

New Zealand Law Society

SUBMISSION ON THE LEGISLATION BILL

Introduction

1. The New Zealand Law Society (Society) welcomes the opportunity to comment on this Bill. While the Society very much supports the goals of the Bill, it wishes to raise some matters of important detail.

Part 1 – General Provisions

2. Clause 4 defines key expressions, including “legislative order”. Within that definition the expressions “Order in Council” and “instrument” occur, but neither of these is defined. One aim of the Bill appears to be to phase out the use of expressions such as “Regulations”, “Rules”, “Proclamations” or “By-laws” in a statutory context. Contrast the definition of “Regulations” in the Regulations (Disallowance) Act 1989, which implies that an Order in Council is somehow different from a Regulation. This tends to suggest that, in using the expressions “Order in Council” and “instrument” in the Bill without defining them, there is a danger of confusion and indeed potential hiatus.
3. The uncertainty becomes more critical under Part 3, where the crucial definition of “disallowable instruments” depends at least in part on the undefined expression “instrument” for the operation of the entire Part 3 scheme. In that regard, note the clause 37 definition of “disallowable instrument”. From this it would seem that all “legislative orders” are “instruments”, but equally there is a category of “instrument”, capable of having “significant legislative effect”, which falls outside the definition of “legislative order”.

Recommendation

4. That the operation of the definition section and the interaction of key terms such as “instrument” and “legislative instrument” be given further consideration to ensure that the Bill is clear.

Part 2 – Publication of Legislation

5. Clauses 6–9 of the Bill deal with publication of legislation in printed and electronic versions. The intention is that both printed and electronic versions of Acts and legislative

orders enacted or made after the commencement of Part 2 will be published. As regards the electronic versions, it appears from clause 6(5) read with clause 9 that the obligation to make available an electronic version of legislation extends only to the current up-to-date version, so that there is no statutory obligation to retain previous versions or indeed possibly even amending Acts or legislative orders on the database.

6. Particularly against the possibility that printed copies may ultimately become a scarce and costly resource, there is an obvious need for the legislative database to continue to store and make accessible (future) superseded versions of legislation and amendment Acts, even if incorporated in the principal Act by updating. Law Commission Report 104 describes the legislative database at some length, including (at paragraphs 2.26 – 2.28) the issue of accessing versions of legislation by date. The Commission notes that the database as currently designed assumes that no material will ever be removed. Thus “[m]aterial that is repealed or revoked will be retained in the database, as will all versions of electronic reprints”. The database “will contain a complete record of the Acts that comprise the statute book, as well as regulations, bills and SOPs, for each point in time from the go live date onward”.
7. All this is obviously needed to enable effective research into legislative history of particular provisions. However, the compiling and maintaining of a historical database as such does not appear to be proposed as a statutory obligation under the Bill as it stands. Consideration needs to be given to broadening the obligation to reflect the apparent common expectation as to the necessary scope of the clause 9 database.

Recommendation

8. That express provision be made for the maintenance of archived copies of enactments at earlier stages, prior to their amendment.

Part 3 – Subordinate Legislation and in Particular “Disallowable Instruments”

9. The scheme and inter-relationship of clauses 37 and 38 is usefully explained at p12 of the Explanatory Note.
10. The question that arises is the overall scope of the new disallowance regime compared to that under the Regulations (Disallowance) Act. The latter Act contains a very broad definition of “Regulations”. For its part, clause 37(1) provides that all “legislative orders”

are “disallowable instruments”, as are (i) instruments made under an enactment that are subject to a provision making them disallowable for the purposes of the Legislation Act, and (ii) “instruments” (which do not otherwise qualify) having “a significant legislative effect” (as defined). The key concept is that of “legislative order”. In various and arguably indeterminable ways, this incompletely defined expression (see above at paragraphs 2 and 3) appears significantly narrower than the governing definition of “Regulations” under the Regulations (Disallowance) Act: refer to the discussion of “legislative order” at p5 of the Explanatory Note.

11. The Society notes that the Explanatory Note does not address the extent and significance of the narrowing of the scope of operation of the proposed new disallowance regime. This change in scope and departure from the current terminology (and definition) of “Regulations” was not envisaged by the Law Commission’s draft Bill forming part of Report 104, so that it would appear to follow that the effect and significance of change effected by the Bill as drafted has not previously been addressed. It is submitted that it needs to be.

Recommendation

12. That consideration be given to the way that the Bill will operate in relation to disallowance; in particular, whether the scope for disallowance is narrowed by the Bill when compared to the position under the Regulations (Disallowance) Act 1989.
13. In other respects, there would appear to be no significant substantive changes made by Part 3 by contrast with the present regime under the Regulations (Disallowance) Act. Clause 42, which contemplates the summary disallowance of an instrument if a motion to disallow it has not been disposed of within the time and in the manner provided, continues the current limitation on its scope of operation contained in s6 of the Regulations (Disallowance) Act. That is, the notice of motion to disallow must be one moved by a member of the Committee of the House of Representatives responsible for the review of disallowable instruments. As with the present Act, the Bill contemplates but does not require that such a Committee exist. If there is to be a requirement that the triggering notice of motion has been moved by a member of the Committee, it may be prudent for the Bill also to provide for the Committee’s continued existence.

Recommendation

14. That consideration is given to requiring the existence of a Committee of the House for review of disallowable instruments.

Part 4 – Parliamentary Counsel Office

15. Clause 58(6) of the Bill provides that “confidential communications” (non-exhaustively defined in clause 58(7) as communications between a “client” of the Parliamentary Counsel Office (PCO) and the Chief Parliamentary Counsel or other counsel in the PCO) are subject to legal professional privilege. The provision does not limit Standing Orders of the House. The Explanatory Note at p18 notes that this provision is based on a Queensland statute. It does not appear to spring from any Law Commission recommendation. It is noted that the Bill declines to include among the functions of the PCO that of “providing free and frank advice”, as recommended by the Law Commission: Explanatory Note p4.
16. It is difficult to see why clause 58(6) is either necessary or appropriate. The expression “a client of the PCO” is not defined. Given the new statutory independence of the PCO – albeit under the Attorney-General’s control (clause 57), the functions of the PCO (clause 58(1)) and the role of Chief Parliamentary Counsel as responsible only to the Attorney-General in respect of all but his or her role as employer (clause 63) – it is arguably wrong to characterise the PCO as acting for “clients” in relation to its functions. Contrast the PCO functions under clause 58(1)(a), (g), (h) and (i). In turn, it is also going to be difficult to identify the “client” in question, in any given case.
17. More fundamentally, it is submitted that the PCO when drafting, examining and advising concerning legislative instruments, is acting as a state agency with special functions, and thus acts effectively for the public of New Zealand and not for any sectional interest. That is so even if the Bill in question is not a Government Bill, but instead an approved Member’s Bill or a local or private Bill. Now that Cabinet papers, which often contain initial drafting instructions for legislation, are available upon request and routinely disclosed, there seems no reason why drafting instructions and communications with “any client of the PCO” or “drafts of legislation prepared by or on behalf of the PCO” (clause 58(7)) should be treated as confidential, far less privileged. They plainly form part of the legislative history. Furthermore, there does not seem to be any compelling reason for throwing a cloak of privilege over this class of documents.

18. Two further points in this regard are noted. First, the PCO will be subject to the Official Information Act, so that requests for access to information which it holds will be subject to the prohibitions and restrictions on disclosure of information for which that Act makes provision. No case for added protection of information held by the PCO going beyond this has been made out or indeed would appear to exist. Secondly, where the Chief Parliamentary Counsel or other PCO counsel provide advice to Committees of the House of Representatives, that advice can be given and received under confidentiality where appropriate, pursuant to Standing Orders. Taken together, these plainly represent a sufficient safeguard without the need for the enactment of clause 58(6).

Recommendations

19. That the provisions regarding privilege (clauses 58(6) and (7)) be deleted.
20. The Bill provides, in clause 63(3)(a), that the Chief Parliamentary Counsel must hold a legal qualification from any common law jurisdiction. It is submitted that this provision – written presumably to safeguard the incumbent’s position – is expressed too widely. It ought to require that the Chief Parliamentary Counsel be eligible for admission to the New Zealand bar (that is, even if possessing legal qualifications from another jurisdiction, have satisfied any requirements for local admission prescribed by the Council of Legal Education).
21. In saying this it is recognised that the current incumbent’s position must certainly be protected and no objection would be taken to that. The issue is simply what the general position ought to be. The Society considers that the Chief Parliamentary Counsel ought to be admitted (or at least eligible to be admitted) as a Barrister and Solicitor of the High Court of New Zealand. Such a requirement would reflect long-standing practice, and be consistent with the spirit of the Lawyers and Conveyancers Act 2006.
22. It is understood that in comparable Australian jurisdictions, the stipulation is that the person appointed to an equivalent position must be eligible to practice in Australia or, as the case may be, the state concerned.

Recommendation

23. That it be provided that the qualifications for the Chief Parliamentary Counsel include being eligible for admission as a barrister and solicitor of the High Court of New Zealand (with suitable provision being made for the protection of the incumbent in the position).

Conclusion

23. The Society does not wish to appear in support of this submission. However, the Society is willing to meet with the Committee or officials advising it if the Committee considers that would be of assistance.

A handwritten signature in black ink that reads "Mary Jeffcoat". The signature is written in a cursive, slightly slanted style.

Mary Jeffcoat
Vice President
27.9.10