

EARLY DESIGN ISSUES

Chapter 1 Good legislative design

Good design matters ...

Legislation is one of the key ways by which governments seek to change behaviour and outcomes for society. Legislation creates and removes rights, powers, and obligations, sets up or disestablishes institutions, gives governments the means to raise and spend money, and enables citizens to hold decision makers to account. Legislation significantly affects both the everyday lives of New Zealanders and their future choices. It affects individual and collective rights, the use of property, the way in which markets operate, the risks to the environment or human safety that are acceptable, and how wealth is distributed in society.

Ensuring that legislation is well designed is important for 3 key reasons.

Poorly designed legislation will often not achieve its goals. Even if the main goals are delivered, legislation that gives rise to significant unintended consequences or fails to adapt to meet society's needs over time may impose unnecessary costs and undermine wider government aims for society.

High quality legislation is also critical to the functioning of New Zealand's democracy. Legislation involves coercive power, and law making comes with responsibility to make legislation that is proportionate, reasonable, rational, and consistent with New Zealand's constitutional principles. Legislation that overreaches can do significant harm by inhibiting freedoms or undermining important values or institutions of our society. The quality of the law-making processes can either reinforce or undermine the legitimacy of a particular piece of legislation, and the State and legislation more generally.

Lastly, good legislation saves significant costs for the system. Making legislation is time-consuming and expensive. The costs come not only from the time needed for Parliament, officials and the public to develop and pass legislation, but also for administrators and the public who need to make changes to implement it. As a result, legislation can be difficult to change once made.

... and it is easy to get it wrong.

The responsibility to make high quality legislation is difficult to discharge well. No one person alone can ensure the quality of legislation, and many things can undermine it. Those involved have diverse and interdependent roles and interests. There are many pressures in terms of politics, time, conflicting interests, agency agendas, and poor co-ordination that can result in poor legislation.

A common goal and set of principles is critical ...

For all these reasons, it is important both that we (those involved in making legislation) are committed to a shared goal of having high quality legislation for New Zealand and that there is a common set of principles by which we measure that quality.

The Guidelines set these common principles. They are intended as a tool to guide thinking by those involved in making legislation. They do not provide absolute rules. Some set default principles where

the presumption should be to meet that principle and only depart from it if there is a clear justification. Others call for informed judgement and the role of the principles is to assist. Sometimes it is only possible to achieve “good enough” legislation, for instance, where there is limited time or information available, or where there are matters outside officials’ control, whether policy, political, or pragmatic.

However, this does not lessen the value of the principles or officials’ responsibility to address them. The work of individual policy and legal advisers, legislative drafters, and other officials is critical to the quality of the decisions made by Ministers and Parliament (and people to whom the power to make legislation is delegated). It is the role of officials to follow good processes and provide clear advice to inform these decisions and so ensure that they are made with knowledge of the principles, the significance of any proposed departure, and the competing interests to be balanced. The public sector increasingly sees itself as the long-term steward of the legislative system for the benefit of New Zealand. Stewardship should be at the forefront of law makers’ minds. Good design and these Guidelines support departments and departmental chief executives to discharge their regulatory and legislative stewardship obligations under the [State Sector Act 1988](#).

These Guidelines are also designed to support transparency about the exercise of law-making power. They support the parliamentary process by enabling members of select committees and other MPs to assess the quality of the legislation that comes before the House. Having a common set of principles also enables the public to assess legislation against one standard, and so hold law makers to account. Officials’ work in ensuring that justifications or judgements are transparently made is vital.

... and reflects 3 core objectives for high quality law.

The principles set out in these Guidelines focus on three fundamental objectives of high quality legislation:

Legislation should be **fit for purpose**—it should be used only when necessary, but when used it should be effective for that purpose (including by minimising unintended costs). In order to achieve this, that purpose needs to be clearly defined early and robustly tested (see [Chapter 2](#)). Legislation should be designed to provide certainty as to rights and obligations but also build in sufficient flexibility to enable them to last. Legislation should be comprehensive enough to deal with likely scenarios. Legislation is part of wider regulatory systems and must work effectively within them (including, increasingly, the international legal system) as well as integrating with the existing body of legislation and common law (see [Chapters 3, 9, 10, and 13](#)).

Legislation should be **constitutionally sound**—by this we mean that legislation should reflect the fundamental values and principles of a democratic society (see [Chapters 4 to 8, 11, and 12](#)), including in the processes by which it is made (see [Chapter 19](#)). It should also be consistent with the Treaty of Waitangi (see [Chapter 5](#)).

Legislation should be **accessible** for users—legislation should be able to be easily found by citizens, and easy to navigate and understand. As a result, those involved in making legislation must think about how users will find and access it.

These core objectives are mutually reinforcing. If citizens cannot find the legislation that applies to them or if that legislation cannot be understood, then both the efficacy of the legislation and the rule

of law itself are undermined. If legislation is vague about the obligations it imposes or leaves too much to people’s discretion, it will create confusion and inconsistency. This places significant costs on those who are regulated. This also causes constitutional concern about the lack of legal clarity over rights and obligations.

These objectives also need to be balanced. For example, to enable legislation to be sufficiently flexible (and so fit for purpose for the future), Parliament may delegate the power to make secondary legislation to the Executive. But too much delegation of significant policy matters will undermine certainty and the legitimacy of legislation. The extent of delegation that is appropriate always needs to be judged according to the particular context and safeguards should be included to address risks posed (see [Chapters 14](#) and [16](#)).

No one-value judgement works for every piece of legislation. The Guidelines do not provide “one size fits all” answers. That said, they aim to provide default approaches, inform judgements, and enable transparency about how that judgement has been exercised. The Guidelines can raise a red flag on proposals that are unusual or otherwise call for particular attention. It is important that, where a default principle is departed from, or judgement is exercised, there is clarity both within and outside government about the underlying rationale.

How to use these Guidelines to achieve good legislative design

This rest of this chapter sets out some key advice on how to approach good legislative design using these Guidelines.

Before starting ...

Provide enough time to get the answers right

Good legislative design is complex and requires time. If it’s done too quickly, it often fails. Of course, sometimes legislation must be produced quickly of necessity. But experience has demonstrated that speed often results in design flaws. Make sure to allow sufficient time for analysis, testing, consultation, revision, drafting, and quality assurance. Talk to legal advisers and the [Parliamentary Counsel Office](#) (the PCO) before setting timing expectations.

Consult and work with the right people

Legislation is complex and requires multiple perspectives to design it well—policy, legal, drafting, and operational experience can inform all the above questions. Legislation is best done when a dedicated multi-disciplinary team work together with agreed understandings on these matters. Seek help from LDAC and others experienced in legislation. The PCO also has an important role to play in developing legislation and officials should not hesitate to seek advice from the PCO. The PCO will help to turn policy ideas into legislation that is drafted in plain language, is easy to use, and is accessible to all who will need to use it. Guidance on instructing and working with the PCO can be found on the PCO website.

Policy is also better when it is informed by genuine consultation. Legislation is information-intensive and ensuring it is effective and reducing the risk of unintended consequences requires consultation at all stages. Consultation also assists the public to plan for change and supports the legitimacy of the

law-making process. [Chapter 2](#) sets out some core principles for consultation.

Know the regulatory system

Legislation does not exist in a vacuum. Legislation intersects and depends on many other pieces of legislation. Consider legislation of general application (for example, the [Official Information Act 1982](#), the [Privacy Act 1993](#), or the [Crimes Act 1961](#)) and specific legislation that overlaps in the particular legislative area (for example, the many Acts that overlap in the resource management context).

Legislation is part of a regulatory system. The [Government Expectations for Good Regulatory Practice \(2017\)](#) have defined regulatory systems as the set of formal and informal rules, norms, and sanctions, given effect through the actions and practices of designated actors, that work together to shape people's behaviour or interactions in pursuit of a broad goal or outcome. This definition may feel more apt for some contexts (for example, food regulation) than others (for example, privacy, which cuts across many systems) and can feel vague. But whatever the definition, the important thing is to think deeply about the area that is being regulating and to talk to those involved to understand what really shapes their behaviour.

This may sound like a tall order, but the concept of knowing the practical and legal context in which the legislation operates is important to achieve legislation that is well-designed to be fit for purpose, constitutionally sound, and accessible to users. For example, without this context, advisers cannot identify the costs needed to inform a regulatory impact assessment, set appropriate criteria to ensure statutory powers are exercised effectively and transparently, or know how stakeholders will access and work with the legislation.

The key questions to assess a regulatory system or context before starting are:

- What is the purpose of the current regulatory system? What is it trying to achieve? Who is the system trying to protect or help (for example, consumers)?
- What are the costs and benefits of the current regulatory system? What works and what doesn't?
- Who is being regulated within the system? What are their incentives for compliance? How do they behave within this system? How much flexibility vs certainty does this system require? This is important for the issues discussed in [Chapters 14 to 17](#) and [22](#).
- Who are the regulators within the system? What roles do they play? What are their relationships? Is a new regulator required? What co-ordination is required and where will overlap be problematic? This is important to the issues discussed in [Chapters 18](#) and [20](#).
- What is the existing law (both legislation and common law) in the system on which the proposed legislation depends, or where does it currently interact or overlap? Knowing this enables you to address the issues discussed in [Chapters 3](#) and [12](#).

Know the purpose

Being clear about the policy objective or purpose of the legislative change sought is fundamental to every subsequent design question (see [Chapter 2](#)). The purpose may change over the course of the policy's development as the policy problem becomes clearer through consultation, research and analysis. A current understanding of the problem should always underpin analysis of the possible solutions.

Understanding the purpose is fundamental to assessing:

- What is needed (or not needed) in the legislation to implement the policy objective and solve the policy problem (see [Chapter 2](#))—remember to step back and assess whether legislation is really needed and make sure to look at whether the existing regime, common law, or non-legislative solutions are already apt to meet the purpose.
- The necessary building blocks of the legislation (see below). Do they go further than is needed to solve the policy problem?
- How to design discretions to make secondary legislation (see [Chapters 14 to 17](#)) or exercise powers (see [Chapter 18](#)).
- How to design any new regulators or other bodies that may regulate or exercise powers in the system (see [chapter 20](#)).

The purpose of the legislation will continue to have an ongoing key function once the legislation is enacted as it will govern how regulators organise themselves and exercise powers under legislation, and how the courts interpret the legislation. A well-articulated purpose should be capable of explaining the regime, guide interpretation of its provisions when there is uncertainty, and act as a test for decision making. See [Chapter 2](#) for more detail on defining the policy objective and purpose of the legislation.

Choose the building blocks of the legislation carefully

The building blocks of any piece of legislation are the rules, powers, institutions, and enforcement structure contained in it. These Guidelines provide many key principles to assist in designing these building blocks in ways that will achieve legislation that is well-designed, fit for purpose, and accessible. However, some key points should be highlighted:

- Well-intentioned legislation may have unintended consequences. The highest risk is often not legislation that is intended to undermine fundamental rights or override Treaty obligations but legislation that does wrong unintentionally or overreaches carelessly. To safeguard against this risk, it is important to know the basics, which are set out in [Chapters 4 to 9](#).
- Consider past models but be careful. In applying these Guidelines, it helps to look at examples known to do a similar job. Assess these existing examples against the regulatory purpose of the proposed legislation and the wider goals of high quality legislation. Look at how they have resolved issues raised by these Guidelines.

However, don't borrow uncritically, as the proposed legislation has its own context and past solutions may need adjusting. For example, overseas models need to be adapted for a New Zealand context. See [Chapter 3](#).

- A key design question is “where the rules get set” in the system. The detail of what is required to comply with legislation may be set in the Act itself (through prescriptive requirements), delegated to regulators or other bodies (to be decided through administrative or legislative tools), or be left for individual actors to decide (if the legislation sets only open-ended principles or outcomes leaving a discretion as to how to comply). These choices have implications for certainty compared to flexibility, risk tolerance, and who ultimately decides what is required to comply. See [Chapters 14 to 17](#), which will assist with how to appropriately allocate material between Acts and secondary legislation.
- Another key question is whether the State needs to enforce the legislation and, if so, what tools are needed for enforcement. There are key trade-offs between criminal and civil tools and other softer compliance methods, which need to be considered alongside questions about who will enforce the legislation. See [Chapter 22](#) and onwards.
- It is also important to look at the issue of *who* will enforce or have other regulatory roles under the legislation, particularly in light of the answers to the questions about roles and responsibilities of the existing regulatory system. Who will do what now? Do they have the tools? Has their mandate been set in a way that supports the purpose of the legislation? How is co-ordination provided for so that there are no gaps in the regime or unworkable overlaps? See [Chapters 18](#) and [20](#).
- Consider how to move from the current world to the new world. What transitional and savings arrangements are needed to move from the old law to the new law in an orderly, fair, and efficient manner that avoids retrospective effects? See [Chapter 12](#).
- What changes may be needed to other legislation to ensure that the new law becomes part of an integrated system of law?

Think about the long term

To design high quality legislation, we need to think about the demands that will be placed on the legislation over the medium to long term and actively consider the big picture. How will it operate in the transition? How will that be different once it is fully implemented? How will the legislation be regarded in 20, 30, 40 years' time? Is there sufficient durability and flexibility? It's important to consider the regulatory system in this context, including the extent of likely technological advances or other changes.

This means designing a system that can adapt to change and allow for continuous improvement. We need to consciously design mechanisms to guard against a “set and forget” tendency for legislators.

Think beyond the present proposed change. Are the existing regulatory and legislative systems healthy? If there is an existing Act, is it better to substantially rewrite or replace the Act in addition to,

or instead of, amending it? This is particularly important where existing legislation is heavily amended and inaccessible. See [Chapter 3](#).

Think about the whole legislative package

Acts and secondary legislation should together create a coherent legislative package. To achieve this, the Act and any secondary legislation that is essential to implement the Act should be developed in tandem as much as possible. Officials should at least have fully considered the content of secondary legislation by the time a Bill is at select committee. This will allow MPs and the public to consider the full legislative regime, and is particularly valuable where secondary legislation contains important operational and technical policy detail.

Think about how users will find and navigate the legislation

Designing legislation that users can find and use easily is critical for both the rule of law and its efficacy. So it is worth thinking about whether legislation should be amended or replaced, how it overlaps with other laws, and whether the legislation is multi-layered or fragmented in terms of these needs.

Use these Guidelines to help

The Guidelines are a valuable tool and will help users to work through matters touched on in this chapter, and much more. See the preliminary material at the front of these Guidelines about when and how to use them.

Reflect and learn for next time

Finally, don't set and forget. Reflect on what worked, what didn't, and what might be done differently next time. Feed back into the public service's stewardship and good design goals by letting LDAC know if there are areas in the Guidelines that are missing or would benefit from supplementary material.