



NEW ZEALAND  
LAW SOCIETY

NZLS EST 1869

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# Secondary Legislation Bill

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*04/02/2020*

## Submission on the Secondary Legislation Bill

### 1 Introduction

- 1.1. The New Zealand Law Society (**Law Society**) welcomes the opportunity to comment on the Secondary Legislation Bill (**the Bill**).
- 1.2. The Law Society is the statutory body established in 1869 that regulates New Zealand's 14,800 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*".<sup>1</sup> The Law Society makes submissions on legislative design and points of legal concern, and seeks to assist in the production of quality legislation that will advance the rule of law, observe constitutional principle and conform to established legislative standards. It carries out this work pro bono, in the public interest.
- 1.3. The Law Society wishes to be heard in support of this submission.

### 2 General comments

- 2.1. The Bill complements the Legislation Act 2019 (**the Act**). It supports the framework applying to secondary legislation under that Act. Together, these two pieces of legislation will ensure that secondary legislation is:
  - *transparent and accessible* – by requiring that secondary legislation must be published; and
  - *subject to oversight by Parliament* – by requiring that secondary legislation must be presented to Parliament and subject to its disallowance procedures.
- 2.2. The Bill is therefore not just a minor or technical piece of legislation. It has an important role in both:
  - supporting and advancing the rule of law – by ensuring that people can easily know what the law is; and
  - upholding the constitutional principle that Parliament, not the Executive, is the supreme legislative power in New Zealand.
- 2.3. This submission addresses two aspects where the Law Society considers that the Bill could be improved to better achieve those objectives:
  - the amendment to the definition of “secondary legislation” made under the Royal prerogative (Schedule 33 of the Bill);
  - the proposed exemptions from the publication, presentation and disallowance provisions of the Act (Schedules 35 and 36 of the Bill).

### 3 Definition of “secondary legislation” made under the Royal prerogative (Schedule 33)

- 3.1. Schedule 33 contains a significant amendment to the current definition of “secondary legislation” set out in section 5(1) of the Act.

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<sup>1</sup> Lawyers and Conveyancers Act 2006, section 65(e).

- 3.2 Under the existing definition in the Act, “secondary legislation” includes any instrument that “is made under the Royal prerogative and has legislative effect”.<sup>2</sup> The definition therefore turns on the effect of the instrument – not what it is called or how it was described when it was made. This ensures that the legal status of an instrument is determined by substance not form.
- 3.3 Schedule 33 of the Bill removes the “legislative effect” test and replaces it with a finite list of instruments contained in a new Schedule 1A of the Act.
- 3.4 The effect is that an instrument made under the Royal prerogative will only be “secondary legislation” if Parliament lists it on Schedule 1A of the Act. That has significant implications. If, for whatever reason, Parliament does not take the active step of listing an instrument on Schedule 1A, then those instruments will not have to be published or presented to Parliament and cannot be made subject to its disallowance procedures.
- 3.5 Under the amendment the *default position therefore is that in future instruments that are made under the Royal prerogative will not have to be published and will not fall under Parliament’s oversight.*
- 3.6 The Law Society has consistently highlighted the need to ensure that *all* instruments with legislative effect should be published and subject to Parliament’s oversight.<sup>3</sup>
- 3.7 This is particularly important with respect to instruments that are made under the Royal prerogative. Unlike other secondary legislation these instruments are made under the Sovereign’s common law powers, not under a power delegated by Parliament.
- 3.8 Nothing has changed in the three months since the Act was passed in October 2019 to justify this amendment. The Law Society does not consider that the rationale given for the amendment – to “align the approach for prerogative instruments more closely with the methodology applied to other secondary legislation”<sup>4</sup> – is adequate in light of its consequences.
- 3.9 The Law Society accordingly does not support the amendment to the definition of “secondary legislation” and recommends that it should be deleted from the Bill.

#### **4 Proposed exemptions from publication, presentation and disallowance (Schedules 35 and 36)**

- 4.1 Under the Act, secondary legislation must be published,<sup>5</sup> presented to the House<sup>6</sup> and subject to Parliament’s disallowance procedures<sup>7</sup> unless an exemption applies.
- 4.2 Proposed exemptions from publication, presentation and disallowance are set out in Schedules 35 and 36 of the Bill.
- 4.3 The Law Society has two concerns in relation to the proposed exemptions:

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<sup>2</sup> Legislation Act 2019, section 5(1).

<sup>3</sup> See the Law Society’s submissions to the Justice Committee on the Legislation Bill (23 February 2018); and the Regulations Review Committee on (a) the Legislation Bill (27 September 2010) and (b) the *Inquiry into oversight of disallowable instruments that are not legislative instruments*, I 16 H (4 April 2014).

<sup>4</sup> Explanatory Note.

<sup>5</sup> Legislation Act 2019, Part 3 Subpart 1.

<sup>6</sup> Legislation Act 2019, section 114.

<sup>7</sup> Legislation Act 2019, section 115.

- some of the exemptions are new or may be inconsistent with existing legislation; and
- there is no system to ensure that exemptions are properly applied.

*Basis for exemptions should be clearly justified*

- 4.4 The Law Society recognises that exemptions from the Act’s publication, presentation or disallowance provisions may be appropriate in very limited circumstances. We agree entirely with the Justice Committee’s previous comment that any such exemptions “should be rare”.<sup>8</sup>
- 4.5 Most of the proposed exemptions in Schedules 35 and 36 are consistent with exemptions already contained in other legislation. However, some of the exemptions are new or inconsistent with existing legislation. There is very limited discussion of the justification for these proposed exemptions in the Departmental Disclosure Statement or other material available in relation to the Bill.
- 4.6 For example, the new publication exemption for notices made under section 14(1) and (2) of the International Terrorism (Emergency Powers) Act 1987 appears to be inconsistent with section 14(4) of that Act, which requires that such notices must be published in the Gazette as soon as practicable.
- 4.7 The Law Society accordingly recommends that the Regulations Review Committee (**the Committee**) should seek advice on each of the exemptions proposed in Schedules 35 and 36 and satisfy itself that:
- the proposed exemption serves a legitimate purpose; and
  - it is no broader than is necessary to achieve that purpose.

This would be consistent with the caution the Justice Committee has previously expressed with respect to the exemption system.

*No system to ensure that exemptions are properly applied*

- 4.8 The Law Society is also concerned that there is no system of oversight to ensure that exemptions are properly applied.
- 4.9 In the majority of cases the application of an exemption is dependent on a specific condition being met. The Bill requires that if a condition is specified for an exemption then it must be complied with.<sup>9</sup> But it appears that the agency making the secondary legislation will itself be responsible for deciding whether or not a condition has been met and therefore determining whether the exemption applies. If the secondary legislation is not published, how can anyone verify that determination and confirm that the exemption was properly applied?
- 4.10 To address this, the Law Society recommends that the Bill be amended to require that, when an agency determines that an exemption applies to any secondary legislation it has made, it must report to Parliament:

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<sup>8</sup> *Legislation Bill: As reported by the Justice Committee* (1 June 2018) at p.3.

<sup>9</sup> See clauses 1 and 2 of Schedules 35 and 36 of the Bill.

- the fact that secondary legislation has been made under a specified empowering provision and an exemption has been applied; and
- (where applicable) the grounds for that exemption.

For efficiency such reports could be provided to Parliament on an annual basis. Parliament could then establish a system through its Standing Orders to refer such reports for scrutiny by an appropriate select committee (such as the Regulations Review Committee). If this approach was adopted, a new rule could be included as part of the current review of the Standing Orders.

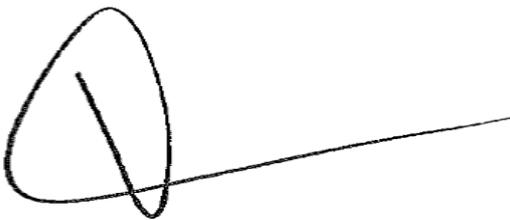
- 4.11 The Law Society considers that a requirement to advise Parliament of the fact that an exemption has been applied would provide an appropriate level of transparency while still meeting the central objectives of the exemption system.

## **5 Summary of recommendations**

- 5.1 In summary, the Law Society supports the Bill and recommends that:

- (a) The amendment to the definition of “secondary legislation” in Schedule 33 of the Bill be deleted and the current definition in section 5(1) of the Act be retained.
- (b) The Committee should seek advice on the basis for each of the exemptions proposed in Schedules 35 and 36 of the Bill and satisfy itself that: the proposed exemption serves a legitimate purpose; and is no broader than is necessary to achieve that purpose.
- (c) Schedules 35 and 36 should be amended to require an agency to report to Parliament the fact that it has made secondary legislation to which an exemption from publication, presentation or disallowance applies.

- 5.2 The Law Society considers that these recommendations will ensure that the Bill better supports the framework of access to, and Parliamentary oversight of, secondary legislation provided for in the Act.

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Andrew Logan  
**Vice President**  
4 February 2020