

The rule of law and good legislation

The rule of law is strengthened when good legislative processes are followed, including robust policy development, and public consultation. Ideally, potential law reform will be publicly consulted on before legislation is drafted, with further consultation once the Bill is introduced into Parliament, via the Select Committee process.

These processes help to ensure that laws are understood, supported and respected by the public. It can also help to make the law clearer and more predictable, minimise unintended consequences, and ensure stability over time.

There are general principles for the content of good legislation, which help protect the rule of law. These include that legislation should generally not be drafted to apply retrospectively. Retrospective legislation can undermine the rule of law by making it impossible for the public to foresee and plan how they can comply with the law.

What we found

Participants in our research raised a range of concerns about poor legislation and legislative processes undermining the rule of law. Many of these concerns have also been identified by the Law Society over the years, and include:

- Successive governments continuing to rush policy and legislative processes, including for significant legal reform. This reduces transparency and accountability and can lead to unclear or poorly drafted law.
- Shortening or not following the usual policy development process can mean there is limited or no consultation with the public before a decision is made to change the law. It can also mean officials don't have enough time to properly assess alternative options and develop evidence-based policy and legislation.
- Once a bill is introduced into Parliament, the use of urgency can also undermine the rule of law. Urgency is used to speed up the passage of legislation; it can limit parliamentary debate on a bill and reduce or completely remove the select committee consultation process. The Report sets out urgency statistics going back to 2008, and notes that in its first 100 days, the current Parliament declared urgency eight times to pass 21 bills through 61 stages. Thirteen bills were passed entirely under urgency, without any select committee process. This is more than any of the past five Parliaments in their first 100 days.
- Parliament continues to pass legislation, even where the Attorney-General has reported that the legislation is inconsistent with the New Zealand Bill of Rights Act 1990. This is serious, as the New Zealand Bill of Rights Act is intended to protect the fundamental rights and freedoms of all New Zealanders. At times, the advice provided fails to fully consider all the rights that might be impacted.
- Retrospective legislation continues to be passed by Parliament. While this can sometimes be justified, Parliament should be cautious. Concerning examples include the passage of retrospective legislation under urgency, failure to explain why it is necessary and appropriate for the legislation to apply retrospectively, and application of retrospective legislation in criminal law.

What can be done about it

We believe that bipartisan support across successive governments is needed to establish and maintain good principles and processes for policy and legislation development. Our report sets out a range of achievable steps that can be taken, including that:

- Policy development processes should include sufficient time to:
 - a. Enable consultation with affected parties and, ideally, the public.
 - b. Consider the potential Bill of Rights Act impacts of law reform proposals.
 - c. Allow changes to be made to the law reform proposal, to address concerns raised during the consultation process.
 - d. Allow time for a full select committee process.
- If significant policy amendments are proposed to a bill after the select committee stage, the bill should go back to the select committee so submitters can comment on the amendments.
- Where legislation is intended to override a decision of the courts, or to apply retrospectively, the scale, nature and reason for such a change should be given careful consideration. These deliberations should be set out in the information provided to the public, for their consideration during consultation.

The Law Society also recommends improvements to the way that urgency is used by Parliament:

- The use of urgency should be rare. It should be used only when it is justified by a genuine need for haste.
- Urgency should not be used to meet arbitrary deadlines or operational deadlines which are known in advance.
- Parliament's Standing Orders could be amended to clearly limit the use of urgency to these circumstances, and to require that legislation passed under urgency is made subject to review or scrutiny after it has passed.

There are also steps that can be taken to better ensure that legislation does not infringe on the rights of citizens, protected by the New Zealand Bill of Rights Act:

- Officials who prepare advice on whether a bill appears to be consistent with the Bill of Rights Act must ensure all Bill of Rights Act issues engaged by a proposed bill are identified and properly considered.
- Parliament could establish a select committee responsible for scrutinising bills at the select committee stage for consistency with the Bill of Rights Act. The committee's tasks could include reviewing section 7 reports and Bill of Rights Act advice prepared by officials.