



LEGISLATION DESIGN AND ADVISORY COMMITTEE

24 April 2020

Alastair Scott
Chairperson
Regulations Review Committee
Parliament Buildings
Wellington

Dear Chairperson

Inquiry into parliamentary scrutiny of confirmable instruments

Introduction

1. The Legislation Design and Advisory Committee (**LDAC**) has been given a mandate by Cabinet to review legislative proposals and introduced Bills against the *Legislation Guidelines* (2018 edition) (**Guidelines**). The Guidelines have been adopted by Cabinet as the government's key point of reference for assessing whether draft legislation is well designed and accords with fundamental legal and constitutional principles.
2. LDAC's focus is not on policy, but rather on legislative design and the consistency of a legislative proposal or Bill with the principles contained in the Guidelines.

Background

3. LDAC has been invited by you to provide a submission on the March 2020 Report of the Regulations Review Committee (RRC): Briefing to investigate confirmable instruments (the Report).
4. LDAC notes that the Report identifies the following 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.
5. The terms of reference of the Report are stated as being:
 - Is the current process of parliamentary scrutiny of confirmable instruments effective?

- Are any changes required to parliamentary or government processes to make the parliamentary scrutiny of confirmable instruments more effective?

Our submission

6. Our submission is directed at the specific questions that you have identified for feedback from submitters.

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

What problems, if any, do you identify with the current process?

7. Confirmation is one of a range of tools Parliament and the Executive have to ensure that delegated legislation is legitimate by virtue of Parliament's scrutiny of the Executive's use of the delegated law-making power.
8. The most commonly used tool is disallowance. Disallowance and reviews by the RRC under Standing Orders focus on whether the exercise of the decision to make delegated legislation meets Parliament's expectations of its delegate, particularly on whether the Executive has exceeded its delegated authority and whether it has followed the procedure Parliament required. The purpose of section 41 of the Legislation Act 2012, which requires most secondary legislation to be presented to the House, is to provide transparency and accountability – presentation is a necessary precursor to the House exercising its jurisdiction and holding the relevant Minister accountable for the delegated legislation.
9. Confirmation has a different focus and purpose from disallowance and other tools available to Parliament. The purpose of confirmation is to allow Parliament to consider and, if it thinks appropriate, give its formal endorsement or imprimatur to the content of the delegated instrument. Confirmation ought to be a substantive, rather than merely procedural, matter notwithstanding that the process is often streamlined.
10. In considering whether to confirm an instrument, the House can consider the policy underpinning the legislation. It is not confined to consideration of whether the instrument was appropriately made under the empowering provision. Those instruments being confirmed should, therefore, be ones that actually merit a more substantive check. It risks undermining the nature of the safeguard if it is used when not necessary, or as simply notification for awareness or a process check. This all suggests the need for a process which affords sufficient time, expertise and credibility.
11. The Report identifies that the confirmation process as currently conducted may not provide an effective level of scrutiny, for reasons which include the RRC not being well placed to consider the underlying policy of an instrument, a constrained timeframe and inadequate advice. LDAC can understand how those reasons might impact on scrutiny. They suggest the

need for better substantive processes, including improved information being made available to or gathered by the RRC and by other processes supporting the way RRC operates.

12. Which instruments merit a more substantive check should turn on whether the instrument will concern a matter that is properly Parliament's province and whether Parliament ought to have a degree of supervision over the content of the resulting secondary legislation. A part of the process is filtering those instruments which might have more intensive scrutiny. In our view, the key criteria are:
- the nature of the subject-matter (whether it is something that Parliament would normally do itself; an example is taxation.¹ Another might be where the subject matter is so important there would be a legitimate public expectation Parliament would deal with it);
 - the effect of the instrument (for example, is it ostensibly inconsistent with constitutional principles or does it ostensibly interfere with rights under the New Zealand Bill of Rights Act 1990);
 - the scope of the delegation given to the Executive (whether is it more significant than usual, and does the instrument appear to be significant in its scope and effect).
13. In this context, there is a lack of clarity at present as to when the confirmation safeguard should be applied, and in our view this is reflected in the statute book. It may also be challenging for the RRC, without the context or experience in a particular subject area, to exercise this jurisdiction fully. This may be assisted by improved information and by other processes supporting the way RRC operates.

Do you have any comment on the problems identified in this interim report?

14. We agree with the March 2020 RRC Report that there are issues with consequences. Unlike disallowance, where the revocation of the instrument is prospective, failure to confirm an instrument would usually lead to a requirement to refund any monies paid, subject to a few specific exceptions.² In practical terms, this would often lead to retrospective legislation to validate any charges paid under the unconfirmed instrument, particularly where the charges have been paid by untraceable users of the relevant services and the unconfirmed charge was an incremental increase. We consider that this consequence may have led parliament to essentially treating non-confirmation as an unusable power, leading to confirmation being a "rubber stamp".
15. Parliament and the public have instead focussed on disallowance which is also available for the same instruments. And while disallowance is narrower in scope, it has more manageable consequences, is better understood by the Executive, Parliament and the public, and is

¹ Legislation Guidelines (2018 edition), chapter 17.7

² We note also that the exceptions to refunds in section 47I of the Legislation Act 2012 (which are carried over into section 125 of the Legislation Act 2019) do not appear to show any particular pattern

therefore more usable. In our view, this points to only using confirmation with purpose and a clear consistent rationale.

16. We agree that the two examples provided by RRC in its report (s 55(2)(a) of the Antarctica (Environmental Protection) Act 1994 and s 15 of the New Zealand Superannuation and Retirement Income Act 2001) are examples of powers to make confirmable instruments with very low levels of discretion. However, we would draw different conclusions from the Report as to whether they are appropriate for confirmation:
- In the case of the Antarctica (Environmental Protection) Act 1994, the power to amend the schedule enables the Executive to update a treaty that Parliament has directly written into New Zealand law. We can see the logic to requiring Parliament's confirmation of any change to the treaty, in light of the careful (and sometimes controversial) balance between Parliament and the Executive's roles in relation to treaties and their incorporation into New Zealand Law.
 - Section 15 of the New Zealand Superannuation and Retirement Income Act 2001 does not appear to be appropriate for confirmation. Parliament has set rates of NZ Superannuation, and has set a mechanism for annual adjustment involving no discretion. This does not appear to be a matter that should be confirmed, because it is simply the application of a process set by Parliament.

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

Do you agree that the confirmation process should not be used for decisions to make secondary legislation that involve little or no discretion?

17. LDAC agrees that secondary legislation that involves little or no discretion is unlikely to benefit from the confirmation process. But the first order question is whether it is a matter that is properly in Parliament's province. This will turn on discretion, but also on the nature of the subject-matter, as indicated above. Confirmation should be used when the usual transparency and accountability safeguards of presentation and disallowance are not sufficient for this reason. The closer something is to the constitutional core of what only Parliament may do (e.g. raise taxes, endorse treaties, administer offices of parliament) the more likely that it is something that should be confirmable and not merely disallowable.
18. In some cases, the subject matter may be of such importance, even though the discretion is limited, that there is a legitimate public interest in the instrument being scrutinised or marked by Parliament.

Would it be useful to have more guidance on the types of circumstances in which the confirmation process is appropriate?

19. Clarity on this would assist, particularly if a clear purpose was articulated for confirmation, which enabled agencies to apply the guidance at more than a "form level". For example,

LDAC does not consider that the mere fact that regulations amend an Act (Henry VIII powers) should automatically lead to confirmation.

20. The severe consequences and the overlap with disallowance suggests that confirmation should only be used where there is a clear constitutional rationale for its inclusion and where it is reasonably foreseeable that it would be actually used. If confirmation was used in this way, it would allow RRC and Parliament to put more focus on disallowance.

Are there instruments currently outside the process that should be included in it?

21. This depends on whether the current process is going to be changed. One issue is that the current process may not actually fulfil the objective behind confirmation. If the current process was more robust in its review of the instrument, and what instruments are being reviewed, then it could potentially be useful to include a wider range of instruments.

How should the Regulations Review Committee (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?

22. A list of questions may assist. However, LDAC's experience is that standard lists of questions are not a panacea. Lists of questions are useful if they are very well put together, assist agencies to be able to understand and identify any issues, and ultimately give RRC the right information to be able to interrogate the particular instrument.
23. There is always a risk that relying on agencies to assess their own instruments may not lead to the best information, it is effectively self-vetting. However, having to justify a decision (and knowing in advance that you will need to do so) can be a valuable discipline.

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

24. The RRC brings an accountability perspective that subject standing committees may not have. However, LDAC agrees that Parliament may be able to find procedures that would enable relevant subject-matter expertise without creating timing issues (for example, co-opting members from other committees) to inform RRC's review. This would be particularly relevant for confirmable instruments that are more "policy heavy", such as broad empowering provisions.
25. It may be useful for some instruments to be referred first to a subject matter committee for review, and for its report to then be made available to the RRC, time permitting. Alternatively, subject matter experts from a standing committee might assist the RRC directly in certain cases.

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

26. RRC could consider what additional information or advice they need or would be helpful and seek that advice or information from the relevant agency. This could include:
- (a) government and private agencies
 - (b) relevant public interest or industry bodies.

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

27. LDAC appreciates that an earlier point would be useful. The other point in the process where it might be better for RRC to be involved is when the empowering primary legislation is being drafted and the decision being made that instrument will be a confirmable instrument. This is the point in time at which the appropriateness of the instrument being confirmable versus whether other safeguards would be better is decided.
28. Thank you for considering our submission. We are able to appear before the committee if the committee would find that useful.

Yours sincerely



Karl Simpson
Chair
Legislation Design and Advisory Committee