IMPROVING THE QUALITY OF LEGISLATION – THE LEGISLATION ADVISORY COMMITTEE, THE LEGISLATION DESIGN COMMITTEE AND WHAT LIES BEYOND?

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I. INTRODUCTION[1]

I said last year that in New Zealand's legal system, statute law is not merely King; it is Emperor.[2] However, not all those who love the common law would agree with that proposition. The inductive method of the common law, as opposed to the more deductive method of policy analysis appeals greatly to many lawyers, judges and legal academics. In a recent seminar at the Law Commission, Dr Matthew Palmer provided some interesting insights in the differences between legal thinking and policy thinking.[3] He noted that common law legal analysis is paradigmatically inductive; it reasons from specific disputes to general rules. It is inherently grounded in the context of specific fact situations. By contrast, policy analysis is deductive. It reasons from general objectives to more specific policy recommendations. It is more abstracted from fact situations than the inductive method of the common law.

Legal academics prefer to write analyses of judicial decisions rather than to analyse the policies, drafting and implications of new statutes. Not for them the ambitions of statutory schemes designed from principle deductively. Although, it must be admitted that many statutes have a reactive and ad hoc appearance to them. It seems to me that to focus primarily on case law at the expense of legislation is misplaced and misguided. The main source of new law comes from legislation. Real change comes from the legislature, not the courts.

Legislation is not much taught in our law schools, although there are some honourable exceptions. I am convinced that legislation requires much more attention from lawyers, judges and academics than it has had. I am fortified in this belief by what has been said generations ago by great common lawyers whose wisdom we do not seem yet to have absorbed.

The first book on legislation that I studied was American, published in 1964, entitled *Legislation*. It was by Charles B Nutting and Sheldon D Elliott, and was part of the American Casebook series published by the West Publishing Company. It was designed for law school teaching. It contained some most interesting accounts of the place of legislation in our legal system: pungent, direct and correct. Let me give you a sample. The famous Dean of the Harvard Law School,

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1 I am most grateful for comments from my colleagues Dr Warren Young and Professor John Burrows QC on an earlier version of this speech.

2 Geoffrey Palmer 'Law Reform and the Law Commission after 20 Years: We Need to Try a Little Harder' (Address to the New Zealand Centre for Public Law, Victoria University of Wellington, 30 March 2006) 20.

3 Matthew Palmer 'Thinking about Law and Policy: Lessons for Lawyers' (Seminar to the Law Commission, Wellington, 23 November 2006).

Roscoe Pound, who hailed from that eminently sensible state of Nebraska, (it has a unicameral legislature) said this in 1908:

> Not the least notable characteristics of American law today are the excessive output of legislation in all our jurisdictions and the indifference, if not contempt, with which that output is regarded by courts and lawyers. Text-writers who scrupulously gather up from every remote corner the most obsolete decisions and cite all of then, seldom cite any statutes except those landmarks which have become a part of our American common law, or, if they do refer to legislation, do so through the judicial decisions which apply it.[4]

Ten years later another American great Professor Ernst Freund said this:

> Leaving then aside the formulation of principles in statutory form, a science of legislation as a distinctive branch of jurisprudence is concerned mainly with tasks for which the upbuilding of the common law furnishes no precedents or standards; with those aspects of statutes, in other words, that find no analogy in principles developed by judicial reasoning. *The special province of the science of legislation must be to carry the development of the law beyond what the processes of the unwritten law can possibly do for it.*[5]

Nor is the point confined to Americans. The British Professor of Jurisprudence Professor T E Holland said before the turn of the twentieth century:

> Legislation tends with advancing civilization to become the nearly exclusive source of new law. It may be the work not only of an autocrat or of a sovereign Parliament, but also of subordinate authorities permitted to exercise the function.[6]

Harlan Fiske Stone (then an Associate Justice of the Supreme Court, later to be its Chief Justice, and a former Dean of the Columbia Law School) in an article in the Harvard Law Review in 1936 made an observation that seems to me to apply accurately to contemporary New Zealand:

> It is the fashion in our profession to lament both the quantity and quality of our statute-making, not, it is true, without some justification. But our role has been exclusively that of destructive critics, usually after the event, of the inadequacies of legislatures. There has been little disposition to look to our own shortcomings in failing, through adaptation of old skills and the development of new ones, to realize more nearly than we have the ideal of a unified system of judge-made and statute law woven into a seamless whole by the processes of adjudication.
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> The reception which the courts have accorded to statutes presents a curiously illogical chapter in the history of common law. Notwithstanding their genius for the generation of new law from that already established, the common-law courts have given little recognition to statutes as starting points for judicial lawmaking comparable to judicial decisions. They have long recognized the supremacy of statutes over judge-made law, but it has been the supremacy of a command to be obeyed according to its letter, to be treated as otherwise of little consequence. The fact that the command involves recognition of a policy by the supreme lawmaking body has seldom been regarded by courts as significant, either as a social datum or as a point of departure for the process of judicial reasoning by which the common law has been expanded.[7]

Now, it must be admitted that the common law world has come a long way since 1936. Purposive interpretation is now well established, particularly in New Zealand. Sir Ivor Richardson was influential in the establishment of the purposive approach with his insistence that courts look at the

4 Roscoe Pound 'Common Law and Legislation' (1908) 21 Harvard Law Review 383.

5 Ernst Freund 'Prolegomena to a Science of Legislation' (1918) 13 Illinois Law Review 264, 269 (emphasis in the original).

6 TE Holland *Jurisprudence* (1 ed, United States, 1896) 62 cited in Charles B Nutting and Shelden D Elliot *Legislation: American Casebook Series* (3 ed, West Publishing Co, St Paul, Minnesota, 1964) 249.

7 Harlan F Stone 'The Common Law in the United States' (1936) 50 Harvard Law Review 2, 12.

scheme of the statute when it is being construed.[8] But I am not sure that the older attitude to the common law exemplified in the quoted passages is yet dead in New Zealand.

Having established the importance of statute law, I come now to some remarks on its quality. If statute law is as important as I say it is then quality control of legislation must be essential. Unfortunately, there seems to be little literature on this question. Indeed, I can find none. The quality of a statute seems, like beauty, to be in the eye of its beholder. Yet there are clearly some statutes that are better than others; that work better than others; that are more easily understood than others; or that exhibit superior policy frameworks to others. How do we know how to make better statutes? New Zealand has made some attempts in this area but we are a long way from success and much more needs to be done. I turn now to a discussion of the efforts we have made.

Let me dispose of one issue at the outset. We now have plain English drafting. The Law Commission did a lot of work on this and that work has been adopted.[9] The expectation now is that new Acts will be drafted in a plain English style. However, this is not to say that the whole of the New Zealand statute book is plainly, clearly and succinctly worded. There remain many older pieces of legislation on the books that do not meet the new standards. But, that notwithstanding, I am here to say that plain English drafting alone is not enough to produce a high quality statute book. More is required.

The Legislation Advisory Committee is now more than 20 years old. When the Law Commission was established in 1985, the Law Reform Committees that had previously been the main focus of law reform activity outside the Department of Justice were abolished. But one, the Public and Administrative Law Reform Committee, was revived in a modified form and re-named the 'Legislation Advisory Committee'. The literature on this committee is slender but worth reading.[10]

II. The Legislation Advisory Committee

The Legislation Advisory Committee's greatest contribution has been the formulation, publication and revision of the Legislation Advisory Committee Guidelines. These are adopted by Cabinet and the Cabinet manual requires that they be followed in the production of Government Bills.

First produced in 1987, the Guidelines have gone through many iterations and improvements. They are now considerably longer than they began. They are available on the Department of Justice website and have recently been revised.[11]

The Minister to whom the Legislation Advisory Committee reports is the Attorney-General. Up until relatively recently it was the Minister of Justice but it was thought that the Committee's

8 He wrote that '[t]he twin pillars on which our approach to statutes rests are the scheme of the legislation and the purpose of the legislation' Sir Ivor Richardson 'Appellate Court Responsibilities and Tax Avoidance' (1985) 2 Australian Tax Forum 3, 8.

9 Law Commission *A New Interpretation Act: To Avoid 'Prolixity and Tautology'* (NZLC R17, Wellington, 1990); Law Commission *The Format of* Legislation (NZLC R27 Wellington, 1993).

10 Sir George Laking, Chairperson, Legislation Advisory Committee 'The work of the Legislation Advisory Committee' in Law Commission 'Legislation and its interpretation: Discussion and Seminar papers' (NZLC PP8, Wellington, 1988); KJ Keith 'The New Zealand Legislation Advisory Committee; choreographer or critic?' (1990) PLR 290; Walter Isles QC 'The Responsibilities of the New Zealand Legislation Advisory Committee' (1992) 13 Stat LR 11. The New Zealand Committee has also been discussed in Dawn Oliver 'Improving the Scrutiny of Bills: the Case for Standards and Checklists' [2006] PL 219.

11 *Legislation* Advisory *Committee Guidelines* available at <http://www.justice.govt.nz/lac/index.html> (last accessed 12 February 2007).

concern with legal and constitutional principle made the Attorney-General the more appropriate Minister.

The Terms of Reference of the Legislation Advisory Committee are as follows:

- To provide advice to the Departments on the development of legislative proposals and on drafting instructions to the Parliamentary Counsel Office.
- To report to the Minister and the Legislation Committee of Cabinet on Public Law aspects of legislative proposals that the Minister or Legislation Advisory Committee refers to it.
- To advise the Minister on any other topics and matters in the fields of public law that the Minister from time to time refers to it.
- 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.
- To 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 Legislation Advisory Committee Guidelines, and discouraging the promotion of unnecessary legislation.

While the Committee now reports to the Attorney-General, it is still serviced by the Ministry of Justice, which provides it with secretarial services.

The membership of the Committee comprises a mix of government lawyers, academic lawyers, and lawyers in private practice. It also has two economists on it as well as a sitting judge and a retired judge. It is a big committee and this is deliberate because the people on it are busy and they cannot always all get to every meeting. The membership contains a wide range of high level legal experience.[12]

The Committee has had in recent years three main activities. The first is the design, revision and promulgation of the Legislation Advisory Committee Guidelines. This is a major activity requiring a great deal of time and effort from a lot of committee members who are often busy in other activities. Much of this work is supported by Parliamentary Counsel Office and it is currently under the stewardship of Professor John Burrows QC who chairs the subcommittee of the Legislation Advisory Committee dealing with this topic.

The Committee also advises agencies on the development of legislation. Sometimes government agencies are wise enough to come and consult the Committee before deciding the shape of their legislative proposals. In 2006, for example, the Committee was consulted on the development of new Fire Service Legislation, the rewriting of the Social Security Act and the Ministry of Economic Development's Review of the Regulatory Framework.[13] This practice of involving the Committee at the early stages of a Bill's development has a number of advantages. The Commit-

12 Membership of the Legislation Advisory Committee. Sir Geoffrey Palmer, President of the Law Commission (Chairperson); Mr John Beaglehole, Legal Advisor, Department of Prime Minister and Cabinet; Guy Beatson, Counsellor (Economic) New Zealand High Commission in Canberra; Andrew Bridgman, Deputy Secretary, Ministry of Justice; Graeme Buchanan, Deputy Secretary, Legal Department of Labour; Professor John Burrows QC, University of Canterbury and now Law Commissioner; Professor John Farrar, Dean of Law, University of Waikato; Andrew Geddis, Associate Professor, University of Otago; Jack Hodder, Partner, Chapman Tripp, Barristers & Solicitors; Ivan Kwok, Treasury Solicitor; Grant Liddell, Crown Counsel; Hon Justice Robertson, Judge of the Court of Appeal; Mary Scholtens QC, Wellington Barrister; George Tanner QC, Chief Parliamentary Counsel; Dr John Yeabsley, Senior Fellow NZ Institute of Economic Research, Rt Hon Sir Ivor Richardson, former President of the Court of Appeal; Dr Warren Young, Deputy President of the Law Commission.

13 Legislation Advisory Committee *Annual Report* (Wellington, 2006) available at <http://www.justice.govt.nz/lac/pubs/2006/2006-annual-report.html#1> (last accessed 12 February 2007).

tee can assist with the legislative design. It can query whether the approach suggested is sound. It can cut off unnecessary legislation.

The Committee also engages in substantial education activity. In order to ensure that the Legislation Advisory Committee Guidelines are known and understood, each year the Committee runs a seminar programme that is well attended by public servants. In 2006 it held seminars on the Guidelines and the legislative process in the House of Representatives. These were so well attended that they had to be repeated. It also held a seminar on the Guidelines for private law practitioners from the Wellington District Law Society. These seminars were held in the Legislative Council Chamber and hosted by Madam Speaker. There is clearly a need for continuing efforts to ensure adequate education within the government system on the legislative process, the practicalities of designing and passing legislation and the importance of the Legislation Advisory Committee Guidelines.

For every government Bill that is introduced to the Parliament, the Law Commission provides a report to the Committee on compliance with the Legislation Advisory Committee Guidelines. This process ensures the systematic examination of every government Bill to identify any anomalies. If the Committee decides having looked at the Law Commission's report that further action should be taken then it does so. The action that the Committee takes varies according to the particular circumstances. It may take the matter up with the Minister. Or it may make suggestions to the Parliamentary Counsel Office. Or it can and does attend Select Committee hearings and make a submission to the Select Committee. Or it may go and see the officials responsible for the Bill and make its point of view known in that way.

The Committee has had particular concerns in recent times with delegated legislation. It has made a lengthy submission to the Regulations Review Committee of Parliament and attempts to keep in touch with that committee's thinking in relation to the control and scrutiny of delegated legislation.[14]

The Committee has also made submissions to the Standing Orders Committee on how to change the legislative process in order to assist non-controversial law reform measures.

Professor Dawn Oliver of the Faculty of Law of the University College of London has looked at the work of the Committee and found it to have value. She has written concerning the Legislation Advisory Committee's Guidelines that they 'provide a model from which the United Kingdom could learn in the development of scrutiny standards and checklists for use by parliamentary scrutiny committees.'[15] As both its founder and current Chair, I am not as sanguine as she is about the impact of the Committee's work on the quality of New Zealand legislation. It seems to me to be benign, but peripheral. Indeed the experience of the Committee over 20 years has led to the conclusion that most of the problems with legislation occur early in its design phase. It is often too late to perform major surgery on a Bill after it has been introduced.

Remodelling a Bill is difficult. The work needs to go into the original design. In New Zealand, almost all Bills go to Select Committee for public scrutiny and submissions, and the Select Committees alter the details of the legislation extensively in light of the submissions. However, wholesale revisions to the architecture of a Bill, while not unprecedented, are difficult to accomplish.

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14 Briefing *for the Regulations Review Select Committee from the Legislation Advisory Committee* (Wellington, March 2006).

15 Dawn Oliver 'Improving the Scrutiny of Bills: The Case for Standards and Checklists' [2006] PL 219, 235.

There is no doubt that the Legislation Advisory Committee has done useful work during its more than 20-year existence. It has contributed positively to the quality of new legislation. The Guidelines do seem to be of enduring value. But they are not always followed. And the Committee is not at the centre of the legislative process. Many Members of Parliament have only a hazy understanding about the Committee and its work. Probably public servants that deal with legislation in government departments have a better understanding of its work, since they are required to use the Guidelines, but even among them knowledge and use of the Guidelines are patchy.

The Guidelines contain a checklist of factors to be considered when drawing up legislation that gives an idea of the range of matters that needs to be considered with any legislative proposal. These matters are summarised now according to the current chapters of the Guidelines, but drawing on only some of the key questions they ask:

Means of achieving policy objective

- Has the policy been clearly defined?
- Has consideration been given to achieving the policy objective other than by legislation?
- Have those outside the government who are likely to be affected by the legislation been consulted?

Understandable and accessible legislation

- Has sufficient time and consideration been given to the preparation of the legislation?
- Have the lawyers as well as the policy makers been fully involved (many a clever policy proposal has foundered on legal rocks never considered until the end of the process)?
- Has the draft of the legislation implemented the policy faithfully – can it be understood and will it work?

Basic principles of New Zealand's legal and constitutional system

- Does the legislation comply with fundamental common law principles?
- Have vested rights been altered? If so, can compensation measures be included?
- Is the legislation retrospective and does it impose a detriment on some people?
- Does the legislation impose a tax or levy?

Statutory interpretation

- Have the rules of statutory interpretation been considered?
- Has the Interpretation Act 1999 been considered?

New Zealand Bill of Rights Act 1990 and Human Rights Act 199.

- Is the legislation consistent with these key pieces of Human Rights legislation or does the measure reduce or erode those rights?

Principles of the Treaty of Waitangi

- Is the measure one that requires consultation of Maori? If it does, what form should that consultation take?
- Is there a possibility of conflict between the principles of the Treaty and the legislation itself?

International obligations and standards

- Are there any international obligations and standards relevant to the legislation?
- If there are, does the legislation properly implement them?

Relationship to existing law

- Has all the existing common law and other law legislation been considered in relation to this particular measure?
- Are transitional savings provisions needed?

Creation of a new public power

- If a new public power is proposed, is it really needed, or are suitable powers already available under the existing law?
- Is it clearly stated how the new power will be exercised and who will be accountable for its exercise?
- What protection and checks are there on the exercise of the power?

Creation of a new public body

- If a new public body is needed, what form should it take? Should it be a department of State, a state enterprise, or a crown entity, an office of Parliament?
- Is it clear whether the Ombudsmen Act of 1975, the Official Information Act 1982 and the Local Government Official Information and Meetings Act 1987 apply to the body?

Delegation of law making power

- If the legislation will allow the delegation of legislative power to someone, is that appropriate in the circumstances?
- What procedures have been specified to control the process of making the delegated legislation?
- If the legislation provides for tertiary legislation or 'deemed regulations' is this appropriate?

Exercise of delegated legislative power

- Has the empowering law and general law been complied with in making delegated legislation?
- Does the delegated legislation sub-delegate unlawfully? Is it in invalid for repugnancy to other laws or by reason of uncertainty?

Remedies

- If remedies are required for breach of legislation, what are they and how should they be established?
- What should the limitation period be for exercise of remedies?

Criminal offences

- Is it necessary to create a new criminal offence?
- What are the offences?
- What are the penalties?
- What element of intent will be required for the proposed offence?

Appeal and review

- Will judicial review to the Courts be available under the legislation?
- Should there be provision for appeal? If so, what type of appellate body?
- What will the procedure for appeal be?

Powers of entry and search

- Are powers of entry or search necessary?
- Are the conferred powers subject to appropriate safeguards?

Powers to require and use personal information

- Does the legislation affect privacy?
- Has the Privacy Act 1993 been complied with?

Cross border issues

- Are there cross border issues that should be addressed?
- Are special rules required for civil claims or criminal offences with cross border elements?
- Will a regulatory agency be able to perform its role effectively?

- Should there be recognition enforcement of overseas decisions in New Zealand or vice versa?

The above is only a short taste of what comprises the now more than 200 pages of the Legislation Advisory Committee Guidelines.[16] The Guidelines are updated regularly and major changes were made in 2006.

III. THE LEGISLATION DESIGN COMMITTEE

Despite the good work of the Legislation Advisory Committee, on its own, that committee is plainly not sufficient to ensure consistently high quality legislation. Something else is needed. In 2006, the government decided to set up the Legislation Design Committee and gave the Law Commission extra funding to service it. This new committee was established as a response to the experience with the Legislation Advisory Committee and out of the belief among a number of key agencies involved in the legislative process that 'some significant or complicated legislative proposals would benefit from high level advice on the framework and design of the legislation at an early stage of policy development. Such advice could improve the quality of the final product.'[17]

The Legislation Design Committee is made up of representatives from key agencies. Its role is to discuss projects with departments during the development of legislation. This includes examining how best to implement policy objectives through legislation. The membership of the Committee comprises an experienced official from the Ministry of Justice, the Chief Parliamentary Counsel, the Solicitor General, the legal advisor from the Department of Prime Minister and Cabinet and the Treasury Solicitor. It is chaired by me.

The new committee is not involved in detailed policy formulation. Rather, it becomes involved at a stage prior to drafting of the legislation, where a project has a high level of commitment by the government. The Committee considers the means by which a project will be translated into legislation. This is discussed and in effect workshopped. Obviously not every small amending Act will be an appropriate subject for the Committee. However, new legislation that breaks new ground, or that is big and has an effect on the coherence of the statute book as a whole will be of central concern to the Committee.

The Committee is not intended to cut across existing government accountabilities. The government department promoting the legislation continues to be directly responsible for the policy and the drafting instructions for the Bill. The general consultation with interested departments will continue to take place in the development of advice to Cabinet.

Neither are the new Committee's views binding on anyone. There is no new requirement to separately identify the Committee's views in a Cabinet paper. It is intended that the Committee's role will be complementary to that of the Legislation Advisory Committee. It uses the Legislation Advisory Committee Guidelines and the combined experience of the people on the Legislation Design Committee to try and act as a guide, philosopher and friend to departmental officials generating difficult legislative proposals.

After it was set up in 2006, the Committee delivered a number of seminars to interested government departments that generate a lot of legislation outlining the assistance that it offers. Al-

16 Legislation *Advisory Committee Guidelines* available at <http://www.justice.govt.nz/lac/index.html> (last accessed 12 February 2007).

17 Cabinet Paper, Office of the Minister of Justice, Cabinet Policy Committee 'Legislation Design Committee and Law Commission Funding' (2006).

ready the new Committee has had a number of interesting assignments. The Bill dealing with intellectual property and other issues arising out of the holding of major events in New Zealand was the first major project that the Committee engaged in.[18] After the policy had been decided in broad terms by Cabinet, the Committee looked at the policy and conducted extensive discussions with various officials and provided advice on the shape the legislation should take.

The experience of the Legislation Advisory Committee has played an important role in monitoring and improving the quality of new legislation through the promulgation and scrutiny of observance of its Guidelines. However, The Legislation Design Committee is able to become involved in the production of more principled coherent and workable legislative proposals earlier in the process. It is thought that this may give it more bite. Obviously, the Legislation Design Committee will only have a significant impact if its work adds value. The degree of success of this new Committee will require assessment after further experience.

IV. The Future

There is a case for melding the Legislation Advisory Committee and Legislation Design Committee into a new combined entity. Whether that will be done remains to be seen. But there are wider vistas of concern that also deserve consideration.

Lurking in the background is a different and more profound issue. It is not only the legal and constitutional requirements of the Legislation Advisory Committee Guidelines that are an important ingredient of legislative design and practice. There are many others, particularly the economics of 'good' regulation. What are the key costs, benefits, risks and options associated with alternative policy choices that are going to be converted into legislative form? Most regulation requires legislation.

New Zealand has a strong Cabinet system. Indeed, in many ways it is stronger, more disciplined, more collegial and more an instrument of across government coordination than its counterpart in the United Kingdom.[19] One of its features is a Cabinet Manual that instructs ministers and others on how to do things and how the Cabinet system works in great detail.[20] One of the matters the Manual deals with is legislation, so far as that concerns the Executive – which, it may be remarked, is not nearly as much as it used to do due to the consequences of MMP.

It has become the habit over time to add matters to the Cabinet Manual imposing procedural requirements. Including such matters in the Cabinet system act as a sort of control in the coordination of the whole of Government. The Legislation Advisory Committee Guidelines that are approved by Cabinet is one such example. But there are other important ones. Indeed the Manual requires Ministers in their bids for Bills to draw attention to any aspects that have implications for or may be affected by:[21]

- the principles of the Treaty of Waitangi;
- the rights and freedoms contained in the New Zealand Bill of Rights Act 1990 or the Human Rights Act 1993;
- the principles of the Privacy Act 1993;

18 Major Events Management Bill 2006 99–1.

19 Geoffrey Palmer, 'The Cabinet, the Prime Minister and the Constitution: The Constitutional Background to Cabinet' (2006) 4 NZJPIL 1.

20 Cabinet Office *Cabinet Manual 2001* (Wellington, 2001).

21 Ibid para 5.35.

- international obligations.

These are important matters. Indeed, in relation to the Bill of Rights, the Attorney-General is obliged to draw to the attention of the House any Bill that appears to be inconsistent with the rights and freedoms contained in the New Zealand Bill of Rights Act 1990.

The quality of regulation in New Zealand has also been a problem. In 1997 the Government published a Code of Regulatory Practice.[22] *The Step by Step Guide: Cabinet and Cabinet Committee Processes* requires that regulatory impact statements must accompany 'all policy proposals submitted to Cabinet with legislative implications (leading to government Bills and statutory regulations or Members' Bills that the government is planning to support or adopt) unless an exemption applies.'[23] Work has been going on in the Ministry of Economic Development to enhance and develop the regulatory impact regime further.

The public law and economic quality indicators discussed above are dynamically inter-related. Regulation requires law, and law must conform to certain constitutional and rule of law principles. Law and economics go hand in hand. They always have, although it took lawyers a long time to appreciate the point.

The experience with the Legislation Advisory Committee seems to me to mirror what is going on in the efforts to promote good regulatory practice. To successfully address problems of legislative design, these matters must be engaged with early in the process of policy design. It may be too late by the time the proposal even goes to Cabinet, let alone by the time the instructions go to Parliamentary Counsel Office. Sometimes the thinking in the individual departments is not sufficiently linked to the rest of the Government.

I wonder if it would ever be possible to try and deal with all these issues as a job lot at the beginning of the policy development process and to keep them firmly in mind as that process inevitably iterates.

There have been recent developments in Parliament that have highlighted the need to build into legislation requirements for its systematic review within a certain period after its passage in order to see that its objectives have been achieved. For instance, the Justice and Electoral Committee asked the Legislation Advisory Committee to write comments on the Evidence Bill[24] and in particular on whether it was too prescriptive. Three members of Legislation Advisory Committee attended the Select Committee and made a submission about the Bill. The submission expressed support for the Bill's codification of the law and proposed that the Bill include five yearly reviews by the Law Commission once enacted. This post enactment period review suggestion was accepted by the Select Committee and included as an amendment in their report back to the House.[25] The Bill was enacted as the Evidence Act 2006. Section 202 of the Act requires the Law Commission

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22 Ministry of Economic Development website, available at <http://www.med.govt.nz/templates/MultipageDocumentTOC____22149.aspx (last accessed 13 February 2007).

23 Department of Prime Minister and Cabinet *The Step by Step Guide: Cabinet and Cabinet Committee Processes* (Wellington, 2001) available at <http://www.dpmc.govt.nz/cabinet/guide/guide.pdf > (last accessed 12 February 2007) para 3.36.

24 Evidence Bill 2006, no 256–1.

25 Evidence Bill 2006, no 256–2, (select committee report) XIV.

to conduct 5-yearly reviews of the Act to ensure that it is having the desired effect and to review whether its provisions should be retained, amended or repealed.[26]

We do need vigorous examination of whether legislation has met its policy objectives after it has been passed. We cannot continue to pass Bills and then never consider their design or effect again. We need to rigorously assess test issues such as whether an Act has caused some unforeseen or undesirable consequences, or has had unexpected costs attached to its enforcement. We do hardly any evaluations in New Zealand as to whether Legislation met its policy objectives or had unexpected consequences. Many Acts are amended numerous times in the years following their enactment, but this happens in a reactive way – the changes are quick fixes rather than part of an integrated overview or well-designed plan. We certainly need more considered monitoring of legislation after it has been passed.

From where I sit the real problem is that we still legislate too easily. We give insufficient thought to what we are trying to do when we legislate. And then, having legislated, we do not examine whether we even achieved what we were trying to. We amend too readily when often we should start again. We fail to assess properly the economic consequences of many of the regulatory mechanisms in which we engage. We have created a country with 1100 principal statutes. I think the time has come to put a lot more thought into the legislative process before it starts. In a system where statute is Emperor, we need better methods of statute design, manufacture and maintenance.

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26 Evidence Act 2006:

202 Periodic review of operation of Act

(1) The Minister must, as soon as practicable after 1 December 2011 or any later date set by the Minister by notice in the Gazette, and on at least 1 occasion during each 5-year period after that date, refer to the Law Commission for consideration the following matters:

(a) the operation of the provisions of this Act since the date of the commencement of this section or the last consideration of those provisions by the Law Commission, as the case requires:

(b) whether those provisions should be retained or repealed:

(c) if they should be retained, whether any amendments to this Act are necessary or desirable.

(2) The Law Commission must report on those matters to the Minister within 1 year of the date on which the reference occurs.

(3) The Minister—

(a) may not set a date later than 1 December 2011 for the commencement of the initial periodic review of this Act under subsection (1) unless the Minister is satisfied that, because of the limited number of cases concerning the provisions of this Act decided by the superior courts of New Zealand or for any other reason, it is appropriate to defer the date of the initial periodic review; and

(b) must not set a date later than 1 December 2014 under subsection (1).

APPENDIX 5

Problems of Legislative Quality

1. The Law Commission is well situated to analyse problems with government legislation, both within the executive branch of government and in the Parliament. Through servicing the Legislation Advisory Committee and the Legislation Design Committee, the Law Commission sees the government's legislative output on a continuing basis. The Law Commission is therefore in a unique position to assist with problems that exist with government legislation.

2. The Ministry of Justice as long ago as 1999 gave the incoming government a serious message:[11]

> Dissatisfaction with the legislative process has increased over the years. The volume of legislation is greater than Parliament can manage. There is frustration that routine technical Bills cannot be passed. 70 Bills have been carried over to the next Parliament, yet in 1999 only fifty Principal Bills were passed (and in 1998 only sixty one were passed).
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> The legislative programme is a choke point on government initiatives. By contrast with the modern budgetary process, very little resource is attached to prioritising and quality control of law making. The quality of law-related policy decisions and prioritisation is the underlying issue.
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> Options for the government include:
>
> (a) Continuing the incremental approach to reform.
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> (b) Undertaking a more comprehensive review and reform of the legislative process.

3. The problems analysed in the above passage may have become worse since 1999. The causes of the problem are not easy to analyse and even more difficult to fix.

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11 Ministry of Justice, *1999 Post-Election Briefing for the Incoming Minister* (Wellington, 1999).

4. Part of the problem arises because there is no adequate scrutiny of the quality of legislative proposals before they are introduced into Parliament. Some mechanisms do exist – notably the Legislation Design Committee, Bill of Rights vetting, and Regulatory Impact Statements. However, these mechanisms are fragmented, occur at different stages of the process, and are not properly integrated. As a result, there is no consideration of all the dimensions of the costs and benefits of legislative proposals, whether their objectives are being pursued through the right vehicle, and whether they conform with fundamental legislative principles. This can lead to legislation that imposes unanticipated costs on the community or fails to achieve its purposes.

5. Many Acts are amended numerous times in the years following their enactment but this happens in a reactive way – the changes are quick fixes rather than part of an integrated overview or well designed plan. New Zealand needs to consider developing means to monitor legislation after it has been passed. It is also the Law Commission's view that we must curb the heavy tendency in New Zealand to repeatedly pass extensive amending Acts that can strain and distort the principal Act's main architecture, features and scheme. It can be better not to amend, but to begin again from scratch and redraft the whole Act.

6. In New Zealand, we do few evaluations of whether legislation has met its policy objectives or has had unexpected consequences or costs. We cannot continue to pass Bills and not ever consider their effects again. There needs to be a systematic mechanism to assess and test the effects of Bills after they are passed.

7. There is also too much law already on the books without any sufficient mechanisms for removing that which is no longer required. This problem has been analysed in the Law Commission's recent Report, *Presentation of New Zealand Statute Law*.[12]

[12] New Zealand Law Commission *Presentation of New Zealand Statute Law* (NZLC R104, Wellington, 2008).

8. There are a number of statutes on the books that do not need to be there and they have fallen into disuse. Furthermore, when new statutes are added, the old ones tend not to be reviewed. They are just left.

9. The English Law Commission, in a recent report, found there was an overwhelming support for the principle that there should be a more systematic approach to post-legislative scrutiny. What the English Law Commission understands by post-legislative scrutiny is a:[13]

> ... broad form of review, the purpose of which is to address the effects of the legislation in terms of whether the intended policy objectives have been met by the legislation and, if so, how effectively. However this does not preclude consideration of narrow questions of a purely legal or technical nature.

10. If the incoming government agrees that the reasons for post-legislative scrutiny are compelling, then it would be necessary to put in place processes and resources to ensure improvements are made. This would translate into better regulation. It would, at the legislative stage, put a focus on sharpening the implementation of legislation, and the likely effects of that legislation. Unintended consequences of the legislation would be analysed. This may require empirical research, for instance, research into any difficulties that a piece of legislation is causing the segments of the public most affected by it.

11. There is some legislation in New Zealand that already provides for such reviews. The Evidence Act 2006 provides in section 202 for periodic review of the operation of the Act to be carried out by the Law Commission.

12. Part of the problem faced by the New Zealand Government is the fragmentation of the government's own legal services. A review as long ago as 1986 found that the principal cause of the present weakness of the New Zealand government legal service was the almost total absence of any co-ordination of those services. It stated that:[14]

> ... unless this major defect is remedied the prospect of significant improvement appears to be slight.

13 Law Commission *Post-Legislative Scrutiny* (LAW COM No 302, London, 2006) para 2.4.

14 GS Orr and DJ Bradshaw, *A Review of Government Legal Services* (State Services Commission, Wellington, 1986), 1.

13. The level of quality control exercised in relation to legal matters, both in the development of legislation and the provision of legal advice within the New Zealand Government, compares unfavourably with the economic and financial controls exerted by the Treasury. Legal and constitutional values are badly served in terms of quality control; the checks and balances are inadequate.

14. The Law Commission believes issues relating to the quality of legislation are urgent and important. It can make a contribution to reform in this area. Some measures that could be considered include:

    - Acts of Parliament should be rewritten from scratch, instead of the promotion of large amending Acts;
    - There should be improved pre-legislative scrutiny, for example, by integrating and enhancing the mechanisms which already exists for scrutinising legislation before introduction;
    - A review of Standing Orders should address matters such as issues of scope and omnibus bills;
    - The Law Commission's proposed programme of revision should be implemented;
    - There should be a system of post-implementation review of both regulations and Acts.

15. The Commission would appreciate an opportunity to discuss these issues in detail, and would be happy to provide a more detailed briefing if that would be helpful.