

11 Law-making

New Zealand Members of Parliament may no longer be the fastest law-makers in the west, but we still have many problems in the way we make law. The proposals developed here are designed to fix untidy and out-of-date methods of law-making. In this chapter we describe our proposals to improve law-making, including:

- Article 28 • a fixed four-year term for Parliament, which should improve the quality of legislation by reducing the need for speed:
- Article 50 • the taking of urgency would require a 75 per cent majority:
- Article 48 • publication of important information about significant legislation before it is introduced into the Parliament:
- Article 49 • every parliamentary term and every year the Government must publish a legislative programme:
- Article 52 • safeguards against abuse of delegated legislation are built into the Constitution.

For the sake of completeness, we have in this chapter included a number of matters that do not warrant being included in the Constitution but rather to paint a picture of how the law-making system should function.

Legislation and the process

Some issues that matter most in society, such as how we make law, receive little attention from the general public. Yet what is put in these laws is vital to everyone.¹

A celebrated English judge, Lord Bingham, said “the law must be accessible and so far as possible intelligible, clear, and predictable.”² He stated that every person and the authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, which take effect generally in the future and are publicly administered by

1 For a more developed justification for the measures put forward here see Geoffrey Palmer “The Harkness Henry lecture, Law-Making in New Zealand: Is there a better way?” (2014) 22 Wai L Rev 1.

2 Tom Bingham *The Rule of Law* (Allen Lane, London, 2010) at 37.



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the courts. Legislation comprises the backbone of the rule of law.³

Francis Fukuyama in his magisterial work on political order and decay argues that three elements stand out that distinguish secure, well-governed democratic states with good governance and low levels of corruption from states that fail.⁴ These are a competent state, a strong rule of law and democratic accountability. Law-making engages all three of these in different ways.

Legislation is fundamental to the existence of the state. The rules under which it functions, the regulation of the economy, the environment, the system of education, the health system, the social welfare system, the criminal justice system all require statutes.

New Zealand is drowning in a sea of law. But at least most of it is accessible on the internet on the New Zealand Legislation website. Statutes are the laws that Parliament passes. A second species of law called delegated legislation comes in two types. It is called delegated legislation because it is law not made by Parliament but by some other authority that Parliament has authorised to make it. Statutory instruments, made by the Executive Council, have the force of law. These are often called “regulations”. The second type of delegated legislation comprises a strange variety of tertiary laws that are legally binding instruments, many of them concerning transport for such matters as aviation and maritime safety.

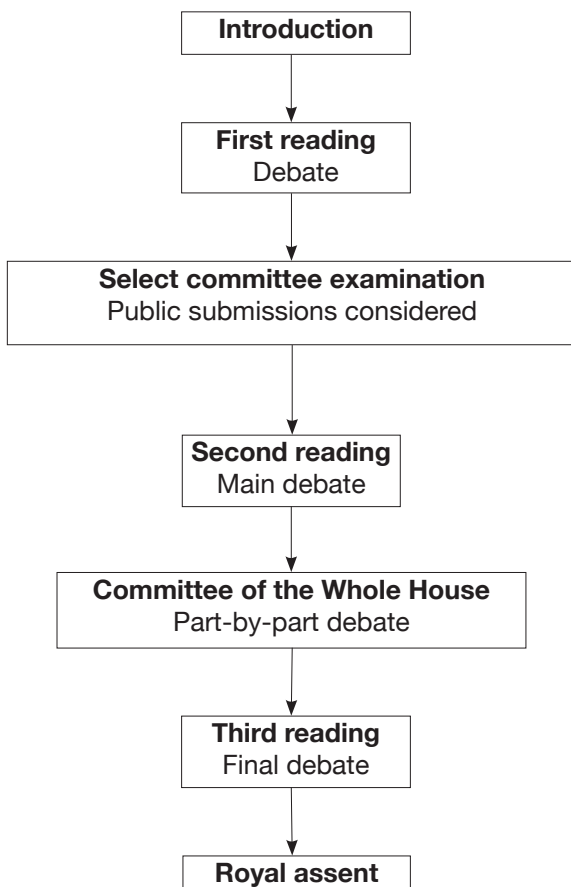
In New Zealand we have a tendency to pass big statutes, find we do not like the results and engage in a constant pattern of massive amendments, whereby statutes risk losing both their principles and coherence.

The quantity of New Zealand statute law has increased rapidly over the last years. It is unrealistic to expect the amount to lessen. Policy-makers use law to achieve their ends and in New Zealand they are prone to overdo it.

3 Daniel Greenberg *Laying Down the Law: A discussion of the people, processes and problems that shape Acts of Parliament* (Sweet & Maxwell, London, 2011) at 271.

4 Francis Fukuyama *Political Order and Political Decay* (Profile Books Ltd, London, 2014) at 25–27.

Legislative process: how a bill becomes law



It is an issue of constitutional balance. The executive branch of Government controls in secrecy both the policy content and drafting of legislation through a legislative programme agreed by Cabinet that is not even available to Members of Parliament under the Official Information Act.

With the responsibilities for legislation in New Zealand split between the Executive and the Parliament, it is not easy to determine which branch of Government bears the heaviest responsibility for the lack of quality and coherence that some statute law exhibits. This makes accountability for the quality and nature of the laws passed by Parliament difficult. A complete reconfiguration of the processes is required to improve quality and make the processes more open and transparent.

It is important to appreciate that while sometimes the system goes too fast and impairs quality, it frequently dawdles and that means that required but usually uncontroversial changes remain unaddressed. The House becomes a bottleneck or choke point for such measures. These two pressures work in opposite directions but both need to be addressed and integrated into a system that is more flexible.

New Zealand may no longer be the fastest law-makers in the west, as MMP has caused the legislative process to slow down. In fact, the Parliament has at times become constipated with the volume of legislation in front of it.

When a Bill is introduced, a public process of passing the legislation begins in Parliament and the Bill is referred to a select committee for public submissions and scrutiny. The Bill is debated four times in Parliament and then becomes law when the Governor-General assents to it.

Sometimes urgency is used to shorten the process, as with the Countering Terrorist Fighters Legislation Bill. This controversial Bill granted big new visual surveillance powers to the Security Intelligence Service and extended powers to cancel passports. The Bill was introduced and debated first on 25 November 2014 and passed under urgency on 9 December. The public had two days to make submissions to a select committee Bill that sat most of the weekend. It was reported back to the House on 2 December.

To deal so quickly with major legislation of this kind is both dangerous and unnecessary. Dangerous because the prospect of making errors is increased. Unnecessary because Parliament could have sat longer up until Christmas and considered the Bill properly. A careful study of the use of urgency over the period 1987 to 2010 found that “routine recourse to urgency to extend the House’s sitting hours is undermining the reputation of Parliament and politicians.”⁵ It reduces scrutiny of legislation and is democratically problematic.

The main problems

The problems we hope to address include:

- an unmanageable quantity of statute law resulting in attendant dangers for the rule of law norm:
- rapid increases over time in the cumulative bulk of statutes:
- a pronounced tendency to pass too many amending Acts that damage the coherence of the principal Act:
- insufficient care and planning in the development of significant new statutory schemes because time is not allowed so quality is reduced:
- undue delays occurring in the passage of necessary smaller changes to the law:
- a propensity to pass new statutes where changes to the law are not needed:
- a failure to evaluate systematically whether statutes have achieved their purpose:
- a lack of transparency surrounding the preparation of legislation within the executive and the fact that the legislative programme is not publicly available:
- a lack of clarity as to whether the Executive or Parliament is responsible for the quality of legislation:
- Parliament does not sit long enough to properly process the legislation that is introduced and does not do a good job of technical scrutiny:

5 Claudia Geiringer, Polly Higbee and Elizabeth McLeay *What’s the Hurry?—Urgency in the New Zealand Legislative Process 1987–2010* (Victoria University Press, Wellington, 2011) at 162.

- urgency can prevent proper scrutiny of Bills and the taking of urgency unreasonably reduces safeguards:
- procedures in the House of Representatives do not add sufficient value to the quality of legislation and need to be changed:
- the moving of extensive amendments in the Committee of the Whole can often be too quick, so the amendments are not properly scrutinised:
- statutes contain too much detail and are of tedious length:
- too often agreed legislative standards are not followed:
- despite great advances in accessibility, there is no index to the New Zealand statute book and it is not arranged around topics.

Recent changes

People do not take much interest in either the presentation of legislation or the manner in which it is made. It is time to pay serious attention to these issues since quite a number of the nation's political discontents can be traced to poorly made law. This was recognised when, in June 2014, the Productivity Commission in a major report called for a review into improving and maintaining the quality of legislation.

Recently changes have been made within the Government regarding the preparation of legislation. The Legislation Advisory Committee established in 1986 did some valuable work on complex legislation and produced guidelines to be followed by departments in preparing legislation. It has since been abolished. A Cabinet Office Circular from May 2015 shows that Cabinet agreed that the Legislation Advisory Committee be remodelled and merged with the Legislation Design Committee.⁶

The new Legislation Design and Advisory Committee (LDAC) works with government agencies “when proposals for bills and drafting instructions are first being developed to address problems in the basic architecture of legislation and identify potential legal and constitutional issues before bills

6 Cabinet Office Circular “Revised Legislation Advisory Committee Guidelines: Cabinet Requirements” (22 May 2015) CO 15(3) at [4].

are introduced.”⁷ Advice provided by the LDAC includes the appropriate allocation of material between Acts of Parliament and delegated legislation.⁸ It is made up of members drawn from the Parliamentary Counsel Office, the Department of Prime Minister and Cabinet, the Crown Law Office, and the Ministry of Justice. Three to four members with relevant expertise work on specific Bills.⁹ It is expected to be consulted on up to 25 bills a year. The LDAC is responsible for the Legislation Advisory Committee Guidelines and for producing a supporting manual of case law, analysis and commentary.¹⁰

These changes are likely to improve things but not sufficiently to overcome the great weaknesses that exist in trying to produce quality legislation when there is only one House in the Parliament. Most countries have two. We do not advocate a second House but quite big changes need to be made. And they need to be more ambitious than those recently carried out.

Proposals for further change

More care at the beginning

Part of the cure is to take much more care at the beginning and provide the public with detailed information on proposed legislation before it reaches the House of Representatives. **Article 48**

Publication of legislative programmes

The Government should produce and publish a legislative programme for Government Bills, including Law Commission projects, for the whole parliamentary term and an annual one as well. It will be particularly important that the timetables for legislation be carefully set. This transparency will help everyone concerned with legislation. **Article 49**

7 Christopher Finlayson, Attorney-General, Establishment of Legislation Design and Advisory Committee (press release, 29 June 2015).

8 *Government Response to the New Zealand Productivity Commission Report on Regulatory Institutions and Practices* (July 2015).

9 PCO Quarterly (July 2015) at 1.

10 Attorney-General, above n 7; PCO Quarterly (July 2015) at 2. See also *Government Response to the New Zealand Productivity Commission Report*, above n 9, where the Government states that one of the first elements to be developed in the manual will be advice relating to delegated legislation.

*Major legislation***Article 48**

All major change legislation should be preceded by careful analysis and public consultation. We think the provision of information about Government Bills before they are introduced would help to make better law and assist the House of Representatives in scrutinising it thoroughly. We propose in the Constitution as follows:

Before introducing to the House of Representatives a Bill containing a new legislative scheme or a Bill containing significant or extensive amendments to an existing Act the Government must make publicly available in advance information concerning the proposed legislation, including but not limited to:

- (a) the detailed nature of the proposals;
- (b) the policy papers relating to the changes;
- (c) the administrative arrangements proposed;
- (d) the fiscal costs of the new measures;
- (e) an analysis of Treaty of Waitangi issues, if any;
- (f) an analysis of whether the proposals comply with this Constitution.

Other non-constitutional changes*Cut clutter*

The drafting of Bills should be changed so that statutes are not cluttered with as many process and administrative details as they are now. This would reduce the length and complexity of statutes and allow clearer exposition of the relevant principles.

A new Legislation Office

In order to produce more systematic preparation of all legislation, the present role of departments should be changed. Whole of government standards for legislative design should be secured by having all Bills prepared in the same way by one agency; a new Legislation Office. This should be located in Parliament rather than the executive, but under the control of the Attorney-General, who will be the minister responsible

for a new Legislative Standards Act. This is not a proposal to divorce legislation from Cabinet influence and ultimate control before it is introduced to Parliament, but rather to make those elements more transparent. Politics is the language of priorities and ministers set the priorities.

A Legislative Standards Act

Some of the principles and processes to be followed by the new Office would be laid down in statute, a Legislative Standards Act. The Office would be subject to the Official Information Act. The Office would have a permanent staff as well as project teams and these would include the present Parliamentary Counsel Office, some economists and other experienced policy analysts. The Office will need to be adequately funded.

Whole of government legislative standards

Agreed whole of government legislative standards should be applied to all Bills. These standards would include the Legislation Advisory Committee Guidelines, the New Zealand Bill of Rights Act, and protections against proposals of legal dubiety that will not stand up in court, or proposals that are constitutionally suspect. The protection of legislative integrity will be safeguarded by parliamentary counsel who are expert and independent. They would certify that these standards have been met in the Bills drafted. Parliamentary counsel will be prominent members of the new Legislation Office and their independence needs to be strengthened. The status of parliamentary counsel as constitutional gatekeepers needs to be recognised. Where the standards are departed from, that would be explicitly authorised by the Attorney-General and the details would be tabled in the House.

An index to the statute book

The Legislation Office would also be responsible for the presentation of the statute law including the production of an index to the statute book and the preparation of codes so that all the relevant law on a topic could be found in one place.

Post-legislative scrutiny

In addition to being responsible for the design and drafting of new legislation, the Legislation Office would have a division whose responsibility it would be to examine existing legislation and publish reports upon whether it met its objectives and what its achievement has been and to analyse what unforeseen consequences may have occurred. Passing new legislation without knowing the effects of the old is like whistling in the dark. Systematic post-legislative scrutiny is largely missing now.

Repealing old law

Another responsibility of the new Office should be to examine the statute book for old laws that are no longer needed and should be repealed. Not enough of this is being done.

Lack of parliamentary time

Parliament needs to have more sitting days to process Bills properly and look at them more closely. It sits fewer days a year than many Parliaments. In the five years to 2012 it sat an average of 75 days a year. Less legislation should be proposed unless the House sits more.

The House, by changing its methods, can make better use of the time it devotes to legislation. MPs are legislators and they need to take the responsibility for producing good law more seriously. The level of technical scrutiny in New Zealand has been justly criticised and it needs to be improved.

More time needs to be available to prepare legislation and improve the quality of our statute law. As we have suggested in chapter four, that provides a strong reason for favouring a four-year fixed parliamentary term. Too much big change is done quickly because of the pressures imposed by the three-year parliamentary term, with serious adverse consequences for quality. The way in which Parliament deals with legislation needs to be drastically improved.