

# Technical Scrutiny of Bills in New Zealand

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## *Introduction*

The New Zealand Parliament has an extensive select committee system dedicated to the examination of bills before the House of Representatives. Subject select committees are established at the beginning of each Parliament and cover 13 subject areas.<sup>1</sup> Virtually all bills before the House are referred to one of these committees following a successful first reading.<sup>2</sup>

The New Zealand Parliament, a Parliament with no upper House, has no specialist committee dedicated to the technical scrutiny of bills. Subject select committees are expected to consider all aspects of bills, both policy and technical, when examining a bill. The functions of select committees in respect of bills are described in Standing Orders.<sup>3</sup> Standing Orders refer simply to examining bills to determine whether they should be passed, and to amendments that the committee may recommend. The scope for amendments is limited to those that are relevant to the subject-matter of the bill.<sup>4</sup>

This contrasts with technical scrutiny committees in the State and Commonwealth Parliaments of Australia. Australian technical scrutiny committees have terms of reference set out in either Standing Orders or legislation. The terms of reference specify the function of the committee and the technical matters to which the committee is to have regard when examining and reporting on bills.

This paper explores the framework for technical scrutiny of bills in New Zealand and the extent to which select committees in New Zealand undertake technical scrutiny. The framework is compared with that in place for the various Australian technical scrutiny committees. The paper then considers various options for strengthening technical scrutiny of bills in the New Zealand Parliament.

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### *Technical Scrutiny*

A useful starting point is to consider what is meant by technical scrutiny of bills. Legislation is generally the most common tool by which a Government seeks to achieve its desired policy outcomes. At the broadest level, technical scrutiny is not concerned with the policy that is to be achieved, but with the quality of the legislation that is proposed to achieve it. Technical scrutiny is a process by which legislation is measured against various standards to check that it meets acceptable objective legislative standards.

Dawn Oliver develops the concept of scrutiny further by identifying three types of scrutiny standards.<sup>5</sup> Oliver's analysis suggests some standards deal with substantive legal standards such as human rights requirements, constitutional principles and standards for drafting legislation. There are also procedural standards such as consultation processes and Cabinet approval processes that bills will be checked against. A third category is information requirements such as requirements for explanatory notes and the required content of these notes.

There is an understandable tendency to focus on the substantive public law standards when considering technical scrutiny standards. Nevertheless compliance with procedural standards and the provision of information regarding technical aspects of a bill can be equally important in achieving the goal of quality legislation. For example, in New Zealand, the Government has agreed that where a bill contains a provision empowering the making of deemed regulations, or a commencement provision deferring commencement until a date established by order in council, the explanatory note will explain the justification for such provisions. Such additional material is invaluable in the scrutiny of the bill. It is also useful for holding the Executive to account for the exercise of delegated powers once the bill enters into force.

### *Technical Scrutiny of Bills in New Zealand*

Technical scrutiny of legislation is often associated with parliamentary committees dedicated to this process. This is the case in New Zealand in respect of delegated legislation, where the Regulations Review Committee checks delegated legislation against criteria listed in Standing Orders.<sup>6</sup> The Regulations Review Committee has developed a substantial jurisprudence of review based on its reports to the House under its various, review, complaint and inquiry functions.<sup>7</sup>

However in respect of bills select committees do not take the lead in New Zealand in technical scrutiny. That role has been taken by the Legislation Advisory Committee (LAC). The LAC was established in 1986 with the following terms of reference:<sup>8</sup>

- (a) To provide advice to departments on the development of legislative proposals and on drafting instructions to the Parliamentary Counsel Office;

- (b) To report to the Minister of Justice and the Legislation Committee of Cabinet on the public law aspects of legislative proposals that the Minister or that committee refers to it;
- (c) To advise the Minister of Justice on any other topics and matters in the field of public law that the Minister from time to time refers to it;
- (d) To scrutinise and make submissions to the appropriate body or person on aspects of Bills introduced into Parliament that affect public law or raise public law issues;
- (e) To help improve the quality of law-making by attempting to ensure that legislation gives clear effect to government policy, ensuring that legislative proposals conform with the LAC Guidelines, and discouraging the promotion of unnecessary legislation.

The membership of the LAC includes Law Commissioners, academic public law specialists, senior private and public sector lawyers, as well as senior policy advisers, Parliamentary Counsel, and senior members of the judiciary. Although it is serviced by the Ministry of Justice and reports annually to the Attorney-General on its activities, its varied membership facilitates independence from the Executive. The Cabinet Manual emphasises its independence from Government influence.<sup>9</sup>

The LAC takes a holistic approach to technical scrutiny. It has developed a comprehensive set of guidelines, the *Guidelines on process and content of legislation* (LAC Guidelines) with detailed guidance on the process of developing legislation, core constitutional principles with which proposed legislation should be consistent, and a number of specific public law issues that may need to be considered depending on the subject matter of the bill. The Guidelines are also prefaced by a checklist in question format for the use of departmental advisers in developing legislation. It is clear from its introduction that the Guidelines are intended to be a source of reference that can be used at all stages of the legislative process.<sup>10</sup>

While the LAC takes a leading role in the technical scrutiny of bills, it is by no means the only player. The Law Commission has an overlapping role in respect of scrutiny of legislation. The Law Commission is an independent Crown entity governed by statute.<sup>11</sup> Its purpose is the systematic review, reform and development of the law of New Zealand.

A recent initiative of the Law Commission has been the establishment of the Legislation Design Committee. The focus of this committee is to assist in designing the architecture of legislation at an early stage in the development of the bill: 'The most efficient time to consider best practice in drafting new legislation is before the framework of the legislation is settled.'<sup>12</sup>

There are other players. To some extent the Parliamentary Counsel Office provides another technical scrutiny step in the process. The Office enjoys some statutory independence. It is referred to as an office of Parliament in its founding

legislation.<sup>13</sup> Parliamentary Counsel are appointed by the Governor-General on the recommendation of the Prime Minister and hold office at the pleasure of the Governor-General. Parliamentary Counsel are expected to draft in accordance with the LAC Guidelines. Nevertheless the independence of the Office should not be overstated. The Office reports to the Attorney-General and is the Government drafter of bills. The expectation is that the Parliamentary Counsel Office will draft for their client department to meet the needs of the client.

The Cabinet Manual requires all proposed bills to be considered by the Cabinet Legislation Committee. The bill must be accompanied by a paper requiring confirmation that the bill has been subject to regulatory impact analysis and meets listed legal criteria. The Cabinet Legislation Committee criteria are compliance with principles of the Treaty of Waitangi; rights and freedoms contained in the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993 (state the nature of any potential inconsistencies identified, or state that there are none; note the steps taken to address any issues, or include information on any justifications for the Bill infringing a right or freedom); principles and guidelines set out in the Privacy Act 1993 (if the Bill raises privacy issues, indicate whether the Privacy Commissioner agrees that it complies with all relevant principles); relevant international standards and obligations; and *LAC Guidelines: Guidelines on Process and Content of Legislation*, a publication by the Legislation Advisory Committee.

To assist the Cabinet Legislation Committee with its consideration of the New Zealand Bill of Rights Act 1990, the Ministry of Justice provides advice to the Attorney-General in relation to non-Justice bills, with the Crown Law Office advising the Attorney-General on Justice bills.

In summary there is considerable Executive and independently sourced technical scrutiny of bills prior to introduction in the House. The concentration of resource at these earlier stages is understandable given the time constraints and political factors that enter into the law making equation once a bill enters the Legislature.

### *Parliamentary Technical Scrutiny*

Select committees have the power to conduct technical scrutiny of bills. Unless the House restricts committee consideration when referring the bill, a committee may recommend any amendment to the bill that is relevant and is consistent with the principles and objects of the bill.

The question is whether select committees, in the absence of specific Standing Orders instruction, measure bills against the LAC Guidelines or other public law standards for legislation when considering bills in the consistent and systematic manner that, for example, dedicated scrutiny committee do in Australia.

There is clear evidence that committees take note of submissions made to them on technical scrutiny matters. A survey of the submissions made by the LAC to select

committees in 2007 demonstrates that committees recommended amendments to bills reflecting almost all advice received from the LAC. In 2007 184 bills were considered by committees. The LAC made submissions on ten bills. In eight of the ten bills the proposed changes were adopted by the committee.<sup>14</sup>

Other organisations regularly make submissions to select committees on technical scrutiny matters. In 2007 the Human Rights Commission made submissions on 7 bills as part of its role of monitoring domestic legislation for human rights compliance and providing specialist human rights advice to Parliament. The New Zealand Law Society also monitors all bills and submits regularly reflecting the expertise of that Society.<sup>15</sup> The Society has the function under section 65(e) of the Lawyers and Conveyancers Act 2006, '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'.

Select committees appear on the whole to be provided with generous numbers of submissions relating to matters of technical scrutiny. The evidence suggests that committees generally accept the technical advice of these specialist submitters. Committees also receive advice from the Regulations Review Committee on provisions in bills relating to delegated legislation.<sup>16</sup> The Regulations Review Committee does systematically review all bills for this purpose. Select committee staff have also in my experience provided advice from time to time on technical scrutiny matters.

However in the absence of a requirement to consider technical scrutiny matters, it is not clear that systematic and consistent technical scrutiny of bills is being undertaken by select committees in all cases.

### *The Need for Parliamentary Technical Scrutiny of Legislation*

It is important that the Legislature take responsibility for technical scrutiny of bills that it considers. Legislation is the product of Parliament. Parliament should ultimately determine the standards for the legislation that it makes.

On a more practical level, a feature of the New Zealand Legislature is that bills often change considerably during their course through the House. As noted, virtually all bills are referred to select committees which invite public submission. These submissions and further work by the committee frequently lead to recommendations to amend the bill. Where the recommendation from the committee is unanimous these amendments are adopted into the bill at second reading.<sup>17</sup>

There is also scope for later amendment to the bill at the Committee of the whole House stage. It is important that these amendments are measured against the same public law standards as the bills when they were originally introduced. These are strong arguments for the House of Representatives adopting and applying scrutiny standards independently of the Executive.

A further matter noted by McGee is the importance of select committee consideration of the relationship of the bill before them to the New Zealand Bill of Rights Act 1990.<sup>18</sup> McGee notes that the Attorney-General's view in vetting bills at introduction for consistency with the Act is not conclusive, and that it is open to a committee to make recommendations that amend the bill for consistency with the Bill of Rights Act. This role is not reflected in legislation or in Standing Orders.

To consider whether improvements can be made to parliamentary technical scrutiny in New Zealand, it is useful to compare New Zealand's arrangements for technical scrutiny with the jurisdictions in Australia.

### *Parliamentary Technical Scrutiny in Australia*

The Australian Senate is the historical leader in terms of parliamentary scrutiny of legislation. The Senate established a committee for the scrutiny of delegated legislation in the 1930s and the Scrutiny of Bills Committee in 1981. Today the Scrutiny of Bills Committee measures legislation against scrutiny standards prescribed in Senate Standing Order 24:

The committee examines all Bills which come before Parliament and reports to the Senate whether such bills

- (i) trespass unduly on personal rights and liberties, or
- (ii) make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers, or
- (iii) make rights, liberties or obligations unduly dependent upon non-reviewable decisions, or
- (iv) inappropriately delegate legislative powers, or
- (v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.

The practice of the committee is to publish an *Alerts Digest* that is presented to the Senate which outlines the bills introduced in the previous week. The committee comments on the bills in terms of the matters relating to the terms of reference. In some cases the committee seeks further clarification of matters from the relevant Minister.<sup>19</sup>

The committee then produces a Report containing the relevant extract from the Digest, the minister's response and any further comments the committee may wish to make. In the first report of 2009 on the Alert Digest No 1 2009, the committee was satisfied with the ministerial responses received on technical scrutiny matters, though it comments in one case that further information in the explanatory note to the bill would have been appropriate. The ministerial responses are appended to the report.

The core principles stated in Standing Order 24 have been adopted in various forms in most of the Australian state/territory jurisdictions that have scrutiny committees.

In the Australian Capital Territory and Victoria, scrutiny committees have been given the additional responsibility of reporting on consistency with their respective Bills of Rights. In addition Victoria has added consideration of information and privacy standards.

The Parliament of Queensland has established its own scrutiny standards in legislation.<sup>20</sup> The standards are labelled fundamental legal principles and consist of a non exhaustive list of rights and liberties. They also require legislation to have sufficient regard for the institution of Parliament, with particular reference to the use of delegated legislation.

Under the Legislative Standards Act 1992 it is a function of Parliamentary Counsel to advise Ministers on consistency with the fundamental legal principles in an independent capacity and to ensure that the Queensland statute book is of the highest standard.

Like New Zealand, the Queensland Cabinet Handbook incorporates consistency with scrutiny standards into its legislation approval procedures. However under the Parliament of Queensland Act 2001 the scrutiny of legislation committee also apply the fundamental legal principles to bills before the House. The committee then reports to the House on perceived inconsistencies with fundamental legal principles. Oliver concludes her comparison between the Queensland and the UK scrutiny systems with the observation:<sup>21</sup>

The particular points of comparison for the United Kingdom in the Queensland system include the fact that independent, executive *and* parliamentary scrutiny standards are set, that they are partly statutory, that they include procedural, informational and substantive matters and that those matters broadly reflect the kinds of concerns with which the UK Parliament's committees might also be expected to concern themselves.

### *Options for Enhancing Technical Scrutiny of Legislation in New Zealand*

Comparison of technical scrutiny of legislation in New Zealand and Australia shows that the formal framework for *parliamentary* technical scrutiny is less developed in New Zealand than Australia. Executive and independent scrutiny is well established with standards and monitoring processes developed by the Legislation Advisory Committee, the Cabinet Office and others.

The New Zealand select committee framework is highly developed in that virtually all bills are referred to committees for public hearing and committee scrutiny. However in terms of formal terms of reference, either in legislation or in Standing Orders, technical scrutiny is not a required function of New Zealand committees. There is a Regulations Review Committee dedicated to the technical scrutiny of delegated legislation with formal technical terms of reference, but no equivalent, as has been established in most Australian jurisdictions for the scrutiny of bills.

Is this a problem? There are two main aspects to consider: the need for formal adoption of objective technical standards, and the need for systematic application of those standards to all bills.

### *Technical Scrutiny Standards*

There is an argument that there is no need for New Zealand committees to adopt their own standards for scrutiny of bills. The LAC committee has developed and maintained an admirable set of technical standards over a period of years. The LAC Guidelines have not been developed in isolation by the LAC. Indeed they contain significant material, particularly in the field of delegated legislation that has been developed in conjunction with the Regulations Review Committee under its inquiry function. Examples of this are the principles in the Guidelines relating to the use of deemed regulations and provisions empowering incorporation of material by reference.<sup>22</sup> These detailed sections in the Guidelines result from inquiries conducted by the Regulations Review Committee. The most recent inquiry of the Regulations Review Committee into the use of exemption powers in primary legislation may well result in an additional section in the LAC Guidelines.<sup>23</sup> To some extent then Parliament already has a stake in the LAC Guidelines.

As comprehensive as the LAC Guidelines are, they are not the source of all standards for technical scrutiny applied in Parliament to bills. Standing Orders have core requirements that prescribe basic technical standards against which staff of the Clerk of the House monitor bills for compliance. As earlier noted, expectations in respect of the content of explanatory notes have been established through reports of select committees, and not all of these matters of detail are captured in the LAC Guidelines.<sup>24</sup>

There is also some force in the argument that committee's should feel some ownership of the standards that they apply to the scrutiny of legislation. The LAC Guidelines are an excellent and well respected resource, however they are not tailored to Parliamentary scrutiny. The Guidelines provide a checklist that consisting of general questions for scrutiny when reviewing the bill. Some questions are clearly relevant to scrutiny conducted at any stage of the process, such as the Chapter 3 questions on basic principles of New Zealand's legal and constitutional system. However many questions are more appropriately aimed at departmental officials than members of a select committee.

That said, the LAC Guidelines are such a rich resource for technical scrutiny standards that there is little point in duplicating the work that has gone into their development. When compared with the scrutiny standards prescribed in Australian jurisdictions, the combination of checklist questions covering matters of principle and detailed discussion found in the LAC Guidelines stands up well.

The Senate Scrutiny of Bills committee has acknowledged in the past that its terms of reference are 'rather vague, and their operation depends on how the committees



have come to understand them', and are described by Oliver as unhelpfully general.<sup>25</sup> It is interesting to compare the terms of reference in Standing Order 24 with the original terms of reference intended for the committee, where the scrutiny standards focussed on more specific substantive standards such as the need for a warrant for search and seizure, and the undesirability of retrospective provisions and Henry VIII clauses in legislation.<sup>26</sup> While not an exhaustive list, the standards were more clearly identified in their original format.

Of the Australian scrutiny standards the most highly developed appear to be those of the Queensland Parliament. The fundamental legal principles in the Legislative Standards Act 1992 start from the premise of "principles relating to legislation that underlie a parliamentary democracy based on the rule of law". The standards cover key substantive public law standards as well as procedural and information standards. The standards provide a certain degree of flexibility by being non-exhaustive. Parker comments:<sup>27</sup>

It is clear, then, that the Queensland Government has done little more than recognise principles which are already fundamental to our system and therefore should already be considered in the drafting of legislation. Unfortunately they have not always been adequately respected in Queensland legislation. To the extent that this Act formally reminds Queensland governments to actually have regard to them, it will be useful.

Formal adoption of scrutiny standards, as later achieved in Queensland with the Parliament of Queensland Act 2001 does have the benefit of a clear public statement of principle. Gaining momentum for legislative change, or even amendment to Standing Orders can be difficult however. There are also advantages in having standards that can be developed in detail in response to the work of select committees, what Oliver calls "legisprudence".<sup>28</sup> In reviewing the options for the setting of standards for scrutiny in the UK, Oliver concludes that the gathering together of informal checklists from sources such as previous committee reports would be more achievable than more general standards set in Standing Orders and would allow for greater buy in from committee members.

This survey suggests that New Zealand select committees would be best to use the LAC Guidelines as a starting point for technical scrutiny, but that committee staff should have the flexibility to develop further detailed standards and checklists. These would need to be consistent with the LAC Guidelines, but could reflect particular issues raised by committees and acknowledged in Government responses to committee reports. While reference to the standards would be helpful in Standing Orders, it may not be feasible or desirable to freeze these standards in primary legislation.

### *Systematic Scrutiny*

A remaining concern is that New Zealand select committees are not required to consider matters of technical scrutiny. At present committees respond to

submissions by the LAC, the New Zealand Law Society and other parties that have an interest in scrutiny. Committees also consider the advice given in respect of provisions in bills relating to delegated legislation by the Regulations Review Committee. Committees will also be guided by the advice of committee staff and advisers. The concern is whether this is an adequately systematic approach and whether it is appropriate for parliamentary committees to rely on the dedication of external, and mostly independent submitters.

According to their own reports the LAC and the New Zealand Law Society appear to review most Government bills. However this does not appear to cover all member, private and local bills. There is also no guarantee that external submitters can be relied upon to provide technical scrutiny of legislation.

Further, the current arrangements do not adequately cover the amendment of legislation as it passes through the House. There is little prospect of external submitters vetting the recommended amendments from departmental reports, or indeed the proposals adopted by the committee itself. It seems an abrogation of the Legislature's primary responsibility for it not to apply quality standards to its most important output at all steps of the legislative process. The only real check at this stage, other than the members themselves are Parliamentary Counsel, and staff of the Office of the Clerk.

This issue would be addressed in part by inclusion in Standing Orders of a clear requirement for committees to undertake technical scrutiny of bills. This would not directly address amendments made after select committee consideration. However it would contribute to a greater awareness amongst members of their responsibility for setting and monitoring standards for the quality of legislation. Formal recognition of this role in Standing Orders would assist in promoting the importance of technical scrutiny.

### *Bills of Rights Scrutiny*

One specific area of scrutiny that merits formal recognition is scrutiny of bills for consistency with the New Zealand Bill of Rights Act 1990 (The NZBORA). The NZBORA is described by Rishworth thus:

Looking back from the perspective of 2006 the New Zealand Bill of Rights now seems the very prototype of the so-called 'new constitutionalism' – an interpretative statutory bill of rights allied with the idea of pre-enactment scrutiny and judicial declarations of incompatibility (but without the possibility of judicial *non-applications* of inconsistent enactments, as under the stronger Canadian Bill of Rights). The New Zealand Bill of Rights, as noted subsequently served as a model for the United Kingdom's Human Rights Act 1998 and thereby indirectly as a model for ACT and Victoria.<sup>29</sup>

The NZBORA can itself be considered a core set of legislated scrutiny standards against which legislation is measured both pre and post enactment. As discussed,

the processes for Executive scrutiny of bills are formally set in place through the requirements of the Cabinet Manual and vetting conducted by the Attorney-General under section 7 of the Act on introduction into the House. However there is no formal recognition of the role of select committees in forming their own view on consistency of bills before them with the NZBORA.

The importance of this function is noted in a discussion paper developed by the Public Law Committee of the Wellington District Law Society in 2002.<sup>30</sup> The paper notes:

The duty under s 7 arises only on the introduction of a Bill. In several recent instances, amendments have been proposed by a select committee, or introduced during the Committee of the Whole stage by way of supplementary order paper, with significant NZBORA implications. Examples include:

the Criminal Justice Amendment Bill 1999 (home invasion legislation which retrospectively applied longer non-parole periods);

the Electoral Integrity Bill (which changed procedures for removing “party-hopping” MPs); and

the Terrorism Suppression Bill 2001.

The paper makes the further point:

The reliance on public submissions to select committees is not guaranteed to produce high quality advice. The House processes very large amounts of legislation. The legal profession, the academic community, and other non-governmental organisations have only limited resources to scrutinise Bills and identify NZBORA issues — especially where s 7 has not been invoked. Many of the issues are complex and time consuming to address.

The proposals for improving scrutiny from this discussion paper included a proposal to enhance Parliament’s own ability to scrutinise bills from a human rights standpoint. The options proposed included establishing a specialist review committee or expanding the role of the current Regulations Review Committee to provide human rights scrutiny for all legislation. The paper concludes:

The overriding consideration, in our view is the need for an independent stream of advice to Parliament and the public. This could be achieved without changing the select committee structures themselves.

The best solution may therefore be to focus on developing the range of advice to existing select committees – possibly by establishing a position of specialist legal counsel on NZBORA issues in the Office of the Clerk of the House.

The Office of the Clerk has not established a specialist legal counsel position as suggested by the Wellington District Law Society. However the establishment of a Legal Services Office in the Office of the Clerk in 2006 has strengthened the support available to select committees as. The Legal Services Office now comprises five Legislative Counsel and appropriate use of this resource by select committees is currently being promoted.

A further development has been the provision of public access to advice provided to the Attorney-General on the consistency of bills with NZBORA. All advice provided to the Attorney-General on NZBORA consistency since 1 January 2003 is listed on the Ministry of Justice website. The availability of this Crown advice now provides select committees with a resource to focus debate on this aspect of bills.

The need for informed consideration of NZBORA issues is a concern taken up by Rishworth.<sup>31</sup> Rishworth focuses on the instances where select committees have taken issue with the assessment of the Attorney-General on whether legislation that inconsistent with the NZBORA can be justified a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society.

Members must be free to reach independent decisions. But that said, there are cases in which the Attorney-General's advice, set out with legal analysis and reasons, is frankly more compelling than member's assertions that they assess the balance between rights and social interests differently. Such assertions can be easy to make. If made too easily the Bill of Rights will fail in its mission to protect rights of unpopular minorities when threatened by popular causes.

...

The Attorney-General's report does not dictate that members agree with it. But it is wrong for members to approach the report on the basis that they can simply ignore it, and enact the legislation without regard for whether it breaches the Bill of Rights. They must engage in the enterprise.

What I draw from these points is that select committees should have access to independent expert advice on NZBORA matters. The advice would enable members to make their assessment on consistency following structured consideration of the issues and the developing jurisprudence supporting the application of the NZBORA. Members must consider and decide on whether provisions in a bill before them are consistent with NZBORA, but members can clearly benefit from support in scanning bills for potentially inconsistent provisions and in framing their assessment of bills.

Further, there is merit in formally recognising the role of select committees in NZBORA scrutiny for the same reasons noted in respect of technical scrutiny generally: the Legislature should take responsibility for its own systematic technical scrutiny of legislation; and scrutiny awareness is needed so that members can apply these principles to any amendment of a bill as it passes through the House. The importance of scrutiny for consistency with NZBORA and the need for a systematic consideration of every bill merit inclusion in the terms of reference of select committees.

### *Conclusion*

Technical scrutiny of bills is well provided for in New Zealand through systematic Executive and independent pre-enactment processes. New Zealand's primary scrutiny standards, the LAC Guidelines are recognised in commonwealth jurisdictions as a benchmark for measuring legislation. There may however be

benefit in select committee staff further developing the checklist in the guidelines to take into account detailed technical standards that have evolved from select committee 'legisprudence'. There is an important role for committee staff in developing relevant checklists for committees as well as monitoring and giving expert advice from a technical scrutiny perspective on the bills that come before the committee.

New Zealand legislation is less well served in the systematic application of technical scrutiny. Select committee terms of reference include the power to consider bills and propose amendments of a technical nature. However the absence of a reference in Standing Orders to the technical scrutiny role, and to the standards that should be applied, results in a reliance on third party submissions on bills. Parliamentary technical scrutiny may not therefore be consistently applied to all bills. The scrutiny standards contained in the NZBORA are fundamental legal principles and scrutiny for consistency with the NZBORA also deserves discreet inclusion in select committee terms of reference. ▲

## End Notes

<sup>1</sup> *Standing Orders of the House of Representatives of New Zealand 2008*, SO 180.

<sup>2</sup> *Ibid*, SO 280. The exceptions including where the House sits under urgency and select committee consideration of the bill is omitted.

<sup>3</sup> *Ibid* SO 282.

<sup>4</sup> *Ibid* SO 283.

<sup>5</sup> Dawn Oliver, *Improving the Scrutiny of Bills: The Case for Standards and Checklists* [2006] *Public Law* 219.

<sup>6</sup> *Standing Orders of the House of Representatives of New Zealand 2008*, SO 310.

<sup>7</sup> See the *Regulations Review Digest* maintained by the New Zealand Centre for Public Law at [http://www.victoria.ac.nz/NZCPL/Regs\\_Review/Index.aspx](http://www.victoria.ac.nz/NZCPL/Regs_Review/Index.aspx), last accessed 3 February 2009.

<sup>8</sup> For information on the Legislation Advisory Committee, including the current LAC Guidelines, see <http://www.justice.govt.nz/lac/> last accessed 3 February 2009.

<sup>9</sup> *Cabinet Manual 2008*, last accessed at <http://www.cabinetmanual.cabinetoffice.govt.nz/> on 3 February 2009.

<sup>10</sup> See the Legislation Advisory Committee *Guidelines on process and content of legislation* at page 10 <http://www.justice.govt.nz/lac/>.

<sup>11</sup> The Law Commission Act 1985 and the Crown Entities Act 2004.

<sup>12</sup> Law Commission, *Legislation Advisory Role of the Law Commission*, last accessed at <http://www.lawcom.govt.nz/Article.aspx?PostingID=207> on 11 February 2009.

<sup>13</sup> Statutes Drafting and Compilation Act 1920, section 2.

<sup>14</sup> This assessment was based on the Annual Report of the Legislation Advisory Committee for 2007, the submissions to select committees made by the LAC on bills in 2007 and the Select Committee reports on the bills submitted on by the LAC.

- <sup>15</sup> All submissions made by the New Zealand Law Society on bills can be found at [http://www.lawsociety.org.nz/publications\\_and\\_submissions/submissions2](http://www.lawsociety.org.nz/publications_and_submissions/submissions2), last accessed 4 February 2009.
- <sup>16</sup> *Standing Orders of the House of Representatives of New Zealand 2008*, SO 309(3).
- <sup>17</sup> *Standing Orders of the House of Representatives of New Zealand 2008*, SO 291.
- <sup>18</sup> DG McGee *Parliamentary Law in New Zealand* 3<sup>rd</sup> edn 2005, p 356.
- <sup>19</sup> See for example Alerts Digest No 1 2009 at <http://www.aph.gov.au/senate/committee/scrutiny/alerts/2009/index.htm> last accessed 6 February 2009.
- <sup>20</sup> The Legislative Standards Act 1992.
- <sup>21</sup> Dawn Oliver *Improving the Scrutiny of Bills: The Case for Standards and Checklists* [2006] *Public Law* 219, 234.
- <sup>22</sup> See the Legislation Advisory Committee *Guidelines on process and content of legislation* at Guidelines, Chapter 10, Part 4 and Appendix 4, <http://www.justice.govt.nz/lac/>.
- <sup>23</sup> Report of the Regulations Review Committee *Inquiry into the use of instruments of exemption in primary legislation* AJHR 2008 I.16Q.
- <sup>24</sup> DG McGee *Parliamentary Law in New Zealand* 3<sup>rd</sup> edn, 2005, p 317.
- <sup>25</sup> Dawn Oliver, *Improving the Scrutiny of Bills: The Case for Standards and Checklists* [2006] *Public Law* 219, 241.
- <sup>26</sup> Senate Standing Committee for the Scrutiny of Bills *Ten Years of Scrutiny* 1991, p 13 [http://www.aph.gov.au/senate/committee/scrutiny/10\\_years/](http://www.aph.gov.au/senate/committee/scrutiny/10_years/), last accessed 11 February 2009.
- <sup>27</sup> Christine Parker, *Fundamental Legal Principles*, *Griffith Law Review* 123, at p 128.
- <sup>28</sup> Dawn Oliver, *Improving the Scrutiny of Bills: The Case for Standards and Checklists* [2006] *Public Law* 219, 243.
- <sup>29</sup> Paul Rishworth *The New Zealand Bill of Rights and the Legislature: Praxis and Pitfalls* Conference in Legislative Protection of Human Rights, Melbourne (2006).
- <sup>30</sup> Wellington District Law Society *Improving the scrutiny of legislation for consistency with the New Zealand Bill of Rights Act 1990 — A discussion paper* 2002.
- <sup>31</sup> Paul Rishworth *The New Zealand Bill of Rights and the Legislature: Praxis and Pitfalls* Conference in Legislative Protection of Human Rights, Melbourne (2006), at page 15.