considered that in-depth reviews were often crisis

[1] Including New Zealand's longstanding practice of referring almost all bills to a select committee (with the exception of Appropriation Bill or Imprest Supply Bills, and where urgency is called). Standing Orders of the House of Representatives 2014, SO 288.

[2] Law Commission (UK) *Post-Legislative Scrutiny* (No 302, 2006) at [2.24].

[3] "Improving the Quality of Legislation" (Appendix 5) www.beehive.govt.nz/sites/all/files/Law_Commission.BIM_3_pdf (accessed 2 September 2016).

[4] The New Zealand Productivity Commission *Regulatory Institutions and Practices* (30 June 2014), at 46.

driven,[5] rather than a planned and proactive assessment of the effects of specific legislation. In response, the Government focused its attention on the role of departmental stewardship, indicating a view that monitoring and review of legislation by government departments is an adequate, systematic, process to scrutinise legislation once it is passed.[6] It is appropriate to test that response, and to critically examine the "who, what, when, and how" of carrying out post-legislative scrutiny.[7]

This paper explores and comments on post-legislative scrutiny in New Zealand. It concludes that substantial New Zealand-based research is essential to inform a New Zealand-focused response to post-legislative scrutiny. It suggests that consideration should be given to Parliament better utilising its existing select committees, or creating a standalone select committee, for post-legislative scrutiny, as a means to hold the executive to account and in recognition that Parliament has some responsibility for the laws that it passes. This is particularly encouraged for legislation passed under urgency. It is also suggested that greater use should be made of pre-planned scrutiny through legislative provisions, and that consideration should be given to centralised support and guidance for post-legislative scrutiny to assist with identifying an evaluation process that is fit for purpose and to ensure consistent review methodologies are utilised.

II What is Post-Legislative Scrutiny?

It is necessary to start with consideration of what is meant by the phrase 'post-legislative scrutiny.' Various authors have addressed the purpose of such scrutiny,[8] and others have grappled with how this exercise should be carried out,[9] but the expression itself has not been strictly defined.

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[5] Above n 4, at 12.

[6] See Government response to the New Zealand Productivity Commission report on Regulatory Institutions and Practices (2015) <www.beehive.govt.nz/sits/all/files/Govt-response-Productivity-Commission.pdf> accessed 14 August 2016.

[7] Ross Carter *Statute Law in New Zealand* (5th ed, Lexis Nexis, Wellington, 2015) at 103, citing Hon Chris Finlayson QC "Post-Legislative Review", Address to Meeting of the Commonwealth Parliamentary Association, 16 August 2006.

[8] See for example Lydia Clapinska "Post-Legislative Scrutiny of Acts of Parliament" (2006) 32(2) Commonwealth Law Bulletin 191, 198.

[9] See for example Koen van Aeken "From Vision to Reality: *Ex Post* Evaluation of Legislation" (2011) 5 Legisprudence 41.

To scrutinise is to expose a subject to "critical observation or examination."[10] What, then, are the characteristics of post-legislative scrutiny? The English Law Commission, in its report on post-legislative scrutiny, said:[11]

> …we understand post-legislative scrutiny to refer to a broad form of review, the purpose of which is to address the effects of the legislation in terms of whether the intended policy objectives have been met by the legislation and, if so, how effectively. However, this does not preclude consideration of narrow questions of a purely legal or technical nature.

Thus, at its simplest, post-legislative scrutiny means a process of assessment of regulatory outcomes. This requires consideration of the purposes of an Act and whether those purposes have been achieved. Clear policy objectives are relevant to understanding and evaluating that purpose. The consequences of the legislative response, both intended and unintended, need to be identified and understood. This includes questioning whether an Act has had an adverse impact on existing law, and considering how it has been interpreted and applied by the courts, lawyers, regulators and individuals.[12] Post-legislative scrutiny also means asking the right people the right questions about the legislation and its impact. Those questions, and the relevant participants, may be identified by the regulatory impact analysis carried out before legislation is introduced. That is, post-legislative scrutiny may replicate existing pre-legislative scrutiny,[13] demonstrating the "direct and dynamic" relationship between pre- and post-legislative analysis.[14]

In some cases, it may be necessary to assess an Act as a whole to determine its efficacy; in other cases, it may be sufficient simply to determine whether any interpretation issues have arisen or whether stakeholders are satisfied that it is generally working as expected. Put another way, not all forms of critical observation or examination will be justified for all legislation. Similarly, a 'one size fits all' approach may lend itself to token assessments or may divert resources from scrutiny of legislation that needs very careful wide-ranging review. It has been said that it is preferable to have "effective

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[10] Judy Pearsall (ed) *Concise Oxford Dictionary* (10th ed, Oxford University Press, New York, 1999).

[11] Above n 2, at [2.4].

[12] Lydia Clapinska "Post-Legislative Scrutiny of Acts of Parliament" (2006) 32(2) Commonwealth Law Bulletin 191, 198.

[13] "Post-Legislative Scrutiny" (2006) 27(2) Statute Law Review iii, at iv.

[14] Rt Hon Sir Geoffrey Palmer QC "Law-Making In New Zealand: Is There A Better Way?" (2014) 22 Wai. L. R. 1, 31.

review of a few pieces of legislation a year rather than perfunctory review of many Acts."[15] On this basis, post-legislative scrutiny also means examination of legislation that is "proportionate to need."[16]

Another feature of post-legislative scrutiny is that it ought to be responsive to possible change. It would be undesirable, and inconsistent with the purpose of post-legislative scrutiny, simply to examine legislation but not to address any deficiencies that might be uncovered. Therefore, post-legislative scrutiny also means a process of regular law reform. Reform is "the amendment or altering for the better some faulty state of things,"[17] and, in this context, scrutiny is a way to inform improvements to current legislation.

Having said that, post-legislative scrutiny is not generally meant as a process for re-examining policy arguments.[18] Likewise, it is not intended as an opportunity to praise or condemn government policy.[19] In addition, it must be recognised that however it is defined, developing and implementing a system of post-legislative scrutiny requires political will. Meaningful scrutiny brings with it the obvious risk of identifying critical problems with legislation, which may not be politically attractive. There are also resource implications, including the need for capable individuals, effective evaluation tools and parliamentary time to pass any necessary legislative changes. In other words, it costs money and may result in recommendations that are incompatible with the government's policy agenda. This may reduce any incentive for a system of rigorous analysis.[20]

But, with the estimated cost of legislation at between $2.0 million and $6.2 million per Act[21] it is important that policy-makers, law-makers and the public can be satisfied that

[15] Law Commission (UK) *Post-Legislative Scrutiny: A Consultation Paper* (No 178, 2006) at [7.57].

[16] Office of the Leader of the House of Commons *Post-legislative Scrutiny – The Government's Approach* (March 2008), at 8.

[17] Rt Hon Sir Geoffrey Palmer QC "The Law Reform Enterprise: Evaluating the Past and Charting the Future" (Scarman Lecture 2015, Middle Temple Hall, London, 24 March 2015).

[18] See for example above n 2, at [2.15] and [2.17].

[19] See Australian Government *Post-Implementation Reviews* (February 2016), at 5.

[20] See above n 14, at 29.

[21] Above n 7, at 105, citing Wilson, Nghiem, Foster, Cobiac and Blakely "Estimating the cost of new public health legislation" [e-publication May 2012], *Bulletin of the World Health Organisation*: www.who.int/bulletin/volumes/90/7/11-097584/en and www.otago.ac.nz/wellington/otago033080.pdf.

it is money well spent. It is arguable, therefore, that post-legislative scrutiny is not a process that should be short-changed.

III Post-Legislative Scrutiny in New Zealand

New Zealand lacks a coordinated programme of post-legislative scrutiny. It is not alone in this regard, indeed "very few OECD member countries have actually deployed *ex post* evaluation systematically."[22] However, various forms of such scrutiny do "occasionally" take place in New Zealand.[23] This section critically examines the existing 'who, what, when and how' for post-legislative scrutiny.

A Who?

Current forms of post-legislative scrutiny involve a range of different agencies. The courts have an integral role in the interpretation of legislation. This is a form of scrutiny, and it is often decisions by courts that first identify publicly issues with legislation not meeting policy objectives. Similarly, *ad hoc* inquiries, including Royal Commissions of Inquiry, can scrutinise legislation and regulatory regimes,[24] although such inquiries are generally reactive and in response to regulatory failure. A good example is the Royal Commission of Inquiry on the Pike River Coal Mine Tragedy,[25] which was instrumental in a wide-ranging reform of health and safety legislation.[26]

Likewise, the Law Commission, as the central advisory body for the purpose of promoting the systematic review, reform, and development of the law of New Zealand, has a role to play in post-legislative scrutiny.[27] The Commission reports to the responsible minister with programmes for "the review of appropriate aspects" of the law, with a "view to their reform or development."[28] It may be referred specific topics for consideration by a responsible minister, but it can also "initiate proposals for review

[22] OECD "Ex Post Evaluation of Regulation" in *Government at a Glance 2015* (OECD Publishing, Paris, 2015).

[23] Above n 7, at 103.

[24] See Inquiries Act 2013. As to public inquiries generally see Cabinet Office *Cabinet Manual* at [4.69] – [4.99].

[25] The Hon Graham Panckhurst, Stewart Bell PSM, David Henry CNZN *Royal Commission on the Pike River Coal Mine Tragedy* (30 October 2012).

[26] See Cabinet Minute "Improving Health and Safety at Work: Overview" (2013) CAB Min (13) 24/10.

[27] Law Commission Act 1985, long title and s 3.

[28] Above n27, s 7.

and reform, and can act as a clearing house for reform ideas from others."[29] It has, since its creation, researched and publicised reports on a wide array of reviews of legislation and legal issues, including topics that have resulted in legislative change.[30]

The revision programme established by the Legislation Act 2012 is also a form of post-legislative scrutiny. Legislation may suffer under the weight of repeated amendments that create confusion or, at worst, inconsistency. The purpose of revision is to "re-enact, in an up-to-date and accessible form, the law previously contained in all or part of 1 or more Acts."[31] While revision must not change the effect of the law,[32] it permits statutes to be revised, combined or divided; to adopt a new title; to "omit redundant and spent provisions"; and to be otherwise updated in terms of language, punctuation, and new or additional purpose provisions "to express better the spirit and meaning of the law."[33] General maintenance of the stock of legislation through revision may identify whether legislation continues to be fit for purpose. If not, it is possible that revision may be abandoned in favour of broader legislative reform.

However, the role of government departments and select committees deserves particular attention.

1. Government Departments

Government departments have always had an "ongoing, practical responsibility for oversight of legislation."[34] Indeed, the department responsible for administering or implementing legislation is "at the "sharp end" when it comes to delivering the objectives that Parliament intended."[35] No doubt, this recognises departments' significant involvement in the policy work that underlies a legislative response (including preparation of regulatory impact analyses and statements).

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[29] Above n 7, at 46.

[30] See for example the Sale and Supply of Alcohol Act 2013 which implemented the Government's response to the Law Commission's report *Alcohol in our Lives: Curbing the Harm* (NZLC R114, 2010), albeit that the Government did not adopt all of the Law Commission's recommendations.

[31] Legislation Act 2012, s 29(2).

[32] Above n 31, s 31(3).

[33] Above n 31, s 31.

[34] Office of the Minister of Finance and Office of the Minister for Regulatory Reform *Regulatory Systems Paper Two: Improving New Zealand's Regulatory Performance* (April 2013) at [11].

[35] Above n 4, at 4.

Under the State Sector Act 1988, as amended in 2013, Chief Executives of departments are responsible to Ministers for the "stewardship of the legislation administered by the department or departmental agency."[36] Stewardship means the "active planning and management of medium- and long-term interests, along with associated advice",[37] and the responsibility for stewardship is further described as including:[38]

> …the need for departments to actively monitor and periodically assess the performance and condition of the regulatory regimes established by the legislation they administer, and to use that information to advise or act on problems, vulnerabilities and opportunities for improvement.

The "proactive duty"[39] of systematic monitoring required by stewardship is said to help "ministers assess whether the objectives of the regimes are being achieved, and whether changes should be made to legislation…"[40]

Yet, despite the government's focus on stewardship as a systematic process of post-legislative scrutiny, no systematic approach to such scrutiny is required across departments. In August 2016, New Zealand's largest government department identified "wide variation" in monitoring and evaluation across its regulatory systems.[41] In contrast, in Australia, guidance is clear that a post-implementation review (PIR) is required for all regulatory changes with "substantial or widespread economic impact" and any legislation that has been introduced, or significantly changed, without a regulatory impact statement (RIS), including where an exemption was granted (e.g. legislation passed under urgency).[42] The PIR must evaluate the legislative response by revisiting the objectives sought to be achieved by legislation as set out in a RIS. All PIR must be carried out within set timeframes and must address

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[36] State Sector Act 1988, s 32(1)(d)(ii).

[37] Above n 36, s 2.

[38] *Government Response to the New Zealand Productivity Commission report on Regulatory Institutions and Practices* <www.beehive.govt.nz/sites/all/files/Govt-response-Productivity-Commission.pdf> (accessed 26 August 2016).

[39] Jonathan Ayto "Why Departments Need to be Regulatory Stewards" (2014) 10(4) Policy Quarterly 23, 27.

[40] Above n 4, at 353.

[41] Ministry of Business, Innovation and Employment *MBIE's Regulatory Management Strategy 2016/2017* (August 2016).

[42] Australian Government Department of Prime Minister and Cabinet *Guidance Note Post-Implementation Reviews* (February 2016).

the same questions, including the reasons for government action, the options considered, the impacts of the regulation and the stakeholders consulted.[43]

Here, departments are not given guidance on what, when and how to monitor legislation under their stewardship duty. While a RIS, which summarises the pre-legislative regulatory impact analysis, must include "arrangements for monitoring, evaluation and review,"[44] it appears to be left entirely to departments to implement a consistent process of scrutiny. This creates the potential for inconsistencies across departments in the manner in which scrutiny is performed, meaning that legislation with similar effects may not be subject to equal scrutiny.

2. Select Committees

Parliamentary select committees have broad powers to scrutinise, and to initiate formal inquiries into, government departments or any other matter "relating to the subject area allocated to the committee."[45] This may include inquiries into legislation. Select committees undertaking such an inquiry can "advertise for and examine witnesses,"[46] and, having considered the evidence, report recommendations to the House of Representatives to which the government must respond.[47] The House may also establish other select committees,[48] and in some limited cases select committees undertake inquiries where required by statute.[49]

One select committee of note is the Regulations Review Committee (RRC), which scrutinises subordinate legislation. To that extent, it undertakes post-legislative scrutiny of the uses of powers delegated by Parliament. Importantly, the RRC may

[43] Above n 42, at 7 – 11.

[44] The Treasury <www.treasury.govt.nz/regulation/regulatoryproposal/ria/handbook> (accessed 26 August 2016).

[45] David McGee QC *Parliamentary Practice in New Zealand* (3rd ed, Dunmore Publishing Ltd, Wellington, 2005) at 427. Note that the Standing Orders describe the functions of subject select committees as including consideration and reporting on "any other matters". Standing Orders of the House of Representatives 2014, SO 189(1)(h).

[46] Above n 45.

[47] The Government must respond to recommendations within 60 working days. Standing Orders of the House of Representatives 2014, SO 252(1).

[48] Standing Orders of the House of Representatives 2014, SO 184(2).

[49] A recent example is s 37 of the Returning Offenders (Management and Information) Act 2015, which requires a select committee to review the operation of the Act 18 months after its commencement.

report to the House (and the House may disallow[50]) any regulations that infringe specified principles.[51]

Select committees are instrumental in the scrutiny of bills.[52] However, they have little formal involvement in post-legislative scrutiny, and it appears that they rarely instigate their own inquiries into whether legislation is working in practice. A search of select committee inquiries for the past two Parliamentary terms identified very few (only two of 39) reports that could be regarded as meeting a post-legislative scrutiny function.[53] In contrast, select committees in England formally participate in post-legislative scrutiny. Their involvement, which is informed by the English Law Commission report that identified a "strong message" that "Parliament should have ownership of the process of post-legislative scrutiny,"[54] requires that:[55]

> Three to five years (normally) after Royal Assent, the responsible department must submit a memorandum to the relevant Commons departmental select committee (unless it has been agreed with the committee that a memorandum is not required), published as a command paper.

The select committee decides whether to conduct further inquiries, and if not the departmental memorandum may form the basis for an inquiry by another committee of the House of Commons or the House of Lords.[56] By requiring departmental reporting to select committees, all Acts "receive a measure of post-legislative scrutiny within Government and [are] specifically considered for scrutiny within Parliament."[57] The latter is largely absent in New Zealand.

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[50] Above n 31, s 42. This power is, however, rarely used.

[51] Above n 48, SO 319(2).

[52] Almost all bills are referred to a select committee, with the exception of Appropriation Bill or Imprest Supply Bills, and where urgency is called. See above n 48, SO 288.

[53] See for example Regulations Review Committee *Interim Report on the Inquiry into Parliament's Legislative Response to Future National Emergencies* (7 May 2015), and Justice and Electoral Committee *Inquiry into the 2013 Local Authority Elections* (25 July 2014), obtained by a search of Parliament's website using the term "inquiry" across all select committees between December 2011 and October 2016, and the document type "Inquiry – SC report", "Other matter – SC report" and "Special report – SC report" <www.parliament.nz/en/pb/sc/reports/> (accessed 9 October 2016).

[54] Above n 2, at [3.4].

[55] Cabinet Office (UK) "Guide to Making Legislation" (July 2015) at 263.

[56] Above n 55 at [42.33].

[57] Above n 16, at 9.

B What and When?

As to 'what' and 'when' legislation is examined, post-legislative scrutiny must occur if legislation expressly requires it. That is, a statute might require the responsible Minister, a department, or another agency to review the operation of the Act (or a part of the Act); to consider whether amendments are necessary; and to report to the responsible minister. One example is the Search and Surveillance Act 2012, which requires a joint review of the operation of the Act by the Law Commission and the Ministry of Justice.[58] The review is required to assess the provisions of the Act, whether they should be retained or repealed, and whether any amendments are "necessary or desirable."[59]

Notwithstanding the ability to include pre-planned review provisions in Acts, as at August 2016, there were only 16 Acts with specific "review of operation of Act" provisions and only eight Acts with "review of Act" provisions.[60] In the absence of a statutory trigger for review, it seems that the selection and timing for any scrutiny is left to the priorities determined by government departments (or their Ministers), cases of regulatory failure, or legislation being otherwise identified for reform. There are obvious issues with this approach.

First, placing an emphasis on stewardship responsibilities assumes that departments have the capability and tools to assess regularly all the legislation within their remit. For some departments, the stock of legislation required to be kept under review is vast.[61] While it might be assumed that Chief Executives will ensure they have adequate resources for monitoring and evaluation, it has been recognised that giving effect to stewardship expectations will "require revised capabilities, frameworks and information systems."[62] It is unclear whether (or when) this will occur. Further, with their responsibilities to government, departmental priorities could be influenced by the political agenda, meaning that reviews that are unfavourable to a proposed policy programme could, theoretically at least, be stalled.

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[58] Search and Surveillance Act 2012, s 357.

[59] Above n 58, s 357(1)(c).

[60] Search of "review of operation of Act" and "review of Act" in content of legislation, Legislation Online <www.legislation.govt.nz> (accessed 28 August 2016). This search also captured 'periodic' review of Act provisions.

[61] For example, the Ministry of Justice states that it manages more than 150 pieces of legislation. See <www.justice.govt.nz/about/about-us/> (accessed 2 September 2016).

[62] Above n 34, at [15].

Secondly, there are potentially broad social and economic implications where legislation fails to achieve its aims, or has unexpected consequences. The devastating effects for the wellbeing of individuals and the economic performance of the country can be enormous.[63] For example, the true cost of 'leaky buildings', linked to the failure of building regulation in the 1990s, remains to be seen, but will undoubtedly be significant. Avoiding regulatory failure is arguably one purpose of post-legislative scrutiny, and proactive measures to assess the effectiveness of legislation are necessary *before* failure occurs.

Finally, progressing a law reform agenda is inextricably linked to the policy direction determined by the government of the day. For this reason, many areas ripe for scrutiny and reform will not get the attention they deserve unless there is the political appetite. For example, the Adoption Act 1955 has been described as a "classic example of badly out-of-date law that has not been addressed but should be."[64] Although a recent decision of the Human Rights Review Tribunal declared certain sections of the Adoption Act to be inconsistent with the right to freedom from discrimination,[65] the Government has said it does not intend any to undertake large-scale reform.[66] Therefore, even if issues are identified in the application or effect of legislation, the likelihood of scrutiny and subsequent reform is, in reality, remote. The government determines its own legislative priorities.

Except for broader law reform, in both Australia and England 'what' and 'when' legislation is reviewed is clearly identified. In England, with certain specified exceptions, all legislation is reviewed within 3 to 5 years after Royal Assent.[67] In Australia, subject to any exemptions, a PIR must occur within 2 years for legislation with substantial economic impact and within 5 years for legislation passed without a compliant RIS.[68] Australia also makes use of 'sunset' provisions, in which a law

[63] Above n 4, at 1.

[64] Above n 14, at 30.

[65] *Adoption Action Incorporated v Attorney-General* [2016] NZHRRT 9, [277].

[66] "No large-scale reform for adoption law, Government says" (3 August 2016) New Zealand Law Society <www.lawsociety.org.nz/news-and-communications/latest-news/news/no-large-scale-reform-for-adoption-law,-government-says> (accessed 9 October 2016).

[67] Above n 55, at 263.

[68] Above n 42.

"ceases to have effect after a specific date unless further legislative action is taken."[69] While sunsetting, and review clauses for all legislation, were contemplated in New Zealand in the late 1990s they have not become a widespread practice.[70]

C How?

Given the wide array of agencies involved in post-legislative review, there is no one source of reliable information about how this scrutiny is carried out. It is likely that 'how' scrutiny is conducted will be influenced by the agency leading the review, the nature of the legislation, the scope of the review, and the available resources.

Meaningful scrutiny does, however require collation and analysis of relevant information. The approach adopted by the Law Commission is instructive. In particular, the Commission has developed a range of review techniques, including appointing committees, consultants and working groups; utilising the research skills of university academics; holding public seminars and debates; and producing discussion papers for input from interested parties.[71]

While not all legislation will justify this degree of scrutiny, these methods are illustrative of the tools that can be employed to assess how legislation has worked in practice. An example of where such tools have been used is the review of the operation of the Health Practitioners Competence Assurance Act 2003, which was conducted in four stages including:[72]

> …a survey of organisations and individual practitioners on the operation of the Act, a series of open workshops to develop proposals…further workshops to discuss preliminary findings and recommendations…and a draft report to the Minister was published for wider public consultation.

Notwithstanding this, there has been criticism that:[73]

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[69] Australian Government, Attorney-General's Department *Guide to Managing Sunsetting of Legislative Instruments* (April 2014). Note that sunsetting is used primarily for legislative instruments, not statutes.

[70] Above n 12, at 194. See also Ministry of Commerce *Bright Future: 5 Steps Ahead – Making Ideas Work for New Zealand* (August 1999) at 53.

[71] Above n 7, at 46.

[72] Director-General of Health *Review of the Health Practitioners Competence Assurance Act 2003: Report to Minister of Health by Director-General of Health* (June 2009). The review was expressly required by s 171 of the Health Practitioners Competence Assurance Act 2003.

[73] Above n 14, at 29.

> Too often known and reliable research is not followed or not examined, and seat-of-the-pants reactions and popular sentiments are used to change the law more than careful analysis. In an age when there are a variety of social science research methodologies available for examining how legislation has performed in practice, this seems unfortunate.

The extent to which those carrying out scrutiny have regard to the range of available methodologies is unclear, although this comment suggests it is infrequent. As one author has observed, "methodological know-how and technical skills"[74] are a necessary pre-condition for successful post-legislative scrutiny, but this is often neglected.

IV Challenging the Status Quo

The focus on stewardship as a total solution to the need for post-legislative scrutiny raises questions about the appropriateness of the executive evaluating itself. It is noteworthy that European commentators have cautioned, in the context of government-led evaluation, that the possibility of critical reviews creates "a risk of selective, biased or even absent evaluations."[75] Concerns about overstated gains and understated losses were also raised in response to the English Law Commission's consultation on post-legislative scrutiny.[76] A cynical view is that this risk might be heightened in New Zealand, where departmental performance is linked to meeting stewardship responsibilities.[77] That is, performance assessments may influence the nature and timing of post-legislative evaluations in order to avoid creating difficulties in the relationship with the responsible minister. Even if it is accepted that reviewing departmental performance may improve the quality of post-legislative analysis, the absence of any clear guidance about when and how legislation should be evaluated arguably undermines the emphasis placed on stewardship.

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[74] Koen van Aeken "From Vision to Reality: *Ex Post* Evaluation of Legislation" (2011) 5 Legisprudence 41, 68.

[75] Ellen Mastenbroek, Stijn van Voorst, Anne Meuwese "Closing the Regulatory Cycle? A Meta Evaluation of *Ex-Post* Legislative Evaluations by the European Commission" (2015) Journal of European Public Policy 1, 2.

[76] Above n 2, at [3.21].

[77] State Services Commission *Performance Improvement Framework* <www.ssc.govt.nz/pif-framework> (accessed 2 September 2016).

It is also notable that, except to the extent that Parliament passes amending legislation and its select committees choose to initiate inquiries, Parliament is mostly absent in any system of post-legislative scrutiny. The Parliamentary "black hole"[78] that exists post-implementation is surprising given that post-legislative scrutiny has been described as a "potential tool" for holding the executive to account,[79] and an important basis for ensuring informed decision-making by Parliament.[80] While it is acknowledged that Parliament is busy, it is also arguable that it must have some responsibility for the laws that it passes.

The way in which post-legislative scrutiny is, or ought to be, conducted in New Zealand warrants significant research beyond the scope of this paper. What is clear, as noted by one commentator, is that it is:[81]

> …better to implement a policy of evaluation *ex post* of legislation with prudence and after much research. Pilot studies or other experimental measures can be of great value. To be avoided is to install a system of evaluation which serves merely [as] 'lip service.'

The need for prudence and research is endorsed. In addition, it is submitted that it is necessary for any consideration of a system of post-legislative scrutiny to be framed in the New Zealand context. To date, save for the Productivity Commission's report into regulatory institutions and practices, no comprehensive research specifically looking at the 'who, what, when and how' of such scrutiny has been conducted here. For this reason, it is at least arguable that the current focus on stewardship is not as informed as it could be, and that it risks being seen as simply renaming an existing obligation that has previously failed to achieve a systematic process of legislative review.

Examination of precisely how post-legislative scrutiny is currently conducted by government departments is necessary. So too is consideration of the tools used across departments; the difficulties they say that they face; how well they think they are doing this job; and what they say they might need to allow them to do this better. In other

[78] Above n 12, at 192.

[79] Pieter Zwaan, Stijn van Voorst, Ellen Mastenbroek "Ex Post Legislative Evaluation in the European Union: Questioning the Usage of Evaluations as Instruments for Accountability" (2016) International Review of Administrative Sciences 1, 4.

[80] Hon. Chris Finlayson QC "Post-Legislative Review", Address to Meeting of the Commonwealth Parliamentary Association, 16 August 2006.

[81] Above n 74, at 66.

words, it is necessary to get to the 'coal face' of current post-legislative scrutiny practices. It is suggested that this process could (and perhaps should) be done without the need to identify the respondents: "[f]rankness and openness about where things went wrong will not be encouraged if those identified face the prospect of a public drubbing."[82]

A survey of the historical and projected workload of select committees is also necessary. It is appropriate to assess the number of times those committees have elected to conduct post-legislative scrutiny inquiries of their own, including what factors instigated the review; how the inquiry was conducted; the reports that were issued; and what (if any) response followed. In other words, how does Parliament currently focus its efforts on post-legislative scrutiny? This inquiry would be an opportunity to examine the role of existing committees, and the extent to which that might be expanded to include some level of post-legislative scrutiny within Parliament.

It is suggested that these, and other factors relevant to post-legislative scrutiny, are matters that should be subject to careful investigation, consideration and recommendation by a body such as the Law Commission, as it was in England in 2006. For present purposes, the following ideas are raised for consideration. In doing so, it is recognised that a lack of political will is the greatest hurdle to post-legislative scrutiny.[83] It is appropriate, however, to think about how things might be done differently as this can provide fertile ground for change.

A Greater Role for Parliament

Scrutiny is "intrinsic to all parliamentary work",[84] and in those countries with more developed systems of post-legislative scrutiny it is implicitly acknowledged that that responsibility exists both before and after legislation is passed. It is suggested that consideration should be given to Parliament playing a more formal role in post-legislative scrutiny.

[82] Above n 2, at [2.17].

[83] Above n 2, at [2.18].

[84] Andrew Murray "The Contribution Specialist Legislative Scrutiny Committees Can Make to Better Governance" (Australia-New Zealand Scrutiny of Legislation Conference, Canberra, 7 July 2009).

1. Enhanced Role for Existing Select Committees

Parliament could make more use of existing subject select committees by amending the standing orders to expand their responsibility to include post-legislative scrutiny.[85] In this way, select committees involved in pre-legislative scrutiny of a bill are "also responsible for evaluating the outcome of that law."[86] The requirement for select committee scrutiny could apply only to legislation passed after any amendment to the standing orders, with the remainder of the stock continuing to be subject to ongoing monitoring by departments, and within the remit for review by the Law Commission and other agencies. That is, this proposal is for a future-focused programme of scrutiny.

It is suggested that legislation that is passed under urgency should be subject to select committee scrutiny within a specified timeframe (e.g. 1 – 2 years). The rationale for this is that urgency often eschews pre-legislative scrutiny by select committees, and therefore it is appropriate that this legislation is subject to careful analysis and public input at some stage to determine whether it is fit for purpose. Statutes that make a major change to the existing law or that have a significant or widespread economic impact could also be included for review within say 2 to 5 years. There should be room for extended timeframes in cases where insufficient time has passed to determine the legislative effect. Limiting the scrutiny to a specified range of legislation is intended to ensure that select committees can manage the workload.

Select committees could establish a publicly accessible programme for post-legislative scrutiny, listing legislation that is to be reviewed and when that review is due to take place. Like England, departmental reviews could form the first stage of scrutiny. This recognises both the resource limitations of select committees, but also the expectation that department's will have expert knowledge and information about how legislation is working in practice. It is suggested that existing departmental review processes would "be enhanced by the knowledge that they can and might be followed up by Parliament in a formal sense."[87]

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[85] For example, an amendment to SO 189(1).

[86] Prognos "Expert Report on the Implementation of Ex-Post Evaluations" (6 December 2013) at 26. <www.normenkontrollrat.bund.de/Webs/NKR/Content/EN/Publikationen/2014_02_24_evaluation_report.pdf?__blob=publicationFile&v=2>. This comment was made with respect to Parliamentary committees in Sweden (accessed 2 September 2016).

[87] Above n 2, at [3.48]. See also above n 12, at 197.

Departmental reports to select committees should be required to address set criteria, and for ease of access this should be in the same format in all cases. Specified information could mirror the pre-legislative analysis, and include the Act's objectives, an assessment of the predicted impact versus the actual impact (including economic, cost/benefit, and compliance), and any identified issues (whether with interpretation, implementation or otherwise). It is suggested that there should be discretion for a select committee to give exemptions for any of the specific reporting criteria on a case by case basis. The case for exemption must be made by the department, but the threshold for exemption should be high to ensure that deviating from set criteria is the exception and not the rule.

Departments should be required to state the data used to inform their report, and the methods used to obtain and/or analyse it. At a minimum, select committee scrutiny could involve questioning department officials about their review, perhaps guided by the following questions:[88]

- Have the policy objectives been achieved?
- Has the legislation had unintended economic or other consequences?
- Has it been over-cumbersome?
- Do any steps need to be taken to improve its effectiveness or operation?
- Have things changed so that it is no longer needed?

More broadly, the select committee should have the same powers as it does in other respects,[89] including the ability to seek submissions and public input into the matter. Select committees should be required to report to the House on post-legislative scrutiny activities, including making any recommendations about legislation as a result of a review.

It is recognised that adding a post-legislative scrutiny function would inevitably increase the workload of committees, and there is a risk that members might find it difficult to prioritise this scrutiny. This is a risk that appears to have eventuated in England where, in 2013, it was noted that "of the 58 government post-legislative scrutiny memoranda published so far only three have been the subject of dedicated

[88] Above n 12, at 202.

[89] See for example above n 48, SO 196 and 198.

reports by committees."[90] This may, however, be a symptom of the wider parameters for scrutiny in England. [91] The suggestion here is for the scope of the scrutiny to be limited only to appropriate Acts (being those identified as having significant implications), and to be assisted by highly prescribed departmental reporting.

2. A New Post-Legislative Scrutiny Committee

An alternative is for Parliament to establish a new select committee for post-legislative scrutiny.[92] While England rejected its Law Commission's recommendation for a separate committee for post-legislative scrutiny, its reason for doing so – concern not to duplicate the scrutiny functions of existing select committees[93] – does not apply here. New Zealand select committees do not regularly carry out post-legislative scrutiny, so the risk of duplication is unlikely. In addition, New Zealand lacks the 'check and balance' of an upper house, which could be said to emphasise the need for additional parliamentary scrutiny. Further, if it is accepted that Parliament has a responsibility to satisfy itself that it is passing laws that are fit for purpose, then a logical response is to use the means available to it to assess whether it is meeting this obligation. New Zealand has a successful track record for using select committees for a specialist purpose, namely the RRC. It is not a step too far to suggest that a dedicated committee which has as its sole purpose the coordination and conduct of post-legislative scrutiny may have a greater chance of prioritising such scrutiny.

The scrutiny could include the same range of legislation and timeframes as suggested above.[94] Similarly, a scrutiny programme could be published; departmental reviews could inform the first stage of scrutiny; and the minimum requirements for scrutiny could involve simply questioning officials about the departmental review to validate or challenge the review methodology and its outcome. However, in addition, a post-legislative scrutiny committee could be given specific powers to:

- Request additional information and reports from departments on any question relevant to the operation of legislation under review;

[90] Liaison Committee *Select Committee Effectiveness, resources and powers: responses to the Committee's Second report* (24 January 2013).

[91] All legislation, with limited exceptions, is to be reviewed within 3 to 5 years of Royal Assent.

[92] Above n 48, SO 184(2).

[93] Above n 16, at 9.

[94] Namely, legislation passed under urgency (1-2 years), and legislation which makes a major change to the existing law or that has a significant or widespread economic impact (2-5 years).

- Publish departmental reports and seek input and submissions from stakeholders and other interested parties;
- Request and/or receive input from a subject select committee that undertook pre-legislative scrutiny of the bill;
- Establish expert committees to advise on legal, technical or practical aspects of the legislation;
- Recommend that legislation be referred to the Law Commission for more comprehensive evaluation (whether on its own or in conjunction with other legislation or another Law Commission project);
- Identify deficiencies and report to the House on recommended improvements; and
- Identify and disseminate good legislative practice with regular (annual) reports to the House and to Ministers (the latter for dissemination to departments).

These powers go beyond what is currently available to subject select committees. The ability to involve experts in post-legislative scrutiny recognises that a range of skills and techniques may be required to determine legislative impact, and that expertise in those areas may not be accounted for in the committee's membership. The power to recommend referral to the Law Commission would be significant, and would highlight the committee's potentially important role in identifying areas worthy of major investigation or law reform. That said, it is suggested that the committee should have no powers to:

- Conduct post-legislative scrutiny of other legislation, without the authorisation of the House;
- Substantively "re-litigate" policy considerations underlying legislation; or
- Recommend that legislation be repealed.

These limitations would ensure that resources are directed only to that legislation within the committee's responsibility, and that re-runs of pre-legislative policy arguments (and attempts to 'scuttle' the legislative response) are avoided. In addition, any decision around repealing legislation is properly left to the executive, although it would be open to the committee either to identify significant deficiencies that could only be resolved by a substantial re-write or repeal, or to report that the effect of the legislation is spent (with the logical conclusion being that it justifies repeal).

As it builds specialist knowledge, this committee could also be given responsibility to identify and review (with the approval of the House) outdated legislation, to assess, among other things, whether it is still needed or whether steps are required to improve its operation. Although the political agenda may drive (or prevent) law reform with political implications, there will no doubt be legislation that is in need of review but which does not have the same political aversion.[95] It is suggested that any wider scope for scrutiny by this committee should be complementary to, but should not replace, either the existing forms of scrutiny by other agencies or the general maintenance of the stock of legislation that is addressed by the revision programme.

Establishing and running a new select committee obviously has resource implications. However, it is suggested that it is rational to undertake a cost analysis that takes into account the economic and social costs of regulatory failure. Indeed, cases of regulatory failure ought to be sufficient impetus for Parliament to create its own programme for post-legislative scrutiny. The question for Parliament might well be whether it can afford *not* to inquire into this limited range of legislation, which is identified for scrutiny given its potential for significant impact.

B Pre-Planned Scrutiny

It is accepted that not all Acts will require post-legislative scrutiny. However, going forward at least, there needs to be some way of identifying 'what', and if so 'when', legislation should be subject to scrutiny. A simple solution is to legislate for reviews. Where a review is required by legislation it creates a legal obligation for post-legislative scrutiny.

It is suggested that the government should set out its position on post-legislative scrutiny prior to the enactment of a bill.[96] By extension, select committees examining bills could expressly consider post-legislative scrutiny, and whether in its view such scrutiny should be expressly required. In this way, a case-by-case analysis is made whether an Act justifies scrutiny.

[95] See for example, the Perpetuities Act 1964 which has potentially significant implications for inheritance rights where property is held in trust.

[96] Jack Simson Caird, Robert Hazell and Dawn Oliver *The Constitutional Standards of the House of Lords Select Committee on the Constitution* (The Constitution Unit, University College London, 2015) at [5.7.1].

Review provisions can give guidance as to the scope of the review, the questions to be asked, and sometimes the consultation that is required. As such, where a review is required by legislation it could specify:

- The start and end date for review;
- Who is to conduct the review, and whether expert input can be sought from other agencies;
- What is to be reviewed (the whole or a part of the Act), and any questions to be addressed;
- Consultation obligations; and
- Reporting requirements.

In addition, consideration could be given to wider use of 'periodic' review provisions.[97] These provisions, which require scrutiny to be conducted at (or within) set intervals, ensure that significant Acts are, in effect, in a constant state of review. This allows for an ongoing assessment of the legislative response, taking into account the changing social and economic landscape. It is also a systematic method of ensuring that an Act remains fit for purpose throughout its existence. It is suggested that if more use was to be made of periodic reviews it will be necessary for such provisions (and any agency responsible for the review) to recognise that it could, in some cases, take years to conduct the review, and therefore the timeframe for the review must be cognisant of this (for example, a 5-7 year cycle).

Overall, legislating for scrutiny would create clarity as to the steps required and the timeframe within which they must take place. Using this approach more frequently would signal a new era for post-legislative scrutiny, one in which its importance is expressly recognised as part of the life-cycle of legislation.

C Guidance for Post-Legislative Scrutiny

The methods for scrutiny are vast and complex, and include (among others) legal analysis and social-science methodologies. Sir Geoffrey Palmer has observed that: [98]

> A multitude of methods exist: survey research, focus groups, time series analysis, regression analysis, cost-benefit analysis, cost-effectiveness

[97] Similar to the periodic review required by s 202 of the Evidence Act 2006 (being at least once during each 5-year period).

[98] Above n 14, at 31.

> analysis, analysis of implementation processes and costs, measuring administrative burdens, legal textual analysis, historical analysis, in-depth interviewing and participant observation all have their uses in this field.

While it will almost always be necessary to "tailor the evaluation" to fit the legislation under examination,[99] it is suggested that post-legislative scrutiny would benefit from better guidance as to how it should be conducted, and the methods that should be employed.

One author has observed that it is "very much advisable…to implement a general evaluation policy"[100] that organises the manner in which scrutiny is carried out. The advantage with a universal approach to post-legislative scrutiny is that it ensures consistency in the selection of an appropriate method for review, in addition to the development of expertise in the wide range of techniques available. Establishing a central agency that brings together the methodological know-how and technical skills in one place, and which has responsibility for providing expert advice and support to agencies carrying out post-legislative scrutiny (whether departments or select committees), is worthy of consideration.

Some parallels can be drawn with the functions of the Scrutiny Unit in England. The Unit is a politically neutral office within the House of Commons which supports select committees' undertaking pre- and post-legislative scrutiny work through its staff of lawyers, accountants, economists and procedural specialists.[101] The expertise of the Scrutiny Unit "extends beyond subject competence to an understanding of legislative scrutiny."[102] In this respect, it is relevant that legislative scrutiny requires particular skill and "takes place in a context that is much more complex than policy evaluation."[103] That is, the Scrutiny Unit could be said to offer expertise beyond that which might be available from policy analysts within government departments.

Similarly, parallels can be drawn with Sweden, where so-called *ex post* evaluation is done with the support of an Evaluation and Research Secretariat within its Parliament.

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[99] Above n 74, at 61.

[100] Above n 74, at 61.

[101] "Scrutiny Unit" <www.parliament.uk/mps-lords-and-offices/offices/commons/scrutinyunit/> (accessed 2 September 2016).

[102] Above n 2, at [3.41].

[103] Above n 74, at 53.

The staff, including senior evaluators and research officers, undertake tasks including:[104]

- Helping the committees to prepare, implement and conclude follow-up and evaluation projects, research projects and technology assessments.
- Locating and appointing researchers and external expertise to carry out projects.
- Preparing background materials for evaluation and research projects at the request of the committees.
- Requesting up-to-date reports from government and non-government agencies on the operation and effects of laws.
- …
- Contributing to the general development of the committees' evaluation and research activities.

In New Zealand, the Legislation Office recommended by Sir Geoffrey Palmer QC could fulfil a similar role. That office is proposed to be located in Parliament and would have responsibility for ensuring consistency in the preparation of all bills, with departmental secondments providing relevant expertise.[105] However, such an office could also be well placed to provide expertise and support to agencies scrutinising existing legislation, whether through advising on proposed review strategies; seconding expert staff into agencies for the duration of a review process; or undertaking aspects of the evaluation in conjunction with the agency or external experts appointed on behalf of the agency. In addition, the office could co-ordinate scrutiny requirements as between a select committee and a department, including by providing neutral advice on whether a departmental report meets the criteria required to be addressed by a select committee; whether detailed scrutiny is warranted for a particular piece of legislation; or whether various pieces of legislation might be scrutinised together.

Over time, the experience and expertise of such an office could lead to the development of standardised procedures and guidelines for undertaking post-legislative scrutiny. While a New Zealand focused approach will flow from New Zealand based knowledge, considerable guidance could be taken from a review of the processes

[104] OECD "Law Evaluation and Better Regulation: The Role for Parliaments" (Joint meeting of the OECD and the Scrutiny Committee on Law Implementation of the French Senate, 5 December 2013).
[105] Rt Hon Sir Geoffrey Palmer QC "There Should be a Law Against it" *New Zealand Listener* (29 January 2015); see also above n 14, at 31 and 37.

adopted in other jurisdictions. For example, Germany is described as having a process of post-legislative evaluation that is "systematic and based on a standardised methodology set out in guidelines for public administrators."[106] Similarly, in Switzerland there is an obligation to evaluate legislation against criteria of "efficien[cy], effectiveness and impact."[107] Knowing more about these guidelines and criteria, and how they have worked in practice, could inform the development of guidance in New Zealand. One author has also suggested that the general principles relevant to drafting good legislation could be adapted for application to post-legislative scrutiny.[108] Here, the Legislation Advisory Committee Guidelines (and checklist) may provide a useful basis for a general set of criteria for undertaking scrutiny.[109]

It is important to note that it is not proposed that guidelines would create a strict, 'one size fits all', approach to post-legislative scrutiny. Rather, it is envisaged that it may involve collating, in one easily (and publicly) accessible place, information as to the relevant range of (tested and accepted) evaluation methods, and a checklist of relevant considerations for assessing whether legislation is operating as intended. A standardised starting point for scrutiny would ensure that legislation with similar effect undergoes a similar evaluation process, and to that extent such guidance would be instrumental to ensuring a consistent approach to post-legislative scrutiny.

A Legislation Office could also play an integral role in keeping up-to-date with developments in evaluation methodologies. This would create an opportunity to build on, and to apply, international developments specifically for the New Zealand context. Such an office could also provide valuable training opportunities in which knowledge can be shared to grow the skill-base and capability of all those involved with post-legislative scrutiny, and to impart good practice (and learnings from failures) to contribute to better regulation in the future. This is consistent with one of the recognised purposes of systematic post-legislative scrutiny.

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[106] "Post-Legislative Scrutiny to Improve Quality of Laws" (6 June 2016) Live Mint <www.livemint.com/Opinion/odwaOwPmUhuRY86rtFXql/Postlegislative-scrutiny-to-improve-quality-of-laws.html?facet>

[107] Above n 86, at 30.

[108] Above n 74, at 54.

[109] Legislation Advisory Committee *LAC Guidelines: 2014 edition* <www.lac.org.nz/guidelines/lac-revised-guidelines/> (accessed 10 July 2016).

Again, there are obvious resource implications. Any such office would need to be appropriately staffed and funded to meet its objectives with respect to post-legislative scrutiny. However, in assessing the value of such expenditure, it is worth reiterating the widely accepted merits of post-legislative scrutiny (including the potential to "lead to better and more effective law"[110]) and to remind ourselves of the current lack of any coordinated system of scrutiny in New Zealand. There needs to be a genuine commitment to improving the way in which laws are made by examining how existing laws are working. Given the importance of statute law to the "infrastructure of governance," [111] it is suggested that there is no rational basis not to fund appropriate guidance and support for systematic scrutiny.

V Conclusion

A key purpose of post-legislative scrutiny is to determine whether the end product is fit for purpose. In turn, such scrutiny allows an opportunity for defects in legislation to be "identified and rectified" promptly and cost effectively.[112] While the existing forms of scrutiny each have their merits, the agencies carrying out the scrutiny are varied; what is reviewed is mostly left to those agencies, and there is no timeframe for scrutiny (except where expressly required by statute). The methods employed are unclear, but presumably (in light of criticism) not entirely cognisant of modern evaluation methodologies. There is, it seems, much room for improvement.

This paper challenges to status quo in order to encourage different ways of thinking about the 'who, what, when and how' of post-legislative scrutiny. It recommends that wide-ranging New Zealand focused research is undertaken, but also suggests ideas for consideration. Those ideas are influenced by the perceived need for improved Parliamentary input into examining the effects of the legislation that it passes. Combining the existing review responsibilities of departments with an expanded role for select committees, or a new post-legislative scrutiny committee, is a pragmatic response. It recognises the work carried out by departments, but introduces a degree of Parliamentary oversight to improve the accountability of government. Greater use of pre-planned reviews is another way to identify 'what' and 'when' legislation is to be subject to scrutiny, and would help to determine review priorities and (with specified

[110] Above n 12, at 198.

[111] Above n 14, at 4.

[112] Scrutiny Unit Committee Office, House of Commons *Briefing note: Post-legislative Scrutiny* (31 January 2006).

review requirements) the manner in which reviews are conducted. Finally, establishing a Parliamentary office to support post-legislative scrutiny could have a number of benefits, including the growth of New Zealand based expertise in carrying out such scrutiny and the scope to produce 'tried and tested' criteria for measuring the effects of legislation.

In making these suggestions, it is recognised that the political agenda will ultimately determine their fate. However, the "headline reasons"[113] for systematic post-legislative scrutiny, coupled with the demonstrated lack of a planned and proactive mechanism for scrutiny in New Zealand, should provide any necessary incentive to consider these ideas for change.

[113] Above n 2.

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