

25 November 2016

Standing Orders Committee
Parliament Buildings
Wellington

Re: Review of the Standing Orders

1 Introduction

- 1.1 The New Zealand Law Society welcomes the opportunity to submit on the current review of the Standing Orders. The Standing Orders of the House of Representatives are the rules that govern the legislative process and the current review notes that “conducting regular reviews of House procedures and rules is essential to keeping Parliament relevant”.
- 1.2 The Law Society is the statutory body established in 1869 that regulates New Zealand's 12,000 lawyers. One of its statutory functions is to *“assist and promote, for the purpose of upholding the rule of law and facilitating the administration of justice in New Zealand, the reform of the law”*.¹ The Law Society's submission on the review of the Standing Orders is based on its considerable experience in dealing with legislation.²
- 1.3 The Law Society carries out this work pro bono in the public interest. It seldom takes a position on the policy contained in a Bill but makes submissions on legislative design and points of legal concern. It seeks to assist in the production of quality legislation that will advance the rule of law, observe constitutional principle and conform with established legislative standards.

2 Improvements in the legislative process

- 2.1 The Law Society supports measures that have been adopted in recent times to improve the quality of legislation. These include:
 - The establishment of the Legislative Design and Advisory Committee to advise on the design of Bills before they are finalised and to present submissions on Bills at select committee.
 - The recent amendments to the State Sector Act 1988 that promote the responsibility of chief executives to attend to the effective stewardship of “the legislation administered by the department or departmental agency”.
 - The programme promoted by the Office of the Clerk to enhance legislative scrutiny by select committees and to provide guidance and advice to the committees on improving legislative content.

¹ Lawyers and Conveyancers Act 2006, section 65(e).

² In 2015 the Law Society made 20 submissions to select committees and appeared in support on 7 occasions. In 2016 the figures thus far are 30 and 9 respectively.

- The Access to Subordinate Legislation Project within the Parliamentary Counsel Office that aims to improve access to legislation by publishing all subordinate instruments on the New Zealand legislation website.³
- The Revision Bill programme conducted under the Legislation Act 2012 that will over time assist the revision and consolidation of statutes.

2.2 Despite these welcome developments, the Law Society considers that changes to the Standing Orders are needed to enhance the quality of legislation. New Zealand has a tendency to pass too much legislation and often too hurriedly.⁴ Unlike most democratic legislatures, the New Zealand Parliament has only one House, and it seems that this has altered the speed with which legislation is progressed. The Standing Orders cannot deal with the problems of the legislative process that arise within the Executive Branch but they can improve the quality of parliamentary scrutiny of Government Bills.

3 The Legislative Programme

- 3.1 Legislative proposals are prepared within the Executive Branch under conditions of secrecy for the most part and often introduced into Parliament with little or no warning. The Government's legislative programme is covered by the Official Information Act 1982, although requests for official information can be declined on the criteria set out in the Act. The Law Society believes that it would be a more effective open-government approach to proposed legislation for the Government proactively to make its legislative programme publicly available. This would provide the public with at least some warning of impending legislation. Requiring Governments to publicise their legislative programmes would not prevent them from later altering their legislative priorities in order to accommodate changes in policy or respond to current events.
- 3.2 The practice of circulating exposure drafts of Bills before their introduction is another mechanism that is likely to engage the public and enhance the quality of legislation. The Law Society recommends that the Standing Orders ought to encourage this practice in order to promote from the outset public input into the architecture and content of Bills.

Recommendation:

That the Standing Orders ought to encourage the Government to table its legislative programme in the House of Representatives at the beginning of each session of Parliament.

Recommendation:

That the Standing Orders ought to encourage the circulating of exposure drafts of Bills in order to promote public input at an early stage into the architecture and content of Bills.

³ There are more than 100 agencies in New Zealand empowered to make subordinate instruments, which makes this a project of high importance to ensure subordinate legislation is accessible in accordance with the requirements of the rule of law.

⁴ As the Attorney-General, Hon Christopher Finlayson, observed at a recent conference ("Advancing Better Government Through Legislative Stewardship", Parliament Buildings, 27-28 October 2016), we are "chronic micro-legislators." The statute book is enormous, comprising more than 65,000 pages of law. When all the statutory instruments and other species of tertiary legislation are added, the quantity of law is so great that it places undue strain on the principle of the rule of law.

4 Urgency

- 4.1 The Law Society submits that changes need to be made to the urgency provisions of the Standing Orders. Nothing damages the quality of legislation more than passing it too quickly under urgency, without sufficient consideration or select committee scrutiny.⁵
- 4.2 There are numerous examples of this. In 2013, for example, Parliament enacted the New Zealand Public Health and Disability Amendment Act in a single sitting day.
- 4.3 Its principal effects were, first, to prevent anyone from making a complaint to the Human Rights Commission or bringing judicial proceedings against any government family carer policy no matter how discriminatory, and secondly, to exclude retrospectively the provision of remedies under the Human Rights Act 1993 for past discrimination. The legislation reversed the effects of a decision of the Human Rights Review Tribunal, which the High Court and the Court of Appeal upheld on appeal.⁶ The decision had upheld the human rights of some of the most vulnerable members of our community – the disabled and family members who cared for them. There was no warning that the Bill was to be introduced; there was no public consultation on it; there was no select committee consideration of it.
- 4.4 In this case, the Law Society believed the situation so serious that it wrote to the Attorney-General to express its objections. The Law Society informed the Attorney that:⁷
- “It is ... a cause of considerable concern to the Law Society that this Bill proceeded through Parliament in a single sitting day, under urgency, without the benefit of select committee scrutiny, public submission or informed debate. ...”
- 4.5 A more recent example is the Returning Offenders (Management and Information) Bill, which was introduced and passed through all stages on 17 – 18 November 2015. The Law Society wrote to the Minister of Justice, saying:⁸
- “The absence of public consultation when urgency is accorded is generally undesirable, particularly where provisions directly affect significant constitutional matters and individuals’ rights. The New Zealand Law Society agrees with the Attorney-General that the Bill is inconsistent with the right to be secure against unreasonable search and seizure, for the reasons identified in the Attorney’s report under section 7 of the New Zealand Bill of Rights Act 1990. Other rights, including the right to the observance of the principles of natural justice, and rights of freedom of association and movement, may also be affected. ...”
- 4.6 The Law Society submits that the House should sit for longer hours each year in order to alleviate the pressures on the Government’s legislative programme and reduce the need to use urgency. Despite the valuable addition of extended sitting hours introduced in 2011, the House should sit for longer if it is to process the amounts of legislation that have become customary in recent years. The House sits for relatively few hours (only about 400 sitting hours per year). The Ireland, Denmark and Israel legislatures sit for up to 700 hours, and the United Kingdom House of Commons sits for more 1,100

⁵ Sascha Mueller “The Busy House: Alternatives to the Urgency Motion” (2011) 9 NZJPIL167; see also Sasha Mueller “Where’s the Fire? The Use and Abuse of Urgency within the Legislative Process” (2011) 17 Canterbury L Rev 316; Geoffrey Palmer “Law-Making in New Zealand: Is there a Better Way?” [The Harkness Henry Lecture] (2014) 22 Wai L Rev 1.

⁶ *Atkinson v Ministry of Health* (2010) 8 HRNZ 902 (HRRT); *Ministry of Health v Atkinson* 92010) 9 HRNZ 47 (HC); *Ministry of Health v Atkinson* [2012] NZCA 184, [2012] 3 NZLR 456.

⁷ NZLS letter 28.5.13.

⁸ NZLS letter 26.1.16.

hours. The House sits on average only one day in five; the Annual Report of the Office of the Clerk for the year ended 30 June 2012 shows that over the period from 2007 to 2012, the House sat on average 75 days a year.⁹ The Law Society considers that much of the pressure of time on the House could be alleviated by having members available to sit on a minimum of (say) 100 days each year.

Recommendation:

That the Standing Orders ought to require the House of Representatives to sit for longer hours each year to alleviate pressure on the Government's legislative programme, and to avoid the need for the House to call urgency on Bills before it.

5 Time for filing of submissions

- 5.1 The Law Society expresses concern about the length of time select committees allow for the public to file submissions on Bills. Presently, there is no provision in the Standing Orders governing the minimum time allowed, which has sometimes resulted in unrealistic deadlines. Three weeks is not uncommon even for quite complex Bills; in one extreme instance, the public was given four days to file submissions.¹⁰ Other recent examples include the Electoral Amendment Bill (nine working days)¹¹ and the Broadcasting (Election Programmes and Election Advertising) Amendment Bill (ten working days).¹²
- 5.2 Select committee examination of Bills in a unicameral legislature such as New Zealand's "substitutes for the scrutiny functions ordinarily performed by a second parliamentary chamber".¹³ Select committees are therefore "a crucial bastion of democracy in our legislative process."¹⁴ Unrealistic deadlines imposed on the select committee process seriously hinder the public's input into legislation. The Standing Orders ought to prescribe a minimum period of six weeks for the filing of submissions.
- 5.3 However, even a period of six weeks is inadequate for some pieces of legislation. Recent examples include the Land Transfer Bill and Te Ture Whenua Maori Bill, both of which were comprehensive and complex rewrites of existing statutes. The Law Society and other submitters sought and were granted short extensions. Nevertheless, the pressure this puts on submitters can result in less than optimal examination of Bills. The Law Society recommends that select committees should allow a longer period than six weeks for filing submissions where the complexity and demands of the Bill justify it.
- 5.4 The Law Society also notes that the House has sometimes placed select committees under impossible deadlines for examining and reporting back on Bills. The Standing Orders require select committees to present their reports to the House within six months of the Bill being referred to the committee.¹⁵ However, that standing order is made subject to the House or the Business Committee

⁹ House of Representatives, Annual Report of the office of the Clerk of the House of Representatives for the year ended 2012 at 14.

¹⁰ (1989) 503 NZPD 14728-14279 (the Transport Amendment Bill (No 4) 1989). See the discussion in PA Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Thomson Reuters, Wellington, 2014) at [11.7.2(2)].

¹¹ See NZLS submission 27.10.16 at paragraphs 2.1 and 2.3:

¹² http://www.lawsociety.org.nz/_data/assets/pdf_file/0014/106313/Electoral-Amendment-Bill-27-10-16.pdf.

¹³ https://www.parliament.nz/en/pb/bills-and-laws/bills-proposed-laws/document/00DBHOH_BILL71456_1/broadcasting-election-programmes-and-election-advertising

¹⁴ PA Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Thomson Reuters, Wellington, 2014) at [11.6.2(7)].

¹⁵ JF Burrows and PA Joseph "Parliamentary law making" [1990] NZLJ 306 at 307.

¹⁵ SO 295(1).

imposing a different reporting-back period where circumstances warrant. The original intent was to allow longer time for reporting back where the complexity of the Bill warranted it. However, in around 30 per cent of cases, the House abridges rather than extends the normal reporting-back period, which often leaves committees insufficient time to examine submissions and recommend amendments.¹⁶ On rare occasions, select committees have had less than one week to examine and report back on Bills. This is clearly unsatisfactory. The Committee is urged to consider an amendment to the Standing Orders to ensure any abridgement of the reporting-back period allows sufficient time for select committee consideration of Bills.

Recommendation:

That the Standing Orders ought to prescribe a minimum period of six weeks for the filing of public submissions on Bills from the time that select committees call for submissions.

Recommendation:

That the Standing Orders ought to provide that select committees should allow a longer period than six weeks for the filing of submissions where the complexity and demands of Bills justify a longer period.

Recommendation:

That the Standing Orders be amended to ensure any abridgement of the reporting-back period allows sufficient time for select committee consideration of Bills.

6 Supplementary Order Papers

- 6.1 The Law Society submits that steps should be taken to curb the tabling of substantive SOPs at the Committee of the Whole stage. As outlined below, there are constitutional objections to expansive amendments to Bills at this late stage of a Bill's passage.
- 6.2 SOPs propose amendments to bills after their introduction into Parliament and are not routinely subject to Bill of Rights reporting. In the Law Society's view this is problematic. Where proposed amendments engage domestic and international human rights obligations, the usual reporting mechanism ought to apply.
- 6.3 There have been several recent examples where a lack of scrutiny of late substantive amendments to Bills raised significant concerns. These include:
 - 6.3.1 Provisions relating to classified security information added to the Health and Safety Reform Bill without public notification or consultation (Schedule 2A was included in the Bill as reported back by select committee on 24 July 2015).¹⁷ The Law Society wrote to the Minister of Workplace Relations and Safety, saying the provisions encroach on very significant constitutional rights and should not have been inserted at a late stage in the legislative process.¹⁸
 - 6.3.2 A provision authorising under delegated legislation significant transitional powers to suspend, amend or override the Tax Administration Act 1994. This provision was introduced

¹⁶ House of Representatives *Annual Report of the Office of the Clerk of the House of Representatives for the year ended 30 June 2012* (2012) at 14: "Almost 30 percent of the bills referred to committees had shortened time frames for reporting to the House, placing pressure on committee consideration."

¹⁷ <http://www.legislation.govt.nz/bill/government/2014/0192/16.0/DLM5976660.html>

¹⁸ <https://www.lawsociety.org.nz/news-and-communications/news/late-addition-of-national-security-provisions-concerns-law-society>. See also <http://www.lawsociety.org.nz/news-and-communications/news/law-society-releases-letter-on-h-and-s-amendments2>

in an SOP to a tax omnibus Bill¹⁹ after the Bill's first reading. The Law Society expressed its substantive concerns about the proposal to the Finance and Expenditure select committee, and noted that there had not been adequate opportunity for the public to consider and comment on these wide-ranging powers:²⁰

“... the consultation relating to introduction of this regulation making power has been inadequate. Treasury officials criticised the ‘... inadequate level of consultation for a proposal that would create such a wide-ranging power to amend or override an Act’. A transitional override power is a matter of great concern, and should be given full consideration, including proper public consultation. It should not be introduced through supplementary order paper.”

- 6.3.3 A provision inserted by SOP in the Judicature Modernisation Bill changed the legislative status of amendments to the High Court Rules and potentially immunised them from scrutiny. The Law Society wrote to the Minister of Justice, saying the issue was of sufficient concern that the Government should recommit the Bill under Standing Order 311 to allow amendments to be made prior to third reading. Notwithstanding the Law Society's request, the clause was retained and the legislation enacted (it is now part of the Senior Courts Act 2016).²¹ The Law Society remains concerned that there is considerable uncertainty about the legal status of the High Court Rules and their amenability to scrutiny. It considers the change should not have been made without proper public and Parliamentary scrutiny.

Recommendation:

That the Standing Orders ought to make supplementary order papers tabled at the Committee of the Whole stage subject to reporting by the Attorney-General on whether they are consistent with the New Zealand Bill of Rights Act 1990.

7 The Committee of the Whole – technical scrutiny of legislation

- 7.1 The Law Society submits that what happens in the Committee of the Whole presents a significant threat to legislative quality.²²
- 7.2 Amendments are moved and agreed to by SOP in circumstances that often do considerable damage to the architecture and coherence of Bills. Both opposition and Government members can move amendments with little notice and with no certainty until the last minute whether or not they will be accepted. SOPs can be tabled up until the moment that voting begins on the provisions they propose to amend. SOPs of more than 100 pages are not unknown.²³ Wholesale amendments at this late stage can cause considerable harm, yet there is a reluctance to recommit Bills that are subject to such amendments. Attempts over the years to rectify this feature of the New Zealand process have not proved effective.

¹⁹ <http://www.legislation.govt.nz/sop/government/2016/0190/latest/DLM6922701.html>

²⁰ http://www.lawsociety.org.nz/_data/assets/pdf_file/0005/104945/Taxation-Business-Tax,-Exchange-of-Information,-and-Remedial-Matters-Bill,-SOP-190-15-9-16.pdf at paragraph 26.

²¹ Senior Courts Act 2016, s 147.

²² See David Bagnall “Problems with New Zealand’s Legislative Process, and How to Fix Them” (2009) 24(2) Australasian Parliamentary Review 114, in which he suggests that the conduct of the committee stages of all or most Bills should be conducted in the second chamber without the need for unanimity. See also Geoffrey Palmer “Law-Making in New Zealand: Is there a Better Way?” [The Harkness Henry Lecture] (2014) 22 Wai L Rev 1.

²³ In 2009 a Government supplementary order paper contained 112 pages of amendments to the Climate Change (Moderated Emissions Trading) Amendment Bill.

- 7.3 In short, the Committee of the Whole stage is no longer capable of ensuring that each provision of a Bill is subjected to close technical scrutiny.
- 7.4 It is ironic that not only is scrutiny often inadequate, but also that it takes too long. Even uncontroversial changes often wait a considerable time to be passed into law. It promotes the public interest to keep the law up to date and systematically remedy defects and faults in it.
- 7.5 Structural reform to reduce the legislative backlog in the House and improve the quality of technical scrutiny of legislation should be considered. The Law Society appreciates that this may be beyond the scope of the current review of the Standing Orders but suggests that consideration should be given to introducing a parallel legislative chamber, modelled on the Australian Commonwealth Parliament's Main Committee.²⁴ That would enable the House to devote more time to legislation and process it in a more considered manner. A committee modelled on the Australian precedent would provide close, detailed scrutiny of a Bill's provisions to ensure they are fit for purpose. Such detailed scrutiny would substitute for the sweeping SOP amendments currently seen at this late stage of a Bill's passage.
- 7.6 The Commonwealth Parliament's Main Committee, established in 1994,²⁵ has been successful in alleviating the pressures on the Australian lower house.²⁶ About a third of all legislation is referred to it.
- 7.7 The committee stage of Bills that are largely uncontroversial could be taken in this parallel chamber, comprising no more than 30 members, sitting in the old Legislative Council Chamber. It would enable more time and attention to be given to the detail of Bills, with the aim of achieving optimal legislative outcomes. A Bill subject to examination in the Main Committee would revert to the full Committee of the House in the event of significant disagreement. A parallel legislative chamber would mean that the House could deal with two streams of business concurrently.
- 7.8 Adoption of a parallel legislative chamber would facilitate business for uncontroversial measures and improve the quality of parliamentary scrutiny. Such changes would help to alleviate the serious delays to which some measures are subject because they lack political priority.

Recommendation:

That consideration be given to establishing a parallel legislative chamber for the technical scrutiny of Bills and for ensuring that they properly give effect to the purposes of Bills as agreed to on second reading.

8 Summary of recommendations

- 8.1 The Law Society recommends amendments be made to the Standing Orders:
- 8.1.1 to encourage the Government to table in the House of Representatives its legislative programme at the beginning of each session of Parliament;
 - 8.1.2 to encourage the circulating of exposure drafts of Bills in order to promote public input at an early stage into the architecture and content of Bills;
 - 8.1.3 to require the House of Representatives to sit for longer hours each year to alleviate pressure on the Government's legislative programme, and to avoid the need for the House

²⁴ A serious proposal for such a step was made by the then Acting Second Clerk – Assistant of the Office of the Clerk in New Zealand: Bagnall, above note 22, at 114.

²⁵ The Main Committee is now known as the Federation Chamber.

²⁶ http://www.aph.gov.au/About_Parliament/House_of_Representatives/Powers_practice_and_procedure/00_-_Infosheets/Infosheet_16_-_The_Federation_Chamber.

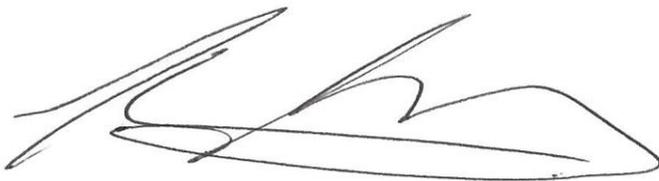
to take urgency on Bills before it;

- 8.1.4 to prescribe a minimum period of six weeks for the filing of public submissions on Bills from the time that select committees call for submissions;
- 8.1.5 to provide that select committees should fix a longer period than six weeks for the filing of submissions where the complexity and demands of Bills justify a longer period;
- 8.1.6 to ensure any abridgement of the reporting-back period allows sufficient time for select committee consideration of Bills; and
- 8.1.7 to make SOPs tabled at the Committee of the Whole stage subject to reporting by the Attorney-General on whether they are consistent with the New Zealand Bill of Rights Act 1990.

8.2 The Law Society also suggests that consideration be given to establishing a parallel legislative chamber for the technical scrutiny of Bills and for ensuring that they properly give effect to the purposes of Bills as agreed to on second reading.

9 Conclusion

- 9.1 The Law Society urges the Committee to respond positively to the concerns expressed in this submission concerning proper parliamentary scrutiny of legislation. A good many of these concerns address issues that have caused considerable anxiety for some years.²⁷ These issues have not been attended to, despite attention being repeatedly drawn to them. The concerns raised in this submission identify systemic defects in the parliamentary process that ought to be addressed.
- 9.2 The Law Society would like to be heard in support of its submission.



Kathryn Beck
President

²⁷ See for example the concerns expressed 26 years by JF Burrows and PA Joseph “Parliamentary law making” [1990] NZLJ 306.