



NEW ZEALAND
LAW SOCIETY

NZLS EST 1869

Referendums Framework Bill

16/09/2019

Submission on the Referendums Framework Bill

Introduction

1. The New Zealand Law Society (Law Society) welcomes the opportunity to comment on the Referendums Framework Bill (Bill).
2. Referenda have been used in New Zealand for over a century to gauge public opinion on significant electoral and social issues. While a referendum is an exercise in direct democracy rather than representative democracy through Parliament, it is still a significant feature in New Zealand's constitutional landscape in providing a voice for the people. In New Zealand, referenda have always been held under the authority of legislation, whether a standalone enactment, part of a regular legislative process,¹ or resulting from the Citizens Initiated Referenda Act 1993 process.

Direct and representative democracy considerations

3. This Bill provides a framework for the rules to govern any referenda held alongside the 2020 general election. The Government has announced its intention to hold a referendum on legalising the recreational use of cannabis at the 2020 election. At the time the Bill was introduced, there was also a possibility of an additional referendum on the End of Life Choice Bill being held at this time. Whether or not a referendum will be held for that matter will depend on the passage and any amendments made to the End of Life Choice Bill over the next few months. The referenda covered by the Bill will be conducted using the operational infrastructure that is already in place to govern the conduct of a general election.
4. The Law Society recognises that providing a general framework which could cover a number of possible referenda at the 2020 general election has certain advantages in providing a single set of rules and utilising current electoral systems and resources. Our concern relates to how a referendum is to be included in that framework.
5. Under clause 8 a referendum may be conducted under this Bill only if it is:
 - declared by an Order in Council to be a referendum for the purposes of the Bill; or
 - declared by another enactment to be a referendum for the purposes of the Bill.

The declaration must specify:

- the wording of the question or each question to be put to electors and the wording of the options for which electors may vote in response to the question; or
 - the proposal or issue that is to be put to the electors in the referendum and the wording of the options for which the electors may vote in response.
6. The effect of legislating for an overarching framework for defining the rules applying to the referenda at the 2020 election is that the actual wording of the referenda will be determined elsewhere and at a later time, by Order in Council. We recognise that there will still be a legislative mechanism in place through secondary legislation but raise the issue whether an important element of public engagement and representative democracy has been lost in this process.

¹ Such as provided for under the Local Electoral Act 2001, s.9.

7. Where primary legislation is used to specify the proposed wording of the referendum, the full legislative process applies, including the opportunity for the public to make submissions to a select committee and in-depth scrutiny, debate and possibly amendment by Parliament itself. With the citizens-initiated referenda process, the Clerk of the House scrutinises and determines the final wording of the question after a public consultation process.
8. By contrast, secondary legislation is made under delegated authority by the Executive and does not go through the same scrutiny prior to coming into effect. There is currently no opportunity for public engagement at the stage of determining the wording of the referendum. For a direct democracy process, early engagement with electors is significant, given that the underlying purpose of a referendum is that direct connection. How a referendum is worded may affect possible interest and turnout.
9. While the Order in Council may be subject to Parliamentary scrutiny through the Regulations Review Committee, this happens after the event and only on specified grounds (such as not being in accordance with the general objects and intentions of the empowering Act or trespassing unduly on personal rights and liberties). These grounds may be difficult to apply to the technical issue of how a referendum question is worded.
10. The Law Society suggests that one possible solution is that the wording of the known referenda to be held alongside the 2020 general election could be included in the Bill at this stage. It is also possible that by the time this Bill progresses, the End of Life Choice Bill will have also progressed to a point that it will be known whether a referendum will be required for that Bill. If that is the case, there would be little reason not to include the wording of the known referenda in the Bill.
11. A second option is to retain the Order in Council process but to provide for a process for public notification of the proposed wording and to allow the public to make submissions on the wording, similar to the process in the Citizens Initiated Referenda Act 1993, section 7. The Law Society considers that providing an opportunity for the public to have input into the proposed wording of a referendum would be consistent with its purpose as an expression of direct democracy.
12. A third option would be to provide in the Bill a requirement (before clause 8) that the Minister refer a draft Order in Council to the Regulations Review Committee under SO 318(2) for the Committee's consideration and comment to the Minister and that the Minister is required to have regard to the Committee's comments in finalising the Order. It would then be open to the Committee to conduct a public consultation process.
13. The Law Society does not seek to be heard but is available to discuss the options suggested in paragraphs 10 – 12, if that would be helpful to the Justice Select Committee.



Tiana Epati
President

16 September 2019