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POST-LEGISLATIVE SCRUTINY IN NEW ZEALAND: IS A MORE FORMAL MECHANISM NECESSARY?

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Abstract

This paper has considered what post-legislative scrutiny is and why it is necessary, and also considers New Zealand's approach to *ex post* evaluation. While this paper does not argue against the proposition that better post-legislative scrutiny is necessary in New Zealand, it does argue that better post-legislative scrutiny is not going to be achieved by introducing a formal review process which engages an independent review body and undertakes standardised review of all legislation. This paper considers that the focus should instead be on the post-legislative scrutiny processes that are already in place in New Zealand and how those can be strengthened. In particular the focus should be on providing better guidance around the role of departments as regulatory stewards, creating better feedback loops between the *ex ante* and *ex post* stages of evaluation, and approaching regulatory management in an integrated way. This paper concludes that it is just not going to be politically feasible to introduce a formal and systematic approach to review when there are other, more cost effective measures that can be taken to improve post-legislative scrutiny in New Zealand.

Key Words

Post-legislative scrutiny, regulatory management, evaluation, legislation, *ex post* evaluation

I Introduction

New Zealand's stock of legislation is large and growing. Keeping that stock up to date by undertaking post-legislative scrutiny is one of the most important roles the Government should be engaging in. Legislation needs to be reviewed to ensure outcomes are still being achieved, unnecessary and inefficient laws are removed, and rules are adapted to changes in social and economic conditions. Although New Zealand has a heavy reliance on primary legislation and should be engaging in regular review, there is no one formal mechanism to undertake post-legislative scrutiny. Instead, New Zealand's regulatory framework has been described as "at best a patchwork of monitoring and review of regulation, from time to time informed by evaluation".[1]

New Zealand does not have strong processes for reviewing regulatory regimes, and tends to have a set and forget approach to regulatory management. In 2013 the New Zealand Productivity Commission undertook an inquiry into New Zealand's regulatory institutions and identified that *ex post* evaluation is not mandatory in New Zealand and there are no established mechanisms for conducting such evaluation.[2] The ability to review not only individual regulatory systems but the policy making process as a whole needs to be strengthened, and one way of doing this would be by introducing systematic reviews.[3] There is currently little guidance on how to conduct post-implementation review, how to determine what successful legislation is, and how to determine whether the particular Act in question is successful or not. Where there is the ability to review regulatory regimes, these efforts are often hampered by more urgent political and social issues, so changes to existing regulatory regimes generally only occur in response to crisis. With weak feedback systems, necessary changes in

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[1] Derek Gill and Susy Frankel "Learning the Way Forward? The Role of Monitoring Evaluation and Review" in Susy Frankel and John Yeabsley (eds) *Framing the Commons: Cross-Cutting Issues in Regulation* (Victoria University Press, Wellington, 2014) at 2.1.

[2] The New Zealand Productivity Commission *Regulatory Institutions and Practices* (30 June 2014).

[3] OECD "Country Profile: New Zealand" in *Regulatory Policy Outlook* (OECD Publishing, Paris, 2015).

the regulatory environment do not occur quickly enough in order to respond to change.[4]

It is necessary that improvements in the way New Zealand undertakes post-legislative scrutiny are made, because evaluation that is taking place at the moment is unsatisfactory. However improvement does not have to come in the form of creating a formal and systematic mechanism which ensures every single law is reviewed after the same amount of time, by one specialised and independent review body. The political reality is that to introduce such a mechanism would cost too much and New Zealand just does not have the resources in terms of people or time to undertake such a process.

The increased focus on departmental stewardship should be put to the forefront of efforts to improve post-legislative scrutiny processes. With better guidance for departments on when and how to undertake post-legislative scrutiny, better feedback mechanisms between *ex post*[5] and *ex ante*[6] processes and ensuring that ad hoc review mechanisms can still undertake review where necessary, post-legislative scrutiny and legislative quality overall will improve. Trying to get select committees involved in the evaluation process, or creating a new body altogether to undertake evaluation is going to be seen as a waste of time and money when there are steps which can be taken to strengthen the current system which will be politically feasible.

For better and smarter legislating to take place, *ex post* review has to gain a more central place in New Zealand's policy making process.[7] The quality and effectiveness of legislation has an important influence on New Zealand's productivity and broader economic, social and environmental wellbeing and so it is fundamental that post-legislative scrutiny is strengthened so that the quality and effectiveness of legislation will improve. However the best way forward for New Zealand is not to shake up the current system by introducing new and more formal mechanisms for review which

[4] Steven Bailey and Judy Kavanagh "Regulatory Systems Institutions and Practices" (2014) 10 Policy Quarterly 12 at 12.

[5] *Ex post* scrutiny refers to post-legislative scrutiny.

[6] *Ex ante* scrutiny refers to pre-legislative scrutiny.

[7] Stijn Smismans "Policy Evaluation in the EU: the Challenge of Linking *Ex Ante* and *Ex Post* Appraisal" (2015) 6 Eur. J. Risk Reg. 6 at 11.

will be expensive and complicated. Instead, the current system needs to be strengthened in order to create a learning regulatory system where New Zealand's policy cycle can adapt to meet future challenges without needing a major crisis or failure, to act as a catalyst for change.[8] The balance between needing better scrutiny and actually getting better scrutiny is best achieved by focusing on the processes that are already in place and ensuring they are strengthened.

II Post-Legislative Scrutiny

A What is Post-Legislative Scrutiny?

Post-legislative scrutiny can be broadly defined as the process of assessing statutory outcomes, or the review of policy initiatives, *after* legislation has been implemented. A formal post-legislative scrutiny mechanism usually refers to an organised and institutionalised framework which ensures the consistent and coherent review of all legislation through a specialised process, by a specialised body, after a certain amount of time post-implementation.

The English Law Commission, in its report on post-legislative scrutiny, said:[9]

> …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.

Post-legislative scrutiny will therefore generally consider the purposes of an Act and whether those purposes have been achieved, as well as whether there have been any unintended or intended consequences which have arisen out of the legislative response. For example, post-legislative scrutiny may need to consider whether an Act

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[8] Bailey, above n 4, at 13.

[9] Law Commission (UK) *Post-Legislative Scrutiny* (No 302, 2006) at [2.4].

has had any adverse effects on existing law or whether issues have arisen with its interpretation and application by the courts, practitioners, regulators and individuals.[10]

While the actual framework that is adopted may vary according to jurisdiction due to the influence of any current pre-legislative scrutiny processes or the availability of the necessary information, a one size fits all approach will rarely be the best approach to take.[11] This is because not all legislation will require the same level of evaluation and a one size fits all approach can result in wasted or diverted resources. Some legislation will require more intense and regular evaluation because it may deal with content which has impacts on the economic and social wellbeing of New Zealanders, whereas other legislation may not require such intense and regular evaluation because it does not have the same sort of impact. Regardless of the type of framework that is adopted, it is fundamental that the framework is comprehensive and will produce the best results by improving legislation, for the least amount of cost.[12]

Implementation is not the end of the policy process. The policy process is a cycle of experimentation and learning, where policies are revised and amended as time goes on. Scrutiny is not confined to "thinking ahead" or *ex ante* processes, where policy makers must consider all the things that could go wrong prior to enactment, but should include "thinking along the way" or *ex post* processes, where issues that emerge during practice are identified and the regime is prepared for adjustment based on critical evaluation of those issues.[13] Not only allowing both types of scrutiny to take place, but ensuring the *ex-ante* and *ex-post* components of evaluation are linked, is the key to an efficient, effective and coherent policy cycle.[14]

It would be undesirable to simply examine legislation and not address any issues that might arise. A key way of ensuring that the *ex ante* and *ex post* evaluation processes

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

[11] Law Commission (UK), above n 9, at [3.1].

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

[13] Derek Gill "Regulatory Management in New Zealand: What, Why and How?" in Susy Frankel *Learning from the Past, Adapting for the Future: Regulatory Reform in New Zealand* (Lexis Nexis, Wellington, 2011) at 206.

[14] Vitor Oliveira and Paulo Pinho, "Bridging the gap between planning evaluation and programme evaluation: The contribution of the PPR methodology" " (2011) 17 Evaluation [SAGE Journals] 293.

are linked is by ensuring that any framework that is created is not confined to just identifying deficiencies in the law but has the ability to respond to any defects that are identified. Allowing *ex post* evaluation to identify defects and using that information in *ex ante* evaluation to respond to those defects ensures any issues that arise are addressed, and that the two processes are linked.

B Why is it necessary?

Legislation deserves special review measures because it has special features that set it apart from other forms of policy formation. Legislation generally imposes constraints on citizens and businesses and there can be concerns about the lack of transparency with some legislative initiatives when constraints are being imposed on society. There is political bias in favour of legislation over other forms of policy intervention and there can be a lot of uncertainty around the effects of legislation because it will be impossible to ever predict every single effect legislation may have. Therefore there is a high payoff from closer management of the regulatory system to ensure these concerns are mitigated as much as possible, even if it does come at a cost.[15]

Post-legislative scrutiny is necessary to ensure the creation of better legislation in two key ways. Firstly, post-legislative scrutiny is essential for improving the legislation at issue. The primary motivation behind suggesting legislation should be reviewed after it has been brought into force is to see whether it is working in practice as it was intended to. If it is not working as it was intended to, the aim is to discover why and address the problem as efficiently and cost effectively as possible.[16] *Ex ante* evaluation occurs at the point when policy makers know the least about effectiveness and there can be a considerable difference between the original policy design and how regulators apply the rules, and how citizens respond. While unintended consequences as a result of adaptation of behaviour of regulators and regulatees is inevitable, evaluation can help reduce uncertainty and complexity by improving administration and identifying the need for redesign. This need is highlighted by the large number of Bills enacted each year, a lot of which due to practical constraints, may not receive the necessary scrutiny during any pre-legislative processes. Inefficient and ineffective

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[15] Gill and Frankel, above n 1, at 2.4.3.
[16] Law Commission (UK) *Post-Legislative Scrutiny: A Consultation Paper* (No 178, 2006) at [6.2].

legislation can then persist for a considerable amount of time if not identified by review mechanisms, which can be very costly for very little benefit.[17]

Post-legislative scrutiny is necessary to avoid the much higher and broader economic and social implications of regulatory failure. With the cost of introducing legislation being estimated at between $2.0 million and $6.2 million per Act, it is important that policy and law makers, but also the public at large, can be satisfied that this money is being well spent and that any issues will be identified well before the regulatory failure stage.[18] Post-legislative scrutiny can encourage the concentration of those working at the pre-legislative stages of scrutiny, on implementation and the statutes likely effects while knowledge that there will be post-legislative scrutiny will also provide a continuing reminder of the responsibility of policy makers to deliver the policy aims of the legislation.[19]

Secondly and perhaps more importantly than just reviewing legislation for the purpose of improving that one Act, is that review can encourage learning and adaptation of the regulatory system as a whole. It is necessary for good policy that there is an effective feedback loop directly from the *ex post* processes into the *ex ante* processes.[20] By linking these two processes the policy cycle becomes complete and any knowledge about common mistakes gained during the *ex post* processes can be fed back into the start of the legislative process and should encourage better translation of policy outcomes into legislation.[21] Linking the two processes does not only allow negative and unintended consequences to be identified, but can also be used to identify good practice. This is where review shows examples of legislation that work well and should be replicated in order to strengthen future policy development.[22] Greater post-legislative scrutiny which links the *ex ante* and *ex post* stages of evaluation can encourage the framing of what a successful statute is from

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[17] Gill and Frankel, above n 1, at 2.4.1.

[18] Ross Carter *Statute Law in New Zealand* (5th ed, Lexis Nexis, Wellington, 2015) at 105.

[19] Law Commission (UK), above n 16, at [6.4].

[20] Productivity Commission, above n 2, at 379.

[21] RT Hon Sir Geoffrey Palmer QC "Law Making in New Zealand: Is There A Better Way?" (2014) 22 Wai. L. R. 1, at 15.

[22] Law Commission (UK), above n 9, at [2.12].

just getting a Bill onto the statute book, to actually measuring the effect it had and whether it is constructively informing any ongoing policy discussion.[23]

Not only does post-legislative scrutiny have important benefits for the effectiveness of legislation, it is also beneficial for policy makers as it allows policy makers to create policy and implement legislation without being absolutely certain about the outcomes. Any comprehensive evaluative mechanism should produce solid evidence but also the opportunity to learn because there will always be a gap between the design of legislation and the practical implementation.[24] No law can ever be designed perfectly and consider every single consequence that might arise, so the ability to change must be built into a regime. Less emphasis needs to be had on designing legislation and more emphasis placed on the monitoring, evaluation and review processes that will identify these unforeseen consequences and how that can then be used to inform the policy implementation process. For legislative quality to continue to improve, there must be an ongoing and responsive cycle of evaluation in place which feeds back and informs the design process and allows for continuous improvement of regulatory regimes.[25]

The greatest problem facing law makers all over the world, is that while most legislative initiatives are subject to a cost-benefit analysis in advance of their implementation, they are not subject to the same process after their implementation.[26] While high level policy objectives can be clearly stated prior to enactment, the outcomes of legislation are not known in advance, especially when outcomes depend on complex interactions of various actors. In these cases, good practice involves utilising post-legislative scrutiny and allowing a system of experimentation and learning to take place.[27] Legislative review is one of the most important steps that can be taken for the future of regulatory reform because it can not only reduce the social

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[23] Constitution Committee, *Parliament and the Legislative Process* (HL 173-1-2003-04, 29 October 2004) at [171].

[24] Smismans, above n 7, at 15.

[25] Bailey, above, n 4, at 16.

[26] Michael Greenstone "Towards a Culture of Persistent Regulatory Experimentation and Evaluation" in David Moss and John Cisternino (eds) *New Perspectives on Regulation* (The Tobin Project, Unites States of America, 2009) at 113.

[27] Gill, above n 13, at 210–221.

and economic cost of ineffective and inefficient legislation, but can also promote the goal of simplification.[28]

III Post-Legislative Scrutiny in New Zealand

A Review Mechanisms in New Zealand

New Zealand's current system of post-legislative scrutiny is a "plethora of ad hoc review mechanisms at varying levels" with few formal requirements for *ex post* evaluation.[29] The key review mechanisms that make up this ad hoc approach are, departments undertaking review of their own policy initiatives, the use of mandatory review provisions in legislation and review undertaken by specialised bodies such as the Law Commission, Royal Commissions of Inquiry, select committees and the Court.

Formal policy evaluation of the process and impacts of legislation, is undertaken by departments in response to their "ongoing, practical responsibility for oversight of legislation".[30] In 2013, the Government issued the Initial Expectations for Regulatory Stewardship which have recently been updated in 2017 by the Government Expectations for Good Regulatory Practices.[31] Under Part B, the Government expects regulatory agencies to adopt a whole of system view and take a proactive collaborative approach to the care of the regulatory system within which they work. This regulatory stewardship role includes responsibility for monitoring, review and reporting on existing regulatory systems, as well as implementing good regulatory practices for new regulatory systems.[32]

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[28] Cass Sunstein "The Regulatory Lookback – Opening Keynote Address" 94 B.U. L. Rev. (2014) 579 at 591.
[29] Gill and Frankel, above n 1, at 2.2.2.
[30] 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].
[31] Government Expectations for Good Regulatory Practices 2017.
[32] Above n 31, Part B.

The regulatory stewardship message was backed with a 2013 amendment to the State Sector Act, which identified that the Chief Executives of departments are responsible to ministers for the "stewardship of the legislation administered by the responsible department or departmental agency".[33] Therefore stewardship of legislation is not only ensuring planning and management of policy interest's takes place,[34] but also includes the active monitoring and periodical assessment of regulatory regimes established by the legislative initiative, and use of that information to initiate action on problems or identify opportunities for improvement.[35] Government departments in relation to their significant involvement in the policy work that underlies a legislative response have a proactive duty and responsibility not only during the pre-legislative stages but also in the post-legislative stages of evaluation, to ensure objectives are being met and changes to legislation that could be made, are being identified.

Another key way post-legislative scrutiny takes place in New Zealand is through the use of mandatory review clauses. For example, in s 202 of the Evidence Act the Minister must every 5 years, refer to the Law Commission for consideration of the operation of the provisions of the Act, whether the provisions should be retained or repealed or if the provisions are to be retained whether any amendments are necessary or desirable.[36] The Law Commission must then report on those matters to the Minister within two years.[37] Mandatory review provisions ensure that periodic review takes place automatically, by providing a compulsory trigger for review. It may be identified at any stage of the legislative process that a mandatory review provision is necessary from the very beginning of consideration of the policy, to when the Bill is being drafted, or even as late as during the Select Committee stage. No matter what stage a review provision is included, mandatory review provisions are usually identified as being necessary to enable a "very important area of law to be kept up to date… in a principled way".[38]

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[33] State Sector Act 1988, s 32(1)(d)(ii).
[34] State Sector Act, s 2.
[35] Government Response to the NZPC Report on Regulatory Institutions and Practices (2015).
[36] Evidence Act 2006.
[37] Evidence Act, s 202(2).
[38] (21 November 2006) 635 NZPD 6652 per Christopher Finlayson.

Specialised bodies such as the Law Commission or Royal Commissions of Inquiry also conduct review. The Law Commission is the central advisory body responsible for systematic review, reform and development of the law of New Zealand.[39] The Commission may be referred specific topics to review by a responsible minister, but can also initiate its own proposals for review. It has undertaken a wide array of reviews of legislation and legal issues, including many reports which have resulted in legislative change. However the Law Commission is a small advisory body with limited funds and resources, which is why it is considered to be a more specialised process, as there is only so much evaluation and only certain types of evaluation that it can undertake. The Royal Commission of Inquiry also scrutinises legislation but on a more ad hoc basis because review usually only takes place by Royal Commissions in response to regulatory failure.[40] For example, health and safety legislation was widely reformed in New Zealand,[41] after the Royal Commission of Inquiry on the Pike River Coal Mine Tragedy.[42] Royal Commissions are reserved for matters of very significant public interest and must report their findings to the Government. Commissioners who serve on the Royal Commission are selected for their wealth of knowledge and expertise in the particular inquiry that is taking place.[43]

Parliamentary Select Committees also have broad powers to scrutinise and inquire into government departments, or any other matter "relating to the subject matter allocated to the committee".[44] This broad power may include inquiry into legislation. While select committees are fundamental in the scrutiny of Bills they have little formal involvement in the post-legislative stage of scrutiny as they will rarely initiate this broad power of post-legislative scrutiny themselves. The Court also plays a role in review when interpreting legislation. Court decisions are often the first to publicly identify legislation that is not meeting its policy objectives and can act as a platform for further review to take place.

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[39] Law Commission Act 1985.

[40] See Inquiries Act 2013.

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

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

[43] Department of Internal Affairs "Royal Commission on the Pike River Coal Mine Tragedy" <http://pikeriver.royalcommission.govt.nz/>.

[44] Standing Orders of the House of Representatives, 2014, SO 189(1)(h) functions of select committees as including consideration and reporting on "any other matters".

B New Zealand's Approach to Scrutiny

New Zealand's ad hoc approach to scrutiny is largely a set and forget approach,[45] with any formal system of scrutiny usually in response to regulatory failure.[46] However New Zealand is not alone on this issue, in fact "very few OECD member countries have actually deployed *ex post* evaluation systematically".[47] Prior to addressing the issue of post-legislative scrutiny, the House of Lords Select Committee on the Constitution identified that Parliament in the United Kingdom frequently ended its legislative scrutiny at the point of Royal Assent, and that little or no evaluation of whether legislation had achieved its aims occurs. While there were occasions when some post-legislative scrutiny occurred, it was "patchy at best", tending to occur in response to something that had gone wrong.[48] While significant pre-legislative scrutiny developments had occurred in the United Kingdom, similar developments for post-legislative scrutiny had not.[49]

While New Zealand is not the only country which is lacking in evaluative mechanisms, many of the system wide evaluative mechanisms that are utilised by some other countries, are still not used in New Zealand.[50] These include stock management mechanisms such as regulatory impact statements (RIS), red tape reduction, regulatory budgets and in/outs, ad hoc mechanisms such as stock takes, principle based, benchmarking and in depth reviews, and programmed reviews such as sun setting, provisions embedded in statute and post-implementation reviews.[51]

Relatively few reviews are required in New Zealand either by law or in the regulatory management guidance. While regulatory impact statements are employed and in depth reviews do take place, there are no requirements for sun setting, in which a law ceases

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[45] Productivity Commission, above n 2, at 46.
[46] Productivity Commission, above, n 2, at 12.
[47] OECD "*Ex Post* Evaluation of Regulation", above n 12.
[48] Peter Riddell in Constitution Committee, *Parliament and the Legislative Process,* above n 23.
[49] Law Commission (UK), above n 9, at [2.2].
[50] Productivity Commission, above n 2, at F 14.1.
[51] Gill and Frankel, above n 1, at 2.3.3.

to have effect after a specific date unless further legislative action is taken,[52] and post-implementation reviews are only required where a RIS was inadequate or not supplied. Other than ad hoc reviews and the role of researchers in analysing reviews and writing articles, there are few mechanisms to learn about the effectiveness of legislation in achieving policy goals. In contrast to new legislation there is no standard procedure whereby the executive is answerable to the legislature for the general administration of legislation. It seems that across both the executive and legislative branches of Government, the focus of the formal system of regulatory management is on *ex ante* and not *ex post* review.[53]

With some significant regulatory failures highlighting the risks of New Zealand's set and forget approach, and commentators calling for an overhaul of New Zealand's legislative process due to the poor quality of legislation New Zealand is producing,[54] the Government asked the Productivity Commission to investigate into how to improve the overall design and operation of regulatory regimes in New Zealand. Assessing existing regulatory regimes and practices, and identifying where and how to make improvements, will be useful to assist the future design of legislation and regulatory frameworks.[55]

While a number of problems were identified by the report, it was highlighted that there is a weak whole of system mind set when thinking about regulatory performance. New Zealand undertakes hardly any reporting on the performance of legislation, and when reporting does occur, the processes to allow that information to be analysed and sent to the right people in the right format to inform decisions about improving regulatory performance, are just not there.[56] Rather than being a complete loop, where feedback from monitoring, evaluation and review shapes the design of new legislation, the formal system is an open loop with limited responsibility assigned

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[52] Australian Government, Attorney-General's Department *Guide to Managing Sun setting of Legislative Instruments* (April 2014).

[53] Gill and Frankel, above n 1, at 2.2.5.

[54] Palmer, above n 21 at 29.

[55] The New Zealand Productivity Commission *Regulatory Institutions and Practices Brief* (July 2013).

[56] The New Zealand Productivity Commission *Regulatory Institutions and Practices Issues Paper* (August 2013).

to reviewing existing regulatory regimes.[57] Due to this attitude, opportunities are missed to regularly evaluate, adjust and improve rules and ensure regimes are working as well as they should be.[58] New Zealand has to find an effective mechanism for ensuring regular post-legislative scrutiny becomes ingrained in the regulatory management environment, or otherwise legislative quality is just not going to improve.[59]

C Recommendations and Response

The Productivity Commission noted that a suite of initiatives to improve how the stock of regulation is managed had been implemented by the Government, such as the Initial Expectations for Regulatory Stewardship, which set expectations for departments on what is needed to be done to ensure appropriate management of their regulatory systems.[60] While this is a step forward in improving regulatory management, the Commission noted that more could still be done to improve the effectiveness of not only the Expectations but also post-legislative scrutiny in general. The key recommendation was that the Government should require departments to prepare and publish regulatory system reports which articulate their strategies for keeping their regulatory regimes up to date, and every three years commission a review of each department’s progress and seek advice on whether it is necessary to create new legislative mechanisms for managing the stock of regulation.[61]

The Commission also recommended that the Treasury should articulate a set of principles to encourage departments to focus efforts on reviews that have the largest anticipated benefits, set up an ongoing assessment to identify areas requiring attention, and specify targets, such as yearly expenditure or a target number of

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57 Gill and Frankel, above n 1, at 2.2.5.

58 The New Zealand Productivity Commission *Regulatory Institutions and Practices Draft Report* (13 March 2014).

59 Productivity Commission, above n 2, at 388.

60 Initial Expectations for Regulatory Stewardship 2013; Government Expectations for Good Regulatory Practices 2017.

61 Productivity Commission, above n 2, at 14.01.

reviews, to force identification of reviews with the largest potential benefits.[62] Lastly the Commission recommended that the Government should publish an overarching strategy that sets out how it will improve the management of the stock of regulation, including how specific initiatives will fit within that overarching strategy, how successful management is to be measured and how any initiatives implemented will benefit the community.[63]

The Government responded to the report in July 2015, acknowledging there is weakness in current regulatory review and evaluation practices and that more needs to be done to improve and update the stock of regulation.[64] Despite there being wide variation in the way that different departments undertake review,[65] the Government indicated that it is still an adequate systematic process to scrutinise legislation once it is passed.[66] Departments are already required to systematically and regularly assess the performance and condition of their regulatory regimes and identify opportunities for improvement through the Government Expectations for Regulatory Stewardship.[67] The Expectations also reinforce the responsibility on departments to exercise more active regulatory stewardship over their regulations and in particular the legislation they are responsible for.[68] However the Government agreed that an expectation that departments publish reports on their regulatory management strategy, the state of their regulatory stock and plans for improvement would reinforce departmental responsibility for the monitoring and review of regulatory regimes.[69]

Each year, each of the seven major regulatory departments will publish Regulatory Management Strategies, which will assess each regulatory system the Department is responsible for, for fitness for purpose.[70] This covers four dimensions; effectiveness,

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[62] Productivity Commission, above n 2, at 14.02.

[63] Productivity Commission, above n 2, at 14.04.

[64] Government response, above n 35, at 1.

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

[66] Government Response, above n 35.

[67] Government Response, above n 35.

[68] Government Response, above n 35.

[69] Government Response, above n 35, at 5.

[70] The Treasury <http://www.treasury.govt.nz/regulation/fitforpurpose/stewardship-strategies/archive>.

efficiency, durability and resilience, and fairness and accountability.[71] Departments can also identify other strategies which they intend to deploy to monitor and evaluate their regulatory systems. For example, the strategy produced by the Ministry of Business, Innovation and Employment (MBIE) identifies that in addition to its business as usual approach to monitoring, they have introduced regulatory system assessments, which are intended to ensure each system is regularly scrutinised.[72]

The recommendation that a target number of reviews per year should be set was considered to be unnecessary as departments did not need targets to undertake review. Although it was acknowledged that such requirements would be put in place if it became necessary in the future.[73]

D The Current Process is still Ineffective

While the Government's response to the Productivity Commission report which requires Departments to publish their Regulatory Management Strategies, is a step forward in encouraging Departments to take responsibility for their legislative initiatives, the overall way New Zealand undertakes post-legislative scrutiny is still ineffective. There is a lack of guidance on what regulatory stewardship actually means, and there is no way to hold Ministers to account for this responsibility. Mandatory review clauses are underutilised, there is little guidance on when or how these clauses should be used, and review that is being undertaken through the stewardship role and mandatory review clauses, is proving to be unsatisfactory. Due to a lack of guidance, review still tends to turn on political will or capacity of officials to undertake the work, and there is a real risk that regimes can continue to operate poorly for long periods of time.

1 Lack of Guidance

71 Ministry of Business, Innovation and Employment *MBIE's Regulatory Management Strategy 2017/2018* (August 2017).
72 MBIE, above n 71, at 4.
73 Government Response, above n 35.

Limited guidance has been given on the need to undertake regulatory scanning, annual regulatory plans and reporting in response to the focus on regulatory stewardship.[74] The Parliamentary Counsel Office considers the issue of whether a regulation should provide for review as a matter of policy which is guided by the drafting instructions of the Department involved. It is for the Department to consider; whether to include a review, who should conduct the review, what the review is to be about, how long after enactment it is to occur, to whom the review is presented to and at what frequency.[75] The Treasury's Regulatory Impact Handbook which provides guidance for developing new regulatory proposals, contains only half a page on monitoring, feedback and review.[76] Both of these examples illustrate that although Departments are required to undertake review in response to the role as a regulatory steward, the way that review is carried out is largely left up to the Department itself.

There is no formal expectation that programmed reviews, evaluations, or even monitoring and reporting requirements, accompany the introduction of legislation. There is little guidance on when and how to develop evaluation plans or even when to include mandatory review clauses or sunset clauses. In fact until the regulatory stewardship expectations were introduced in April 2013, there was no guidance as to what the duties and responsibilities of a Department even were towards review.[77] With no particular guidance on when and how to include mandatory review clauses, while there are examples of mandatory review clauses being used in New Zealand legislation,[78] these review provisions are relatively rare.[79] As at September 2016, only 16 Acts had specific "review of operation of Act" provisions and only 10 Acts had "review of Act" provisions.[80]

Initiatives aimed at improving review and evaluation of regulatory regimes have failed to gain traction in the past in the face of other priorities and limited follow up

[74] Gill, above n 13, at 181.
[75] Gill and Frankel, above n 1, at 2.2.4.
[76] Treasury Regulatory Impact Handbook
[77] Gill and Frankel, above n 1, at 2.24.
[78] For example the Search and Surveillance Act 2012, s 357 which expressly requires a joint review of the operation of the Act to be undertaken by the Law Commission and the Ministry of Justice.
[79] Gill and Frankel, above n 1, at 2.3.3.
[80] Search of Legislation Online <www.legislation.govt.nz> (accessed 7 September 2017).

from central agencies.[81] While steps are being taken to ensure evaluation is at the forefront of policy makers minds by reinforcing the regulatory stewardship obligation, there is a lack of guidance on when review should take place or be included through a mandatory review clause. With a lack of guidance on how to undertake the responsibility of regulatory stewardship, how can it be expected that the regulatory management strategies will actually improve post-legislative scrutiny in New Zealand? The effectiveness of the stewardship obligation is undermined because without guidance, post-legislative scrutiny is still going to be left to determination by government departments or their Ministers, cases of regulatory failure or legislation being identified for reform otherwise.[82] There is a real possibility that without clear guidance on what the responsibility involves, that the regulatory stewardship focus could end up just serving as a mere "lip service", with meaningful evaluation failing to take place.[83]

2 *Unsatisfactory Review*

The review that is being undertaken through mandatory review clauses and the publication of Regulatory Stewardship Strategies is being criticised for being too broad and high level and as a result technical issues are being left outside the scope of the reviews.[84] This largely comes down to the fact that review does not mean the same thing from different perspectives. For example, review from a policy perspective may be to just consider on a broad scale whether the policy is working overall and there are no major unintended consequences occurring. Whereas review from a more legal perspective may be to ask whether there are any technical issues with the legislative scheme or particular injustices resulting from the application of the law.[85] These two perspectives of review are irreconcilable because a broad review process is not going to necessarily pick up on those narrow technical issues which a legal perspective may want, but a technical review process is unnecessary and a waste

[81] Gill, above n 13 at 13.
[82] Lydia Clapinska, above n 10, at 194.
[83] Koen van Aeken "From Vision to Reality: *Ex Post* Evaluation of Legislation" (2011) 5 Legisprudence 41 at 66.
[84] See Elisabeth McDonald "Why so Silent on the Right to Silence? Missing Matters in the Review of the Evidence Act 2006" (2013) 44 VUWLR 573.
[85] Elisabeth McDonald, above n 84.

of resources from a policy perspective where all that is necessary is to review the policy as a whole. Where it has not been characterised properly what level of review is going to take place, the process is going to be unsatisfactory despite the goal of just getting more post-legislative scrutiny to take place being achieved.

For example, the first Evidence Act review was subject to considerable criticism as to the type of review that took place. During the third reading of the Evidence Bill, it was stated that s 202 would ensure that the Law Commission would undertake a very comprehensive review as to how it is working.[86] Whereas the Law Commission, when it came time to undertake the review, considered that s 202 did not "contemplate a first principles review",[87] but rather an operational review.[88] The Law Commission considered that it was not appropriate to use the review as an opportunity to revisit policy decisions made throughout the legislative process, and where there was clear legislative intent that the Act was working as intended, the Commission would not recommend change.[89] There has been criticism of this approach, as it meant many contentious technical issues with the Act were left outside the scope of the review. It was argued that in the first review of the Evidence Act the Law Commission failed to consider several important changes to sections which were not working properly, including ss 32 and 33. Further it was argued that s 202 should not be limited to operational review when read alongside the statement from Parliament that the review should be "very comprehensive".[90]

Similarly, while the Law Commission has not undertaken satisfactory review because it did not consider the technical issues and was too broad, it could be argued that the Regulatory Management Strategies are even more high level and broad and are also failing to provide effective review. The intention of the strategies is to improve regulatory systems by increasing engagement between stakeholders and by encouraging departments to think practically about how they can meet their regulatory

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[86] (23 November 2006) 635 NZPD 6802 per Christopher Finlayson.
[87] Law Commission, *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013) at [1.18] and [1.30].
[88] At [1.40].
[89] At [1.31].
[90] Elisabeth McDonald, above n 84, at 592.

stewardship obligations.[91] While in principle, the doctrine of ministerial responsibility applies, and ministers can be held to account for the regulatory stewardship responsibility, in practice there are actually few mechanisms to make ministers answerable for the administration and management of legislation.[92] Further it can be argued that, due to limited guidance on what these obligations are, a minister is already fulfilling their obligation as a regulatory steward by just doing the bare minimum and publishing a regulatory management strategy. There is no requirement to actually act on any of the findings in their strategies, but only a requirement to report and consider the regulatory regimes they are responsible for. While any sort of evaluation is important, when it is not actually helping to improve and inform future legislative initiatives, then perhaps this sort of review is just too broad and high level to be satisfactory.

3 Insufficient Links Between the Ex Ante and Ex Post Processes

Broadly speaking, a "successful" post-legislative scrutiny process will be one that encourages and allows the information that is learnt from the evaluation to inform the ongoing discussion on the policy.[93] The policy cycle is a continuous learning mechanism, where information learnt from the *ex post* processes must be fed back into the *ex ante* processes, to help inform the creation of other legislative initiatives.[94] However New Zealand's current system is failing to create this sort of link between the *ex ante* and *ex post* processes and ensure that the policy cycle is working effectively as a learning environment. This is not only because any evaluation that does take place does not inform *ex ante* processes, but also because *ex ante* processes do not identify how *ex post* processes should be carried out or how the effectiveness of legislation should be measured and against what framework.

It is really difficult to undertake review of an Act after it has been in operation if the design has not considered how the effectiveness of that legislation in achieving the

[91] Government Expectations for Good Regulatory Practices, above n 31.
[92] Gill and Frankel, above n 1, at 2.2.4.
[93] Liaison Committee *Review of select committee activity and proposals for new committee activity* (HL 135, 13 March 2013) at 52.
[94] Gill, above n 13, at 210–221.

desired impact is to be assessed.[95] The current scrutiny processes do not give enough consideration to how a legislative initiative will be deemed "successful" during the *ex ante* stages of scrutiny. This is a complex consideration because regulatory effectiveness is complex. Success is not only dependent on good legislative design, but how regulators apply rules and use their discretion and how regulatees respond to those regulations. Monitoring can be difficult because information is not widely available and effects can often be separated in time and space.[96] While it is beneficial to evaluate legislation and try and learn from mistakes that are made, if the framework does not allow for consideration in the pre-legislative scrutiny stage of how the particular legislation will be identified as successful or not, it will be extremely difficult to learn anything.

The current process is ineffective because there are not enough feedback loops linking pre-legislative scrutiny processes with post-legislative scrutiny processes so that it can be understood whether the legislation in question is achieving the goals set out in the beginning of the policy work. However feedback loops are also lacking in the other direction with post-legislative scrutiny processes failing to inform the pre-legislative scrutiny of other legislation and contribute to the effectiveness of legislation as a whole. Whatever measures that are taken to improve legislative scrutiny will be ineffective if New Zealand's legislative process continues to operate as an open process rather than a complete feedback loop.

IV A Formal Process is Not the Way Forward for New Zealand

A What is meant by a Formal Process?

Although something needs to be done to improve the effectiveness of post-legislative scrutiny in New Zealand, a formal and systematic process, one which engages an independent or "non-Executive" body to undertake evaluation, is not the way forward. It has been consistently argued that a more formal process is necessary for New Zealand because by engaging an independent evaluator post-legislative scrutiny will

[95] Gill and Frankel, above n 1, at 2.4.2.
[96] Gill and Frankel, above n 1, at 2.4.3.

be protected from being entirely dependent on political will. Scrutiny is not a particularly "attractive" topic from a political perspective because it can potentially identify deficiencies in policy-makers work. Post-legislative scrutiny should not suffer from being left to the will of ministerial discretion to decide whether to undertake it or not because it may just not occur at all.

Legislation can provoke differences in view. Reasonable analysts can have different views on the effectiveness of various legislative initiatives based on their independent judgments and so it is fundamental to have the institutional capacity in place to ensure robust evaluations take place. Lack of credibility can be a particular problem with self-evaluation, and it is more likely an independent evaluation will be considered a fair and reasonable one.[97] It has been argued that to ensure evaluation takes place and to avoid ministerial discretion, opportunistic use of evaluation studies or "submarine" evaluation,[98] a more formal process could be introduced which engages an independent review body. This could be an existing body in New Zealand, such as Parliamentary select committees, or a new body could be created, such as a new Legislation Office.[99]

Engaging select committees in post-legislative scrutiny has been employed in the United Kingdom where a more formal approach to post-legislative scrutiny was implemented after the Law Commission undertook a formal consultation process and inquiry into the options available.[100] Departments in the United Kingdom currently responsible for a particular Act should in most cases, generally three to five years after Royal Assent, publish a memorandum, for submission to the relevant departmental select committee.[101] The memorandum, which should include a short preliminary assessment of how the Act has worked in practice relative to its objectives and benchmarks identified *ex ante*,[102] is not meant to be a full post-legislative scrutiny of the Act but just a formal and automatic process which could act

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[97] Gill and Frankel, above n 1, at 2.4.2.
[98] Koen van Aeken above n 83, at 63.
[99] Palmer, above n 21, at 37.
[100] Law Commission (UK), above n 9.
[101] Office of the Leader of the House of Commons *Post-Legislative Scrutiny: The Government's Approach* (CM 7320, March 2008). See also Government Response (18 July 2013) to *Ensuring standards in the quality of legislation* (HC 85, 20 May 2013) at [7]–[44].
[102] Office of the Leader of the House of Commons, above n 101.

as a trigger for further action.[103] The Memorandum is submitted, unless agreed with the committee that a memorandum is not required, in the form of a command paper which allows Lords and other interests to take up points raised in it.[104] It is then the role of the Select Committee to decide 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.[105] The process originally engaged existing select committees to undertake routine post-legislative scrutiny, but ad hoc committees have started to be established to consider a particular Act or Acts.[106] Ad hoc committees have been set up to consider the Adoption Act,[107] the Mental Capacity Act,[108] and the Inquiries Act.[109]

While the United Kingdom approach is one way of protecting the scrutiny process from dependence on political will, it has been noted that New Zealand select committees may just be too busy and restrained in terms of resources to actually be able to undertake this sort of work.[110] It has been suggested that any systematic and formal post-legislative scrutiny process could instead be carried out by a new Legislation Office which would be located in Parliament rather than the Executive, but under the control of the Attorney-General.[111] The Legislation Office would not only be responsible for pre-legislative scrutiny of Acts by helping with design and drafting, but also post-legislative scrutiny whereby it would examine existing legislation and publish reports on whether its objectives are being met and whether there have been any unforeseen consequences. Such a body would conduct scrutiny of five or six big statutes a year.[112]

The majority of New Zealand's post-legislative scrutiny focus is on the work done by Departments to review their legislative initiatives and it is only on an ad hoc basis and

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103 Office of the Leader of the House of Commons, above n 101.at 19–20.
104 Office of the Leader of the House of Commons, above n 101.
105 Cabinet Office (UK) "Guide to Making Legislation" (July 2015) at 263.
106 Liaison Committee *Review of select committee activity and proposals for new committee activity*, (HL 279, 21 March 2012) at 35–39.
107 (29 May 2012) GBPD HL 1082.
108 Mental Capacity Act (UK) 2005.
109 Above n 107 at 55–60.
110 Palmer, above n 21, at 30.
111 Palmer, above n 21, at 39.
112 Palmer, above n 21, at 39.

in response to regulatory failure that other bodies do undertake scrutiny. This focus on stewardship as an answer to post-legislative scrutiny has raised eyebrows in terms of the appropriateness of the Executive evaluating itself. It has been cautioned that there is a risk of selective, biased or absent evaluations taking place where evaluation is government-led.[113] Gains may be overstated and losses understated, particularly where stewardship responsibilities are directly linked to department performance.[114] It is interesting that there is a "parliamentary black hole" in relation to involvement with post-legislative scrutiny,[115] when post-legislative scrutiny could be used to hold the Executive to account.[116] Parliament must have some responsibility for laws once they are passed, and involvement in post-legislative scrutiny would be one way to fulfil this role.

B Political Reality

While ensuring that post-legislative scrutiny does take place and is not entirely dependent on political will is an important consideration and legitimate argument, it is not the only consideration when considering how to approach post-legislative scrutiny in New Zealand. It needs to be realised that it is just not politically realistic to implement the type of formal process that is being advocated for, either by employing select committees to take on the work or by creating a new review body. While the difficulty of conducting an evaluation will differ depending upon the particular legislation being evaluated, in general collecting data and evidence can be costly and time consuming and where the relevant resources are not readily available, the cost can increase.[117] To be of value, scrutiny work is likely to be detailed and very time consuming.[118] A formal review mechanism is going to be extremely costly to get off of the ground because it will require capable individuals, effective evaluation tools and parliamentary time to pass any necessary legislative changes.

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[113] Ellen Mastenbroek, Stijn van Voorst, Anne Meuwese "Closing the Regulatory Cycle? A Meta Evaluation of *Ex-Post* Legislative Evaluations by the European Commission" (2015) 23 Journal of European Public Policy 1 at 2.

[114] Sunstein, above n 28, at 584.

[115] Lydia Clapinska, above n 10, at 192.

[116] 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) 82 International Review of Administrative Sciences [SAGE Journals) 1 at 4.

[117] Gill and Frankel, above n 1, at 2.4.2.

[118] Law Commission (UK), above n 16, at [7.57].

Parliament is busy and select committees do not have the time or resources to undertake legislative review. Introducing a costly system may end up reducing any incentive for a system of rigorous analysis,[119] because with an increased workload the mind set may be to just undertake review for the sake of review, failing to actually undertake meaningful review. Key issues may slip through the gaps because meaningful review is not taking place, or review may not actually take place at all because select committees are just too busy to undertake it. There is a risk that with a more formal and onerous system, fewer and less meaningful reviews may actually take place than there is now.

While involving select committees may be appropriate in the United Kingdom, not only are the two jurisdictions different in the makeup of their parliamentary systems, but New Zealand select committees fulfil a slightly different function to their United Kingdom counterparts. New Zealand has a much smaller Parliament than the United Kingdom, and the separation of powers is less clear in the absence of an Upper House in New Zealand. Therefore select committees in New Zealand are somewhat more tightly controlled by Cabinet than select committees in the United Kingdom, especially in an informal way through Cabinet Ministers holding committee chairs.[120]

The United Kingdom also has two different types of select committees, House of Commons and House of Lords committees. While House of Lords committees can be created on an ad hoc basis with the sole task to consider post-legislative scrutiny of a certain topic, House of Commons committees can still make recommendations on post-legislative scrutiny but just make substantially less recommendations in comparison to Lords committees.[121] With less committees and without the ability to create ad hoc overseeing committees dedicated to post-legislative scrutiny in New Zealand, this work would have to be carried out by the normal select committees which are already busy and engaged in their primary role of reviewing Bills and

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[119] Palmer, above n 21, at 29.

[120] Tom Caygill “A Tale of Two Houses? Post-legislative Scrutiny in the House of Commons and House of Lords” (September 2017) PSA Parliaments Group <https://parliamentsandlegislatures.wordpress.com/2017/09/06/post-legislative-scrutiny-commons-lords/amp/>.

[121] Tom Caygill, above n 120.

engaging the public. New Zealand also tends to pass more laws than the United Kingdom which suggests that New Zealand select committees are already inundated with pre-legislative scrutiny and that they just do not have the capacity to consider post-legislative scrutiny.[122]

There is also a lack of evidence to suggest that the United Kingdom approach as a whole is working and would be worth the cost of introducing such a system in New Zealand. While the process of government departments producing memorandums is working well with the United Kingdom Government stating that by January 2013 58 memoranda had been published, of those 58 memoranda only three were then the subject of dedicated select committee reports.[123] While this could be due to a number of factors such as that legislative initiatives just do not need further select committee scrutiny because they are working well in practice, with such a limited number of reports being undertaken, it is not worth trying to implement such a system when efforts could be focused elsewhere.

New Zealand also does not have the resources to introduce a new independent body to undertake evaluation. There would be a huge cost to implementing an entirely new body to undertake evaluation and it is unlikely that the Government would spend the necessary money on getting a project of this sort of the ground, in the face of other more pressing matters. In comparison, the current approach of engaging departmental review is politically realistic because this sort of review is already taking place and so does not require the huge costs necessary to create a new scrutiny body. Departments also have the capacity to undertake review, not only because they are undertaking it already, even if in a limited way, but because they have been involved with the particular policies from the start and so are best placed to undertake review.

C The Work of Departments is Understated

Aside from not being politically feasible, a formal process is not going to get at the heart of the issues with New Zealand's current system. Introducing another body to

[122] Palmer, above n 21, at 4.

[123] Liaison Committee *Select committee effectiveness, resources and powers: responses to the Committee's Second Report* (HC 911, 24 January 2013) at 12.

undertake scrutiny does not address the key issue with post-legislative scrutiny in New Zealand in that there is a lack of guidance around the role of departments. While having a separate body may reduce the burden on departments to have to undertake scrutiny and so extended guidance on their role as regulatory stewards may not be as important, because it has been explicitly identified by Government that Departments are expected to undertake regulatory management which includes evaluating their regulatory regimes,[124] this responsibility will have to be exercised regardless of whether or not another scrutiny body is charged with evaluation. More effective guidance is still going to be needed on how to fulfil the stewardship responsibility. In particular, guidance on when to include mandatory review mechanisms within a policy initiative is essential. Introducing a new review body to review legislation in the *ex post* stages of evaluation, does not address the issue of how to determine if review needs to be provided for in the *ex ante* stages of evaluation.

A formal process is not necessary to hold the Executive to account because while this is an important consideration, in reality it may be cynical to believe that the job of scrutiny should not be left solely to government departments because they may not do a sufficient job due to not wanting to identify their own failures and have their hard work reformed. Agencies are highly professional and they work hard to get the analysis right. Those actually doing the analysis are civil servants and not ministers, and while responsive where appropriate to ministerial influence, that responsiveness does not compromise their role to produce sound analysis. It is actually in the interests of ministers to have their departments working hard to get the analysis right in order to avoid political embarrassment.[125] By claiming that it is not appropriate for the Executive to be reviewing itself may not accurately represent the work that actually does take place in departments.

Introducing a formal process understates the work done by departments and does not address the key issue that there is limited guidance available to departments on how to exercise their regulatory stewardship responsibility. Instead, retaining the current informal approach but adjusting and strengthening the processes by providing more

[124] Government Expectations for Good Regulatory Practices, above n 31.
[125] Sunstein, above n 28, at 591.

guidance to departments, would improve post-legislative scrutiny in New Zealand in a more cost effective and efficient way.

D A Formal Process is Inflexible

A formal process is also not going to appropriately deal with the tension between political and legal definitions of review. A formal process may provide more satisfactory review because it is independent and is more likely to be considered fair and reasonable, but there is a key problem with the view that a formal process is necessary. Proponents for a more formal process are not just proponents for a process carried out by an independent body, but are also proponents for a more formal process which does not just consider broad, high level policy analysis, but gets to the more technical and legal issues of legislation.[126] This sort of process is not at the heart of post-legislative scrutiny which by definition is to consider whether an Act is meeting its objectives, objectives usually being set in a broad rather than a narrow way.[127]

A formal process is not going to address technical issues unless it is specifically set up in that way and practically, any formal mechanism would not be set up in this way because there is no reason to set up a process like this from a policy perspective. Post-legislative scrutiny is not generally meant as a process for re-examining policy arguments. Likewise, it is not intended as an opportunity to praise or condemn government policy.[128] Scrutiny is for the purpose of identifying if policy objectives have been met and should not be used as an avenue to bring up arguments that the policy itself is wrong.[129] Legislation is extremely important but it is only one aspect that makes up policy as a whole. Such an extensive focus on legislative evaluation and the technical issues, is disproportionate to the role legislation actually plays in a policy scheme, and setting up a post-legislative scrutiny process in a way which disproportionately focuses on technical issues will be seen as a waste of resources from a policy perspective.

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[126] Palmer, above n 21.
[127] Law Commission (UK), above n 9, at [2.4]; Cabinet Office Circular "Impact Analysis Requirements" (30 June 2017) CO 17/3.
[128] The Office of Best Practice Regulation (OBPR) *Australian Government Guide to Regulation* (February 2016) at 5.
[129] Law Commission (UK), above n 9, at 2.15.

If it is conceded that technical evaluation is not actually going to take place even if a more formal process is implemented, then the evaluation that is being advocated for is actually already being done through the regulatory stewardship role. A more formal process is not going to add anything new to the work already being done by departments if the type of review that is to take place is broad policy review. Instead, setting up a formal process and introducing a new agency will just add an unnecessary step in the policy cycle, where efforts could be focussed on strengthening the stewardship role and refining how broad policy analysis is undertaken so that it can make a difference to legislative quality, rather than being too high level.

The current process also recognises that some institutions are better placed to undertake certain types of review and allows different types of review to take place if it is necessary. This is beneficial because not all legislation needs the same level of review. Some legislation is more regulatory focused and does not impose large constraints or consequences on society. More technical and consistent evaluation is not necessary, and a broader or high level review by departments is appropriate. Whereas other legislation which does deal with key societal issues and does have consequences on society may require much more intensive and constant evaluation undertaken by a specialist agency like the Law Commission or a Royal Commission.[130] The current process recognises that some agencies are just better placed to undertake different types of evaluation and allows this to happen.

A blanket approach is not appropriate considering these individualised needs of certain Acts. It would be far more preferable to have effective review of a few pieces of legislation a year rather than a perfunctory review of many Acts,[131] and the current process recognises this. Introducing a formal process where one body undertakes all legislative analysis would be a step backwards for post-legislative scrutiny in New Zealand, because although the current system is not perfect and can be strengthened, a more formal system would just hinder the flexibility of the current system. Some legislation may be subject to unnecessary evaluation which is a waste of time and resources, while other legislation may not get the time and level of evaluation it needs

[130] See Evidence Act.
[131] Law Commission (UK), above n 16, at [7.57].

because the review body is too busy trying to review all legislation in the same way. While a more formal process may still allow more specialist review to take place, this would only occur after it has gone through the formal process. This then imposes an unnecessary and costly step in the evaluation process where under the current process, that specialist review would take place straight away.

E The Goal of Linking the Ex Ante and Ex Post Stages of Evaluation is Undermined

A formal process is also not appropriate, because it undermines the goal of linking the *ex ante* and *ex post* elements of the policy cycle. Departments are directly involved with policies from the start and will have the greatest knowledge on what the speculated outcomes were meant to be. Departments are best placed to undertake scrutiny already having the knowledge that has come from introducing the policy in the first place, but also because it is departments that will have to learn from what has been discovered through evaluation and use that knowledge to influence future policy work.[132] A standardised process undertaken by an independent agency adds an unnecessary step in the policy cycle, because any information that is learnt will have to be fed back to departments. Whereas allowing departments to undertake review cuts out this unnecessary extra step in the policy cycle.

By not linking the *ex ante* and *ex post* stages of the policy cycle, the key role of post-legislative scrutiny in reducing the burden of certainty on policy makers, is undermined. While there is an issue with the political imperative of framing regulatory reforms as policy experiments, rather than solutions to problems,[133] it is important that policy makers are not held to an unattainable standard. No policy maker could ever consider all of the consequences of a legislative initiative because unintended consequences are inevitable as a result of the behaviour of both regulators

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[132] Sunstein, above n 28, at 591.
[133] Gill, above n 13, at 206.

and regulatees.[134] Evaluation can help reduce this uncertainty and giving policy makers the ability to evaluate their work is a much stronger tool than relying on policy makers to get it right every time. The goal of reducing the burden of certainty may be undermined where an independent review body is involved because of the potential for policy makers to be dissuaded from creating policy unless they are absolutely sure of the outcomes, which they never can be. While it is necessary that policy makers get as close as possible to certainty with their policies and allowing self-evaluation is not so that deficiencies in work can be covered up, where policy makers are in charge of reviewing their own work, the burden of certainty is not as onerous and a learning regulatory environment, which is beneficial for legislative quality overall, is encouraged.

V What Should Be Done to Improve Post-Legislative Scrutiny in New Zealand?

Review is necessary to improve the quality of legislation in New Zealand, and post-legislative scrutiny needs to be employed more regularly and efficiently to achieve this goal. However the way forward is not to implement a formal process. Instead it will be more cost effective, and politically feasible, to tidy up the processes that are already in place. The examples of review processes identified in the earlier part to this paper need to not only be strengthened individually but also collectively, so that they work together more effectively to ensure better post-legislative scrutiny is undertaken in New Zealand. This must start with strengthening of the stewardship role and linking of the *ex ante* and *ex post* scrutiny processes, and must continue with the strengthening of ad hoc processes and allowing those processes to work in with the stewardship role in an integrated way.

A Strengthen the Stewardship Role

The first step to ensuring post-legislative scrutiny is undertaken more regularly and more effectively in New Zealand is to establish a much clearer statement of the roles

[134] Gill and Frankel, above n 1, at 2.4.1–2.4.3.

and responsibilities of departments administering legislation. While legislating the general obligation of stewardship on departments is an important part to ensuring effective evaluation takes place, it is not enough. There needs to be extended guidance, sometimes called capacity building measures, on what is expected of departments exercising their stewardship obligation to ensure that the obligation is taken seriously and meaningful review actually takes place. Departments need to build communities of practice around evaluation and monitoring by the constant reminder of the obligation as a steward.[135]

For example, the Cabinet Office in the United Kingdom has produced guidance on the expectations on departments as to their role in post-legislative scrutiny. This provides guidance on when reviews need to take place, how those reviews need to be undertaken and what should be included within each review. In particular, guidance was given on the need to establish a timetable for review of each Act within the responsibility of the particular department.[136] Clearer guidance from the centre of Government to departments on what is expected is essential to help ensure a greater commitment to post-enactment review work and routine consideration of whether and if so how legislation will be monitored and reviewed.[137] One way of providing better guidance to departments on how to fulfil their role as regulatory stewards in New Zealand, would be to provide better access to information on how to design sunset clauses, review clauses and evaluation plans. The current use of mandatory review provisions in New Zealand is on an ad hoc basis and there are no mandatory requirements to undertake review aside from publishing departmental regulatory management strategies.[138] Sunset clauses are also not employed in New Zealand, in comparison to Australia where they are used often.[139]

Not only providing guidance on when to use these provisions, but establishing a set of compulsory requirements for review, would ensure that review is not left to the will of ministers without requiring another agency to take on an extra review role. Not all

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[135] Gill and Frankel, above n 1, at 2.4.3.

[136] Cabinet Office (UK) "Guide to Making Legislation", above n 105, Part 43.

[137] Law Commission (UK) above n 16.

[138] Gill and Frankel, above n 1, at 2.4.3.

[139] Australian Government, Attorney-General's Department *Guide to Managing Sun setting of Legislative Instruments,* above n 52.

legislation would need to be subject to compulsory review requirements, but would be employed for appropriate legislation where the need for compulsory review is proportionate to the type of legislation. For example, legislation like the Evidence Act which concerns an area of law which has consequences for society in its application and is subject to societal change, should be identified from the beginning of the policy process as an Act which needs a mandatory review provision, rather than it only being identified in the select committee stage. Compulsory review requirements would guide departments to identify legislation that requires review from the outset. This would then allow the drafting stages of the policy and legislation to consider how that review will occur, and whether any pre-legislative scrutiny processes can be used as a framework for how the post-legislative scrutiny will be carried out.

Australia has compulsory review requirements 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).[140] A post-implementation review may also be required where the RIS presented to policy makers sufficiently diverges from best practice. The review must consider the objectives set out in the RIS and consider whether these are being achieved by the legislation, the purpose being to see if the legislation remains appropriate. Review must occur within five years for legislation with substantial economic impact and within two years for legislation passed without a compliant RIS.[141] All post-implementation review must address the same questions, such as the reasons for government action, the options considered, the impacts of the legislation and the stakeholders consulted.[142]

New Zealand already undertakes programmed reviews by using mandatory review clauses in legislation.[143] However because it is not compulsory to provide programmed reviews in certain legislation and because there is a lack of guidance around how to use these provisions, mandatory review is underutilised by

[140] The Office of Best Practice Regulation, above n 128.
[141] The Office of Best Practice Regulation, above n 128.
[142] The Office of Best Practice Regulation, above, n 128, at 7–11.
[143] See Evidence Act 2006.

departments because it is up to those departments to decide when and how to use the provisions. There needs to be clearer guidance around not only the responsibility of the stewardship obligation, but how that responsibility can be carried out through the provision of mandatory review. In particular if there were compulsory requirements for review provisions, the ad hoc approach to mandatory review, which differs from department to department, would be much clearer and evaluation would be encouraged to take place.

B Link the Pre-Legislative Scrutiny Processes with the Post-Legislative Scrutiny Processes

One of the most important steps going forward for New Zealand is that the *ex-ante* and *ex-post* components of evaluation are linked. New Zealand is not going to have an efficient, effective and coherent policy cycle, if the pre-legislative and post-legislative stages of scrutiny are not linked.[144] The main purpose of post-legislative scrutiny is not to just improve the legislative initiative at hand, but to enable any information that is learnt to be fed back into the pre-legislative scrutiny processes and inform the drafting or creation of new legislation.[145] Improving pre-legislative scrutiny may decrease the overall need for post-legislative scrutiny, but it is still needed regardless. An effective pre-legislative scrutiny system will reduce the amount of legislation that will have to go further than just being subject to standard evaluation, while an effective post-legislative scrutiny mechanism will identify issues which could not be foreseen until the legislation was implemented and working in practice. The two types of scrutiny play a different role and when used properly can effectively complement each other and link up the policy cycle, ensuring effective feedback loops are maintained.[146]

New Zealand undertakes pre-legislative scrutiny relatively well.[147] There is a well-established system in the policy phase of Cabinet and its committees, supported by

[144] Oliveira and Pinho, above n 14, at 293.
[145] Gill, above n 13, at 210–221.
[146] Law Commission (UK), above n 9, at [2.2].
[147] OECD "*Ex Post* Evaluation of Regulation" above n 12.

official's committees, interdepartmental processes and the Treasury Regulatory Quality Team. In the legislative design phase, relevant government departments, the Legislation Advisory Committee and the Parliamentary Council Office are all involved in scrutiny. There is an active select committee system as well as Parliamentary debates and the Regulation Review Committee are involved in pre-legislative scrutiny.[148] While there is no generic process for policy and legislative design, consultation with stakeholders, preparation of a Regulatory Impact Statement and various *ex ante* processes such as Regulatory Review Plans and Annual Portfolio Regulatory Plans, all take place in the pre-legislative scrutiny sphere.[149]

One way of linking the two processes is to utilise some of these pre-legislative processes in the post-legislative scrutiny stage. Regulatory impact statements (RIS) are an important tool in setting out the intended outcomes of regulations,[150] and could be used as a framework for undertaking post-legislative scrutiny. Legislation could be tested against the outcomes identified in the RIS to see whether those outcomes are being met, or whether there are any unintended consequences that have arisen since implementation which were not set out in the RIS. By providing a framework to test the legislation against, post-legislative scrutiny is not being carried out with no idea of how to determine if the legislation is successful or not. A successful legislative initiative would be identified as one that is meeting its intended outcomes as outlined in the RIS, and an unsuccessful legislative initiative will be one which is not meeting its intended outcomes.

It is important for a complete feedback loop to be maintained that not only does *ex ante* evaluation inform *ex post* evaluation but that *ex post* evaluation also informs *ex ante* evaluation. Departments are directly involved in the production of policy and the legislation that may come out of that policy, and need to be informed by post-legislative scrutiny when producing legislation. Evaluation of existing legislation can be the starting block for the regulatory impact statements of new legislation, and can inform the way legislation is created. However there is no point in strengthening post-

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[148] Gill, above n 13, at 181.
[149] Gill and Frankel, above n 1, at 2.1.2.
[150] Productivity Commission, above n 2, at 379.

legislative scrutiny processes if that information cannot then be used to inform. Key decision makers need to also have sufficient training to be able to use any information that may be produced from post-legislative scrutiny in the regulatory impact statement of new legislation.[151] Gradually implementing an integrated system of regulatory management which encourages regulatory impact assessment in the *ex ante* phase of scrutiny but also regulatory impact evaluation in the *ex post* phase of scrutiny is essential to ensuring better quality of legislation. Ensuring that the two phases are linked, and where evaluation is not mandatory that there is adequate guidance and training on how to undertake and interpret that evaluation, will allow post-legislative scrutiny to improve.

C An Integrated Approach

An integrated approach to regulatory management is going to be essential in ensuring that satisfactory review takes place. Encouraging and strengthening the work done by departments does not mean other review bodies should be forgotten about. The work that is done by ad hoc or specialist review bodies such as the Law Commission and Royal Commissions of Inquiry, still plays an important part in regulatory management. Strengthening the utilisation of these outside bodies alongside strengthening the stewardship role, would be one of the most effective ways of ensuring quality post-legislative scrutiny takes place.

Some review bodies are just better equipped to undertake certain types of review and so the use of these review bodies, in particular identification by departments that it is appropriate for another review body to undertake review, is essential. Guidance could be given not only as to when mandatory review should be provided for, but who that review should be done by and how policy makers should decide which is the best review body to undertake that review. While this is already taking place, for example legislation can explicitly provide for mandatory review to be undertaken by the Law Commission,[152] better guidance on when and how this should be provided for would

[151] Gill and Frankel, above n 1, at 2.4.3.
[152] See Evidence Act 2006.

strengthen and encourage the more consistent use of these review bodies. Satisfactory review is not going to come about if all efforts are focused on one type of review. New Zealand's system is "a plethora of ad hoc mechanisms",[153] and so the best approach is an approach that understands the interplay between these different mechanisms and encourages the identification of when one mechanism may be better placed to undertake review than another.

The second part of an integrated approach is not only ensuring that all forms of post-legislative scrutiny work collaboratively but also ensuring that the work which is undertaken by departments, as key drivers of post-legislative scrutiny, is satisfactory. If departments are not exercising their obligations properly, then all the other steps that should be taken in an integrated approach will not work effectively. The Government has to take a leadership role in regulatory management and advocate for better post-legislative scrutiny processes by ensuring there is a way to check whether or not departments are exercising their role in regulatory stewardship.[154] It was recommended by the Productivity Commission that every three years a review should be commissioned of each department's progress and advice should be sought on whether it is necessary to create new legislative mechanisms for managing the stock of regulation.[155]

This does not mean engaging an independent reviewer to review every single substantive review that is undertaken by each Department, because it has already been identified that this sort of review is unnecessary. Instead there just needs to be some way of ensuring that departments are exercising their stewardship role and actively evaluating the regulatory management systems they are responsible for. The stewardship obligation needs to be strengthened by better guidance but the support and guidance for the responsibility cannot just end after that guidance is given. The obligation must be consistently monitored to see if more needs to be done to ensure better post-legislative scrutiny takes place in New Zealand. It will never be known if

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[153] Gill and Frankel, above n 1, at 2.2.2.
[154] Gill and Frankel, above n 1, at 2.4.3.
[155] Productivity Commission, above n 2, at 14.01.

the regulatory stewardship role is encouraging the best review possible to take place or if more guidance is necessary, until that process is tested and continually tested.[156]

VI Conclusion

Legislation requires special attention because it has special features that set it apart from other forms of policy intervention. It is uncertain and can impose restraints on society, so active evaluation and review is required to not only mitigate these concerns but also to ensure that regulatory management becomes a process of constant learning and experimentation. Much of the focus of regulatory management in New Zealand, and around the world, has been on how *ex ante* processes can improve legislation. However a whole of systems approach to regulatory management would not just focus on these *ex ante* processes but would view evaluation as a fundamental part of the feedback loop which can be utilised to enhance the quality of legislation in general.

Once legislation is introduced, it needs to be managed and evaluated, however incentives to manage and evaluate are weak in New Zealand because the mechanisms for monitoring and reviewing legislation are limited in comparison to other jurisdictions. With limited incentives and few resources to undertake evaluation, the ability to provide effective feedback to policy makers is poor and the maintenance of the regulatory stock to ensure it remains fit for purpose and effective is even worse. New Zealand is lacking in its systematic end to end learning and integration of evaluation because of the separation of policy from the ability to monitor, evaluate and review legislative outcomes, and the lack of guidance on how to actually undertake post-legislative scrutiny.

[156] Productivity Commission, above n 2, at 14.02.

While there have been improvements in regulatory management with the issuance of the Government Expectations for Good Regulatory Practices and legislating of the responsibility for regulatory stewardship, more can be done to improve regulatory effectiveness. Departments need to build cultures of evaluation and monitoring so that post-legislative scrutiny becomes ingrained in the regulatory management cycle. There needs to be more guidance on different ways to undertake review and there needs to be greater leadership on the issue of post-legislative scrutiny.[157] Poor legislative quality is a drain on New Zealand's economy and society, and waiting for regulatory failure is not good enough when issues can be identified well before this stage is reached through effective post-legislative scrutiny.[158]

While something needs to be done to improve regulatory management, implementing a formal and systematic process which engages an independent agency and reviews all legislation in the same way and after the same amount of time, is not the way forward. A formal system is not going to deal with the fundamental issues with New Zealand's system which include a lack of guidance on the stewardship obligation, a lack of guidance on when to provide mandatory review and the fact that unsatisfactory review is taking place. New Zealand needs to link the *ex ante* and *ex post* phases of scrutiny and introducing a formal system is going to frustrate this by creating a larger gap between the two phases and involving an unnecessary step in the policy cycle. New Zealand also just does not have the resources or capacity to involve a new agency, or employ Parliamentary bodies, such as select committees, to undertake evaluation. It would be too costly to include an independent body in comparison to the cost of just strengthening the current post-legislative scrutiny mechanisms.

Departments need to be given better guidance on how to undertake review and the *ex ante* and *ex post* processes must be linked to encourage better legislative review takes place. The use of different review mechanisms needs to be encouraged so that New Zealand's approach to post-legislative scrutiny continues to reflect that different types of legislation may require different types of evaluation that needs to be undertaken by a specialist body who is better placed to undertake those different types of review.

[157] Gill and Frankel, above n 1, at 2.5.
[158] Bailey and Kavanagh, above n 4, at 16.

New Zealand has to improve the way post-legislative scrutiny is undertaken and an integrated approach to regulatory management which not only sees the strengthening of the regulatory stewardship role but provides the ability to test whether that responsibility is being exercised properly, is going to be necessary in order to ensure better post-legislative scrutiny takes place and the quality of legislation as a whole improves.

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