

# Whose Law is it?—Accessibility through LENZ:

## Opportunities for the New Zealand public to shape the law as it is made

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### Introduction

There are 2 general questions that we typically think about when we consider the accessibility of our laws:

- how easy is it for people to find the law?; and
- having found it, how easy is it for people to understand?

Each of these questions relates to the law after it has been made. In this paper, however, I focus on public accessibility at an earlier stage: namely, while the law is being created.

Primary legislation drafted in New Zealand often changes significantly after its introduction and before its enactment. Sometimes the resulting Act bears little resemblance to the introductory version of the Bill because of changes made during its passage.

In particular, this paper focuses on how internet technology, and specifically our LENZ system, facilitates public access to information about draft laws as they work their way through the New Zealand parliamentary process.

### LENZ

First I must introduce LENZ. The acronym stands for “Legislative Enactments of New Zealand”. The LENZ system is the child of the PAL Project (Public Access to Legislation). The PAL Project was successfully completed early in 2008, and use of the LENZ system has now become business as usual in the Parliamentary Counsel Office in Wellington<sup>2</sup>. The LENZ system is an integrated tool set that we use to author, store, publish, and reprint New Zealand legislation.

Parliamentary counsel use an authoring tool (Arbortext Editor) to draft legislation in XML<sup>3</sup> format. When a Bill is introduced, HTML<sup>4</sup> and PDF versions are generated from the XML

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<sup>2</sup> References throughout this paper to the Parliamentary Counsel Office are references to the New Zealand Parliamentary Counsel Office.

<sup>3</sup> XML (Extensible Mark-up Language) is a mark-up language that uses tags to identify different types of information.

<sup>4</sup> HTML (HyperText Markup Language) is a standard language used for creating and publishing documents on the World Wide Web.

file and published on the New Zealand legislation website ([www.legislation.govt.nz](http://www.legislation.govt.nz)). After a Bill is introduced into the Parliament, successive versions of the Bill are published on that website, complete with revision-tracking mark up that indicates the changes that have been made since the previous published version.

Before discussing in detail the information that can be found on the legislation website, I will first outline the New Zealand legislative process. I will then touch briefly on the theme of this conference.

## Overview of the New Zealand legislative process

The diagram shown in the Appendix is an overview of the legislative process, showing the stages at which a new version of a Bill is published on the legislation website.

After its introduction, assuming a Bill follows the standard path through the House of Representatives,<sup>5</sup> there are 2 stages at which it may be amended: the select committee stage and the Committee of the Whole House stage.

After introduction, most Bills will be referred to a parliamentary select committee comprising 10-12 Members of Parliament, from Government and opposition parties. The select committee typically is given 6 months to examine the Bill, hear public submissions, and prepare a report for the House. After hearing submissions, the select committee instructs parliamentary counsel to make changes to the Bill.

At the Committee of the Whole House stage, any Member of Parliament can propose further changes to the Bill. At each of these stages the proposed changes are voted on, and the Bill is republished using mark up that highlights the changes that have been agreed.

Before a Bill receives Royal Assent, it will be debated and voted on 3 times in the House: after introduction, after the select committee reports back, and after the Committee of the Whole House reports back.

## Theme of this conference: Whose law is it?

I am conscious that a discussion about the opportunities that exist for members of the public to influence the law while it is being made might be seen as something of a 2-edged sword for legislative counsel! Having spent months finely crafting the *Absolutely Perfect Bill* that implements the Government's policy in a clear, precise, logical, and well-structured manner, it can be disconcerting to be asked at the select committee stage to insert new material that does not sit well within the structure, or that has the potential to introduce ambiguity.

It is, of course, a good and natural thing to take pride in our work, and to feel a sense of ownership about it. It is that sense of ownership that motivates us to apply considerable care and attention in its development. And, at least in a general sense, we clearly do have an ownership stake in legislation in our role as "guardians of the statute book". Nonetheless, however much we are prone to feel we own each piece of legislation we draft, reluctantly we must acknowledge that our individual drafting projects do not, in fact, belong to us as parliamentary counsel!

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<sup>5</sup> The New Zealand Parliament consists of a single chamber, the House of Representatives. [Ed]

I will proffer my personal view on the question of “Whose law is it?” I consider that the laws that we draft ultimately belong to the people who are governed by those laws. This premise leads to the conclusion that the public not only have a right to access laws after they have been enacted, but also a right to seek to influence the shape of those laws before they impact on their lives.

Feedback received from members of the public can often help to identify areas of ambiguity and other weaknesses in a proposed legislative scheme. Public scrutiny of draft legislation can therefore be regarded as a useful tool for testing its workability.

Internet access to draft legislation, at different stages of the legislative process, provides a mechanism for increasing public awareness of that process. It also has great potential to make it easier for people to take part in the process, by breaking down barriers to participation that might otherwise exist.

## **Accessibility at different stages in the legislative process**

### ***Accessibility at the pre-introduction Stage***

At the pre-introduction stage, when policy development takes place and the introduction Bill is drafted, any opportunities for the public to influence the shape of the law are provided by the department that is sponsoring the Bill. In many cases, extensive formal consultation on the policy will be undertaken before drafting instructions are issued to the Parliamentary Counsel Office. In some cases, departments may also release an ‘exposure draft’ prepared by PCO before a Bill is introduced.

In September 2007, the New Zealand Police broke new ground in public consultation by launching a drafting wiki (<http://www.policeact.govt.nz/wiki>). A wiki is a website that allows visitors to add, remove, and edit content. The Policing Act wiki gave to members of the public the ability to contribute their ideas as to how the law relating to policing ought to be reformed by directly editing an on-line version of a proposed new Policing Act. This novel approach to consultation generated international media interest at the time, and the organisers described the response that was received to it as “overwhelming”.

I should emphasise that the Policing Act wiki was not an initiative of the Parliamentary Counsel Office. I mention it only because it did generate such intense interest, and because I anticipate that the concept of using a wiki as a means of public consultation at the pre-introduction stage could arise again in future.

Wikis have been described as more of a social revolution than a technical revolution, and their use as a means of internal information sharing is already beginning to be embraced by a number of major law firms.<sup>6</sup> We now live in what many are calling the “information age” and it is inevitable that the attitudes and expectations of an increasingly computer-literate public will lead to many different styles of consultation using the internet. It is entirely possible that we will see more widespread use of wiki-style technology by politicians, departments, and

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<sup>6</sup> e.g. Allen & Overy (last accessed at <http://www.iwr.co.uk/information-world-review/features/2168470/blog-standard-approach>); Linklaters (last accessed at <http://www.thelawyer.com/cgi-bin/item.cgi?id=127569&d=11&h=24&f=23>).

lobby groups, in the legislative drafting arena.<sup>7</sup>

There can be no doubt that the Policing Act wiki was a modern and innovative means of eliciting the views of the public on an item of draft legislation. However, the use of wiki-style technology to consult the public about the wording of draft legislation does raise a number of difficult issues for legislative counsel. Some of those issues include—

- (a) a blurring of the important line between policy and drafting—a distinction that is important to legislative counsel, but unlikely to be appreciated by many members of the public;
- (b) a risk that the practice may reinforce an approach whereby policy refinement takes place only after there is a draft legislative text on which to comment;
- (c) the possibility of losing useful contributions that are overwritten by a later user who takes a different point of view; and
- (d) the potential for extensive public debate about the wording of legislation to create “sacred phrases” that then become difficult to alter even if the proposed wording is not ideal.

I will not need to convince this audience that drafting legislation is a task that demands specialist skills. I can reassure you that the Policing Act wiki was not intended to replace drafting by parliamentary counsel!

The Policing Bill that was subsequently introduced into Parliament was drafted, in the usual manner, by a team of parliamentary counsel from the Parliamentary Counsel Office. The parliamentary counsel involved did not refer to the wiki site (which, by its very nature, changes from hour to hour) during the course of their drafting. The introduction Bill ultimately bore only a passing resemblance to the wiki Act.

#### ***Accessibility at the select committee stage***

In addition to being made available in hard copy, all Bills are published on the legislation website overnight on the date that they are introduced. The introduction copy of every Bill includes, at the front, an explanatory note that is designed to explain the policy behind the Bill, and the content of the Bill, in lay terms. The instructing department provides text to explain the general policy of the Bill, and parliamentary counsel writes a “clause by clause” analysis setting out the effect of each provision in the Bill.

On the legislation website, users can search for a particular Bill, or browse through lists of Bills to find what they are looking for. Having found a Bill, users can choose to view other versions of that Bill, and can click on a link to a list of all Bills in relation to which public

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<sup>7</sup> Another recent example of a type of wiki being used to inform legislative drafting is US Senator Dick Durbin’s site entitled “Legislation 2.0: Getting our discussion underway” (last accessed at <http://openleft.com/showDiary.do;jsessionid=E674D13460DB3712296D603CF8DA62C5?diaryId=363>). The Senator seeks on-line participation before drafting legislation relating to broadband access. He says: “I think this is a unique experiment in transparent Government and an opportunity to demonstrate the democratic power of the internet. If we’re successful, it could become a model for the way legislation on health care, foreign policy, and education is drafted in the future.”

submissions are currently being sought.

## New Zealand Legislation: Bills

Bills are proposed Acts



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### Building Amendment Bill (No 2) 272-1 (2008), Government Bill

See other versions | View PDF copy | View whole Bill (99KB)

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#### Versions

Title	Version	PDF
Building Amendment Bill (No 2) 272-1 (2008)*	Introduction 8 September 2008	View

\* the version you were viewing.

#### Public submissions on Bills

See:

- list of Bills for which public submissions are currently being sought
- list of Bills before select committees

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The list of Bills in relation to which submissions are being sought is generated from the New Zealand Parliament website. That website also contains information about the different select committees that exist and helpful advice about how to make submissions.

NEW ZEALAND PARLIAMENT

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Advanced Search

THE HOUSE NEXT SITS ON TUESDAY, 10 FEBRUARY 2009

HOME > SELECT COMMITTEES > SUBMISSIONS CALLED FOR
ALERTS | BROADCASTING

### SELECT COMMITTEES

#### SUBMISSIONS CALLED FOR

Select committees invite your input on the following items of business. The closing date for submissions is given along with information about where to send your submission.

The Commerce Committee and the Justice and Electoral Committee are now accepting online submissions for some items of business, as indicated below. You can upload a submission that you have already drafted or type a brief submission in the web form provided.

SUBMISSIONS CALLED FOR SEARCH

KEYWORD <input style="width: 95%;" type="text"/>	SELECT COMMITTEE All <input style="width: 95%;" type="text"/>	
PARLIAMENT All <input style="width: 95%;" type="text"/>	DATE All <input style="width: 95%;" type="text"/>	DOCUMENT TYPE All <input style="width: 95%;" type="text"/>
<input type="button" value="Go"/>		

SUBMISSIONS CALLED FOR 1 TO 20 OF 148

TITLE	CLOSING DATE
<b>Domestic Violence (Enhancing Safety) Bill</b> Public submissions are now being invited on this bill.	27 FEB 09
<b>Review of the Emissions Trading Scheme and related matters</b> Public submissions are now being invited on this submissions called for.	13 FEB 09
<b>Aquaculture Legislation Amendment Bill (No 2)</b> Public submissions are now being invited on this bill.	05 FEB 09

**HOW PARLIAMENT WORKS**

**PARLIAMENTARY BUSINESS**

**SELECT COMMITTEES**

- ▶ Select committee details
- ▶ Schedule of meetings
- ▶ Papers
- ▶ Select committee reports
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**MPS AND PARTIES**

**THIS WEEK**

**PUBLICATIONS AND RESEARCH**

**HAVE YOUR SAY**

**VISITING**

**HISTORY AND BUILDINGS**

**EDUCATION**

In 2008, the Select Committee Office ran a pilot project that provided website users with an option to make an online submission to some select committees. An analysis of the submissions received by those committees during the pilot showed that a very high percentage of submissions were made via the website.

Users were given an option to upload a document that they had prepared, or to simply complete a webform. A significant number of people chose to complete the webform, rather than prepare a separate document. It seems reasonable to speculate that at least some of the submitters who completed a webform may not have gone to the effort of preparing and posting a hard-copy submission if that were the only option open to them.

It is intended to roll out the on-line submission system to all select committees in the middle of 2009. This innovation, coupled with the easy access to introduction copies of Bills on the legislation website, undoubtedly makes it easier for the public to find out about, and comment on, the laws that Parliament<sup>8</sup> is proposing before they are enacted.

After receiving public submissions, the select committee discusses what changes (if any) they might recommend be made to the Bill and asks parliamentary counsel to prepare a revised version of the Bill that shows those changes using revision-tracking mark-up. After the proposed changes have been voted on by the committee, it formally reports back to the House by presenting a reprinted version that indicates the recommended changes. It is not unusual for a committee to recommend numerous changes as a result of the submissions that it has heard.

The revision tracking mark-up that is used in the reported back version indicates whether the committee agreed to each change unanimously, or by majority only. The key below illustrates the mark-up that is used in the hard copy reprinted version of a Bill that is reported back from a select committee:

## **Key to symbols used in reprinted bill**

### **As reported from a select committee**

text inserted by a majority

text inserted unanimously

~~text deleted by a majority~~

~~text deleted unanimously~~

The screenshot below shows a revision tracked clause as it appears on the legislation website. The caption that indicates whether a change is recommended unanimously or by majority appears when the user hovers the cursor over inserted or struckout text.

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<sup>8</sup> I.e. the New Zealand Parliament.

## Real Estate Agents Bill 185-2 (2007), Government Bill

- enacted

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### Bill by clause

#### Contents > Part 1 Interpretation and application

#### 4 Interpretation

In this Act, unless the context otherwise requires,—

**agency agreement** means an agreement under which an agent is authorised to undertake real estate agency work for a client in respect of a transaction

**agent** means a real estate agent ~~licensed~~ who holds, or is deemed to hold, a current licence as an agent under this Act

**Authority** means the Real Estate Agents Authority established by **section 14**

**branch manager** means a person who holds, or is deemed to hold, a current licence as a branch manager under this Act

**client** means the person ~~for whom~~ on whose behalf an agent carries out real estate agency work

**company** means a company within the meaning of the Companies Act 1993, and includes a building society within the meaning of the Building Societies Act 1965, and a limited partnership registered under the Limited Partnerships Act 2008

inserted (select committee majority)

**contractual document**, in relation to a transaction, means a document that contains or records an agreement or a proposed agreement to enter into or effect the transaction, and includes a document that contains or records an offer that, on its acceptance, gives rise to such an agreement

**commission** means remuneration by way of commission, fee, gain, or reward for services provided by an agent ~~under an agency agreement~~ in respect of a transaction

The select committee's report will also contain a commentary section at the front, in which the committee discusses the issues it considered and explains its recommended changes. That commentary will usually contain a separate report from the minority of the committee, if the reprinted Bill recommends changes that were not agreed to unanimously.

The reported back version is published in hard copy and placed on the legislation website on the date on which the committee tables its report in the House. Members of the public can then download a PDF version of the reported back Bill, or view it in HTML format on the website.

At the second reading, Members<sup>9</sup> debate the main principles of the Bill, and any changes recommended by the select committee in its report. Changes that are supported by every committee member are automatically included in the Bill if the second reading is agreed. Changes that were not recommended unanimously are subject to a single vote at the end of the second reading debate. Assuming the second reading is agreed, the Bill then proceeds to be considered by a Committee of the whole House.

### **Accessibility at the Committee of the Whole House Stage**

There is no time limit on the Committee of the whole House debates and controversial Bills may be debated over several days before a vote is called. It might seem that, by this stage, all opportunities for a member of the public to influence the legislation have passed. However, any Member of Parliament can participate when a Committee of the Whole House debates a

<sup>9</sup> I.e. Members of the New Zealand House of Representatives.

Bill, and can propose changes to that Bill. Therefore the key to seeking a change at this stage is to identify the right Member, or political party, and to lobby them in an effective manner.

Changes to a Bill at the Committee of the Whole House stage are proposed in 2 ways:

- by preparing, in advance, a supplementary order paper (SOP) describing the desired changes in narrative form; or
- by lodging a ‘table amendment’ during the debate.

Supplementary Order Papers are published on the legislation website, but table amendments, which are less formal documents, are not. Parliamentary counsel draft SOPs that are supported by the Government, whereas a member of the Office of the Clerk drafts SOPs on behalf of opposition Members.

Supplementary Order Papers are found on the New Zealand legislation website on the same page that lists the different published versions of a Bill:

The screenshot shows the New Zealand Legislation website interface. At the top, there is a header with the title "New Zealand Legislation: Bills" and the subtitle "Bills are proposed Acts". To the right of the header are the logos for "newzealand.govt.nz" and the "PARLIAMENTARY COUNSEL OFFICE TE TARI TOHUTOHU PAREMATA". Below the header is a navigation bar with links for "Home", "Search: Acts Bills Regulations All", "Browse: Acts Bills Regulations All", "Glossary", "About", "Guide", "Site map", and "Buy Online". The main content area displays the title "Real Estate Agents Bill 185-2 (2007), Government Bill" and a list of actions: "enacted", "See other versions", "View PDF copy", and "View whole Bill (454KB)". Below this is a "Versions" section with a table listing two versions of the bill. The first version is "Real Estate Agents Bill 185-2 (2007)\*" with the description "Reported from the Justice and Electoral Committee on 29 May 2008" and a "View" link. The second version is "Real Estate Agents Bill 185-1 (2007)" with the description "Introduction 3 December 2007" and a "View" link. A note below the table states "\* the version you were viewing." Below the table are sections for "Acts from this Bill:" (listing "Real Estate Agents Act 2008 No 66, Public Act"), "Related Supplementary Order Papers:" (listing "Supplementary Order Paper No 243 (released 02 September 2008)"), and "Public submissions on Bills" (with a "See:" link and two bullet points: "list of Bills for which public submissions are currently being sought" and "list of Bills before select committees"). At the bottom of the page is another navigation bar identical to the one at the top.

**New Zealand Legislation: Bills**  
Bills are proposed Acts

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**Real Estate Agents Bill 185-2 (2007), Government Bill**

- enacted

See other versions | [View PDF copy](#) | [View whole Bill \(454KB\)](#)  
Contents | « Previous | Next » | [Search within this Bill](#)

**Versions**

Title	Version	PDF
<a href="#">Real Estate Agents Bill 185-2 (2007)*</a>	Reported from the Justice and Electoral Committee on 29 May 2008	<a href="#">View</a>
<a href="#">Real Estate Agents Bill 185-1 (2007)</a>	Introduction 3 December 2007	<a href="#">View</a>

\* the version you were viewing.

**Acts from this Bill:**

- [Real Estate Agents Act 2008 No 66, Public Act](#)

**Related Supplementary Order Papers:**

- [Supplementary Order Paper No 243 \(released 02 September 2008\)](#)

**Public submissions on Bills**  
See:

- [list of Bills for which public submissions are currently being sought](#)
- [list of Bills before select committees](#)

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Reviewing the information that can be gleaned from the select committee’s reported back version could be a useful tool when seeking to identify a Member of Parliament who may be willing to propose a particular change. The commentary at the front of the reported back version will indicate which political parties did not agree to the changes that were recommended only by a majority of the select committee.

The move in New Zealand from a ‘first past the post’ electoral system to a proportional representation system has resulted in recent New Zealand governments being formed by coalitions of different parties. This phenomenon can also be seen as enhancing the opportunities for a member of the public to successfully lobby for change at the Committee of

the Whole House stage of the legislative process. It is not unheard of for parliamentary counsel to be asked to draft a Government SOP that makes reasonably significant changes to a Bill as a result of demands from a minor coalition party in exchange for its support.

All of the changes proposed by members at the Committee of the Whole House stage are voted on. When the final form of the Bill is established, in most cases, it will again be reprinted showing the changes that have been agreed. That reprinted version of the Bill, complete with revision-tracking mark-up, will again be published in hard copy and on the legislation website.

## Conclusions

The ability of individual members of the public to seek to influence the shape of the law by making submissions at the select committee stage, or by lobbying Members of Parliament, is not new in New Zealand. However, internet access to legislation at various stages of the legislative process provides a new mechanism for increasing public awareness of that process. It also has significant potential to make it much easier for people to participate in the process.

The use of internet technology is fast becoming a major part of people's lives. The World Internet Project New Zealand<sup>10</sup> found that 78 per cent of New Zealanders use the Internet, indicating that this is a medium that reaches a majority of the New Zealand population. Those that do not use the Internet tend to be older people, which suggests that this percentage will only increase over time. Internet access removes barriers (for example, geographic, physical, and economic barriers) that may otherwise prevent people from seeking to take part in the legislative process.

If we embrace, or even just accept, the notion that the law belongs to the people that are governed by it, then any initiative that enhances opportunities for the public to have their say about a proposed law before it is enacted must be a good thing. I am happy to say that the legislation website that forms part of our new LENZ system does just that.

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<sup>10</sup> Last accessed at [www.wipnz.aut.zc.nz](http://www.wipnz.aut.zc.nz).

# APPENDIX— OVERVIEW OF THE NEW ZEALAND LEGISLATIVE PROCESS

