

Outline of Presentation

The view from the other side of the fence: Parliamentary scrutiny Our constant critics and consumers: laws regulating the content of statutes or scrutinising statutes, the role of legislative review committees and other related matters

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Introduction

This presentation is in 2 parts:

- the legislation review committee in New Zealand:
- Parliamentary scrutiny of Bills in New Zealand generally.

This presentation focusses on some of the features of NZ practice which may be different from the practice in some of the Australian systems.

It seems that the differences between Australia and New Zealand may be more significant in the area of Parliamentary scrutiny of Bills generally. For example, practically all NZ Bills receive a heavy work-out at subject select committees.

Some of the many pros and cons of NZ's different practices are listed below. Some go without saying.

Part 1 — Legislation Review Committee

Body

NZ Standing Order 377 provides for a legislative review committee called the Regulations Review Committee.

The Regulations Review Committee, by convention, —

- is chaired by an Opposition member:
- tries to reach a consensus view across party lines.

Functions - examination of bills

The Regulations Review Committee may consider, in respect of any Bill before a subject select committee, —

- any regulation-making power; and
- any provision that contains a delegated power to make instruments of a legislative character; and
- any matter relating to regulations.

See Standing Order 377(3).

No criteria for the consideration are set in Standing Orders.

The Regulations Review Committee may then report on that consideration to the subject select committee that is considering the Bill. The report is not made to the Minister in charge of the Bill.

The Regulations Review Committee has no power to require amendments to be made to the Bill.

Pros and cons in terms of Parliamentary scrutiny

- it is up to the subject select committee to decide whether and how to take the Regulations Review Committee's comments on board.

Functions - examination of regulations before they are made

There is provision in Standing Orders for a Minister to refer draft regulations to the Regulations Review Committee for consideration and for the Regulations Review Committee to report on the draft regulations to the Minister.

See SO 377(2).

This provision is not widely used.

Functions - examination of all regulations after they are made

All regulations must be laid before the House of Representatives not later than the 16th sitting day after the day on which they are made (*see* s 4 of the Regulations (Disallowance) Act 1989).

The Regulations Review Committee examines all regulations to see whether the regulations ought to be drawn to the special attention of the House of Representatives on one or more of the following grounds (*see* Standing Order 377(1) and 378):

- “(2) The grounds are, that the regulation—
 - “(a) is not in accordance with the general objects and intentions of the statute under which it is made:
 - “(b) trespasses unduly on personal rights and liberties:
 - “(c) appears to make some unusual or unexpected use of the powers conferred by the statute under which it is made:
 - “(d) unduly makes the rights and liberties of persons dependent upon administrative decisions which are not subject to review on their merits by a judicial or other independent tribunal:
 - “(e) excludes the jurisdiction of the courts without explicit authorisation in the enabling statute:
 - “(f) contains matter more appropriate for parliamentary enactment:
 - “(g) is retrospective where this is not expressly authorised by the empowering statute:
 - “(h) was not made in compliance with particular notice and consultation procedures prescribed by statute:
 - “(i) for any other reason concerning its form or purport, calls for elucidation.”

Functions - investigation of complaints about regulations at any time

The Regulations Review Committee also investigates complaints about the operation of regulations, to see whether the complaint relates to one of the grounds on which the committee may draw a regulation to the special attention of the House of Representatives (*see* Standing Order 377(5) and 379).

The Regulations Review Committee may report on the complaints to the House of Representatives.

There is no time limit. So a regulation that has “passed” the initial Regulations Review Committee examination may still be drawn to the attention of the House of Representatives later if a complaint is subsequently upheld.

Pros and cons in terms of Parliamentary scrutiny

- regulations can be scrutinised at any time, not just within a specified disallowance period.

Regulations (Disallowance) Act 1989

Any member of Parliament may move a notice of a motion to disallow any regulations or any provisions of any regulations. There is no time limit.

Notices of motion given by a member of Parliament who is a member of the Regulations Review Committee attract special treatment. Basically, the relevant regulation is deemed to have been disallowed at the expiration of 21 sitting days, unless the motion has been disposed of or certain other things have happened. *See* s 6(1) of the Regulations (Disallowance) Act 1989.

Regulations Review Committee reports

The Regulations Review Committee publishes reports of its investigations and other activities.

These reports are now collected on a website. *See* http://lawschool.vuw.ac.nz/vuw/content/display_content.cfm?school=law&id=1480

Pros and cons in terms of Parliamentary scrutiny

- Regulations Review Committee decisions form a body of precedents which inform the drafters of new legislation which may raise similar issues.

Part 2 - Parliamentary scrutiny of Bills generally

NZ Parliamentary practice and Standing Orders

- unicameral system:
- NZ Standing Orders are prescriptive about some of the requirements for Bills, eg they require that the commencement provision must be in a separate clause:
- NZ Standing Orders restrict the types of omnibus bills that can be introduced:
- NZ practice is often to split Bills at the end of the committee of the whole House stage into separate Bills.

Pros and cons in terms of Parliamentary scrutiny

- the additional checks and balances in the NZ system go some way to compensating for the single layer of scrutiny of Bills in the unicameral system:
- legislative proposals are not “hidden” in portfolio Bills that amend all the legislation administered by a particular department. However, they can be “hidden” in other types of omnibus Bills.

New Zealand Bill of Rights Act 1990

Where any Bill is introduced into the House of Representatives, the Attorney-General must,—

- in the case of a Government Bill, on the introduction of that Bill; or
- in any other case, as soon as practicable after the introduction of the Bill,—

bring to the attention of the House of Representatives any provision in the Bill that appears to be inconsistent with any of the rights and freedoms contained in the Bill of Rights.

See section 7 of the New Zealand Bill of Rights Act 1990.

All Bill of Rights advice given to the Attorney-General is now made publicly available, whether or not it results in a section 7 report.

Pros and cons in terms of Parliamentary scrutiny

- any inconsistencies with the rights and freedoms contained in the Bill of Rights are public knowledge from the outset, and can be scrutinised by the select committee and by the House of Representatives:
- there is no official process for scrutinising whether amendments moved at the select committee stage or the committee of the whole House stage are inconsistent with the rights and freedoms contained in the Bill of Rights.

Consideration by subject select committees

All Bills stand referred to a subject select committee for consideration after their first reading. *See* Standing Order 283. The only exceptions are —

- if the House of Representatives has accorded urgency to the Bill:
- Appropriation and Imprest Supply Bills.

Some select committees do not have a Government majority.

Some select committees are chaired by MPs who do not belong to the major coalition partner in the Government.

Subject select committees advertise for public submissions on Bills that are referred to them, except in urgent or other unusual circumstances.

Pros and cons in terms of Parliamentary scrutiny

- subject select committees pride themselves on the level of scrutiny they give Bills.
- subject select committees often work across party lines to try and make a legislative proposal work better, even if they do not agree with the proposal overall.

Time for select committees

Standing Order 289 provides—

- a subject select committee must finally report to the House of Representatives on a Bill within 6 months of the Bill being referred to it or by such other time fixed by the House of Representatives:
- the Business Committee may extend the time for the report for any Bill.

As a rough rule of thumb, most Bills do spend about 6 months at the select committee stage. A few, more urgent, Bills spend less than 6 months, and some Bills spend a lot longer.

Role of subject select committees

The department of the Minister in charge of the Bill prepares a departmental report summarising the submissions and recommending any changes to the Bill.

The subject select committee can—

- either pick up and run with those departmental recommendations or not:
- recommend other changes.

However, subject select committees with a Government majority tend not to recommend proposals that are not supported by the Government.

The subject select committee recommends actual amendments to the Bill, in the form of a redline, marked up version of the Bill.

Pros and cons in terms of Parliamentary scrutiny

- members of select committees work their recommendations up to the stage that they are the actual amendments needed to the Bill. As a result, the members of the select committee, rather than the Minister in charge of the Bill, fill many of the secondary level gaps in their initial recommendations:
- the fact that select committees work with, and report back, Bills with the amendments shown in them as a redline version of the Bill has advantages over the Parliamentary amendments that are moved in the “omit cat and substitute dog” SOP style, in that MPs can see exactly what they are doing:
- extensive select committee involvement means that bills can sometimes become less coherent in terms of implementing a consistent policy. What starts out as a cat can turn into a donkey, or a cat with 6 legs, as a result of the ability of individual members to pursue their own agendas and have them implemented as a price for supporting a Bill:
- there may also be adverse effects on the technical quality of a Bill caused by rewriting the policy through the select committee process, because there is often insufficient time to assess how changes affect the structure and language of other parts of the Bill:
- if the select committee is tied, the select committee cannot report (and the Bill is simply discharged). Much of the output of the select committee scrutiny is lost, since public submissions are not reflected in select committee recommendations.

What happens to subject select committee recommendations?

Subject select committees recommend amendments to Bills directly to the House of Representatives, not to the Minister in charge of the Bill. Their reports are public.

The Bill as reported back from the select committee shows 2 types of amendments included in the Bill:

- amendments recommended by the committee unanimously:
- amendments recommended by a committee by majority.

Amendments recommended by a committee unanimously are automatically adopted as part of the Bill when the Bill is read a second time.

The Speaker puts a question at the end of the second reading of the Bill that the amendments recommended by the committee by majority be agreed to. If the House of Representatives agrees, those majority amendments are also then adopted.

See Standing Orders 292 and 294.

Pros and cons in terms of Parliamentary scrutiny

- members of select committees are not discouraged from recommending amendments by the fact that the Minister in charge may disregard the recommendations.

Second reading

In NZ, there is a debate following the presentation of the select committee report on the Bill.

This debate is a maximum of 2 hours. This debate can happen any time after 3 sitting days have expired since the presentation of the select committee report.

Pros and cons in terms of Parliamentary scrutiny

This debate ensures that there is a full debate on the Bill, which is fully informed by the findings of the select committee, once the MPs are fully familiar with the Bill and before the consideration in committee of the whole House stage.

Consideration in committee

A committee of the whole House considers each Bill to determine whether the Bill properly incorporates the principles or objects of the Bill as read a second time by the House of Representatives. Most Bills are so scrutinised.

Most Bills are voted on —

- by voice vote or by party vote, which speeds up the time spent on the voting:
- “Part by Part”, rather than “clause by clause” or “Bill as a whole”. As a rough rule of thumb, MP’s expect that the closure motion will be taken after about an hour’s debate on each question, ie on each Part during a “Part by Part” debate.

Pros and cons in terms of Parliamentary scrutiny

- there is time for a reasonable level of scrutiny of Bills at this stage:
- in reality, scrutiny at this stage tends to be less constructive than at the select committee stage:
- there is an expectation on the part of the Government that PCO will structure Government Bills so as not to draw out the time taken in committee of the whole House. This can have negative impacts on the readability of legislation.

Parliamentary Counsel involvement

Parliamentary Counsel attend both—

- select committee meetings (except for some of the hearing of submissions):
- the committee of the whole House stage.

Pros and cons in terms of Parliamentary scrutiny

- members of the select committee are the PCO's first audience. We have to draft Bills in a way that—
 - (a) is intelligible to ordinary backbench MPs who might be quite new to legislation; and
 - (b) can withstand sometimes very close scrutiny by MPs who might be ex-Ministers with an in-depth knowledge of the subject:
- Parliamentary Counsel are very aware of the MPs' views about the legislation, eg whether it makes sense, whether it does the job, etc:
- Parliamentary Counsel give advice to the select committee about some of the recommendations they are proposing:
- Parliamentary Counsel usually draft all of the amendments recommended by the select committee, not just those later accepted by the Minister in charge of the Bill. (The exception is if the Attorney-General does not agree to Parliamentary Counsel assisting because the amendments are contrary to Government policy. This does not happen often):
- because the members of the select committee (and other MPs and the public) can see exactly how the amendments look, often a lot of reworking is needed to get the amendments just as they are wanted.