



Making Laws That Work

How laws fail – and how we
can do better

JUSTICE DAVID GODDARD

NOVEMBER 2022

The book ...



MAKING LAWS THAT WORK

How Laws Fail and
How We Can Do Better

David Goddard

An autopsy of failed laws – to avoid repeating the same mistakes

- ▶ We should learn from failures – our own and those of others
- ▶ Four broad ways laws fail
- ▶ Some common causes of those failures
- ▶ Some suggestions to reduce the risk of failure in the future
 - ▶ Key issues to consider
 - ▶ Options for addressing those issues
 - ▶ Checklists!



What
happened to
this building?

What do these 3 animals have in common?



Four broad types of failed law

- ▶ Damp squibs
- ▶ Overshoots
- ▶ Nasty surprises
- ▶ Backfires

Failure type 1 – the damp squib

- ▶ UK Proceeds of Crime legislation enacted in 2002
 - ▶ The legislation established an “Assets Recovery Agency” ...
 - ▶ Which recovered almost nothing – less than its operating costs
 - ▶ Before being abolished in 2008
- ▶ NZ relationship property “economic disparity” regime
 - ▶ Intended to address significant unfairness in NZ RP regime
 - ▶ Broadly framed standard
 - ▶ Courts adopted a complex test and made modest awards
 - ▶ Essentially a dead letter
 - ▶ Often the case where low value claims must be pursued through formal legal channels before obtaining any recovery ie where default outcome = no remedy

Some causes of damp squibs

- ▶ People to whom the law is addressed are not aware of it or don't understand it
- ▶ People intended to benefit don't have the knowledge, skills and resources to obtain those benefits
- ▶ People required to comply don't have the knowledge, skills and resources to do so
- ▶ “Sludge” – queues, delays, complex forms/processes and other practical difficulties in accessing benefits
- ▶ Institutions that lack resources or will to administer the legislation
- ▶ Deep-seated beliefs or customs – just passing a law will not change these
- ▶ Gains from breach outweigh sanctions
 - ▶ Initially or over time
 - ▶ Eg Taranaki Botanic Garden Act 1876, Impounding Act 1955

Failure type 2 - overshoot

- ▶ 2013 bail law changes
 - ▶ Estimate in RIS = 50 person increase in prison muster
 - ▶ Result hard to measure – but remand rates increased by around a third and this probably added hundreds, perhaps thousands of extra remand prisoners
 - ▶ Very high human and economic costs
- ▶ CCCFA responsible lender regime strengthened in 2021
 - ▶ Impact much broader than intended
 - ▶ BUT adaptive legislation, so the issue could be swiftly addressed by amending regs and code

Some causes of overshoots:

- ▶ Poor quality information/assumptions about current facts
 - ▶ and a readiness to legislate without more fact-finding
- ▶ Over-broad application of rules
 - ▶ Failure to provide for (adaptive) exclusions
- ▶ Changing default settings without addressing stickiness of defaults
- ▶ Failure to monitor outcomes against original goals and adjust in light of experience

Failure type 3 – nasty surprises

- ▶ Window tax introduced in England in 1696
 - ▶ Vigorously criticised by Charles Dickens in 1850
 - ▶ Finally repealed in 1851
 - ▶ Copied in France, Netherlands and other European countries ... in some of which it lasted even longer
- ▶ Leaky building crisis in NZ
- ▶ A common nasty surprise = implementation costs far in excess of predictions
 - ▶ Can result in damp squib or nasty surprise – or both!

Some causes of nasty surprises

- ▶ Static analysis – failure to think through incentive effects
- ▶ Lack of institutional capacity or will to administer the law in accordance with its objectives
- ▶ Lack of focus on whether/how those to whom the law speaks can do what it requires

Failure type 4 – backfires

- ▶ Bombay under the Raj – a law provided for a bounty on cobra skins
 - ▶ Enterprising locals started breeding cobras for the bounty
 - ▶ Large sums spent on the bounty, but no fewer cobras
 - ▶ So ... the bounty was cancelled
 - ▶ Result: cobras released by breeders– more cobras than before
 - ▶ The cobra effect!
- ▶ Hanoi in the French era in the early 20th century
 - ▶ Again, a law provided for a bounty – this time on rat tails
 - ▶ The bounty proved costly and expensive, and was cancelled
 - ▶ End result: more rats (and many sightings of tail-less rats)
- ▶ And again in Fort Bennion, USA in 2007 – this time with wild pigs



Many other (depressing) backfires

- ▶ Mexico city smog – carless days scheme introduced 1989



- ▶ Many vehicle safety and emissions interventions coupled with indefinite grandparenting

Some causes of backfires

- ▶ Static analysis – failure to think through incentive effects
- ▶ Grandparenting of existing approaches
- ▶ Lack of institutional capacity and/or will

Key themes from study of failures

- ▶ Law is not magic
 - ▶ “Covid-19 is hereby abolished”
- ▶ Laws can only work by changing how people behave
 - ▶ How will the relevant people know what to do?
 - ▶ How easy is it for them to do what the law requires?
- ▶ Clarity of policy goals
 - ▶ How do people behave now?
 - ▶ What is about this that is unsatisfactory?
 - ▶ What does success look like? What differences will we see in relevant actors' behaviour if the law succeeds?
 - ▶ Can the legislation bring about these changes in behaviour?
 - ▶ How sure are we about that?
- ▶ Pay close attention to quality of information
 - ▶ and the implications of uncertainty

Unpacking reasons to legislate

- ▶ Not “to change the law from X to Y”
- ▶ Not “to make the law fairer”
 - ▶ Fairer on paper irrelevant if very few can access benefit in practice
- ▶ Not (usually) fairer outcomes in court
 - ▶ That will only apply to the very few who go to court, or can credibly threaten to do so
- ▶ But to change behaviour – and outcomes – for some defined group
- ▶ Be clear about who will behave differently, and what the goal is in terms of breadth of reach
- ▶ Eg PRA – is the goal that all separating couples will divide their property fairly? Most? Half? Fewer than a quarter?
- ▶ If we don't know what changes in behaviour we are seeking to bring about, for which people, and how the legislation will contribute to this, why are we legislating? Should we be?

People – including us – are not good at predictions

- ▶ We are good at making up stories that explain the present and predict the future
- ▶ But these stories are often wrong
- ▶ Experts are slightly better at making predictions
 - ▶ And much, much more confident!
- ▶ There is no correlation between the confidence we feel and the accuracy of our predictions
- ▶ The good news: there are strategies for improving the quality of our predictions
 - ▶ but they will still be pretty imperfect

Two strategies for reducing the risk of failure

- ▶ Adopt a more structured and systematic approach (decision hygiene)
 - ▶ Break big questions down into more manageable sub-issues
 - ▶ Gather information about each sub-issue
 - ▶ Draw on a range of perspectives
 - ▶ Improve reliability of predictions
- ▶ Bear in mind the limits of our knowledge and the uncertainty of our predictions
 - ▶ Track what is happening over time
 - ▶ Adjust as we obtain new information or circumstances change in ways we did not anticipate
 - ▶ Design laws to enable this – adaptive legislation

The user interface for a law

- ▶ Institutions are critical
- ▶ Most people affected by a law will never read it
 - ▶ or seek legal advice about it
 - ▶ so ... how will they know what they need to do?
- ▶ Is it easy for those intended to benefit to do so?
- ▶ Is it easy for those intended to comply to do so?
- ▶ Is relevant information available in a timely and accessible way?
 - ▶ Eg (variable) speed limits
 - ▶ Eg written and oral warnings about border controls
 - ▶ Eg BORA warnings on arrest
- ▶ Reducing the risk of damp squibs depends at least as much on the interface as on the underlying legal text
- ▶ Interfaces are also the key to complexity and how to reduce it
 - ▶ What matters is complexity as people experience it, not complexity on the page

Default settings

- ▶ Defaults matter – a lot
 - ▶ Eg retirement saving
 - ▶ Eg organ donation
 - ▶ Eg PAYE taxation and other deductions at source
- ▶ NB impact of adjusting stickiness of defaults
- ▶ Make it as simple as possible – ideally automatic – to benefit/comply
 - ▶ Eg by adjusting defaults
 - ▶ Eg by reducing barriers to benefit/compliance
- ▶ Preliminary binding decisions are an under-used mechanism
 - ▶ Child support
 - ▶ Construction contract adjudication
 - ▶ Significant potential for enhancing access to justice

Adaptive legislation

- ▶ Include mechanisms to adjust legislative scheme in light of new information and/or unexpected outcomes
- ▶ Identify baseline
- ▶ Continue to gather information
 - ▶ The less opportunity there was to do this pre-enactment, the more important it is post-enactment
- ▶ Review outcomes against predicted behaviour changes
- ▶ Use adjustment mechanisms to address (risks of) failure

Adaptive legislation can take many forms eg

- ▶ Delegated rule-making
- ▶ Legislating principles
- ▶ Safe harbour provisions
- ▶ Broad standard plus prescribed minimum requirements
- ▶ Broad standard plus regulatory guidance
- ▶ Broad standard plus binding rulings
- ▶ Broad standard plus licensing (with tailored conditions)
- ▶ Broad standard plus “compliance plan” and audit
- ▶ Obligation to comply with rules issued by regulator
- ▶ Detailed requirements in primary legislation and exemption power
- ▶ Bright line rule and generally expressed “safety valve”
- ▶ Tailored requirements using real time technologies

Reducing complexity

- ▶ The complexity that matters is complexity experienced by the user
 - ▶ Standards that are simple on paper may be very complex for users to apply
 - ▶ Lengthy fine-grained laws may be simple for users, with the right interface
- ▶ Complexity depends at least as much on the user interface as on the written law
 - ▶ Institutions are critical
 - ▶ Mechanisms for accessing information and obtaining benefits/complying are critical
- ▶ Consider providing in legislation for complexity-reducing mechanisms
 - ▶ Eg variable speed signs
 - ▶ Eg provision of authoritative guidance and “safe harbours”
 - ▶ Eg child support – initial formula assessment
- ▶ Choosing an approach
 - ▶ Depends on audiences, frequency, institutional arrangements, acceptability of variable outcomes
 - ▶ Strive for greatest level of accessibility and predictability for users that is reasonably achievable
 - ▶ In primary legislation or through other mechanisms (secondary rules, agency guidance, signposts etc)

Companies Act minority buy-outs

- ▶ Law Commission report and 1993 Act – company required to pay a “fair and reasonable price” for the minority’s shares
 - ▶ Simple on paper
 - ▶ Flexibility is necessary: no single valuation method works in all scenarios
 - ▶ BUT considerable uncertainty in practice and numerous disputes
 - ▶ Result = undesirable complexity and cost
- ▶ Amended in 2008:
 - ▶ Default valuation methodology: pro rata share of company value, disregarding the proposal that triggered the buy-out
 - ▶ A different methodology may be used if using the default methodology “would be clearly unfair to the shareholder or the company”

Primary checklist

1. What is the current position ?
2. What is the legislation aiming to change ?
3. Who are the audiences for the legislation ?
4. What institutions will the legislation depend on ? Do they have the capacity to play their role ?
5. Has this been tried elsewhere ? How did that go ? How relevant is their experience?
6. Is a trial/pilot an option ?
7. How will the legislation contribute to changes in behaviour ?
8. Can the legislation adapt to take account of new information and/or changed circumstances?
9. Does the legislation take cross-border issues into account?
10. Telling the story: the narrative explaining the reasons for the reform.

Benefits checklist

B1 Who is the legislation intended to benefit? What benefits are those beneficiaries intended to obtain?

B2 What criteria do the beneficiaries need to meet to qualify for those benefits ?

B3 How will the beneficiaries become aware of the availability of those benefits, and how to obtain them ?

B4 Can receipt of those benefits be made a default setting that does not require any specific action from beneficiaries ?

B5 If beneficiaries are required to make an active decision, or take active steps, what can be done to make this as simple and easy as possible ?

Compliance checklist

C1 Who is required to take steps to comply with the legislation ?
What is each relevant compliance group required to do ?

C2 Can some compliance obligations be reduced or eliminated?

C3 How will each compliance group be made aware of their obligations ?

C4 What can be done to make compliance as simple and easy as possible ?

C5 What can be done to encourage compliance?

Institutions checklist



I1 What institutions will play a role in implementing the legislation ? What decisions and actions will they be required to take ?

I2 Will each of those institutions have the capacity and will to perform its role?

I3 How can any concerns about institutional capacity be addressed?

The book has more to say about

- ▶• The importance of institutions
- ▶ Default settings
- ▶ Adaptive legislation
- ▶ Reducing complexity
- ▶ Implications of new technologies
- ▶ Cross-border issues
- ▶ Using the checklists to design more effective laws

And for further reading ...

- ▶ Atul Gawande, *The Checklist Manifesto: How to Get Things Right* (Metropolitan Books, New York, 2009)
- ▶ Daniel Kahneman, *Thinking, Fast and Slow* (Farrar, Straus and Giroux, USA, 2011)
- ▶ Daniel Kahneman, Olivier Sibony, Cass Sunstein, *Noise* (Little, Brown Spark, New York, 2021).
- ▶ Anthony King and Ivor Crewe, *The Blunders of our Governments* (Oneworld Publications, London, 2013)
- ▶ Cass R. Sunstein, *Simpler: The Future of Government* (Simon & Schuster, 2013)
- ▶ Cass R. Sunstein and Reid Hastie, *Wiser: Getting Beyond Groupthink to Make Groups Smarter* (Harvard Business Review Press, 2015)
- ▶ Cass R. Sunstein, *The Cost-Benefit Revolution* (MIT Press, 2018)

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