

16 September 2022

Rt Hon Trevor Mallard
Chair, Standing Orders Committee

By email: standing.orders@parliament.govt.nz

Re: Review of Standing Orders 2023

1 Introduction

- 1.1 The New Zealand Law Society | Te Kāhui Ture o Aotearoa (**Law Society**) welcomes the opportunity to make a submission to the Standing Orders Committee on the Review of Standing Orders 2023 (**Review**).
- 1.2 This submission has been prepared with input from the Law Society's Public and Administrative Law Committee,¹ and recommends:
- (a) Having systems and processes in the Standing Orders which empower Parliament to undertake post-legislative scrutiny of legislation, and in particular, of bills that have been passed under urgency;
 - (b) Amending the Standing Orders to set out the key objectives of post-legislative scrutiny, and to provide for 'trigger points' for Parliament to undertake post-legislative scrutiny;
 - (c) Developing a set of questions to guide Parliament in carrying out effective post-legislative scrutiny;
 - (d) Empowering Parliament to develop and publish a programme for post-legislative scrutiny to be undertaken during each parliamentary session;
 - (e) Extending the current Sessional orders which provide for procedures to consider and respond to declarations of inconsistency, into the revised Standing Orders;
 - (f) Amending the Standing Orders to provide for additional measures to monitor inconsistencies with the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993;
 - (g) Publishing authoritative evidence of decisions to adjust the House's rules by making Sessional orders, alongside the list of current Sessional orders; and

¹ More information regarding this Committee is available on the Law Society's website: <https://www.lawsociety.org.nz/branches-sections-and-groups/law-reform-committees/public-and-administrative-law-committee/>.

- (h) Making various amendments to Appendix C of the Standing Orders to improve the preliminary procedures for local bills.

1.3 The Law Society wishes to be heard in relation to this submission.

2 The use of urgency and the need for post-legislative scrutiny

2.1 The New Zealand parliamentary system has many admirable features in its scrutiny of bills, including:

- (a) the referral of most bills for scrutiny by subject select committees,
- (b) the ability of all members of the House to promote changes at the committee of the whole House stage, and
- (c) the ability of all members of the House to debate alternatives, and present opportunities to strengthen legislation when it is being made.

2.2 These measures are important for a unicameral system and provide an important avenue for public engagement in the legislative process.

2.3 However, the Law Society has recently observed an increasing number of bills being passed under urgency, and without the valuable in-depth scrutiny by the public and by select committees.² Data published on the Parliament website shows 24 bills were accorded urgency during the 51st Parliament. In contrast, 78 bills were accorded urgency during the 52nd Parliament. As at 8 September 2022, 28 bills have been accorded urgency during the 53rd Parliament.

2.4 While urgency is, in certain circumstances, necessary and justified, we are concerned about the increasing use of urgency and the very limited consultation timeframes for scrutinising bills and seeking public input.

2.5 We also note that bills which are passed under urgency are sometimes the subject of informal consultations with select organisations and stakeholders (including, on some occasions, the Law Society). This practice can be problematic, as informal consultations are not transparent or consistent with open democratic processes, and do not allow the public to engage directly with Parliament, see who submitted on each bill, and know what was said in relation to each bill. In addition, informal consultation processes are often undertaken on a confidential basis, and within a very short timeframe. As a result, submitters cannot engage effectively with officials or Ministers about their views, or have their written submissions published on the Parliament website.

2.6 The Law Society supports legislative procedures which promote democracy and transparency by allowing select committees, and the public, to give proper consideration to legislation passed by the House. We therefore recommend amending the Standing Orders to provide for processes which empower Parliament to undertake post-legislative scrutiny of legislation – including, in particular, bills that have been passed under urgency – as discussed below.

² This data is available here: <https://www.parliament.nz/en/pb/bills-and-laws/progress-of-legislation/>.

The benefits of post-legislative scrutiny

2.7 In recent years, there have been a number of international studies into the benefits of post-legislative scrutiny. The UK Law Commission has given four main reasons for having more systematic post-legislative scrutiny:³

- (a) to see whether legislation is working out in practice, as intended;
- (b) to contribute to better regulation (including secondary legislation);
- (c) to improve the focus on implementation and delivery of policy aims; and
- (d) to identify and disseminate good practice so that lessons may be drawn from the successes and failures revealed by this scrutiny work.

2.8 In addition, such scrutiny allows for the identification of potential adverse effects of new legislation on fundamental rights. A comparative study of post-legislative scrutiny, carried out by the Westminster Foundation for Democracy, concluded that:⁴

Legislative improvement remains, for the most part, a by-product of a parliament's legislative process. By reviewing government action or inaction, and by amending legislation of various kinds, a parliament takes measure of the extent to which the laws of a country are fit for purpose, as well as the extent to which a government is managing the effective implementation of its policies and abiding by statutory obligations. However, this link is not always formally recognised within the parliamentary system, and relevant information is not always captured, directed and responded to on that basis.

The act of carrying out Post-Legislative Scrutiny is therefore justified as a stand-alone activity that enables a parliament to self-monitor and evaluate, as well as reflect on the merits of its own democratic output and internal technical ability.

The need for post-legislative scrutiny in New Zealand

2.9 New Zealand's parliamentary processes only provide for very limited post-legislative scrutiny of legislation. In-depth reviews of legislation are generally carried out by Te Aka Matua o te Ture | Law Commission, or because of a requirement specified in legislation. As a result, there is little systematic monitoring of the implementation of legislation, and evaluation as to whether laws have achieved their intended outcome, and whether they remain fit for purpose. This has led to the Productivity Commission describing New Zealand's approach to assessing the effects of legislation as being "crisis-driven", rather than being a proactive and planned assessment, with a "set and forget" approach to regulation.

2.10 Regulatory complexity, out-of-date laws and a lack of regulation review have played a part in driving a need to find legislative design solutions. In 2014, the Productivity Commission found that nearly two-thirds of public sector chief executives considered that agencies with

³ Law Commission (UK) *Post-Legislative Scrutiny* No. 302 (2006) at [2.24]. A copy of this report is available here: https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jxou24uy7q/uploads/2015/03/lc302_Post-legislative_Scrutiny.pdf.

⁴ Franklin De Vrieze and Victoria Hasson *Post-Legislative Scrutiny: Comparative study of practices of Post-Legislative Scrutiny in selected parliaments and the rationale for its place in democracy assistance* (Westminster Foundation for Democracy, 2017) at page 11. A copy of this Paper is available here: <https://www.wfd.org/what-we-do/resources/comparative-study-post-legislative-scrutiny>.

regulatory functions often work with legislation that is outdated or no longer fit for purpose.⁵ The Executive has since taken steps to focus on the role of departmental stewardship and to ensure there are systems in place for departments to monitor and review their legislation. For example, public service principles now require “stewardship” by Government departments, including promoting stewardship of legislation administered by agencies.⁶

- 2.11 While these measures have, to some extent, improved post-legislative monitoring of legislation, the Law Society remains of the view that Parliament must take a more active role in evaluating whether the laws it has passed achieve their intended outcomes:⁷
- (a) to ensure the requirements of democratic governance and the need to implement legislation in accordance with the principles of legality and legal certainty, are being met;
 - (b) to enable the adverse effects of new legislation to be apprehended easily and expeditiously;
 - (c) to support a consolidated system of appraisal for assessing how effective a law is at regulating and responding to problems and events; and
 - (d) to support improvements in legislative quality by learning from experience both in terms of what works and what does not, and in terms of the relationship between objectives and outcomes.
- 2.12 Under New Zealand parliamentary procedure, legislative scrutiny could be approached in a manner similar to how the House approaches financial scrutiny, by considering the whole ‘financial cycle’. This ‘financial cycle’ comprises the Budget debate, select committee scrutiny of the Estimates and proposed spending in the Budget, with the House then debating and passing the Appropriation Bill. Select committees then conduct financial reviews which culminate in the House holding an annual review debate to provide oversight of how the budgeted appropriations have been spent.
- 2.13 If the current process of legislative scrutiny is compared with current financial oversight procedures, it is apparent that any review by Parliament of the legislation it has passed occurs only on an ad-hoc basis, and excludes the post-legislative scrutiny aspects of the ‘cycle’. If post-legislative scrutiny occurs at all, it is as a result of legislated review requirements or in the context of broader policy reviews. The Law Society therefore suggests amending the Standing Orders to provide for more robust scrutiny processes, as discussed below.

⁵ New Zealand Productivity Commission *Productivity Commission Survey: Regulator chief executives’ perceptions of regulatory regimes* (March 2014) at page 6. A copy of that report is available here: <https://www.productivity.govt.nz/assets/Documents/52f55192fd/Regulator-chief-executives-perceptions-of-regulatory-regimes.pdf>.

⁶ Public Service Act 2020, s 12(1)(e)(v).

⁷ Above n 4, at page 11.

Options for post-legislative scrutiny by the House of Representatives

- 2.14 New Zealand's subject select committees have a wide mandate to initiate inquiries and briefings, and report to the House on other matters related to their subject areas.⁸ In addition, the Regulations Review Committee (**RRC**) reviews secondary legislation and assesses it against criteria set out in the Standing Orders.⁹ The RRC carries out a specific role of post-legislative scrutiny of legislation made by the Executive and, currently, a significant role in reviewing COVID-19 orders made under the COVID-19 Public Health Response Act 2020 (which require a positive resolution of the House in order to continue in effect).¹⁰
- 2.15 The Law Society submits there are mechanisms or models within the current Standing Orders which could be developed further to carry out parliamentary post-legislative scrutiny of the legislation the House has passed.
- 2.16 Select committees carry out in-depth scrutiny of bills which, in most cases, are systematically referred to each committee by the House. However, committees then have very little involvement in formal post-legislative scrutiny or in initiating their own inquiries into whether, or how, the legislation is working in practice. This is in contrast to the approach taken by the UK Parliament where a good portion of select committee activity involves post-legislative scrutiny work, supplemented by a requirement that the Government publish a memorandum on the implementation of legislation 3-5 years after Royal assent.¹¹ A recent report found that 23 post-legislative scrutiny inquiries were undertaken by the UK Parliament between 2008 and 2019, and concludes that post-legislative scrutiny is being undertaken, and is possible, even when legislatures have capacity limitations.¹²
- 2.17 With the New Zealand unicameral system and unwritten constitutional arrangements, there are strong reasons for suggesting that legislation passed under urgency should be subject to select committee scrutiny within a specified timeframe (for example, 1-2 years after commencement, which then gives select committees the opportunity to assess how the legislation has been applied in that time, and to determine whether it remains fit for purpose).
- 2.18 International research suggests Parliaments should develop their own 'trigger points' for carrying out post-legislative scrutiny at the right time.¹³ The Law Society agrees with this assessment, and recommends that the Standing Orders Committee develop a set of trigger

⁸ Standing Orders of the House of Representatives 2020, SO 190 and 191.

⁹ SO 326 and 327.

¹⁰ COVID-19 Public Health Response Act 2020, s 16.

¹¹ Above n 4, at pages 7 and 17.

¹² Dr Tom Caygill *Post-Legislative Scrutiny in the UK Parliament, The Post-Legislative Scrutiny Series, 1* (Nottingham Trent University, November 2021) at page 7. A copy of that report is available here: <https://www.wfd.org/sites/default/files/2021-12/2021-10-18-PLS-in-the-UK-Parliament-Dr-Thomas-Caygill-FINAL.pdf>.

¹³ Franklin De Vrieze *Post-Legislative Scrutiny: Guide for Parliaments* (Westminster Foundation for Democracy, 2017) at pages 17-18, available here: <https://www.wfd.org/what-we-do/resources/guide-post-legislative-scrutiny>; Tom Caygill *A Tale of Two Houses? Post-Legislative Scrutiny in the UK Parliament* (European Journal of Law Reform, 2019) at pages 92-94, available here: https://www.elevenjournals.com/tijdschrift/ejlr/2019/2/EJLR_1387-2370_2019_021_002_002.pdf.

points for select committees to carry out post-legislative scrutiny. These trigger points should be set out in the Standing Orders, and could include:¹⁴

- (a) legislation that is passed under urgency;
- (b) representations made to a parliamentary committee, or through a public petition, that a piece of legislation needs to be reviewed due to a particular policy impact;
- (c) comments in a judicial decision or an inquiry that the legislation should be reviewed; and
- (d) legislation which contains a sunset clause, or a clause which requires a review by Parliament.

2.19 Researchers have also identified some typical questions which could be addressed during such post-legislative evaluation and which consider, for example, whether:¹⁵

- (a) the original objectives of the law been achieved in quality, quantity and time, when measured against the baseline of what would have happened without the intervention of that law;
- (b) the law and how it has been applied is well-suited to meeting the desired objectives;
- (c) there have been any significant unexpected side effects; and
- (d) implementation has led to any unfairness or disadvantage to any sector of the community.

2.20 The Law Society considers it would be helpful for the Standing Orders Committee to develop a similar set of model questions to guide select committees in carrying out effective post-legislative scrutiny.

2.21 Post-legislative scrutiny also presents an opportunity for Parliament to look at potential cross-cutting impacts that Parliament has decided to treat as a priority (including impacts on human rights, gender, regulatory requirements and the environment). The Standing Orders could therefore provide for processes for select committees to identify and prioritise appropriate cross-cutting topics and then conduct reviews of relevant related-subject legislation.

2.22 We also recommend making further changes to the Standing Orders to set out the key objectives of post-legislative scrutiny, to assist the House and the public in assessing whether the policies of the legislation have been implemented, and whether the legislation is fit for purpose. The approach taken by select committees in conducting post-legislative scrutiny could then be similar to the role given to the RRC in examining secondary legislation against the grounds set out in the Standing Orders.¹⁶

2.23 The key objectives could potentially include understanding:

¹⁴ See Franklin De Vrieze *Post-Legislative Scrutiny: Guide for Parliaments*, above n 13, for a full list of possible trigger points.

¹⁵ See, for example, Franklin De Vrieze *Post-Legislative Scrutiny: Guide for Parliaments*, above n 13 at page 13 (Box 1), which contains a list of typical questions addressed in ex-post facto evaluation of legislation.

¹⁶ SO 327(2).

- (a) the impact (legal, political, social and economic) of the legislation;
- (b) whether the primary and secondary legislation are fully implemented in the most efficient manner;
- (c) whether the policy objectives of the law have been met;
- (d) whether the expected effects, costs and benefits were correctly anticipated;
- (e) whether the law has any unintended effects (for example, economic or social impacts);
- (f) any difficulties in the implementation process;
- (g) if the law is well known by the stakeholders and beneficiaries;
- (h) if the law has been challenged in court;
- (i) if the law has impact on inequalities; and
- (j) if the law is still necessary.

2.24 Select committees could also develop and publish a programme for post-legislative scrutiny to be undertaken during each parliamentary session. Select committees could also ask departments to identify possible pieces of legislation for post-legislative scrutiny (perhaps as part of any reviews on the activities and performance of government agencies). Select committees could then initiate post-legislative scrutiny inquiries, call for public submissions, and report to the House on their findings, with a requirement for the Executive to respond to a committee's report within a specified timeframe (for example, 60 days).

2.25 We acknowledge that a systematic programme of post-legislative scrutiny would inevitably increase the workloads of select committees, and existing committees may find it difficult to prioritise post-legislative scrutiny. Therefore, an alternative option would be to establish a separate specialist committee, akin to the RRC, which would be responsible for conducting post-legislative scrutiny. A specialist post-legislative scrutiny committee could take a different focus to the scrutiny of bills and avoid post-legislative scrutiny being used to relitigate policy arguments for or against the legislation.

2.26 It could be argued post-legislative scrutiny can be carried out by the House and existing select committees without amending the Standing Orders. However, we note that to date the New Zealand Parliament has carried out little post-legislative scrutiny or systematic monitoring of the implementation and operation of legislation. Such scrutiny will not happen automatically, and is unlikely to take place in the absence of a clear framework, trigger points and objectives in the Standing Orders. Against this background, we strongly recommend amending the Standing Orders as suggested above.

3 Process for considering and responding to declarations of inconsistency

3.1 We note the recent amendments to the New Zealand Bill of Rights Act 1990 (NZBORA),¹⁷ and the Sessional orders made in accordance with those amendments, and recommend

¹⁷ The NZBORA was amended by the New Zealand Bill of Rights (Declarations of Inconsistency) Amendment Act 2022, which commenced on 30 August 2022, and requires the House to consider, and, if they think fit, respond to, declarations of inconsistency made under the NZBORA and the HRA.

extending these Sessional orders into the revised Standing Orders. However, we note the procedures set out in the Sessional orders are yet to be used and will require some assessment as to their effectiveness if they are to be incorporated into the Standing Orders.

3.2 We also note these Sessional orders are not as readily accessible on the Parliament website as the Standing Orders. The ‘Sessional orders’ page on the Parliament website only provides a list of current Sessional orders,¹⁸ and does not include any authoritative evidence of decisions to adjust the House’s rules.¹⁹ We recommend publishing authoritative evidence of such decisions alongside the list of current Sessional orders (or providing links to each relevant decision) to improve accessibility.

3.3 We also recommend amending the Standing Orders to provide for the following additional measures to monitor inconsistencies with the NZBORA and the Human Rights Act 1993 (HRA):

- (a) a process for Parliament to receive annual reports by Government on the number and the types of inconsistencies with the NZBORA or the HRA, and the effect of these inconsistencies (which could then be considered as part of a post-legislative scrutiny process); and
- (b) a review of any reporting on declarations of inconsistency by a parliamentary committee (such as the Justice Select Committee) once a parliamentary term.

4 Preliminary procedures for local bills

4.1 Appendix C of the Standing Orders sets out the preliminary procedures for local bills and private bills. The Law Society recommends the following changes to Appendix C to improve the preliminary procedures for local bills:

- (a) Clause 3(1)(b)(ii) requires a notice for a local bill to be published “in one or more other newspapers that have at least an equivalent circulation in that locality or region or district to the daily newspapers circulating in that region or district”. Members of the profession have observed that promoters of local bills have difficulty in determining circulation rates (which may be commercially sensitive) and identifying the areas that come within the meaning of “locality”. We therefore suggest amending clause 3 of Appendix C to provide that promoters (or their agents or solicitors):
 - (i) are only required to publish notices relating to local bills on the local authority’s website for a period of at least two weeks (provided the local authority has, within the previous 12 months, engaged in the special consultative procedure provided for in the Local Government Act 2002 in respect of the subject matter of the Bill);²⁰ and

¹⁸ The list of current Sessional orders can be found here:

<https://www.parliament.nz/en/pb/parliamentary-rules/sessional-orders/>.

¹⁹ Above n 18. The Parliament website notes that the authoritative record in each case is either the *Journals of the House* or the relevant determination of the Business Committee.

²⁰ Local Government Act 2002, s 83.

- (ii) could also be required to disclose what other publication has been done, to assist the public.
- (b) Clause 8 requires the copy of the bill that is open for public inspection to be certified by the promoter, or the promoter’s solicitor, agent or chief executive. Clause 8(2)(b) specifically provides that each certificate must be written directly on the copy of the bill and may not be separate from it. This requirement is unnecessary and archaic, and a separate certificate should suffice. We therefore recommend amending clause 8(2)(b) accordingly.
- (c) Clause 7 requires a copy of a local bill to be deposited in a public library or a service centre, and published on a website maintained by (or on behalf of) the promoter for at least 15 working days. Promoters may not be able to comply with these requirements where COVID-19 or other restrictions prevent access to public libraries and service centres, or where website/internet outages occur. The Law Society therefore proposes amending Appendix C:
 - (i) to give the Clerk general discretion, on request of a promoter, to waive in advance any part of Appendix C, if satisfied the waiver, together with any conditions imposed by the Clerk, will achieve a materially similar effect to Appendix C, and is appropriate in the circumstances; and
 - (ii) to empower the Clerk to endorse a local bill as either “*Standing Orders complied with*” (as currently required by clause 15(2)(a) of Appendix C), or as “*Standing Orders complied with, except in matters which I consider to be immaterial, having regard to the purpose of Appendix C*”.

5 **Next steps**

- 5.1 The Law Society is grateful for the opportunity to make a submission on this Review, and looks forward to appearing before the Standing Orders Committee to speak to this submission.

Nāku noa, nā



David Campbell
Vice-President