

31 October 2019

Rt Hon Trevor Mallard
Speaker of the House of Representatives
Chair, Standing Orders Committee
Parliament Buildings
Wellington

Dear Mr Speaker

Re: Review of Standing Orders 2020

1 Introduction

- 1.1 The New Zealand Law Society (Law Society) welcomes the opportunity to make a submission to the Standing Orders Committee on the Review of Standing Orders 2020 (Review).
- 1.2 This submission addresses the following topics:
- a. The purpose provision of the Standing Orders.
 - b. Pre-legislative procedures.
 - c. Time for filing submissions.
 - d. New Zealand Bill of Rights and declarations of inconsistency.
 - e. The process for future reviews of Standing Orders.

2 Purpose provision

- 2.1 The Law Society notes that it is now common practice for legislation to contain a purpose statement outlining the objectives or intent of the legislation. Such purpose statements assist in the interpretation and application of the specific rules contained in the legislation.
- 2.2 The Law Society submits that it is appropriate for the Standing Orders to include a more specific provision than the current provision, which states only that the Standing Orders “contain rules for the conduct of proceedings in the House of Representatives and for the exercise of powers possessed by the House”.¹
- 2.3 The existing provision could be improved by including reference to the function and purposes of the House’s proceedings. For instance, the principle of Parliamentary accountability has recently been recognised as being a fundamental constitutional principle. The conduct of government by a Prime Minister and Cabinet collectively responsible to Parliament lies at the heart of Westminster democracy. The Supreme Court of the United Kingdom has recently explained that:²

¹ Standing Order 1.

² *R (on the application of Miller) v the Prime Minister, Cherry and others v Advocate General for Scotland* [2019] UKSC 41, p 17.

“Ministers are accountable to Parliament through such mechanisms as their duty to answer Parliamentary questions and to appear before Parliamentary committees, and through Parliamentary scrutiny of the delegated legislation which ministers make. By these means, the policies of the executive are subjected to consideration by the representatives of the electorate, the executive is required to report, explain and defend its actions, and citizens are protected from the arbitrary exercise of executive power.”

- 2.4 The Law Society recommends that the purpose provision of the Standing Orders ought to be amended to provide that the purposes of the Standing Orders are to:
- a. provide rules for the conduct of proceedings in the House of Representatives and for the exercise of powers possessed by the House; and
 - b. recognise the principle of Parliamentary accountability in parliamentary procedures to ensure that the House carries out its law making, oversight and representative functions effectively.

3 Pre-legislative procedures (e.g. exposure drafts and consultation)

- 3.1 The 2017 Review of Standing Orders (2017 Review) considered the idea of amending the Standing Orders to provide concrete rewards for inclusive and robust pre-legislative policy-making by government. It noted that a full policy development process, including consultation, exposure drafts, and thorough examination of policy implications, can only improve legislative quality.³ The Review noted that the Committee had considered rewarding good pre-legislative policy-making with the prospect of a streamlined process in the House but been unable to reach agreement. The Review noted that the Clerk of the House had indicated that he would like to collaborate with relevant agencies to identify ways that pre-introductory policy work and consultation processes could align more closely with the House’s consideration.⁴
- 3.2 The Law Society agrees that a full pre-legislative policy making process is likely to improve legislative quality and we support initiatives to improve pre-legislative policy-making. We note, however that there are downsides in a unicameral system to reducing Parliamentary scrutiny, even if pre-legislative processes have been carried out.
- 3.3 As a first step, the Law Society suggests that the Standing Orders could be amended to require the government, on introduction, to report to either the House or select committees on the pre-legislative procedures it has carried out. This may provide some incentive towards use of pre-legislative procedures and for the government to actively consider their use in relation to each Bill.

4 Time for filing submissions

- 4.1 The Law Society has previously expressed concern about the inadequate time provided for filing submissions on some Bills.⁵ There have been further examples recently where the Law Society has made similar remarks on the time for filing submissions including, for example, the Christ Church Cathedral Reinstatement Bill,⁶ the Crown Minerals (Petroleum) Amendment Bill,⁷ the Arms (Prohibited

³ Review of Standing Orders, Report of the Standing Orders Committee, July 2017, at 24.

⁴ Ibid at 24–25.

⁵ See here https://www.lawsociety.org.nz/_data/assets/pdf_file/0016/107062/Standing-Orders-Review-25-11-16.pdf at [5].

⁶ https://www.lawsociety.org.nz/_data/assets/pdf_file/0008/117548/I-SC-Chch-Cathedral-Reinstatement-Bill-9-12-17.pdf

⁷ https://www.lawsociety.org.nz/_data/assets/pdf_file/0007/127609/Crown-Minerals-Petroleum-Amendment-Bill-9-10-18.pdf

Firearms, Magazines and Parts) Amendment Bill,⁸ and the Misuse of Drugs Amendment Bill.⁹

- 4.2 We note the Committee endorsed previous committee observations in the 2017 Review, indicating desirable timeframes including:¹⁰
- a. committees should generally allow a minimum of six weeks when setting a closing date for submissions;
 - b. a lesser period than six weeks may be allowable in exceptional circumstances, but submitters should be given a realistic period to comment on a substantial bill or inquiry;
 - c. longer than six weeks can be decided when dealing with large or complex bills—this is up to the committee concerned;
 - d. committees examining bills must allow sufficient time for proper drafting and consideration of amendments and commentaries.
- 4.3 The 2017 Review further observed that “select committees must bear in mind their crucial role in engaging with the public on the House’s behalf, and ensuring that New Zealand’s interests are served by quality legislation. On this basis, they should endeavour to allow reasonable timeframes for public input.”¹¹ The Law Society agrees with these conclusions and reiterates our previous 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.

5 New Zealand Bill of Rights and declarations of inconsistency

- 5.1 The Law Society notes that the Government has announced that Cabinet has approved, in principle, a move to amend the New Zealand Bill of Rights Act 1990 (Bill of Rights) to provide a statutory power for senior courts to make declarations of inconsistency under the Bill of Rights and require Parliament to respond. The proposal is that a declaration of inconsistency will trigger a reconsideration of the issue by Parliament.¹²
- 5.2 The Law Society notes that if this amendment proceeds, there will need to be a process for how Parliament will “reconsider” the issue as Parliament does not usually initiate actions on its own motion. This may be addressed in the amending legislation, but amendments to the Standing Orders may also be required. Given this, the Law Society notes this as an issue that the Committee will need to consider in the near future.
- 5.3 In relation to Parliament’s consideration of Bill of Rights issues during the passage of legislation, the Law Society submits that the Standing Orders could be strengthened. If the rare case where Parliament decides to pass legislation that is inconsistent with the Bill of Rights occurs, Parliament should confront that choice directly and clearly report on and review the effects of the measures in question. To that end, the Law Society submits that existing requirements could be strengthened by:
- a. including a requirement in the Standing Orders that Select Committee reports clearly identify any issues of potential inconsistency with the Bill of Rights and how these have been addressed;

⁸ https://www.lawsociety.org.nz/_data/assets/pdf_file/0014/133502/I-FEC-Arms-Prohibited-Firearms-Magazines-Parts-Amdmt-Bill-4-4-19.pdf

⁹ https://www.lawsociety.org.nz/_data/assets/pdf_file/0019/133705/Misuse-of-Drugs-Amendment-Bill-11-4-19.pdf

¹⁰ Above n 3 at 28.

¹¹ Ibid.

¹² Hon Andrew Little and Hon David Parker “Government to provide greater protection of rights under the NZ Bill of Rights Act 1990” (press release, 26 February 2018).

- b. requiring a separate vote in Parliament at the second reading stage (similar to where a Select Committee reports back on amendments made by majority) where there are Bill of Rights inconsistencies in a Bill;
- c. requiring annual reporting by the Government to Parliament on the number and types of Bill of Rights inconsistencies, and what the effect has been (a specific measure of post-legislative scrutiny); and
- d. establishing a review of Bill of Rights reporting by a parliamentary committee (such as the Justice Committee) once a parliamentary term.

6 The process for future reviews of Standing Orders

Identifying what rule changes the Committee is considering

- 6.1 The Law Society submits that the Standing Orders Committee could improve the accessibility and effectiveness of its Standing Orders reform process by making it clear to the public what rule changes it is considering. We understand that is happening in relation to the proposal to consider rules relating to televising and use of political advertisements but consider it should occur more generally. This would allow the public to make more focused submissions on standing orders being considered for change and provide fair notice of matters the public can most helpfully submit on.
- 6.2 There are a variety of ways that the Committee could achieve this including:
 - a. Publishing the advice of the Office of the Clerk when submissions are called for, rather than only after the Committee reports on the review.
 - b. Publishing an issues paper identifying a general outline of themes and possible areas for reform (without limiting submitters to those areas if they want to make other proposals).

Committee's decision-making

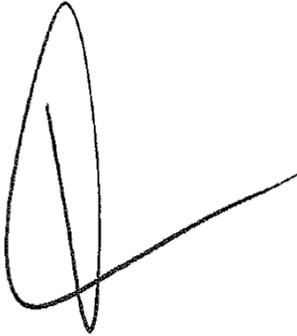
- 6.3 The Law Society understands that by convention the Committee makes decisions on the basis of consensus or overwhelming support.
- 6.4 That convention serves to protect the minority (or minor parties and independents) so that changes to the rules of procedure are not forced through on a bare majority. The idea of consensus encourages a long-term approach and a recognition that the Government of today could be the Opposition of tomorrow.
- 6.5 However, given it is a very high threshold, it can also operate as a form of entrenchment of current rules (which may protect or harm the minority) and limit the ability of Parliament to adapt and improve.
- 6.6 The Law Society invites the Committee to consider whether the threshold ought to be adjusted or consider other ways that the Committee could operate so as to facilitate rather than stifle, the prospect of innovation. For instance, if there is uncertainty about the merits of a proposal, it could be adopted on a trial basis for the next term of Parliament (or some other limited period of time) and then reviewed afterwards.

7 Conclusion

- 7.1 In conclusion, the Law Society submits that the Committee consider improving the Standing Orders to ensure they remain fit for purpose and to enable more robust pre-legislative policy making, ultimately increasing the quality of legislation overall.

7.2 The Law Society does not seek to be heard on this submission.

Yours sincerely

A handwritten signature in black ink, consisting of a large, vertical, teardrop-shaped loop on the left and a long, horizontal stroke extending to the right from the bottom of the loop.

Andrew Logan
Vice President