Law reform and the Law Commission in New Zealand after 20 years

We need to try a little harder

By Geoffrey Palmer

Sir Geoffrey Palmer is President of the New Zealand Law Commission. Sir Geoffrey has had a long career in the law, as an academic lawyer, a politician (1989-1990 he was Prime Minister of New Zealand), and a law practitioner. He is the New Zealand Commissioner on the International Whaling Commission, and a member of Her Majesty's Privy Council. Sir Geoffrey was awarded a KCMG in 1991 and made an Honorary Companion of the Order of Australia in the same year. In 1991 he was listed on the United Nations 'Global 500 Roll of Honour' for his work on environmental issues. These included reforming resource management law. Sir Geoffrey also sat as a Judge ad hoc on International Court of Justice in 1995. He holds honorary doctorates from three Universities.

All law reform agencies face serious challenges—the primary one being implementation. Justice Michael Kirby of the High Court of Australia recently announced that there has been a 'failure, anywhere, to establish a satisfactory link between the institutional law reform body and the lawmakers with the power to convert proposals for legal reform into action'.[1] The problem exists in all countries where there is a Law Commission.

The New Zealand Government has recently adopted a programme to implement six previous reports of the Law Commission and has made progress towards that end. In her Prime Ministerial statement to Parliament in February, the Rt Hon Helen Clark said one of the initiatives in the justice and security area should be to 'give priority to law reform proposals already received from the Law Commission which update key statutes, for example in the property law area'.

The issue of how to secure governmental legislative and official attention once law reform reports are produced is certainly a significant problem.

I shall attempt to throw some light on what I believe the real nature of the underlying issue to be and suggest some possible ways of approaching a resolution of it. There lurks beneath this implementation issue something deeper than political indifference to worthy projects.

Post-modernism and law reform

I have spent now 40 years in the law, much of it in reform activities. I am beginning to feel there is a sense of unfulfilled expectations about law reform and the legal climate generally. It is to the philosophical cause of that unease I now turn. Legislative reform truly does represent modernity, but we seem to be living in a post-modern age.

There seems to be an infection seeping into the legal system in the Western world. It is the infection of post-modernism. It has implications for law reform. Post-modernism is marked by scepticism concerning the foundations of knowledge. It advances the view that language constructs reality, but does not mirror it. Post-modernism points out the insoluble difficulties in postulating coherent unitary texts or sets of legal principles.

Post-modernism sets itself against authority. It denies that there is any independent authority in the law. According to post-modernism, law is merely one discourse among many and has no objective basis. As such, both philosophy and jurisprudence lack foundations. They turn into word games. Under such an analysis the great traditions of the law collapse and there can be no clarity about what will follow. Post-modernist argument brings the authority of law into serious issue.

Much of post-modern thought had its origins in literary criticism. When viewed through a post-modern lens, the relationship between law and literature leads to uncomfortable conclusions. Texts are as much a foundation of statute law as they are of literature. Thus, infirmities in the text and, particularly, suggestions that texts have no meaning are particularly destructive.

I do not wish to begin a disquisition on legal philosophy, but I do think that post-modernism has had, and will continue to have, an important effect on our legal institutions: post-modernists tend to believe there should be as little law and legislation as possible

since they are sceptical that law can achieve anything. Even though it has manifest and serious defects, the theory undermines trust in the institutions of the law, its effectiveness and its legitimacy. It leads to a pragmatic, short-term approach.

Post-modernism will have its strongest effects on statute law. Massive amounts of law are made in New Zealand every year, of which primary legislation sometimes does not produce the greatest bulk. Today, New Zealand's primary laws comprise nearly 1100 statutes; 1096 to be precise. We had only 600 principal Acts in 1978. Under the authority of today's Acts there are 4292 instruments published in the statutory regulations series. There exist also, according to Parliamentary Counsel Office website, 273 sets of "deemed regulations"; this last number, the site warns us, may be incomplete.

What concerns me is the relative failure to look at the body of our laws as a whole, and impose on them some organising pattern or principles that will enable our legal system to work effectively and fairly in practice. Simply adding to the bulk of the law without considering its overall pattern is problematic. It was this thought that constituted the overarching principle behind the thinking that set the Law Commission on its way.

The establishment of the Law Commission was not based on post-modern thinking, rather the reverse—the vision that the law could be accessible, understandable, coherent and administered fairly by institutions that are neutral and behave with integrity. These are hopes that ought not to be abandoned lightly.

Accessibility of statute law in New Zealand

There is one practical approach I intend to explore at the Commission, as a means of making the primary statute law more accessible. In New Zealand, unless one knows the name of the principal Public Act, there is good chance that relevant provisions can be overlooked.

The New Zealand statute book is both massive and unmanageable. More useful is the American approach, where both at State and Federal level, a code is produced of all State law or Federal law passed by the legislature, and rearranged under logical topic headings.

The State of Iowa provides a useful comparison, as it is a state of three million people with an emphasis on primary industries—a characteristic it shares with New Zealand. The Iowa Code of 2003 allows people in both the public sector and the private sector to locate and read all the relevant primary statute law that may be important to a particular concern. All the law on, for example, 'animals' can be found in one place, along with detailed sub-headings and extensive cross referencing.

Under the heading 'Animals' alone, we find 177 separate headings and many other sub-headings. By looking at this index one can find any law that one might possibly want to know about from mules and muskrats to wolves and woodchucks.

Iowa has elections every two years and the legislature meets every year. The law requires a new Iowa Code to be issued as soon as possible after the final adjournment of the second regular session of the general assembly. So, in New Zealand terms, the whole of the statute law is reprinted in Iowa every two years in an integrated and accessible manner.

What I am trying to demonstrate is that a modern method exists of providing the law in an accessible form and systematic manner, without the need to go through the session laws as they were passed by the Iowa legislature. The session laws of Iowa are drafted in such a way as to amend, add or subtract from the Code, accepting its pattern of organisation. It is the arrangements of these laws and the indexing that is the key to this accessibility.

With modern technology, such a process should not be impossible in New Zealand. In my view, it needs to be seriously considered.[2]

It seems to me that the State has an obligation to make laws accessible if it expects citizens to obey them. There are many practical difficulties that flow from a lack of accessibility. Probably first among them is the cost of locating the relevant provisions. Very few people in New Zealand, other than lawyers, can find their way around the statute book, and many lawyers have problems.

The problem also causes difficulties for our public discourse on matters. Journalists, in particular, have great difficulty being able to say in any clear way what the law is, and they tend to veer away from trying to do so. In a democracy as small as New Zealand, where public debate is continuous and volatile, much of it is conducted on a daily basis in complete

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ignorance about what the law may be on the topic under discussion. And often, that law is highly relevant to what is being debated.

Delegated legislation: a cautionary tale from the United Kingdom

Statutory bulk leads, it seems, to unbridled pragmatism. On a recent visit to the United Kingdom, I was briefed by the First Parliamentary Counsel and the Law Commission in England on the Legislative and Regulatory Reform Bill. This Bill makes provision for reforming legislation on a wide scale and implementing recommendations of the United Kingdom Law Commissions. It was introduced on 11 January 2006.

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The breadth of the measure can best be understood by quoting its purpose clause, clause 1(1):[3]

> A Minister of the Crown may by order make provision for either or both of the following purposes –
>
> (a) Reforming legislation;
>
> (b) Implementing recommendations of any one or more of the United Kingdom Law Commissions, with or without changes.

In effect, this is law-making by delegated legislation. There may be a case for dealing with recommendations of the Law Commissions in the manner suggested, but I do not advocate it. It is even more difficult to see the case for reforming legislation on a broad front by way of delegated legislation.[4] The Bill contains a number of pre-conditions set out on exercise of the power. Indeed, satisfaction of these conditions may make judicial review on the exercise of this Act, should it become law in its present form, a frequent occurrence. Such measures cannot impose or increase taxation. There are restrictions on the creation of new offences and restrictions on creating new rights of forcible entry, search or seizure. The proposed order must be 'proportionate' and strike a fair balance between the public interest and the interests of any persons adversely affected.

In my view, it would be deleterious to New Zealand's existing constitutional arrangements to follow a procedure like that contained in the Bill. However, it should be noted at this point that the New Zealand Parliament has developed a practice to fast-track legislation by use of Orders in Council. This is the affirmative resolution procedure that has grown up in relatively recent times.[5]

The Regulations Review Committee has published an interim report questioning the procedure.[6]

The struggles that the Committee has had with 'deemed regulations' over many years is a further example of the problems that delegated legislation can cause.[7] The difficulties with deemed regulations are that they are not drafted by Parliamentary Counsel. They are not published in the statutory regulations series. They are not approved by Cabinet. Often they contain material incorporated by reference which gives rise to problems.

What also emerges from the 2004 report of the Regulations Review Committee is the increasing use of notices, codes of practice and orders that escape the jurisdiction of the Regulations Review Committee.

New Zealand needs to take account of the trend to find ways of avoiding its legislative processes becoming overwhelmed.

It is clear that the quantity of primary and secondary legislation has increased markedly in New Zealand in recent years. Much of this is inevitable. The complexity of issues with which Governments must now deal has altered enormously over a period of 30 years.

With the development of deemed regulations, affirmative resolution procedures and increasing use of notices, codes of practice and orders, however, New Zealand could be considered to be travelling back towards the place from which it came.

It is essential to find and define a dividing line between primary and delegated legislation, so that Government, the Parliament and, in particular, public servants know where that line lies. The intellectual effort required by such an inquiry ought not to be underestimated.

Pre-legislative and post-legislative scrutiny

Statutes are often not required and should be avoided if possible. Legislation is not the answer to every problem. A fundamental threshold question needs to be asked much more often and much more rigorously than it is—is legislation required at all? We have to avoid cluttering up an over-full statute book with unnecessary laws.

Last year, I was appointed Chair of the Legislation Advisory Committee. This is the successor to the old Public and Administrative Law Reform Committee. Its most important work product has been the Legislation Advisory Committee Guidelines, which have been adopted by Cabinet as appropriate benchmarks for legislation to meet.[8]

It has occurred to me, in relation to this work, that an early warning system would be helpful. Where agencies are planning legislation, the architecture of it needs to be settled early and in accordance with sound legal and constitutional principles.

Early discussion about the choice of legislative vehicles, and the methods of complying with the Guidelines, would improve the quality of legislation a great deal. It is often too late once the measure has been drafted.

It is clear that we have been adding to the bulk of the law on a continuing basis. What we do not do is to stop and conduct an inquiry into the effects of what we have done. The difficulty with conducting post-legislative scrutiny is to provide an effective set of intellectual tests as to what it comprises and how it can be delivered. The first issue is whether Parliament itself should engage in this activity. In New Zealand, Select Committees can conduct inquiries on a very wide range of matters. But Parliament is busy, and there are resource restraints.

Furthermore, there are many different types of legislation. A 'one size fits all' approach would not be workable. Indeed, post-legislative scrutiny could be governmental, Parliamentary, or external. Or it might involve all three.

Obvious questions that need to be examined in post-legislative scrutiny exercises would be the following:

- What interpretative difficulties have been encountered in the legislation?
- Has the legislation had unintended legal consequences?
- Have the policy objectives been achieved?
- What have been the economic costs imposed by the legislation, and what does it cost to administer?
- Has it been cumbersome and bureaucratic?

Such scrutiny could be as narrow or as broad as was desired. How much legislation should be scrutinised, and when, where and how such scrutinising should occur are obviously issues of importance.

While post-legislative scrutiny may be difficult and expensive, it is impossible to see why it should not be carried out. How much do we really know about the effects of all the laws that have been passed? In a rational society committed to the rule of law, even in a post-modern world, we should know more. Passing more legislation without knowing is like whistling in the dark.

Conclusion

The bulk of legislation, and its various forms, poses a problem to the coherence of the legal system as well as access to its principles and rules. Attention needs to be given to providing some overall coherence and imposing a pattern on the statute book, so that it is both orderly and accessible.

In considering the balance between primary legislation and delegated legislation, greater effort has to be made to determine what is appropriate for delegated legislation and what is not. At present, we have no clear bright line rule in New Zealand about the proper balance. Securing one will require a lot of intellectual effort.

Before Government Bills are introduced, more effort needs to go into the initial design of legislation, particularly its architecture and the relationship of the proposed law to the established body of laws as a whole. Similarly, post-legislative scrutiny of Government Bills that are passed needs to be undertaken to ensure that the stated objectives were met, and that unexpected consequences did not ensue.

If we do not address these difficulties, it is my view that more and more law will find its way into delegated legislation through measures of the character of the Legislative and Regulatory Reform Bill in the United Kingdom. For a constitution like New Zealand's, that is unacceptable. Parliament must remain in control.

This is a summary of Sir Geoffrey's address to the New Zealand Centre for Public Law, Victoria, University of Wellington, given on 30 March 2006.

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Endnotes

1. Hon Justice Kirby 'Law Reform and Human Rights – Scarman's Great Legacy' (lecture for the Law Commission of England and Wales, Gray's Inn, London, 20 February 2006).
2. This suggestion is not new. I first put it forward in 1979, Geoffrey Palmer. *Unbridled Power* Oxford University Press, Wellington (1979) 82.

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intrudes into protected free speech (under art 10 of the European Convention on Human Rights).

In Australia, the Attorney-General's Department told the Inquiry that the use of terms like 'praise' and 'glorify' were considered during the development of the *Anti-Terrorism Act (No 2) 2005* (Cth)—but rejected as too imprecise and capable of generating difficulties of proof.[6] They concluded that the existing Australian law already 'appropriately encapsulates incitement and glorification of [terrorist] acts' and thus there 'appears to be no need for a separate offence'.[7] The ALRC agrees.

Next steps

With the release of this Discussion Paper, the ALRC has invited individuals and organisations to make submissions in response to the specific proposals, or to any of the background material and analysis provided. The deadline for submissions was 3 July 2006.

The ALRC is confident that, following further community feedback on these proposals, the final report and recommendations will achieve the desired aim in terms of technical improvements to the law and striking the balance between freedom of speech and the fair reach of the criminal law.

Endnotes

1. See H Lee *Emergency Powers* (1984), 92. The opinion of the Attorney-General has never been published.
2. Sections 80.2(7) and (8) of the *Criminal Code 1995* (Cth).
3. As defined by s 30A of the *Crimes Act 1914* (Cth).
4. Explanatory Memorandum, Anti-Terrorism Bill (No 2) 2005 (Cth), 93.
5. *Terrorism Act 2006* (UK) s 20(2).
6. Australian Government Attorney-General's Department, *Submission SED 31*, 12 April 2006.
7. Ibid.

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3. Legislative and Regulatory Reform Bill 2006 (UK) cl 1(1).
4. M Taggart, 'From 'Parliamentary Powers' to Privatisation: The Chequered History of Delegated Legislation in the Twentieth Century' (2005) 55 U *Toronto LJ* 575.
5. R Prebble, *The Trouble with Convenience: Problems Arising from the Use of the Affirmative Resolution Procedure to Amend Legislation* LLM Research Paper, Victoria University of Wellington (2005).
6. Regulations Review Committee, 'Interim Report on the Inquiry into the Affirmative Resolution Procedure' Wellington (2004).
7. Regulations Review Committee *Inquiry into Instruments Deemed to be Regulations—An Examination of Delegated Legislation: Report of the Regulations Review Committee* Wellington (July 1999); *Inquiry into Principles Determining Whether Delegated Legislation is Giving the Status of Regulations*, Wellington (June 2004).
8. Legislation Advisory Committee, *Legislation Advisory Committee: Guidelines on Process and Content of Legislation* Wellington (2001) <http://www.justice.govt.nz/lac/index.html> at 30 March 2006.

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