

New Zealand Law Society

SUBMISSION ON ELECTORAL (ADMINISTRATION) AMENDMENT BILL

Summary

1. The Society wishes to submit on only one point in relation to this Bill.
2. It believes that the Electoral Commission should be an Officer of Parliament, not an Independent Crown Entity.
3. This is based on constitutional principle; it is not an expression of lack of confidence in any holder of the office of Minister of Justice or officials of the Ministry of Justice or any other department or agency.

Submission

4. The Society has no issue with the responsibility for electoral administration being consolidated in one entity, rather than being a troika as at present.
5. The Society does have an issue with the status of the Electoral Commission. It believes that the entity should be an Officer of Parliament, not an Independent Crown Entity.
6. The case made against the Officer of Parliament model in the Regulatory Impact Statement attached to the Bill is not convincing (Explanatory Note p12). It states (in italics, with our commentary following):

“The Officer of Parliament model provides a high level of independence through institutional separation from the Executive branch of government.

Agree.

“However, the Officer of Parliament’s lack of a responsible Minister would mean that it would have reduced accountability for the delivery of electoral services and the expenditure of tens of millions of taxpayers’ dollars every election cycle.”

It is not clear why this should be so. The Officer of Parliament would be accountable to Parliament, whose select committees conduct many financial reviews of expenditure. The accountability to a Minister, necessarily a successful candidate at the election for which the Commission was responsible, is not self-evidently

appropriate. The Auditor-General and the Ombudsmen are not regarded as unaccountable.

“A new Officer of Parliament could be not implemented in time to manage the 2011 general election due to the additional policy processes and the legislative drafting required.”

If that is so, then it can be only because policy resources are being directed in other ways. It is not credible that “additional policy processes” are such that the nature of the entity could not be changed. It seems to the Society that this is no more than a statement that the Government would prefer to put its policy effort into other matters.

If the Parliamentary Counsel Office really cannot cope with the legislative drafting required, then the Society will make experienced drafters available to assist.

The proposal also does not meet the existing criteria for establishing an Office of Parliament in New Zealand determined by Parliament’s Finance and Expenditure Committee in 1989.”

Those criteria are then given in a footnote:

“The Finance and Expenditure Committee stipulated that an Office of Parliament must only be created to provide a check on the arbitrary use of power by the Executive;”

Agreed. It is difficult to think of a more fundamental matter where a check on arbitrary use of power by the Executive is crucial than the conduct of Parliamentary elections.¹

“An Office of Parliament must only be created to discharge functions that the House of Representatives itself, if it so wished, might carry out;

That is applicable here; the House could appropriately organise elections of its members if it wanted. To the extent that the Executive and the Crown are aligned in 21st century practice, then surely any Parliament with a sense of history would not allow the Monarch to organise the election of Parliament’s members? Parliament already determines the key matters such as who may or may not vote. Parliament typically holds a Justice and Electoral Committee inquiry after each election, and that is consistent with the Electoral Commissioner being an Officer of Parliament.

¹ Whether any of the current Officers of Parliament fit that test might well be debated. Probably only the Office of Ombudsmen clearly passes that test. The Auditor-General must be independent, but not quite for that reason. It would be hard to argue that the Parliamentary Commissioner for the Environment exists to provide a check on the arbitrary use of power by the Executive, though its independence is no doubt valuable.

“... Parliament should consider creating an office of Parliament only rarely;”

The Society agrees, but considers it is appropriate here.

“... Parliament should review from time to time the appropriateness of each Office of Parliament’s status as such; and each Office of Parliament should be created in separate legislation principally devoted to that Office.”

The Society agrees, but those are not issues here.

7. Electoral Commission members cannot be candidates. The justification given in the Explanatory Note at p3 is:

“This is to manage a situation that could significantly undermine public confidence in the electoral system, whereby a person administering an election also takes part in it.”

8. This reasoning is sound. The Minister of Justice of the day (assuming he or she is standing again for election) is taking part in the election, and should not be materially involved in administering it.

Speaker preferred

9. Unlike the English system, the Speaker in New Zealand does not resign his or her seat on appointment, and a current Speaker might be a candidate in an election. However, it is rare for a Speaker, on re-election to a Government, to hold any office other than Speaker. While technically possible, it may never have happened.
10. The Speaker already has roles recognised explicitly in the Electoral Act around the death or disability of a member, vacancies generally and reports on corrupt practices, etc.

Independence should be demonstrable

11. The suggestion that the Electoral Commission be an Independent Crown Entity, not just a Crown Entity is an ineffectual acknowledgement that independence is required.
12. A Crown Entity, even an Independent Crown Entity is subject to Ministerial control, and accountable to a Minister. The Society believes the control and accountability should be by and to the Speaker; and through the Speaker to the House itself.
13. Elections are primarily a matter for the people, the candidates, and the Parliament, not the Executive.

14. The Speaker may traditionally have been a buffer between Parliament and the Monarch; but the modern role must surely be to provide confidence in Parliament's ability to monitor the Executive and run Parliament's own affairs. That is the only credible umbrella for the current Officers of Parliament; and the Electoral Commission should join them.

Statutorily Independent Functions

Clause 7 Independence

15. The Society acknowledges that the proposed new s7 makes it clear that the Commission's functions are statutorily independent.
16. In turn, this prevents the Minister giving directions in relation to those functions; s113 of the Crown Entities Act.
17. However, the Minister could add functions under s112 of that Act, and independence would not apply. Although s105 would prevent directions being given to the Commission, as an Independent Crown Entity, in respect of government policy, there could be:
- (a) directions, that fall short of being in respect of government policy, in respect of added functions; or
 - (b) worse, communications that are "expectations" falling short of being "directions" (see below) even in respect of statutorily independent functions.
18. More important, one of the functions of the Commission is to consider and report to the Minister on electoral matters referred by the Minister (proposed new s5(d)). The wording of that provision may be ambiguous, but the Society believes that even if a matter is referred by the Minister as a matter of convenience, the report should be to the House.
19. It would also be desirable that further functions be added only by an Act of Parliament not under it (i.e. s112 of the Crown Entities Act should not apply).

Independence of Independent Crown Entities?

20. It is interesting to note how the Executive regards Independent Crown Entities.
21. In a letter to Board chairpersons dated 17 December 2004 (Appendix 4, A Guide to Ministers) under the heading "What the Government expects of Crown entities" it is stated:
- "A "no surprises" approach is part of operating in the State sector and being part of government in the broadest sense of delivering services to New Zealanders. We expect you to*

advise Ministers in advance of issues likely to impinge on the Government's responsibilities or likely to attract political comment. (our emphasis).

"A "no surprises" way of working is not intended to interfere with entities' statutorily independent functions, nor with boards' operational responsibilities. If you are concerned this might affect your operations, you should discuss this with your responsible Minister."

22. Two points need to be made:
 - 21.1 there is no reason to alert the Minister ahead of Parliament, of electoral administration issues likely to attract political comment; and
 - 21.2 any "discussions" should be with the Speaker or the Officers of Parliament Committee, or perhaps the Justice and Electoral Committee, not the Minister of the day.
23. It follows from this that the Society believes that the report under proposed new s8(1) should be to the House, via the Speaker; not to the Minister, thence to the House.
24. Section 8(3) requiring publication by the Electoral Commission even if the Minister has not been able to table the report because the House is not sitting is to be applauded; but the report should go to the Speaker not the Minister.
25. It follows from the Society's submission on principle, that the appointment process for Electoral Commissioners should be the same as for Ombudsmen; ie, on the recommendation of the House, not on the recommendation of the Minister of Justice..
26. The State Services Commission publication "*Crown Entities: A guide for Ministers*" notes that Ministers have "*a right and responsibility to be engaged in conversations with Crown entities about the direction the Government wishes pursued*".
27. The authority for this is stated to be ss27 and 28 of the Crown Entities Act.
28. Section 28 is about appointments. Section 27 would give the Minister the statutory role "*to oversee and manage the Crown's interest in, and relationship with*" the Electoral Commission.
29. It is hard to see what the Crown's legitimate interest is in the conduct of elections. The public is hardly likely to see the Crown (embodied for practical purposes in the Executive) as the

protector of the public interest. Surely it is Parliament that protects the interest of the public against inappropriate actions of the Crown (historically) and the Executive (currently).

30. After discussing formal means of communication there is this statement:
“Less formal mechanisms available to Ministers include, for example, regular meetings with the board chair, and the senior management acting under authorisation from the board.”
31. Similarly, there are statements about Ministerial and departmental involvement in monitoring.
32. Later there is recognition of the importance of statutorily independent functions (which of course cannot be the subject of Ministerial directions), followed immediately by:
“Powers of direction are likely to be used infrequently. Ministers tend to prefer voluntary compliance with expectations, and other tools (including letters of expectation) work well in conveying Ministers’ expectations.”
33. The Society believes the “voluntary compliance” tools, if they must apply at all to the Electoral Commission, should be in the hands of the Speaker and/or the Officers of Parliament Committee or the Justice and Electoral Committee, not the Minister of Justice of the day.

Other instruments can still apply

34. The Guide goes on to address Letters of Expectation, Statements of Intent, Output Agreements and monitoring.
35. The Society acknowledges that the Electoral Commission should act in a financially responsible manner, and that its budget will be substantially greater than other Officers of Parliament.
36. That may drive a requirement for those mechanisms to be in place; but they exist for other Officers of Parliament, and should be negotiated with the Speaker and a select committee (probably with heavy input from the Ministry of Justice and other affected departments) rather than with the Minister of Justice.