

22 April 2020

Regulations Review Committee
Parliament Buildings
Wellington

By email: rr@parliament.govt.nz

Re: Inquiry into parliamentary scrutiny of confirmable instruments

Introduction and summary of recommendations

1. The New Zealand Law Society (**Law Society**) welcomes the opportunity to comment on the Regulations Review Committee's Inquiry into parliamentary scrutiny of confirmable instruments (**Inquiry**).
2. The Regulations Review Committee (**RRC**) has provided a *Briefing to investigate confirmable instruments* report (**RRC Report**) to the House, and has identified the following two concerns:
 - "The nature of the constitutional protection provided by the process of confirming secondary legislation is not well understood within Parliament or the Government.
 - The confirmation process as it is currently conducted may not provide an effective form of parliamentary scrutiny of secondary legislation."¹
3. The Inquiry seeks to improve understanding of the constitutional importance of the confirmation process, consider the need for more guidance on when it should be used, and whether any changes are required to parliamentary or government processes to make scrutiny of secondary legislation more effective.
4. The Law Society acknowledges the concerns and supports the RRC taking steps to improve understanding of the process of parliamentary scrutiny of confirmable instruments. Our response to the RRC's consultation questions is set out below.
5. We consider the effectiveness of the current process could be improved by allowing the RRC to maximise the time it has for scrutiny, in two respects:
 - a) The RRC should commence its scrutiny of confirmable instruments when the instruments themselves are referred to it, rather than waiting for the confirmation bill. (See discussion at [22] – [26] below)
 - b) The Standing Orders should be amended to permit the RRC to refer a confirmable instrument to another committee for its opinion (current Standing Order 293 only permits the RRC to refer a bill to another committee, not a regulation). (See [20] – [21]).
6. The Law Society would appreciate the opportunity to be heard.

¹ *Briefing to investigate confirmable instruments, Report of the Regulations Review Committee, March 2020* (available at https://www.parliament.nz/resource/en-NZ/SCR_95067/2543db1557cf522e286cf21dc670ffa0854b8131), at p2.

Inquiry questions

Q1: Does the current process of parliamentary scrutiny of confirmable instruments provide effective scrutiny?

7. The Law Society considers the current process for parliamentary scrutiny of confirmable instruments allows effective parliamentary scrutiny to occur. Whether effective scrutiny occurs in fact will depend to a large degree on the extent to which the RRC (and any subject specialist committee) engages with its scrutiny role.
8. Since 2016, the process of scrutiny has been made more accessible by the insertion of Schedule 2 in the Legislation Act 2012, which lists all the provisions under which confirmable instruments are made.² The parliamentary confirmation process itself is clearly set out in subpart 1A of Part 3 of the Legislation Act.
9. Perhaps surprisingly, the RRC's reports on the annual confirmation bills over the past decade do not refer to any substantive concerns about the confirmable instruments that were made over that period. The Law Society does not suggest that any of those instruments should not have been confirmed. It may be that the lack of any expression by the RRC of substantive concerns indicates that the powers to make such instruments were exercised appropriately in all cases. However, there are indications in several of the RRC's reports that it did not consider it had adequate time to perform the necessary scrutiny. The two suggestions for reform made by the Law Society in this submission are directed at allowing the RRC to maximise the time it has for scrutiny.

Q2: Is the additional layer of scrutiny provided through the confirmation process currently being applied to appropriate instruments?

10. The Law Society agrees that, as a principle, the confirmation procedure should not apply where subordinate legislation is required to be made under the principal Act, or where there is a low level of discretion to make it (as is the case with the two examples given at page 10 of the RRC Report).
11. Some alterations to Acts by Orders in Council have already been subject to parliamentary scrutiny. This includes the process of updating legislation or texts of protocols in order to implement New Zealand's international treaty obligations. For example, section 55(2) of the Antarctica (Environmental Protection) Act 1994 provides for amending schedules in the Act in order to update the text of the Protocol.³ As the implications of ratification or accession to any international treaty should have already been considered as part of the parliamentary treaty examination process, the Law Society considers these types of confirmable instruments would not need further detailed examination by a subject select committee.⁴
12. This principle appears to have been accepted in respect of section 61HA(2) of the Social Security Act 1964 (repealed) which was removed from the list of confirmable instruments in 2018, because it related to mandatory CPI adjustment, by Order in Council, of certain

² As had been recommended by Carter, McHerron and Malone, *Subordinate Legislation in New Zealand*, Lexis Nexis, Wellington 2013, at p 151.

³ See Antarctica (Environmental Protection) Act (Schedule 2) Order 2018, confirmed in the Subordinate Legislation Confirmation Act (No. 2) 2018.

⁴ Standing Orders 397-400.

benefits.⁵ It made no sense to require confirmation of an instrument that Parliament had required be made.

Q3: How should the RRC improve the process by which it scrutinises confirmable instruments?

Should the RRC ask administering agencies to complete a standard list of specific questions in relation to each confirmable instrument?

13. There may be merit in having a standard list of specific questions to assist agencies in providing more meaningful responses and develop a deeper understanding of the underlying reasons for the confirmation process. Where the confirmable instrument is made under broad powers, the instrument is likely to contain policy matters that would otherwise be provided for in an Act of Parliament and be subject to parliamentary scrutiny by a subject select committee.
14. The Law Society suggests that issues raised in the Regulatory Impact Statement (RIS) and the departmental disclosure statement provide a good starting point for further scrutiny. As a minimum, a list of organisations consulted, and a summary of concerns or issues raised during the departmental consultation process, should be provided by agencies in response to the standard questions.
15. However, the Law Society agrees with the RRC's statement that the advice provided by administering agencies may not, by itself, be sufficient for effective scrutiny.⁶ That is because the agencies would have a clear conflict of interest if they were being expected to provide material that may undermine the instrument they wish to ensure remains in effect. Accordingly, to perform its scrutiny role effectively, the RRC cannot rely solely on the material provided by agencies.

Should all confirmable instruments, or certain confirmable instruments, be referred to relevant subject-matter select committees, rather than being examined solely by the RRC?

16. The Law Society considers that the RRC should continue its existing process of initial scrutiny of confirmation bills. Under Standing Order 293, the RRC can ask "any other committee for its opinion on [a] bill ..."; where appropriate therefore, the RRC currently has the option to refer aspects of a confirmation bill to a relevant subject select committee to consider and report back to the RRC.
17. Consideration by a subject select committee may be appropriate particularly where the confirmable instrument:
 - contains matters of policy or discretion made under broad empowering provisions; or
 - amends or overrides statutory provisions by regulations (Henry VIII clauses).
18. The power to amend a schedule of an Act may have the significant effect of altering or determining the application of legislation. For example, section 74A(e) of the Arms Act 1983 allows amendment of the description of prohibited firearms or magazines or to declare any semi-automatic firearm to be a prohibited firearm for the purposes of the Act.⁷ This is the type

⁵ Social Security Act 2018, s 459 and sch 10.

⁶ Report of the Regulations Review Committee, *Briefing to Investigate Confirmable Instruments*, March 2020, at p 9.

⁷ See Arms (Prohibited Ammunition) Order 2019, confirmed in the Subordinate Legislation Confirmation Act 2019. See also Report of the Regulations Review Committee on the Subordinate Legislation Confirmation Bill (No 4), December 2019.

of regulation that would be suitable for referral to a subject select committee, as it involves substantive policy issues.

19. By contrast, it may be more appropriate for the RRC alone to consider the following types of instrument (unless there is a compelling reason for scrutiny by a subject select committee):
- Instruments imposing levies or charges in the nature of a tax, as the confirmation requirement reflects the constitutional arrangements for parliamentary oversight under section 22 of the Constitution Act 1986. This oversight reflects the core function of the RRC as Parliament's designated committee to conduct parliamentary scrutiny of powers delegated to the Executive. There are significant consequences if such instruments are not confirmed, and a low element of discretion is exercised.⁸
 - Emergency powers, where the RRC has built up a body of expertise through its consideration of the constitutional principles involved.⁹

Do you have any other suggestion for how the RRC can receive advice to effectively inform its scrutiny of confirmable instruments?

20. This question highlights a deficiency in the current Standing Orders which the RRC may wish to recommend be rectified by the Standing Orders Committee. As currently drafted, Standing Order 293 would not allow the RRC to refer a confirmable instrument to another committee before the confirmation bill had been referred to the RRC. This may create time pressures for the RRC in carrying out its scrutiny function, as the RRC has previously mentioned.
21. To give more time to allow another committee to assist the RRC in its scrutiny, the Law Society recommends that Standing Order 318 be amended to allow the RRC to refer a regulation to another select committee for its opinion (as it can in respect of a bill, under Standing Order 293).

Q4: Would there be advantages in the RRC beginning its scrutiny of certain confirmable instruments after they are made but before the Subordinate Legislation Confirmation Bill is referred to it?

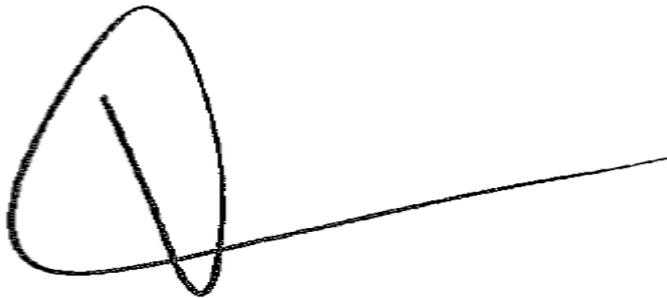
22. As will be clear from our answer to and recommendation above, there is no reason why the RRC needs to wait for the annual confirmation bill before it can begin to scrutinise confirmable instruments.
23. Under Standing Order 318(1), the RRC examines all regulations. As a standing item of business, the RRC can monitor each instrument as it is made. Doing so will allow the RRC to better manage the time available for its scrutiny functions in respect of confirmable instruments.
24. The Law Society considers the RRC's regular scrutiny of subordinate legislation is an opportunity to examine confirmable instruments under the scrutiny grounds in Standing Order 319.

⁸ See for example, levies found to be ultra-vires originally included in the Subordinate Legislation Confirmation and Validation Bill 1995 which were required to be put in another bill amending the empowering legislation: *Subordinate Legislation in New Zealand*, (above n 2) at p. 153, note 49.

⁹ See for example, the Canterbury Earthquake Response and Recovery Act 2010 and Canterbury Earthquake Recovery Act 2011, RRC's two interim reports [2010] AJHR I.16H and [2011] AJHR I.16N. Also see the RRC's Report on its Inquiry into Parliament's legislative response to future national emergencies, December 2016 [2016] AJHR I.16B.

25. In one instance, the RRC recommended that the 1991 Confirmation Bill should not confirm the Commodity Levies (Herbage and Amenity Seed) Order 1991, because of a non-compliant provision under consideration during the course of regular scrutiny by the RRC. The Order was confirmed the following year after the provision of concern was revoked.¹⁰
26. The Law Society suggests that the RRC could build on its current process of quarterly reporting by Legislative Counsel by:
- identifying those instruments that are confirmable and ask the relevant administering agencies to address a standard list of questions;
 - identifying organisations consulted in the making of those instruments and what their concerns are (if any); and
 - depending on the issues raised, the RRC could seek the views of organisations and other relevant affected parties or refer the instrument for a more detailed scrutiny by a relevant subject select committee if permitted under Standing Orders according to the amendment we suggest above.

Yours faithfully

A handwritten signature in black ink, consisting of a large, stylized loop followed by a long horizontal stroke extending to the right.

Andrew Logan
NZLS Vice President

¹⁰ *Subordinate Legislation in New Zealand*, (above n 2), p. 154, note 53.