
New Zealand Bill of Rights
(Declarations of Inconsistency)
Amendment Bill: supplementary
submission – amendments to
Standing Orders

14/04/2021

New Zealand Bill of Rights (Declarations of Inconsistency) Amendment Bill: supplementary submission, on amendments to the Standing Orders

Introduction

1. The New Zealand Law Society | Te Kāhui Ture o Aotearoa (**Law Society**) provides this supplementary submission on the New Zealand Bill of Rights (Declarations of Inconsistency) Amendment Bill (**Bill**) in relation to how the proposed new Standing Orders might be designed.
2. To recap, the Law Society supports the Bill but primarily recommended that the Bill should be amended to require an Executive response to the House of Representatives following the House's consideration of a declaration of inconsistency made by a senior court.
3. The Law Society also made several recommendations in relation to how the proposed changes to the Standing Orders might be designed to facilitate the intended scrutiny of a declaration by the House of Representatives.¹ At its hearing of evidence on 8 April 2021, the Privileges Committee invited the Law Society to make a further written submission specifically addressing those recommendations.

Proposed amendments to Standing Orders

4. The Bill's Explanatory Note recognises the statutory changes are to operate as part of a package alongside related changes to Standing Orders.
5. The Law Society agrees Standing Orders should be revised to facilitate Parliament's ability to consider and respond to a declaration of inconsistency by the courts. The proposed changes will serve to achieve the Bill's intent of parliamentary oversight whilst recognising the relationship of mutual respect between Parliament and the courts.
6. While the exact processes are a matter for the House of Representatives to determine, the objective is that there be an opportunity for both in-depth scrutiny at a select committee and wider debate involving the whole House.
7. A select committee's scrutiny can be expected to be tailored to the particular nature of the inconsistency identified by the courts. A select committee would be able to utilise existing processes to conduct its inquiry, including the possibility of calling for public submissions and engaging the assistance of independent advisers (in addition to receiving advice from departmental advisers).
8. The Law Society **recommends** that the Privileges Committee consider proposing to the Standing Orders Committee the following specific features that will support the legislative changes:
 - a. the Attorney-General's notification of a declaration of inconsistency **stands** referred to a select committee for examination;
 - b. the select committee **must** report to the House of Representatives on any notification referred to it along with any recommendations (the Standing Orders could set a timeframe for reporting);

¹ New Zealand Bill of Rights (Declarations of Inconsistency) Amendment Bill, NZLS submission dated 7 August 2020, available at <https://www.lawsociety.org.nz/assets/Law-Reform-Submissions/NZBoRA-DoI-Bill-7-8-20.pdf>.

- c. ensure the report of the select committee is **set down for debate** in the House of Representatives to be addressed at the time for debating reports from the Privileges Committee (as select committee reports are very rarely debated apart from reports of the Privileges Committee);² and
 - d. a **vote** is held in the House of Representatives as to whether to accept the select committee's report and any recommendations made in it.
9. The Law Society would welcome the opportunity to work with officials on any of the suggested changes if that would be of assistance to the Committee.

Further observations

- 10. The status quo, at least for declarations of inconsistency under the Human Rights Act 1993, is that the Executive must respond within 120 days of the declaration (via the Minister responsible for the legislation declared inconsistent).
- 11. The Bill (if amended as the Law Society urges) will retain that requirement for an Executive response. But as the Bill is premised on there being an opportunity for the House of Representatives to respond first (achieved through the House of Representatives revising the Standing Orders), it raises the question of timing for that response.
- 12. In its original submission, the Law Society suggested that it be some appropriate period (perhaps 90 days) after the House of Representatives has voted on the report of the committee that considered the declaration of inconsistency.
- 13. In practice – and as the Committee observed during the select committee hearing on the Bill – every declaration of inconsistency is likely to raise its own unique set of considerations. Some declarations may be made in respect of wholly unintended inconsistencies that can be speedily resolved, while others may involve difficult polycentric questions that take time and expertise to resolve. There may be many cases in both categories on which different views are possible.
- 14. The Law Society's expectation is that the Standing Orders will set the basic parameters but within those it will be possible for the consideration of a Bill to be expedited for the more straightforward cases. For example, it is possible there may be cases where the Executive will wish speedily to amend legislation, or to indicate a time frame for doing so. This may permit the select committee process to be truncated. But the basic idea that the House of Representatives has an opportunity to respond – on which the Bill is premised – is supported by the Law Society.
- 15. At the Committee hearing, the Chairperson observed that the Bill, if amended as the Law Society urges, would mean the requirement for an Executive response is triggered by a select committee's report. And, to that extent, the Bill when enacted would have implications for the House of Representative's internal affairs – it will mean that the House of Representatives must operate, through its Standing Orders, a process that results in such a report being generated.
- 16. The Law Society does not regard that as being in any way constitutionally problematic or anomalous. Even as things stand, the House of Representatives has adopted Standing Orders that 'fit' with legislative requirements – such as allowing the presentation of section 7 reports

² See Standing Orders 66(1) and 254(1)(a).

under the New Zealand Bill of Rights Act 1990 (SO 269). Although it is not readily apparent, a large number of Standing Orders already give effect to statutory obligations, such as Standing Orders for financial procedures (to align with the Public Finance Act 1989) and to accord protections of natural justice under section 27 of the New Zealand Bill of Rights Act.³ Section 47 of the Legislation Act 2012 (concerning notices of disallowance) is another example of legislation providing for the Executive to take some action on the passing of a resolution by the House of Representatives.

17. The Law Society has not argued that the format of Standing Orders be prescribed in the proposed legislation. While that would not be impossible, it would (apart from other considerations) be a needless cluttering of the Bill of Rights which functions, appropriately, as a statement of fundamental rights and freedoms (in sections 8 to 27) together with its essential operating provisions (sections 3 to 7). It would also make future refinements of Standing Orders more complicated in that legislative change would be required.



Tiana Epati
NZLS President

14 April 2021

³ See Mc Gee, *Parliamentary Practice in New Zealand*, 4th Edition, at p 12.