Sir Geoffrey Palmer QC

Intergenerational Governance problems of legislation

Introduction

We look through the glass darkly at the future. We cannot see it with clarity, if at all.[1] What we do understand are the problems, the tensions and the demands of the present.

The Cabinet and Parliament are focused on those problems of the present and what to do about them in policy terms. Parliamentary questions on contemporary issues are asked. There are inquiries conducted of many different types, some parliamentary, some departmental, some through Cabinet committees. The advocacy of pressure groups and lobbying may cause new problems to be added to the list.

One of the wisest political observations on what governs the issues to be picked up and those to be left for another day is attributed to Harold MacMillan, during his time as the British prime minister. Asked what his biggest problem was, he replied, 'Events, dear boy, events' (Knowles, 2001, p.488). Or, as Donald Rumsfeld said, 'Stuff happens'.[2] This is as true in domestic policy and economic policy as it is in foreign policy. The immediate need to react to earthquakes, fires, floods and international financial crises that hurt people and their property often dominates the agendas of governments. But the immediate is no excuse for neglecting the future.

Sir Geoffrey Palmer is a former Prime Minister and a Distinguished Fellow in the Faculty of Law at Victoria University of Wellington.

It is true to say that the language of politics is the language of priorities. Whatever else the Cabinet members do or do not do, they determine the priorities. They determine the order in which issues will be addressed and the resources that will be devoted to the issue. Many policies require legislation and the ministers, with the advice of public servants and the drafting of parliamentary counsel, design the legislation. Parliament passes the bills into law after select committee scrutiny. In the New Zealand democracy these ministers are connected to the voters through triennial general elections, voters to whom they are ultimately accountable through the institutions of representative democracy. Thus, ministers will be wary of public opinion and take it into account both in determining their priorities and in designing the legislation.

The very structure of the decision-making system outlined above is geared to meet the needs of the present and its problems, not to deal with the future and its problems. Elections every three years limit the time horizons within which ministers think; the next election in New Zealand is

never far away. Public opinion polling exacerbates the tendency. Analytical advice brought before ministers will not easily prevail should it be thought that taking action upon it will imperil the government's chances at the next general election.

The policy conclusion to be drawn is that the biggest enemy of the future is the present. The problems of the present and their resolution crowds out the prospect for the future. No doubt this does not happen on every occasion on every issue, but the tendency seems to me powerful nonetheless.

The environment and fairness to future generations

It is in relation to the environment that the failure to take into account the future seems to arise in its most acute form. I hasten to add, however, that social policy, economic policy and regulatory policy could all provide strong examples of the tendency.

In the annals of international law, the principle of fairness to future generations has been part of the debate since the groundbreaking book by Professor Edith Brown Weiss, *In Fairness to Future Generations: international law, common patrimony and intergenerational equity*, was published in 1989. In New Zealand the history of climate change policy over the past 20 years provides a graphic illustration of inadequate consideration of the future because of the political pressures of the present. Think of climate change in terms of risk analysis. What is the probability that the temperature of the atmosphere will heat up the planet by more than 2° Celsius; what will the consequences be when that does occur; and what is the cost and burden of taking adequate precautions to ensure that the risks are mitigated or arrangements made to adapt to the changes (Palmer, 2015a, p.16)? The difficulty in New Zealand with climate change has not been lack of information or knowledge, but lack of political will resulting from struggles over the policy and destructive legislative activity that has rendered New Zealand legislation close to impotent in dealing with the problem (Palmer, 2015b, p.115). The lack of any multi-party agreement of the type that exists in the United Kingdom will cost New Zealand dearly in the future. We have years of catching up to do. Neither does it help to have Australia as one's neighbour, given that country's approach to climate change policy.

Indeed, environmental issues are particularly prone to the temptation to let things go and wait and see. The political costs of taking adequate action are immediate and the benefits of improvement are often some distance away. The deterioration in the quality of New Zealand's fresh water following the intensification of agriculture has been dramatic (Palmer, 2013). Effective measures to combat the deterioration have not been forthcoming. And it is in the area of environmental policy in New Zealand that the discounting of the future has been at its most intense. We are happy to sign up to ambitious principles, but we fail to honour them in both law and in practice.

In New Zealand the history of climate change policy over the past 20 years provides a graphic illustration of inadequate consideration of the future because of the political pressures of the present.

The Brundtland Report said in 1987:

> Humanity has the ability to make development sustainable – to ensure that it meets the needs of the present without compromising the ability of future generations to meet their own needs. The concept of sustainable development does imply limits – not absolute limits but limitations imposed by the present state of technology and social organization on environmental resources and by the ability of the biosphere to absorb the effects of human activities. (World Commission on Environment and Development, 1987, p.8)

The sustainability paradigm described in the report has dominated international thinking since 1987. It was reaffirmed by the international community at Rio de Janeiro in 1992 in principle 4 of the United Nations Framework Convention on Climate Change, and by the Johannesburg Declaration on Sustainable Development in 2002.[3]

In New Zealand, the Resource Management Act 1991 was explicitly based on the Brundtland Report, and one of the provisions of that act – section 5, the purpose provision – states:

> (1) The purpose of this Act is to promote the sustainable management of natural and physical resources.
> (2) In this Act, sustainable management means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural well-being and for their health and safety while –
> (a) *sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations*; and
> (b) safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and
> (c) avoiding, remedying, or mitigating any adverse effects of activities on the environment. [emphasis added]

Despite this, the evidence suggests that the needs of future generations are so heavily discounted in the resource

management space as to have almost vanished. Recent and credible research I have seen concludes:

> Regional Councils overall are giving limited explicit consideration of future generations within their RPS's [regional policy statements]. In all cases, no attempt was made within the policies of the RPSs to explicitly identify what the foreseeable needs are likely to be, nor how they specifically are to be provided for. (Donaldson, 2017, p.12)

There is inadequate examination, auditing and analysis of what the regional councils have done to our environment. We do know that the law is inadequately enforced by them (Brown, 2017).

My impression is that issues are no longer addressed in terms of 'sustainability' in policy circles in New Zealand. Efforts appear to be made to eschew the concept. One is put in mind of the famous quip of L.P. Hartley: 'The past is a foreign country; they do things differently there' (Hartley, 1953, p.5). Unkind people may think this suggests that we in New Zealand tend to treat both our own past and the future as a foreign country. And future generations tend to be treated as aliens. The way we think needs to be revised.

Stewardship

Some efforts have been made within the New Zealand system of government to remedy deficiencies in addressing future problems by amending the State Sector Act 1988 (sections 2, 1A and 32; see also State Sector Amendment Act 2013). In 2013 statutory amendments were made to legal obligations placed on departments and agencies, chief executives and the state services commissioner to promote the concept of stewardship. One of the purposes of the State Sector Act is to promote a state sector system which 'fosters a culture of stewardship' (s1A(h)). Chief executives have responsibilities in this regard. So does the state services commissioner, who is enjoined to promote 'a culture of stewardship in the State Services'. The interpretation section of the act defines stewardship as 'the active planning and management of medium and long-term interests, along with associated advice' (s2).

This recent focus on the concept of stewardship must be regarded as a welcome development, though how much effect it will have in practice cannot yet be judged. The chances of the present crowding out future thinking and action must be substantial, and obtaining resources to do the necessary work will also be an issue.

The existing process for designing, drafting and passing legislation is hardly optimal in New Zealand. It was seriously and systemically criticised by a report from the Productivity Commission in 2014 (Productivity Commission, 2014). While some changes have been made, they have not remedied the problem.

Present problems with legislation

The problems are complex but they can be summarised:

- New Zealand has more than 65,000 pages of statute law and more than 36,000 pages of legislative instruments. In addition, a large number of rules and other orders are made by other agencies.
- This volume is accumulating at a rapid rate – there were more than 4,200 pages of statute law passed in 2013. In 1959 the public acts covered 880 pages. The volume of law is plainly increasing.
- A hundred agencies, excluding local government, also have power to make delegated legislation. Keeping track of this at present is a formidable problem, although a project conducted by the Parliamentary Counsel Office that is ongoing aims to ensure that all the law can more easily be found.
- The strain on the system in producing this amount of law is considerable.
- Inadequate consultation often occurs with big new statutory schemes and there is inadequate time for proper parliamentary scrutiny and public submissions to be made and heard.
- Too often, little or no effort is made once a law is passed to research whether the statutes did what they were intended to do or produced unexpected consequences. (Palmer, 2014)[4]

With the bifurcated responsibilities for legislation in New Zealand split between the executive and 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.

The New Zealand Law Society told the Standing Orders Committee in 2017 that the process of making quality legislation required some changes:

> the Law Society considers that changes to the Standing Orders are needed to enhance the quality of legislation. New Zealand has a tendency to pass too much legislation and often too hurriedly. Unlike most democratic legislatures, the New Zealand Parliament has only one House, and it seems that this has altered the speed with which legislation is progressed. The Standing Orders cannot deal with the problems of the legislative process that arise within the Executive Branch but they can improve the quality of parliamentary scrutiny of Government Bills. (New Zealand Law Society, 2016)

With the bifurcated responsibilities for legislation in New Zealand split between the executive and 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 sheeting home accountability for the quality and nature of the laws passed by Parliament difficult. It cannot really be said that there is ministerial responsibility for the statutes passed. In order to sharpen the accountability and make clear who is responsible for what, it is necessary to make transparent what occurs now in the legislative process before a bill comes to the House of Representatives. More openness should also help improve the quality of legislation and the ease of its scrutiny, so long as adequate time is allowed to get big legislative schemes right. A complete reconfiguration of the processes is required to improve quality and make the processes more open and transparent.

The yin and the yang between which the demand for new law in New Zealand oscillates consist on the one hand of legislating too quickly and getting it wrong, or on the other hand going too slowly so that important issues lacking political priority remain neglected. We pass legislation in New Zealand quickly because we have no second chamber and we can. Further, the pressure of the three-year electoral cycle adds to the legislative speed wobbles. It is likely that better law would be fashioned in the first place if such things were not possible.

There has been discussion recently about the demise of the Legislative Council, New Zealand's upper house, and potentially resurrecting it or something similar. There is a belief held by some that the most effective way of producing better law is to reinstate an upper house. However, such a step is neither necessary nor desirable. There are other methods of putting the legislative brakes on. If Parliament sat for more hours each year and there was a fixed four-year term, that would help. Either that, or legislate less. It is important to appreciate, however, 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.

One prime issue relates to our failure to evaluate in any systematic or regular way what the statutes we have passed have done. Have they worked as intended, or have they produced unexpected results? Only if such analyses are carried out can we expect to control some elements in the future. Acts of Parliament are designed to produce a set of policy results into the future. Whether these will be achieved is not capable of being known fully at the time the law is made. Thus, efforts to compare the results that were actually achieved with those expected and desired would seem essential in any rational policymaking community. Laws are passed to make improvement and produce better outcomes. Legislation is used as an instrument to change behaviours and shape society in various ways, whether it be the economy, the environment, health, housing, education or crime. The New Zealand approach, however, seems to be to continue legislating in quantity with little attempt to see what actually happened, until something goes sufficiently wrong to require hurried legislative attention. Too often, known and reliable research is not followed or not examined and seat-of-the-pants reactions and popular sentiments are used to change the law more than careful analysis and evidence. In this age when there are a variety of social science research methodologies available for examining how legislation has performed in practice, this seems unfortunate.

It is only by carrying out such work that it will be possible to make definitive judgments about the quality of both the policy and the law. Some elements of the process are ineffective, and sometimes legislation misses the mark. The desire for speed is often the cause.

What a reform agenda looks like

The existing tools for designing and processing legislation require improvement. We cannot confidently face the future with the creaking and cumbersome legislative machinery we have. What is to be done?

> The young tend to take a dim, pessimistic view of the future they are being saddled with, as I have learnt in my recent experiences of teaching climate change law.

The most difficult questions are both intellectual and institutional. Even the most gifted public sector analyst cannot foresee the future. Stuff happens. Crises occur. They must then be addressed. Let me summarise steps that could be taken that would improve the way in which legislation is dealt with, with a view to improving the way legislation is dealt with in the future. It is necessarily brief. I have written at length on these subjects over a period of many years. I can only deal with them in charcoal outline here.

We have a vast amount of law and it is increasing exponentially. Steps need to be taken to reduce the bulk and legislate only when changing the law is legally necessary. There needs to be in my view a comprehensive high-level inquiry into all aspects of the legislative process with a view to improving it. It should cover policy formation, consultation, drafting, parliamentary scrutiny and evaluation of whether the purposes of the enacted legislation have been met.

Technical scrutiny in the House of Representatives is in urgent need of improvement. Sheeting home responsibility between the executive and Parliament is difficult as matters stand and the processes of designing legislation within the executive lack transparency. A main committee based on the model of that of the Commonwealth Parliament in Canberra should be adopted to improve the technical scrutiny of legislation in the House. Surprise by supplementary order paper should be stopped.

If Parliament is going to process as much legislation as it has been doing it should sit for more days in the year and more hours in order to properly scrutinise the bills before it. In order to slow the system down and ensure the legislation has been properly designed and considered, a fixed four-year parliamentary term should be adopted (Palmer and Butler, 2016, pp.44-5). Passing bills through all their stages under urgency without scrutiny should be prevented by requiring a 75% majority to grant urgency.

A reasonable foreseeability test known to tort law could have direct application to future-proofing policy and legislation. In order to foresee the future to the extent possible, literature has to be analysed, work has to be done and risks assessed from a New Zealand point of view. Resources need to be provided to government departments to enable them to carry out their stewardship responsibilities and that work should be made publicly available as a matter of course.

Do we need a secure home for future thinking and analysis that is independent? I note that in 2012 the United Nations was proposing ombudspersons for future generations in order to bring intergenerational justice into the heart of policymaking (United Nations, 2012). An independent Commission for the Future could be established as a watchdog to warn us of failures to address future issues. It could report on the stewardship work departments are doing. This may help the processes of politics to become relevant to younger voters by expanding the range of vision. The young tend to take a dim, pessimistic view of the future they are being saddled with, as I have learnt in my recent experiences of teaching climate change law.

Our history with a previous institution that was both set up and abolished by the Muldoon government was not a happy one. But that is not a reason to abandon the idea. No one has yet found a method of ensuring that the executive takes adequate heed of the rising voices of our independent watchdogs, such as the parliamentary commissioner for the environment. We do have an excess of executive power in New Zealand.

1 This article is based on an address given at the symposium 'Improving Intergenerational Governance', held on 23 March 2017 at the Banquet Hall, Parliament Buildings, organised by the Institute for Governance and Policy Studies.

2 Response by Donald Rumsfeld as secretary of defence when asked about the Iraq war, 11 April 2003.

3 Rio Declaration on Environment and Development, A/CONF151/26 vol.1 (1992) (1992) 31 ILM 874, adopted by the United Nations Conference on Environment and Development at Rio de Janeiro, 13 June 1992; Johannesburg Declaration on Sustainable Development, AS/conf199/20(2002), p.1.

4 Many arguments about legislative quality, parliamentary scrutiny and accessibility of the law are fully developed in this article and some of them are deployed here.

References

Brown Weiss, E. (1989) *In Fairness to Future Generations: international law, common patrimony, and intergenerational equity*, Tokyo: United Nations University; New York: Transnational Publishers

Brown, M.A. (2017) *Last Line of Defence: compliance, monitoring and enforcement of New Zealand's environmental law*, Auckland: Environmental Defence Society and the Law Foundation

Donaldson, D. (2017) *Regional Policy Statements and the Consideration of Future Generations*, report by Perception Planning for Fish and Game New Zealand

Hartley, L.P. (1953) *The Go-Between*, London: Hamish Hamilton

Knowles, E. (ed.) (2001) *The Oxford Dictionary of Quotations*, 5th edn, Oxford: Oxford University Press

New Zealand Law Society (2016) Submission on the review of standing orders, 25 November

Palmer, G. (2013) 'Protecting New Zealand's environment: an analysis of the government's Freshwater Management and Resource Management Act 1991 reforms', *New Zealand Fish and Game*; VUW legal research paper 44, available at Science Research Network, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2344043

Palmer, G. (2014) 'Law making in New Zealand: is there a better way?', *Waikato Law Review*, 22, pp.1-40

Palmer, G. (2015a) 'Climate change and New Zealand: is it doom or can we hope?', *Policy Quarterly*, 15 (4), pp.15-25

Palmer, G. (2015b) 'New Zealand's defective law on climate change', *New Zealand Journal of Public and International Law*, 13 (1), pp.115-36

Palmer, G. and A. Butler (2016) *A Constitution for Aotearoa New Zealand*, Wellington: Victoria University Press

Productivity Commission (2014) *Regulatory Institutions and Practices*, Wellington: New Zealand Productivity Commission

United Nations (2012) 'Ombudspersons for future generations: bringing intergenerational justice into the heart of policymaking', *UN Chronicle*, 49 (1-2), available at https://unchronicle.un.org/article/ombudspersons-future-generations-bringing-intergenerational-justice-heart-policymaking

World Commission on Environment and Development (1987) *Our Common Future*, Oxford: Oxford University Press