

Geoffrey Palmer

A View of the Legal Debate¹

What is proposed amounts to a substantial constitutional change. It can be seen as a shift in power away from the executive branch of government towards the courts. The legitimate source for this shift of power remains unclear. To be successful, constitutional changes have to be enduring. I do not detect any widespread public consensus on the issues surrounding this set of changes.

In New Zealand regulation at present is carried out by a series of ad hoc balancing processes, each specific to its own piece of legislation. Probably we often get it wrong. Certainly there are problems. It has been a problem all my adult life in all the various connections I have had with the New Zealand government over a period now of 40 years. Government regulation and the quality of it has been an enduring issue. The prime issue is whether the proposed solution is acceptable and will actually fix the problem.

One significant gap in these presentations has been that no ministers have spoken. Yet the rights and prerogatives of ministers are greatly affected by these proposals. What is proposed is a

weakening of the capacity of ministers to decide how regulatory policy decisions should be made. I really do wonder what ministers will think of this. Ministers tend to take the view, in my experience, that they are elected to make decisions. That is their function. Measures that inhibit their capacity to take decisions are often not welcome.

What is proposed here is a serious diminution in the range of ministerial responsibility. We have to contemplate the suggested changes against that background principle of our parliamentary democracy. Ministerial responsibility is the prime instrument of accountability in our democratic framework. Ministers must answer to the House and defend their policies to the public. Cabinet has a collective responsibility. What is proposed here cuts across that and imposes a set of self-denying ordinances on ministers. My prediction is that ministers will not support such an arrangement. The reason is that the proposal will reduce their ability

to address the concerns of the public and it will reduce their capacity to govern in accordance with their policy preferences.

The implied message in the changes proposed are that ministers make bad choices and must be prevented from making them. In democratic terms this is a highly arguable proposition.

We can learn something about this from the experience with the Regulations (Disallowance) Act 1989. That legislation provided for parliamentary disallowance of statutory regulations. No motion for disallowance has ever yet succeeded in having a regulation disallowed. Parliament has not shown courage in this matter.

If the parliament is not prepared to deal to the executive, the question arises, who is? The experience with the Regulations (Disallowance) Act raises the whole question of whether what is proposed in this set of proposals is practical. What was designed to be a heavy check on executive power has not proved to be much of an inhibition on it in respect to regulations.

There is no doubt that the Regulations Review Committee has done great work. There is no doubt that it has developed a very important body of jurisprudence. But the fact that Parliament has never been prepared to actually disallow a regulation suggests to me that the House of Representatives is not really prepared to take on the executive on regulation in any serious way.

If that is the case, and that is the true

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lesson from our recent history, it seems to me unlikely that the situation can be rectified by *ex ante* legislative controls of the type contained in the proposal we are discussing.

The biggest problem that law making faces in New Zealand is the three-year term. That is the greatest enemy of good policy development and good law making. Things have to be hurried. Particularly when a new government comes to office, it takes them some time to settle in. It takes them quite a while to sort out their legislative priorities once they have the benefit of advice. If they are engaged in big policy changes with complex issues involving large acts of parliament, then it takes a long time to get the policy decisions made and the legislation drafted, introduced and passed. The biggest change that we could make that would be likely to produce higher quality law is to extend the term of parliament from three years to four and make it a fixed term. But the prospects of that happening are not high given the fact that a referendum rejected that possibility in 1990. Probably most members of the public regard a general election as the only real power they have to turn a government out.

In his paper Paul Rishworth is admirably clear on some changes he felt could be made to the New Zealand Bill of Rights Act 1990. He would add a property protection to the act. The difficulty with including property in the New Zealand Bill of Rights Act is that it would be necessary to go through the whole statute book and look at 1,100 existing statutes to work out which of those involved interference with property rights now and how that matter should be handled. Otherwise, the costs and consequences of such a change would be drastic and uncertain. Such work would take some years.

Professor Rishworth's other point, that there should be only one New Zealand Bill of Rights Act and not a second one, seems to me to be a strong point with which I agree. He would add some features of this proposal to that. I think that such a process would need to be handled with some care.

Richard Ekins makes the case about

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juridical law making quite strongly. He is opposed to it. He thinks it should be left to the democratic polity. He argued that the rules in the bill are not constitutionally orthodox, and I agree with him.

The major point that arises out of all the papers is the justiciable character of the proposal. To have court cases and forensic battles over procedural matters concerning legislative regulatory proposals opens a fresh dimension not contemplated in New Zealand before. Judges in New Zealand have handled the provisions of the New Zealand Bill of Rights Act very well, in my opinion. They are used to dealing with the matters covered by the International Covenant on Civil and Political Rights. They always have been, long before 1990. Most of those matters, such as search and seizure, arrest, legal advice, detention and police powers are familiar to judges and to criminal lawyers.

Neither the judges nor the legal profession are proficient in policy analysis of the type that leads to regulatory legislative proposals. It does seem to me that it is rather a stretch to ask the judiciary to take on this new role and expect it to be performed in a way that does not disrupt the processes of the executive government.

Tim Smith's case for the proposal is that it really isn't so bad and we don't have anything to fear. The courts will not be too assertive, he argues. I doubt this. I also doubt that ministers will share that view. Taking power away from ministers and giving it to the courts is bound to produce a different set of dynamics from

what occurs now. The mechanism of certification, the power of interpretation and the ability to issue declarations of incompatibility, in my view, all amount to a very significant transfer of power, notwithstanding protestations to the contrary.

In many ways making legislation is difficult enough without adding further complexities to the process. I have in mind Bismark's observation that making law is a bit like making sausages and best not observed. This, of course, suggests that the process shouldn't be transparent. I certainly think the legislative process should be as transparent as possible. But the part of it that is conducted within the executive branch of government is different on every occasion, with different interests, different topics and different departments involved.

I come now to George Tanner's powerful paper. Let me stress the conclusion which he did not read to you but I want to set out in full again:

"The bill falls short of complying with many of its own principles. Its use of open-textured language leads to uncertainty of meaning. It attempts to define good law making by reference to a set of simple principles: in doing so it obscures the complexities inherent in them and creates the same lack of clarity and uncertainty that it seeks to prevent. Legislating is a complex business. The bill suggests it is not. The bill suffers from an acute lack of problem definition and does not properly identify and assess workable alternatives. Without massive additional resources, it would be impossible to make all existing legislation compliant with the principles in the bill within ten years: the time frame is unrealistic and unachievable. The bill is a disproportionate and inappropriate response to the issue it seeks to redress.

"The bill overlaps with existing legislation, restating provisions of current statutes in subtly different ways, and in doing so risks creating uncertainty and confusion. It is inevitable that the bill would alter the way legislation is interpreted forcing a return to a methodology long ago abandoned by the courts in favour of an approach that explicitly recognises

the paramount role of the legislature in a modern parliamentary democracy. There is a failure to recognise the impact that the short parliamentary term and other features of the political and parliamentary system have on law making.

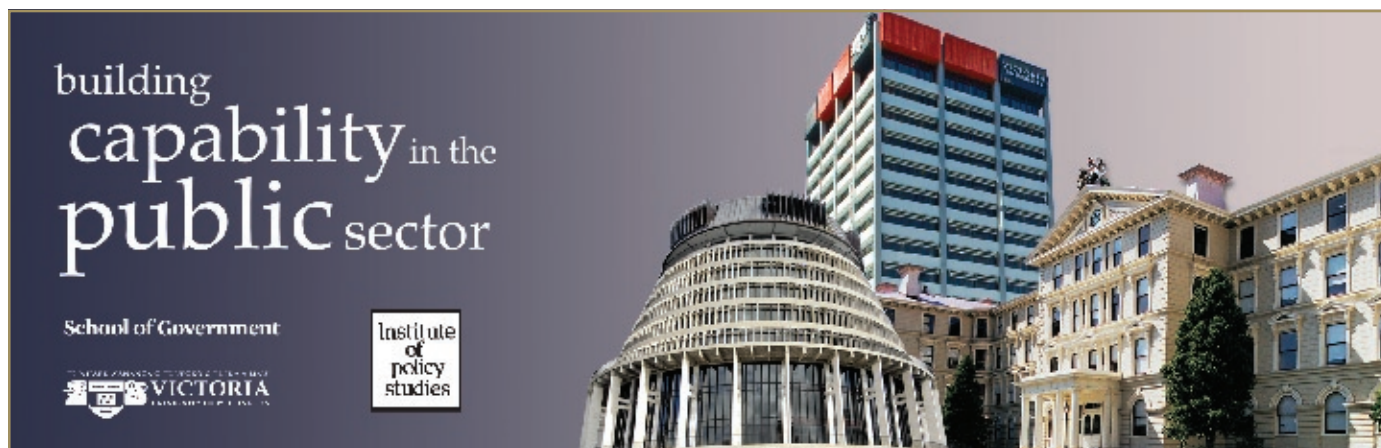
“The bill will bring the courts into areas of law making that are not within their province and for which they lack institutional competence, requiring them to adjudicate on choices made by

democratically-elected governments on complex social and economic issues and the allocation of resources. It will redefine the relationship between the legislative, executive and judicial branches of government and risks damaging the comity between them that is critical to a stable society.”

The dance of legislation is always different from one instance to another and pretty difficult to generalise about.

Economic benefits are not the sole factor to be taken into account. Constitutional principle, ministerial responsibility and the capacity of ministers to govern are also important elements.

¹ The article is a summation of the preceding four articles on legal issues which were presented as papers in the first part of the February 2010 IPS symposium chaired by Sir Geoffrey.



New Ideas for Old Problems

A series of lunchtime seminars introducing new members of staff in the School of Government of Victoria University of Wellington

New Zealand, Australia and the Asia-Pacific Strategic Balance: Ideas and policies

Dr Robert Ayson

12.30 pm-1.30 pm Friday 28 May Room 501, Railway West Wing

Robert Ayson is Professor of Strategic Studies and Director of the School of Government's Centre for Strategic Studies. He has held academic positions with the Australian National University, Massey University and the University of Waikato, and official positions in Wellington with the Foreign Affairs, Defence and Trade Select Committee and the

External Assessments Bureau. He is also a Senior Research Associate with Oxford University's Centre for International Studies. His research interests include strategic concepts, nuclear proliferation, Asia-Pacific security and New Zealand and Australian defence policies.

Politics and Ecology: Case studies in negotiating ecology in conservation, preservation and restoration policymaking

Dr Mike McGinnis

12.30 pm-1.30 pm Friday 25 June Room 501, Railway West Wing

Mike McGinnis was Director of the Ocean and Coastal Policy Center at the University of California Santa Barbara from 1995-2010. He has published over 40 articles in peer reviewed journals on the subject of large-scale environmental policymaking. His edited compendium, *Bioregionalism* (Routledge, 1999), is the primary text on the subject.

He has taught undergraduate and graduate level courses in environmental policy, coastal marine policy, ethics and policy analysis, among other courses. His new position is with the School of Government's Institute of Policy Studies.

Leadership, Political Parties and Parliamentary Performance in the Pacific Islands

Associate Professor Graham Hassall

12.30 pm-1.30 pm Friday 16 July Room 501, Railway West Wing

Graham Hassall took up his position as Associate Professor, Public Policy and Administration, in the School of Government in January 2010 after teaching at the University of the South Pacific from 2004-2009, the Landegg Academy in Switzerland from 2000-2003, and

the University of Melbourne during 1990-2000. He has also had visiting positions at the University of Papua New Guinea, the National Research Institute in Papua New Guinea, and the Graduate School of International Development, Nagoya University, Japan.