



12 September 2011

Human Rights Commission  
PO Box 12411  
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Wellington 6144

**Submission on the Human Rights Commission's discussion paper, *Strengthening Parliamentary Democracy***

1. The New Zealand Law Society (the Law Society) appreciates the opportunity to comment on the Human Rights Commission's Discussion Paper *Strengthening Parliamentary Democracy* (the Discussion Paper).
2. The Law Society responds to the four questions posed by the Commission.

**Q1. Has the Commission overlooked any significant areas relating to strengthening parliamentary democracy that should be included?**

*Fundamentals of the current parliamentary and law making processes*

3. The Discussion Paper only discusses improvements that could be made to current parliamentary and law making processes. It proceeds on the basis that the current fundamental elements of the processes should remain.
4. The Discussion Paper might evoke more rewarding discussion if it also questioned the fundamentals of the current parliamentary and law making processes. It could pose the question: if you were designing a law making process anew (with the key assumptions of MMP, a Westminster system of Ministers being Members of Parliament (MPs), and a unicameral legislature), what would a strong system that upholds rights to participation look like?
5. For example, a fundamental element that could be questioned is the three year term of Parliament. Having a four year term could be one way to reduce the pressure on the legislative process, allowing more time for more careful consideration in law making and more public participation. As against that, a four year term would of course also mean that the Government is not as regularly held to account through the polls. At the 1990 general election 30.7% of those voting supported a four year term (with voter turnout of 85.2%).<sup>1</sup>
6. To be clear, in noting this type of issue the Law Society is not adopting a view one way or the other on the merits. Rather, all the Law Society wishes to do is point out that public discussion might be enhanced by questioning some of the fundamentals of the current structure.
7. Returning to the current structure, there also appears to be a general concern with the current legislative process that the closer a bill is to becoming law, the more the drafting can change

<sup>1</sup> <[www.elections.org.nz/elections/referendum/referendums.html](http://www.elections.org.nz/elections/referendum/referendums.html)>.

without consultation or even peer review by affected parties. The Discussion Paper raises the issue of Supplementary Order Papers (SOPs). Another particular issue is that when select committees recommend amendments to bills, often in response to the concerns of submitters, there is little opportunity for those submitters to comment on whether the amendments achieve the committee's aim, or create any new unforeseen problems. It is pleasing to see that some bills are exposed to two rounds of select committee consultation, such as the controversial Search and Surveillance Bill. However, having two rounds of consultation at select committee could become the norm, where in the second round the select committee releases its proposed amendments to at least seek comment on whether the select committee's proposed amendments:

- (a) actually achieve their aims or resolve the stated problems; or
  - (b) create any new issues or problems.
8. Having two rounds of consultation at select committee may also identify drafting errors earlier, reducing the need for SOPs.
  9. The Discussion Paper raises the issue of parliamentary sitting time and scheduling. There is certainly a view amongst some people that the House seems to waste a lot of time at the committee of the whole House stage of a bill. The function and utility of that stage could be queried and the quality of debate is thought by some to be poor. The function of a committee stage appears to be to examine and debate a bill in detail. That function is much better performed by select committees,<sup>2</sup> which can also deal with bills more carefully. (As the discussion paper points out, select committees could be given more time to perform that role.) In addition, some question whether voting on a bill clause-by-clause or, more commonly, part-by-part so late in the legislative process is sensible. When debate is conducted on a part-by-part basis, it is difficult for the debates to engage with the detail of bills in a useful way, again raising issues as to what the point of the exercise is.
  10. To be clear, the NZLS has not formed a view in favour of those proposals; it simply supports them being included in discussions of New Zealand's parliamentary democracy and in the Discussion Paper.

*Other matters the discussion paper could include*

11. At paragraph 3.2.1 (discussion of urgency), the Discussion Paper could also mention the Parole (Extended Supervision Orders) Amendment Act 2009. It was passed under urgency in a single sitting and without select committee scrutiny when the Attorney-General had tabled a section 7 report outlining inconsistency with the New Zealand Bill of Rights Act 1990 (NZBORA).<sup>3</sup> Most troubling from the Law Society's perspective was that the Attorney-General's report stated that the Bill's policy objectives could be achieved using alternative drafting that would be consistent with the NZBORA. Due to urgency, MPs did not have time to consider the report and possible alternative drafting solutions, and the Bill was passed.
12. On the issue of NZBORA vetting of select committee considerations and SOPs (paragraph 3.2.3), note that a 2003 review of the Standing Orders concluded that:<sup>4</sup>

<sup>2</sup> See also Clerk of the House of Representatives "Review of Standing Orders—Supplementary Submission: Legislative Procedures" (10 May 2011), submission to the Standing Orders Select Committee.

<sup>3</sup> "Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the Parole (Extended Supervision Orders) Amendment Bill" (J.4), tabled in the House on 2 April 2009.

<sup>4</sup> Standing Orders Committee "Review of Standing Orders" [2003] AJHR I 18B at 51.

A requirement for a bill to be re-certified as it progresses through the House may cause delays in the legislative process and would carry a considerable compliance cost in terms of the need for increased legal advice to enable the Attorney-General to identify the Bill of Rights implications of amendments.

That view is disappointing as it implies that the cost of more rigorous vetting and reporting is not outweighed by the potential infringements on rights and freedoms that additional vetting may prevent. The Discussion Paper could also criticise that view.

13. The Discussion Paper could also discuss issues arising from the Electoral (Disqualification of Sentenced Prisoners) Amendment Act 2010, which the Attorney-General found unjustifiably infringed the right of New Zealand citizens to vote.<sup>5</sup> The Bill was sent to the Law and Order Select Committee, when there is a Justice and Electoral Select Committee that is the specialist committee for electoral matters.<sup>6</sup> The Law and Order Committee then received advice from the Department of Corrections,<sup>7</sup> rather than from the Ministry of Justice, which is the specialist policy agency for electoral matters.<sup>8</sup> That occurred despite the human rights issues at stake.
14. The Bill was also progressed as a Member's Bill, which meant that Cabinet did not make decisions on the Bill, such that:
  - (a) discussions on the Bill that occurred in party caucuses did not have to be released under the Official Information Act 1982 (since MPs are not subject to that Act, except in their capacity as Ministers); and
  - (b) the Bill was not required to undergo the scrutiny of a regulatory impact statement.<sup>9</sup>

**Q2. Do you agree with the recommendations at the end of the paper?**

15. The Law Society agrees with the Commission's recommendations.<sup>10</sup>
16. With regard to the first recommendation (period for select committee submissions and scrutiny), the Law Society also supports the Parliamentary Counsel Office's recommendation that the Standing Orders should commend to select committees the best-practice procedure to follow,<sup>11</sup> which could take the form of a schedule to the Standing Orders.
17. With regard to the recommendation for a human rights select committee, there could also be a recommendation that members in charge of bills and/or select committees are required to respond to section 7 reports. One commentator considers that Parliament's engagement with rights issues could be improved if members in charge of bills are required to table responses to section 7 reports, although notes that this could become counter-productive if seen as the

<sup>5</sup> "Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the Electoral (Disqualification of Convicted Prisoners) Amendment Bill" (J.4), tabled in the House on 17 March 2010, at [14]-[15].

<sup>6</sup> Standing Orders of the House of Representatives (2008), SO 184.

<sup>7</sup> Electoral (Disqualification of Sentenced Prisoners) Amendment Bill 2010 (117-2) (select committee report) at 8.

<sup>8</sup> The Labour Party raised concerns of "serious constitutional issues" when the advisors on the "three strikes" sentencing legislation were changed from the Ministry of Justice to the New Zealand Police and the Department of Corrections - see Sentencing and Parole Reform Bill 2009 (17-2) (select committee report) at 12 and 15.

<sup>9</sup> See Treasury *Regulatory Impact Analysis Handbook* (November 2009) <[www.treasury.govt.nz/publications/guidance/regulatory/impactanalysis](http://www.treasury.govt.nz/publications/guidance/regulatory/impactanalysis)>.

<sup>10</sup> For ease of reference, the Commission's recommendations are attached as Appendix 1 to this submission.

<sup>11</sup> Parliamentary Counsel Office "Standing Orders Committee—Review of Standing Orders: Submission from Parliamentary Counsel Office" (7 February 2011), submission to the Standing Orders Select Committee, at 9-11; and first supplementary submission at 5.

last word on the matter.<sup>12</sup> Requiring select committees to respond to NZBORA vets in their reports on bills could prevent this.

**Q3. Are there additional or alternative recommendations that you would propose? If so, what are they?**

18. As discussed in response to question one, the Law Society supports the inclusion, **for the purposes of discussion**, of possible fundamental changes to the parliamentary and law making processes, such as:
- (a) a four year term,
  - (b) two rounds of consultation during select committees, and
  - (c) a critical review of the need for the committee of the whole House stage.
19. However the Law Society has not formed a view on whether those possible changes should be recommended.

**Q4. How could you or your organisation use this discussion paper to progress change?**

20. The Law Society could alert its members (lawyers) to the Discussion Paper to encourage discussion amongst the legal community, by publicising the Discussion Paper in *LawTalk*, the magazine sent to its members.
21. The Discussion Paper could also be useful as part of the current public education and discussion programme being undertaken by the Constitutional Advisory Panel.<sup>13</sup>

The Law Society trusts that these comments are of assistance.

This submission has been prepared by the Law Society's Human Rights and Privacy Committee. If you have any queries regarding this submission, please contact Julie Smith, the Committee Secretary, by telephone (04) 463 2967 or email [julie.smith@lawsociety.org.nz](mailto:julie.smith@lawsociety.org.nz).

Yours sincerely



Jonathan Temm  
**President**

Appendix 1, attached:  
Recommendations of the Human Rights Commission – *Strengthening Parliamentary Democracy*  
Discussion Paper, 2011

<sup>12</sup> Tessa Bromwich “Parliamentary rights-vetting under the NZBORA” [2009] NZLJ 189 at 192.

<sup>13</sup> See <[www.beehive.govt.nz/release/constitutional-advisory-panel-named](http://www.beehive.govt.nz/release/constitutional-advisory-panel-named)>.

**Appendix 1:**  
 Recommendations of the Human Rights Commission – *Strengthening Parliamentary Democracy*  
 Discussion Paper, 2011

The Commission believes that the following reforms would help New Zealand continue to strengthen and support democratic processes. It welcomes discussion and feedback on these points and others.

- A minimum period of 12 weeks allowed for the public to make submissions to Select Committees on legislation of high public interest and significance.
- A review of Parliamentary sitting time that takes account of scheduling, has regard for scope of the legislative programme across the election cycle, and supports the family-friendly responsibilities of Members of Parliament.
- The Standing Orders of Parliament should specifically refer to the fact that no new major legislative provision is to be introduced by Supplementary Order Paper.
- The establishment of a dedicated Human Rights Select Committee.
- The tabling in Parliament and referral to Select Committee of recommendations made by international treaty bodies and New Zealand's reports on its compliance with human rights treaty standards.
- Continued use of innovative forms of e-governance and other approaches to ensure the business of Parliament is effectively notified, that select committee submissions are readily available as soon as possible, and that public participation is enhanced through live-streaming of proceedings and other means.
- Induction and professional development for Select Committee chairs and deputy chairs aimed at strengthening the effectiveness of Select Committees, the dignity of hearings and respect for submitters, and thereby the legitimacy of Parliament.
- An addition to the current Standing Orders relating to Select Committee proceedings to reflect that: *Members of a committee shall treat all submitters and members of the public with courtesy and respect as befits the dignity of Parliament.*
- An amendment to Standing Order 246 to ensure dissenting views of members are included in reports.