

Term of Parliament (Enabling 4-year Term) Legislation Amendment Bill

Submission of the New Zealand Law Society Te Kāhui
Ture o Aotearoa

16 April 2025

1 Introduction

- 1.1 The New Zealand Law Society Te Kāhui Ture o Aotearoa (**Law Society**) welcomes the opportunity to comment on the Term of Parliament (Enabling 4-year Term) Legislation Amendment Bill (**Bill**), which seeks to improve law making by providing a mechanism to extend the maximum term of Parliament to four years in certain circumstances.
- 1.2 While the Law Society supports measures which promote good law making, we are of the view this Bill should not proceed for the reasons given below.
- 1.3 This submission, prepared with input from the Law Society's Public Law Committee,¹ suggests an alternative approach for extending the term of Parliament, and improving law making in New Zealand.
- 1.4 The Law Society wishes to be heard in relation to this submission.

2 The Bill requires further policy work and engagement

- 2.1 While the Bill maintains the three-year 'default' term of Parliament, it proposes to give newly-elected Governments the option to extend the Parliamentary term to four years by ensuring the overall membership of select committees is proportionate to non-Executive party membership.
- 2.2 The rationale for linking the term of Parliament to select committee membership appears to be that having more non-Executive members on select committees will lead to improved checks and balances on the Government's actions.²
- 2.3 While improved checks and balances are commendable, the Law Society does not support the Bill proceeding in its current form for the following reasons:
 - (a) The proposed mechanism for extending the term of Parliament has the potential to upset the balance in the separation of powers between Parliament and the Executive.
 - (b) Any extension to the term of Parliament is a significant constitutional change which will impact New Zealand's political, social and economic landscape. However, the process for making this change has been inadequate and inconsistent with good policy development processes and best practices.
 - (c) A variable Parliamentary term will create considerable uncertainty, and give rise to various practical issues.
 - (d) The proposed referendum question to be put to electors is overly complicated, and requires some understanding of Parliament's operations and constitutional conventions.
 - (e) The Bill is also unlikely to meet its stated policy objective of improving law making.

¹ See the Law Society's website for more information about this committee: <https://www.lawsociety.org.nz/branches-sections-and-groups/law-reform-committees/public-law-committee/>.

² Explanatory Note of the Bill.

2.4 These reasons are discussed in more detail below.

The Bill will undermine the separation of powers

2.5 Clause 5 of the Bill provides that the term of Parliament could be extended to four years if the House passes a resolution confirming that the select committee membership requirement in that clause is satisfied.

2.6 Usually, a resolution of the House would only bind its members, unless the procedure is specifically sanctioned by legislation. While there are some examples of legislation which provide for resolutions, these largely relate to technical procedures regarding operations of the House (such as the appointment of officers of Parliament or changes to Parliamentary precincts). It would be highly unusual and inappropriate to rely on a resolution of the House to implement a significant constitutional change such as an extension to the term of Parliament.

2.7 We also note that the passing of a resolution would depend on Parliamentary procedure, as well as the make-up of the House at the point the motion to pass the resolution is moved and voted on. For example, there would need to be a Government notice of motion to pass the resolution, as a Member's motion would most likely lapse before it could be dealt with.³ This would make the procedure dependent on an exercise of powers by the Government, rather than by operation of the legislation itself. As a result, this arrangement would allow the Government to encroach into Parliament's ability to control its own affairs, and risk straining the careful balance in the separation of powers between Parliament and the Executive.

2.8 We note the resolution mechanism would also require all members to be sworn in, and the House to be sitting and fully operational, before it is determined what the term of Parliament is to be. This would create considerable uncertainty regarding the length of each Parliamentary term (including during the period leading up to, and immediately after, each general election).

2.9 In providing this feedback, we have considered whether Orders in Council could be used as an alternative mechanism to implement the process for extending the Parliamentary term (i.e., in lieu of passing a resolution). However, this arrangement is also likely to undermine the separation of powers, as it would empower the Executive to determine the term of Parliament. Unlike primary legislation, Orders in Council could also be challenged in the courts on various grounds.

Deficient process for making a constitutionally significant change

2.10 If enacted, this Bill would create a significant constitutional change which will have broad political, social and economic consequences. However, the process for making this change has been, thus far, inadequate and inconsistent with good policy development processes and best practices – for example:

- (a) There is currently limited evidence about how the maximum length of the term of Parliament affects decision-making and legislation, public engagement,

³ Standing Orders 2023, SO 101.

Parliamentary scrutiny, longer-term planning, and economic costs.⁴ No efforts have been made to first gather evidence to support what is being proposed in this Bill, or to suggest there is a need for reform in the first place.

- (b) There has been no prior public consultation on this issue before this Bill which is of concern to the Law Society.⁵ It puts considerable strain on the need for any education campaign prior to the referendum to be a very thorough one.
- (c) The proposal to have a variable Parliamentary term, and to link that term to select committee membership, raises technical and legal questions about constitutional conventions, Parliamentary processes, and the separation of powers, all of which would benefit from input from (for example) legal and constitutional experts. It is unclear to what extent such experts have been consulted on this policy proposal.⁶

2.11 The process for achieving constitutional change is important, as it affects both the constitution and acceptance of the proposed changes by society.⁷ This process should, among other things:⁸

- (a) allow time for the reform proposals to be designed, carefully considered, debated, and modified;
- (b) follow a non-partisan and non-political approach;
- (c) involve comprehensive and balanced information campaigns;
- (d) allow for public debate and input *prior to* making any decisions to proceed with a particular reform proposal; and
- (e) seek input from constitutional advisors who can present options for reform and explain their implications.

2.12 We note past constitutional changes have typically adhered to such processes, and, in particular, involved meaningful public consultation and engagement on reform options prior to finalising the reform proposals.⁹

⁴ Ministry of Justice *Regulatory Impact Statement: Enabling a four-year term of Parliament* (25 September 2024) (**RIS**) at page 3.

⁵ While this topic has been “canvassed in various fora over several decades”, there do not appear to have been any recent in-depth consultations which focus specifically on the term of Parliament (RIS at page 4).

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⁷ CI Magallanes “Making comments on making constitutions” (2002) *Victoria University of Wellington Law Review*, 33(3-4), 621–630 at 627.

⁸ Magallanes, above, n 33 at 627-629; Constitutional Advisory Panel *New Zealand’s Constitution: A Report on a Conversation He Kōtuinga Kōrero mō Te Kaupapa Ture o Aotearoa* (November 2013) at page 13.

⁹ For example, the White Paper the preceded the enactment of the New Zealand Bill of Rights Act 1990, which explained the policy rationale for introducing such a Bill and explored the impacts of introducing the legislation.

A variable term will create uncertainty

- 2.13 While this submission does not indicate any preference for a three-year or four-year (or longer) Parliamentary term, the Law Society is of the view that variable terms are unhelpful and there should be only one time length of term in order to provide long-term certainty.
- 2.14 A variable term will create uncertainty at each general election about what the next term of Parliament will be. This gives rise to a number of concerns:
- (a) Uncertainty regarding the length of each Parliamentary term may see electors struggling to make informed choices at general elections, and becoming less engaged in the democratic process as a result.¹⁰
 - (b) A variable term would also create challenges for individuals, Government departments, local government bodies, businesses and communities in planning ahead, and potentially lead to inefficiencies in responding to, or implementing policy changes.¹¹
 - (c) At a practical level, it could also mean the Parliamentary cycle falls out of step with other processes such as local government elections (which could potentially result in general elections coinciding with local body elections).
- 2.15 In highlighting these concerns, it is worth noting that section 17(1) of the Constitution Act 1986, which provides for the current three-year term, operates as an entrenched provision.¹² The effect of entrenchment is that a higher number of votes are required in the House or a majority at a public referendum to change the three-year Parliamentary term, which in turn provides a greater level of certainty about the length of future terms. The variable term proposed by this Bill and the uncertainty of the length of the parliamentary term from one election to another is at odds with this certainty.

The proposed referendum question is inappropriate

- 2.16 The Bill proposes to ask voters whether they support its enactment via a public referendum. However, the provisions in the Bill relate to highly technical matters regarding Parliamentary procedure and constitutional norms (such as proportionality requirements for select committees, the separation of powers, and mechanisms to improve oversight of the Government's actions).
- 2.17 In order to aid voter engagement the Law Society considers that a simpler question could be put to the public by referendum. If the proposal to be advanced is a four year parliamentary term, then the Law Society suggests this question is put to the public (but noting that a proper process, such as that outlined in section 3 of this submission, would need to be followed if a referendum is to be held).
- 2.18 The present Bill involves matters of significant constitutional and House procedure complexity. Many people will not have an adequate grasp of such matters in order to be

¹⁰ RIS at page 22.

¹¹ RIS at page 3.

¹² That is, it cannot be amended or repealed without a 'supermajority' of at least 75% of votes in the House, or a majority of votes in a public referendum (see s 268 of the Electoral Act 1993).

able to meaningfully engage with the content of the Bill, and decide whether they support what is being proposed (particularly in the absence of any initiatives to engage with and educate the public about the proposed changes). This is exacerbated by the absence of public consultation in advance of drafting the Bill, and the failure to engage in broader conversation with the public on this important constitutional issue.

It is unclear whether a longer term will lead to improved law making

- 2.19 The Explanatory Note of the Bill states that New Zealand’s three-year Parliamentary term “is not always conducive to good law making”, and a key purpose of the Bill is to extend the term in order to allow more time to “develop and progress well-tested policy and legislation”.
- 2.20 However, for the reasons given in [3.12] below, the Law Society queries whether a longer term will in fact achieve the stated policy goal of improved law making.

3 Alternative process for extending the term of Parliament

- 3.1 A more appropriate way to deal with the issue of whether the Parliamentary term should be extended would be to:
- (a) first assess whether there is a case for extending New Zealand’s Parliamentary term (including by undertaking meaningful public consultation); and
 - (b) then, facilitate a public referendum for electors to vote on whether they prefer to maintain the status quo or extend the term to a specified number of years; and
 - (c) introduce a bill which would come into effect and amend section 17(1) of the Constitution Act if the bill passes, and the majority of referendum votes support the longer term option; and
 - (d) at the same time, implement a package of reforms to ensure there are countervailing accountability measures in place to improve scrutiny of the Government’s actions.
- 3.2 This alternative approach is discussed in more detail below.

Assessing whether there is a case for change

- 3.3 The first step would be to undertake research and policy analysis, as well as broad public engagement, to understand whether there is a case for changing the term of Parliament, and whether there is any appetite for a referendum on the issue. This process should:
- (a) allow ample time for officials to analyse and weigh up any benefits and disadvantages of having three- and four-year (or longer) Parliamentary terms, and to identify potential options for reform;
 - (b) if a longer term is being considered, identify suitable mechanisms to improve legislative scrutiny, and checks and balances on the Government’s powers (for example, by looking to other comparable jurisdictions, and seeking input from constitutional and legal experts); and

- (c) allow for early input from key stakeholders and constitutional experts (perhaps through targeted consultation);
- (d) facilitate public education and consultation on potential reform options (which would require, among other things, presenting any technical information (for example, relating to Parliamentary processes and constitutional conventions) in a simple and accessible format, and giving submitters adequate time to provide feedback); and
- (e) require careful analysis of relevant information, evidence and public feedback to determine whether it is timely to hold a referendum on the length of the term (noting that, in 2023, the Independent Electoral Review Panel recommended holding a referendum on the parliamentary term, supported by a well-resourced information campaign).¹³

Holding a referendum

- 3.4 If the policy analysis process outlined above indicates there may be a case for change, the next step would be to hold a public referendum. The referendum question should be drafted in a clear and concise manner to assist voters, and invite responses indicating support for either maintaining the status quo and continuing with a three-year term, or for extending the term to a period specified in the question (for example, four years).
- 3.5 In the time leading up to the referendum, it would be crucial to inform and educate the public about the reform options through comprehensive and balanced information and education campaigns.
- 3.6 At the same time, the Government could look to introduce a bill which would come into effect and amend section 17(1) of the Constitution Act if the bill passes, and if the majority of referendum votes show support for having a longer Parliamentary term.¹⁴ This bill should only be passed following a full select committee process which includes an opportunity for public submissions on the bill.

Mechanisms to improve accountability

- 3.7 If section 17(1) of the Constitution Act is ultimately amended, and the Parliamentary term is extended to four years (for example), general elections would only occur every four years, rather than every three years. The reduced frequency of elections would impact the ability to hold the Government and Members of Parliament to account, and so there would need to be countervailing measures to improve accountability and checks and balances on the Government's actions over longer Parliamentary terms.

¹³ He Arotake Pōtitanga Motuhake Independent Electoral Review *Final Report: our recommendations for a fairer, clearer, and more accessible electoral system* (November 2023) at page 142. While this Report includes a chapter on potential changes to the Parliamentary term (chapter 5), the RIS notes, at page 4, that the Panel's review covered an extensive range of electoral matters, and did not include in-depth engagement specifically on the term of Parliament, nor with Māori as Tiriti/Treaty partners.

¹⁴ See s 268 of the Electoral Act 1993.

- 3.8 The Bill before the Select Committee places particular emphasis on one form of Executive accountability: subject select committees having a majority of non-Executive members, as a counterweight to a four year term of Parliament.
- 3.9 As the Select Committee will be aware, because select committee membership is proportionate with the membership of the House,¹⁵ the practice in each parliamentary term has been for the vast majority of committees to have government party majorities. Because of relatively tight party discipline in the New Zealand parliamentary environment this means that select committees have been seen to be ‘government controlled’.
- 3.10 The Law Society understands the theoretical case for having select committees with opposition-party majorities. With respect to non-legislative scrutiny there is scope for this change to increase accountability and scrutiny of the Government’s actions, including through:
- (a) self-initiating inquiries and briefings into matters relating to their subject areas; and
 - (b) requiring Ministers and Government officials to appear before select committees more frequently.
- 3.11 However, the benefits in terms of legislative scrutiny are less certain. This form of select committee majority may see those select committees:
- (a) securing votes to obtain independent advice, and/or to hear from additional submitters;
 - (b) issuing reports recommending, by majority, that bills should not proceed if they raise significant concerns; and
 - (c) recommending, by majority, that a bill should only be passed with amendments which address specific concerns.
- 3.12 However, as the government will have a majority in the House they will be able to overrule recommendations to amend or not proceed with bills. The Law Society is also concerned about possible unintended consequences, which might include:
- (a) governing parties voting shorter report back dates for Bills that are to go before opposition majority select committees, which would allow less time for scrutiny; and/or
 - (b) governing parties increasing their use of urgency to bypass select committee scrutiny of some Bills.
- 3.13 Given that the benefits of a change to select committee majorities are not certain, if the Parliamentary term is to be extended, the Law Society suggests introducing a wider package of reforms to improve scrutiny of the Government’s actions.
- 3.14 We suggest this work might be able to be carried out by the Standing Orders Committee. The proposal would be for this Committee to prepare a package of changes to legislative practice that would act as a counterbalance to the executive. The proposed changes

¹⁵ Standing Orders 2023, SO 186(1).

would be publicised before the referendum and would come into effect if the public voted for the four year term of Parliament.

- 3.15 As the Standing Orders Committee operates on the basis of unanimity, this would be an effective vehicle to ensure the changes are supported on a non-partisan basis to give certainty.
- 3.16 This package could include changes to select committee composition and/or majorities. However, the reforms could also include other initiatives which can be implemented to increase scrutiny of the executive without upsetting existing constitutional arrangements – these include:
- (a) Avoiding rushed policy development and legislative processes (including the use of urgency), and allowing ample time for meaningful public consultation and scrutiny of legislative proposals, as well as publication of information about proposed changes.
 - (b) Ensuring Government bills are accompanied by Regulatory Impact Statements (or other documents such as Law Commission reports), which explain the policy problem, propose options to address that problem, and identify the most appropriate option based on evidence and cost-benefit analyses. These documents should be made publicly available prior to the introduction of a bill.
 - (c) Ensuring each new policy proposal is supported by evidence which suggests the policy will have the desired effect once it is implemented.
 - (d) Ensuring any advice and reports about whether a proposed bill is consistent with the New Zealand Bill of Rights Act 1990 are made publicly available at the time a bill is introduced to the House. These reports and advice should consider the impacts each policy proposal will have on *all* rights and freedoms engaged by that proposal.
 - (e) Providing for a process for public submissions on significant amendments made to bills after the select committee stage (for example, at the committee of the whole House stage).
 - (f) Empowering Parliament to undertake post-legislative scrutiny of legislation after enactment (particularly, where legislation was passed under urgency) in order to understand whether the legislation is operating effectively and as intended, and whether any changes are needed to ensure the legislation meets its stated objectives.



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