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# How Does the Proposed Regulatory Responsibility Bill Measure Up Against the Principles?

# Changing the Role of Parliament and the Courts

## Introduction

The Regulatory Responsibility Bill is, at its heart, an interpretative measure that would require the courts to interpret legislation in a way that ensures so far as possible that it is consistent with a set of principles contained in the bill. This article looks at the bill from two perspectives. The first is whether the bill itself conforms to those principles. The second is what impact the bill might have on the existing relationship between the legislature and the courts, and whether it is compatible with current approaches to the interpretation of legislation mandated by Parliament and applied by the courts.

## Background

### *Common law and statute*

As with most of the so-called common law countries, there are two sources of law in New Zealand: judge-made law and legislation. Legislation is now the dominant

source, although it was not always so. In earlier times in England, the statute was an interloper and the task of the judges was to confine its operation by employing strict rules of construction. If one looks at the New Zealand statute book today – and I use that term to include the whole body of legislation, including statutes and delegated legislation – it will be seen that there are few areas it does not touch.

Much of New Zealand's business and commercial law is statute-based: for

example, the law relating to companies, financial institutions, banking, insurance, capital markets and their operation, takeovers, personal property securities, financial reporting, receiverships, trade practices, consumer protection, foreign investment and intellectual property. The law of contract is a mix of statute and judge-made law, the so-called 'contract statutes'<sup>1</sup> having reformed and codified large areas of what was once common law. Our criminal law is entirely statute-

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based. The law of evidence, formerly a combination of statute and judge-made law, is now codified.<sup>2</sup> The statute has made inroads into tort law through the Injury Prevention, Compensation, and Rehabilitation Act 2001, the Defamation Act 1992, the Contributory Negligence Act 1947 and the Law Reform Acts of 1936 and 1944. The system for transferring and dealing with estates and interests in land has been statute-based since 1870. The New Zealand economy is dominated by the primary sector, so it is not surprising that there is a good deal of legislation relating to it.<sup>3</sup> Significant statutes

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affect education, health, social welfare, courts, immigration, the labour market, occupational regulation, central and local government, the electoral system, revenue and transport. Implementation of Treaty of Waitangi settlements relies on unique and sometimes complex statute law. A substantial amount of statute law gives effect to New Zealand's international obligations (see Gobbi, 2000).

There are over 1,900 public acts in force and thousands of other legislative instruments, including statutory regulations made under the authority of acts of parliament. Each year the New Zealand parliament enacts over 100 acts and the executive makes over 400 regulations. While much of this is amending legislation, new cognate statutes are constantly appearing.

Not surprisingly, the focus of the work of the courts has changed. Instead of making law, the principal job of the

courts is to interpret and apply legislation (Frankfurter, 1947; Hewson, 1950; Steyn, 2001; Kirby, 2002; Hailsham, 1983). While the courts make law and do so every day, for the most part this involves ascertaining the meaning of legislation. The resulting product has been perceptively described by a senior New Zealand judge as 'interstitial legislation'.<sup>4</sup>

It has been asserted that in the New Zealand legal system, statute law is not merely king, it is emperor (Palmer, 2007, p.12). Perhaps the time has come to stop calling New Zealand and other comparable jurisdictions common law countries. Lawyers in particular have been slow to recognise the transcendent role of legislation in our legal system, a reflection possibly of the emphasis placed in legal education on case law.

### *The importance of having good law*

No one would deny the necessity for legislation to be of a high standard. Legislation originates from the policies of elected governments. They decide what they want to do. They may be persuaded by their advisers to legislate in certain areas (sometimes disparagingly described as bureaucratic or departmental legislation), but for the most part governments call the shots. Public sector advisers and lawyers play a large and important part in turning policy into legislation. The knowledge and skills required to design and develop legislation are acquired through doing and are not easily or quickly learned. High standards must be achieved. There can be no mistakes. Legislation cannot be half right or about right. It has to be perfect or as close to perfect as possible. If it is not consistent with legal principle and the values held by a modern parliamentary democracy or it is unclear, the rule of law comes under threat and the faith of society as a whole in its laws and the law-making process is weakened.

There is no formal training available for those who work in the legislative field. The Legislation Advisory Committee (LAC) guidelines on the process and content of legislation, first published in 1987, remain the only source of guidance available to lawyers and policy makers

engaged in developing legislation. To a large extent the guidelines encapsulate a lot of esoteric and institutional knowledge and practice.

John Burrows and Ross Carter's excellent work *Statute Law in New Zealand* (Burrows and Carter, 2009) appears to be the only New Zealand textbook dealing with legislation as a discrete subject, and it stops short of attempting to lay down standards for good legislation. Legislation as a subject is not, and never has been, taught in all our law schools. It is, however, a popular elective at some. Harvard Law School, having pioneered the casebook method of teaching law, abandoned it in 2006. First-year law students at that university now begin their legal studies with a compulsory course on statutes and statutory interpretation (Kirby, 2007). The texts on statutory interpretation have a limited focus and are not concerned with legislative quality. The few texts on law drafting also have a specific focus. The position is the same in most other jurisdictions. It is surprising that matters of such importance receive so little attention from governments and the academic world. There is a large gap in training and resources available to assist in producing good quality law.

Against this background, the work of the Regulatory Responsibility Taskforce should be seen as a serious and welcome initiative. Its proposals for improving legislative quality deserve careful and principled consideration.

### **Does the bill measure up to its principles?**

The principles of responsible regulation are grouped under six categories: rule of law, liberties, taking of property, taxes and charges, role of courts and good law making.

#### *Rule of law*

The first category concerns key elements of the rule of law. The first of these is that the law should be clear and accessible. At the outset, however, the bill's own title raises a question about accessibility. A title should be a succinct, general and accurate description that conveys to a reader what an act is about. An ordinary person looking at the title of this bill for the first time could be misled into thinking

the bill deals with something other than the quality of legislation. The bill uses the word 'regulatory' as a grammatical form of regulation in the sense commonly used by economists. It is, however, about legislation and legislative standards. Apart from the title and a reference to the principles of responsible regulation, the word regulation is not used in the bill; instead, the conventional term legislation is employed. The word 'responsibility' is an odd choice. The taskforce recognises the problems inherent in the title and recommends several alternatives. The title of this bill does not conform to basic standards of clarity and accessibility and the recommendations of the taskforce to adopt a better one should be supported.

Even then, a reader might be led to think that the bill contains a definitive statement of the requirements for good legislation. It is not, however, comprehensive. It does not expressly mandate consistency with a number of important statutes, including the Official Information Act 1982, the Human Rights Act 1993 and the Privacy Act 1993, nor with the Treaty of Waitangi and New Zealand's obligations under international law, all of which import important values into our legislation. It says nothing about the design of sanctions to enforce legislative obligations, or what matters parliament must legislate upon and what matters may be delegated. Although the bill is careful to state that the principles do not limit the New Zealand Bill of Rights Act 1990, there may be considerable overlap with that act. The principle in clause 7(1)(b) of the bill that legislation should not diminish freedom of choice or action might be thought to include some of the specific freedoms protected under the Bill of Rights.

The words 'clear' and 'accessible' lack precision in the context in which they are used. Are they synonymous? To whom must legislation be clear: a specialist in the field? a highly intelligent person? someone of average intelligence? Is 'clear' directed at the drafting or the policy, or both? Legislation has multiple audiences: law makers, users, scholars, judges, and administrators. It can be difficult to lay down hard-and-fast rules in this regard. Much depends on the subject matter.

In the drafting of legislation there is often a tension between principle and detail. How much detail is necessary? Too much and the measure risks becoming cluttered; too little and it risks becoming uncertain. It is a difficult balance. Words have shades of meaning. Nor is clarity just about words: structure and organisation of material are important components of clarity. The clarity of a piece of legislation may be affected by the complexity of the policy it seeks to implement: if that complexity can be reduced the legislation can often become clearer.

Not everyone likes the emphasis in modern legislation on plain language, or drafting innovations such as examples, purpose and overview clauses, flow-charts, diagrams and other graphical aids. Critics say it is unnecessary clutter, adds nothing to an otherwise well-drafted provision and gives readers a false sense of knowing more than they actually do, and that it 'dumbs down' the statute. These people would say that an act having these features is not clear.

While jurisprudence might be developed over time by the courts on what 'clear' means, I suggest it is too broad a concept to pin down and I am not sure if judges are best placed to do it. The word 'clear' by itself does not take one very far, and a law that leaves wide and uncertain scope for judicial development is not a good law. If Parliament only ever enacted clear and unambiguous law, there would be no more cases coming before the courts on the interpretation of statutes. Finally, it is difficult to conceive of a situation where a departure from the requirement for legislation to be clear could, under the proposed bill, ever be reasonable and demonstrably justified. The possibility of engaging the justified limitation qualification in this context seems odd. It would also be highly improbable that the minister and the chief executive would ever certify under clause 8 of the bill that their own bill was not clear.

This article is about legislation, not judge-made law. It might, however, be mentioned in passing that judge-made law is not always a model of clarity and accessibility. Decisions of appellate courts that deliver multiple judgments can make it extremely difficult even for a lawyer to

work out what has been decided and why. Judges can all arrive at the same result but for different reasons. While judges do not always speak with a single voice, the legislature does. Despite the fact that modern-day judgments make sensible use of headings and paragraphs, and judges attend courses on judgment writing, many judgments are too long and often discursive, a feature that is in part the result of the judicial process of analogous reasoning in which a conclusion is reached by drawing on the same or similar cases. There is no guarantee that a decision of a court on whether an act is clear would

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itself be clear on the issue.

The term 'accessible' is not free from ambiguity and can have more than one meaning. The commentary recognises this. It says the word is intended to have three meanings: availability in the sense that the law should be available in the physical sense (where can I get my hands on it?); navigable in the sense that users can locate the law in the existing body of legislation without unnecessary difficulty (where can I find what I'm looking for?); clarity in the sense that the law is understandable to the user (when I've found it, will I understand it?).<sup>5</sup> If the word is to have these meanings, perhaps the bill could say so. Except where a provision is ambiguous, it should not be

necessary to look at extrinsic material to find out what it means.

The obligation to make legislation physically available goes to the fundamental principle of parliamentary democracy under the rule of law that in order to know their rights and obligations under the law, citizens must be able to get hold of it. The Acts and Regulations Publication Act 1989 requires the chief parliamentary counsel to make copies of acts and regulations available for purchase at a reasonable price. There is a similar obligation with

**It is an accepted legal principle that it is the right of a sovereign state to determine its immigration policy from time to time as it sees fit. It may be as arbitrary as it likes.**

reprints, which are compilations of acts and regulations with their amendments incorporated. Acts and regulations both as enacted or made and in up-to-date form are available free via the internet from a database owned and maintained by the Crown ([www.legislation.govt.nz](http://www.legislation.govt.nz)). There is no statutory requirement for internet availability. Would legislation be accessible under the bill if it were available only in electronic form requiring users to download it? That is the position in the Canadian province of New Brunswick, which no longer publishes hard copies of statutes or regulations. Does the obligation to make legislation accessible require state subsidisation? These are just a few of the questions that arise when one considers the content of the obligation. The fact that physical access to legislation is the subject of a separate act suggests that the matter is rather more complex than merely stating that it has to be accessible.

The law on the same topic is often

scattered across several statutes. The last time a comprehensive subject index of New Zealand legislation was published was in 1933. The textual method of amending legislation results in the enactment each year of a great many amending acts. It is unsafe for a reader to read only the principal act: amending acts have to be looked at to see how they affect the principal act. Sometimes an act that is not described as an amending act makes amendments to other acts; the fact that it does so will not be apparent on its face. Reprints help with the problem of navigation, but they don't overcome it.

Would the legal obligation in the bill to make legislation accessible require the state to publish a comprehensive subject index and keep it up to date? Would it require the state to operate a continuous reprinting facility so that reprints of all legislation could be accessed, rather than, as under the current arrangements, just the statutes and regulations for which there is the greatest demand? The word 'accessible' takes on new meaning when its full implications are considered.

The second rule of law component is the principle that the law should not operate retrospectively. The requirement in clause 11 of the bill to prefer an interpretation of legislation that is compatible with the principles, and the power for a court to issue a declaration of incompatibility, will not apply to existing legislation for ten years. Parliament and the executive would be given ten years to get their act together; an act or regulation that is not made compliant within that period will be subject to the interpretative direction and to a declaration of incompatibility. Despite the ten-year grace period, however, there seems to me to be an element of retrospectivity involved. There is no retrospectivity if existing legislation is made compliant, but, if it is not, the bill will certainly have retrospective effect and it is not a sufficient answer to say there is no retrospectivity involved because you have been given ten years to get your legislative house in order. For reasons outlined later in this article, I suggest that pulling that off is impossible. It should perhaps be commented in this regard that while Parliament routinely changes the law prospectively, rather than retrospectively,

the courts seldom, if ever, do.<sup>6</sup>

The third rule of law component is the principle that everyone is equal before the law. The commentary explains this as an entitlement to equality of treatment in the administration of the law, as opposed to substantive equality. It refers to the decision of the Supreme Court of Canada in *Andrews v Law Society of British Columbia* that 'equality under the law' and 'equality before the law' are different concepts. In his seminal work *Constitutional Law of Canada*, Peter Hogg says the language of section 15 of the Canadian Charter, which states that every individual is 'equal before and under the law', was deliberately designed to abrogate a suggestion by a judge in *Lavelle* that review on equality grounds under the Canadian Bill of Rights did not extend to the substance of the law but only to the way it was administered (Hogg, 1992, p.1159). In rights-based legislation, subtle distinctions abound. It will not be immediately obvious to all that the distinction between substantive and administrative equality is intended by the bill, and it may require an authoritative decision from a court to determine the scope of the principle. The point could be made clear by stating these limits explicitly.

The fourth rule of law component is the principle that issues of legal right and liability should be resolved by the application of law, rather than the exercise of administrative discretion. A vast number of statutes authorise decision making by ministers, officials and public bodies. Some set out detailed decision-making parameters, while others are less specific or are silent. Administrative decisions made under an act that does not specify criteria can never be exercised on arbitrary or subjective grounds. Decisions must be made in good faith, for a proper purpose and in accordance with the objectives of the act. It is a basic rule of administrative law that a decision maker cannot take into account irrelevant considerations.

The principle in the bill seems unduly open-ended and uncertain, requiring, as it appears to do, every statute that confers administrative decision-making powers to specify criteria for their exercise. How comprehensive must the criteria be? Even though the commentary appears to accept



that, despite detailed prescription of rules and standards about the exercise of an administrative power, some discretion might be required, the principle itself would seem to preclude this. Discretion is necessary in decision making to ensure decisions are made fairly, and to avoid the harsh consequences that can result from strict adherence to prescribed criteria. Many administrative decisions involve a balancing of different factors, with more weight given to some than to others. Administrative decision making is not an exact science involving the formulaic application of predetermined criteria to a given set of facts.

The Immigration Act 2009 contains numerous provisions for granting different classes of visas. To take one example, residence-class visas are required to be made by the minister or an immigration officer in accordance with residence instructions (see section 72). However, the minister can in his or her absolute discretion grant a residence-class visa as an exception to those instructions. Conditions may be imposed when a visa is granted, whether or not they are part of the immigration instructions applying at the time, and additional conditions can be imposed after grant whether or not they are specified in the immigration instructions (see section 50). It is an accepted legal principle that it is the right of a sovereign state to determine its immigration policy from time to time as it sees fit. It may be as arbitrary as it likes. Immigration instructions are statements of government policy and are a legitimate reflection of this principle (see section 22(8)). The matters that may be provided for in immigration instructions are very broad (see section 22). Would a decision by the minister to issue instructions under these powers involve the exercise of administrative discretion and thus infringe the principle in the bill?

Sections 16 and 17 of the Overseas Investment Act 2006 set out criteria that must be considered by the relevant minister or ministers in deciding whether to grant consent to an overseas investment in sensitive land. Section 17(1)(c) states that in assessing whether the investment will or is likely to benefit New Zealand, they must consider various factors. The

factors are stated in broad terms: for example, whether the investment will result in added market competition, greater efficiency or productivity, or enhanced domestic services. They may also determine what weight to give these factors. Is this unacceptable administrative discretion under the bill?

In my view, it is not good law making for legislation to be put at risk of challenge merely because it confers on an office holder or entity power to make decisions on a basis that involves the exercise of discretion. The principle, like others, is expressed at too high a level of abstraction to be workable.

#### *Liberties*

The second category of principle concerns liberty. Legislation should not diminish a person's liberty, personal security, freedom of choice or action, or rights to own, use and dispose of property, except as is necessary to provide for, or protect, any such liberty, freedom or right of another person. There is, however, a subtle difference in the language of the principle in the bill and the way it is commonly expressed.

The passages in *Bennion on Statutory Interpretation* (Bennion, 2003, pp.784, 846) relied on in the commentary do not, as I read them, support a general freedom of choice principle. *Bennion* is an attempt to set out, in the form of a code comprising 464 sections in 30 parts arranged in 7 divisions and running to nearly 1,500 pages, a series of rules, principles, presumptions and canons for interpreting legislation. Division four is headed 'Interpretive principles derived from legal policy'. It asserts that the rules and principles of construction are derived from legal policy. Section 263 defines the nature of legal policy. Bennion's starting point is that the content of public policy and therefore legal policy is what a court thinks and says. A court may be guided by an act of parliament as indicating parliament's view of public policy and that ultimately parliament's view must prevail.

The principle underpins Bennion's code and is the basis for the rules, principles, presumptions and canons that form part of it. They need to be understood

in this light, and particularly in relation to the bill. It is, however, a flawed view of the functions of the legislature and courts. The idea that the content of public policy and legal policy is what a court says it is cannot be regarded as tenable in a modern parliamentary democracy. It is little more than an attempt to preserve the once-held view that the judges' role in law making is paramount and that a law made by an elected legislature or by the executive in the exercise of a delegated law making power is only a law because the courts recognise it as such. It is completely at odds with the

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modern-day view that parliament makes the law and the judges interpret and apply it.

Section 263 and its definition of the nature of legal policy is followed by various categories of legal policy, one of which is the prohibition of restraints, which is explained as 'legal policy worked out by the judiciary [that] has tended to frown on restraints placed on freedom by private persons'. Passages from four judgments are quoted in support. Three of these cases are relics of an era when judges saw themselves as bastions against the predations of unprincipled and unwelcome statutes. They no longer reflect reality. The fourth does not provide authority for the proposition in the text. None of the cases support a general freedom of choice principle. I would venture to suggest that there is not a single decision of an English or New Zealand court that does.

Section 278 of Bennion's code is also relied on in the commentary as supporting a freedom of choice principle. Section 278 asserts that property or other

economic interests should not be taken away, impaired or endangered by state power except under clear authority. That is altogether different from a general freedom of choice principle, or a principle that a limitation on the right to own, use or dispose of property is justified only to provide for or protect the right or freedom of someone else.

The commentary also relies on Burrows and Carter's *Statute Law in New Zealand* (Burrows and Carter, 2009, pp.322-3) to support the principle against

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imposing limits on the right to own, use or dispose of property. What these authors say, however, is subtly different. What they say is that, whereas once the courts were most protective of property rights, this has understandably diminished in the area of planning and land use, but even today courts will not adopt a construction that takes away property rights more than the act and its proper purpose require. In other words, it is a matter of construction of the statute.

The commentary is much closer to the mark when it refers to the principle of law that parliament does not intend to override fundamental rights unless it does so expressly or by necessary implication, and cites text writers including Bennion and Burrows and Carter, and Blanchard for the New Zealand Supreme Court in *Cropp v Judicial Committee*<sup>8</sup> This is more in line with the modern-day understanding and more usual formulation of the principle. Legislative intent to do any of these things must, to adopt Blanchard's words, be 'clearly spelt out'. In *Secretary of State for*

*the Home Department ex parte Simms*,<sup>9</sup> Lord Hoffmann said that what is meant by the principle of legality is that the legislature must squarely confront what it is doing and accept the political cost: fundamental rights cannot be abrogated by general or ambiguous words.

The principles stated in the bill are overstatements that alter the thrust of the legality principle that the clearest language is required by parliament to abrogate fundamental rights and freedoms. Nor is it about limitations necessary only to protect others; it is about the need for parliament to use the clearest language if it wishes to derogate. The point in its simplest terms is that the liberty principle as expressed in the bill is not recognised by English law: what is recognised is that in the interpretation of legislation, clear words are needed to interfere with fundamental rights. They are different things.

There is great danger in attempting, as the bill does, to package up into a single statutory statement a raft of common law presumptions and rules which the courts use in different contexts all the time. Care and precision are required in stating a principle of this kind. Overstatement or misstatement may have serious consequences. It is true that fundamental rights cannot be abrogated unless parliament uses clear and unmistakable language. By the same token, those fundamental rights should be stated in plain and unmistakable language and their content made clear to legislators so that parliament knows exactly what the rights are that it might be infringing. The bill fails to do this.

### *Taking of property*

The third category of principle is that legislation should not take or impair or authorise the taking or impairment of property without the consent of the owner, unless it is in the public interest and full compensation is paid by the person who benefits. The commentary refers to protections in other countries against the taking of property, notably in the United States and Australia.

The case law on the meaning of taking in the United States is voluminous. Originally, the concept of taking was thought to apply only to physical

appropriation, but since its adoption in 1791 it has undergone enormous development. By 1905, for example, it was used to invalidate legislation of the state of New York limiting to 60 the hours that could be worked in a bakery on the basis that the state's power did not authorise the shifting of resources from employers to employees simply because the legislature disagreed with the existing distribution of wealth, although it could do so for health and safety considerations.<sup>10</sup> The effect of the decision initially was to place boundaries around labour laws and prevent organised labour from obtaining redistributive legislation (Tushnet, 2009, pp.26-7). Taking may arise from physical damage to property that impairs its use. It may occur to intangible property where the owner had a reasonable investment-backed expectation that the property would not be used by the state and the expectation is impaired.

Nowak and Rotunda describe the development of the law on takings by the United States Supreme Court in the following terms:

Rather than develop a single framework to define a taking, the Supreme Court, much to the consternation of commentators, has retained to some extent both the theories of Holmes and Harlan. In its decisions on property use regulations and the extent of permissible government impairment of the value of private property interests the Court has issued rulings which follow no clear theoretical guidelines. The Supreme Court's decisions on 'taking' issues may properly be viewed as a 'crazy quilt pattern' of rulings. (Nowak and Rotunda, 1991, p.430)

There have been numerous decisions on the circumstances in which zoning regulation and landmark zoning can amount to taking; the circumstances in which physical occupation and limitations on an owner's right to exclude access or occupation by others can be a taking; whether utility rate regulation can be a taking; what kind of emergency action will amount to taking (could the state of Virginia destroy ornamental red cedar trees that risked infecting neighbouring apple

trees: answer, yes);<sup>11</sup> and the circumstances in which impairment of use of property may constitute taking. There is also a vast amount of constitutional law-writing on the subject.

Following the Supreme Court's decision in *Kelo v New London*, which upheld eminent domain for economic development purposes as a public use under a Connecticut statute, a number of the states have passed their own legislation relating to the exercise of the takings power. The legislation restricts the use of eminent domain for economic development purposes, enhancing tax revenue or transferring private property to another private entity, defining what constitutes public use and establishing criteria for designating blighted areas subject to eminent domain. The legislation also defines exceptions.

The legal landscape in the United States with respect to takings is highly complex and involves consideration of a unique and often overlapping mix of federal and state constitutional law. It could hardly be described as clear. We should be extremely wary of importing a body of law from another jurisdiction without knowing precisely what it is or where it might lead.

Section 51 (xxxix) of the Australian Constitution was adapted with significant modification from the Fifth Amendment to the United States Constitution. The latter is stated as a limitation on power, while the former is expressed as a grant of power: the Commonwealth may make laws with respect to the acquisition of property on just terms from any state or person for any purpose for which it has power to make laws. Unsurprisingly, there is also extensive case law and academic commentary on section 51(xxxix), reflecting decades of experience. It has been held to render invalid a Commonwealth statute preventing a landowner from carrying out mining operations within 1,000 metres of the surface of the Kakadu National Park, although the statute did not totally prevent mining. It has been held to invalidate a Commonwealth statute that required actions for damages for personal injuries by seafarers to be commenced within six months of the commencement of another statute which, in bringing in a statutory compensation scheme, removed the right

to bring common law actions for damages for personal injury. One need only read the masterly summary of the applicable principles in the judgment of Kirby to realise that the issues are complex and that there are no clear answers.<sup>12</sup>

It would be unwise to enact a law which prohibits in the most general language the taking or impairment of property, leaving it up to the courts to define its parameters by reference to the law in some other jurisdiction or to embark on a jurisprudential development mission of their own. Many of the American states have tried to concretise the generality of taking in their own constitutions and through amendments. If New Zealand is to go down the path of providing a constitutional-type protection for property rights, then we should at the very least codify its essential components so that state, citizen and the courts know what is involved.

#### *Taxes and charges*

The fourth principle is that taxation must be imposed or authorised by act of parliament and that charges for goods and services must be reasonable in relation to the benefits that may be obtained from the goods or services provided and the costs of providing them. There is little to say about this except to observe that as regards tax, the principle is already enshrined in section 22 of the Constitution Act 1986, and as regards charging of goods and services the principles are well established and hardly need legislative endorsement. Indeed, stating the principle in these brief and general terms obscures the fact that there is a considerable science involved in determining what is reasonable and whether a charge bears a proper relation to the goods or services provided.

#### *Role of courts*

The fifth principle, under the category 'the role of the courts', has two elements. The first is that legislation must preserve the role of the courts in authoritatively determining the meaning of legislation. The second is that legislation should provide for a merits appeal against decisions made by ministers, public entities and officials to a court or independent tribunal, and should state criteria.

The first is a well-established principle: parliament makes the law and the courts say what it means. It does, however, raise some interesting questions. How would binding rulings under the Tax Administration Act 1994 be affected? The regime doubtless exists to provide certainty in business arrangements from a tax perspective, and in that regard it reflects the principle that the law should be predictable and certain. If the Commissioner of Inland Revenue makes a private ruling or a product ruling and it is applied in relation to an arrangement

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in the way stated in the ruling, the commissioner must apply the taxation law to the person and the arrangement in accordance with the ruling. Do binding rulings constitute determinations of the meaning of tax legislation, or do they operate merely as an estoppel?

The second element draws on material covered in detail in the Legislation Advisory Committee guidelines. The guidelines are not intended to lay down absolutes. They identify several relevant considerations that should be taken into account in addressing issues about appeal structures. Firstly, there is no common law right of appeal, and natural justice does not require an appeal from every decision. Second, a general availability of appeals is at odds with finality of decision making. Third, the value of an appeal has to be balanced against factors such as cost delay and the significance of the subject matter. Fourth, a right of appeal may not be justified where the primary decision maker

is a body of high quality and expertise: in such cases a limited appeal confined to questions of law may be appropriate. Fifth, the higher the policy or political content of a decision, the less justiciable it becomes and the less appropriate it is to provide for a merits appeal. The importance of these considerations is obscured by the unqualified language in which the principle is expressed in the bill: there is rather more to the issue than the principle implies.

Proponents of the bill might say that it is not the purpose of the bill to preclude sensible exceptions and that objections to the generality of the principles are

**Even if it were assumed that there is less than adequate adherence to the standards of good legislation, it does not follow that a statute is the only way forward. There are several possible alternatives that should be seriously evaluated.**

met, as they are with the Bill of Rights, by the justified limitation qualification. The problem with that response, however, is that it treats the enterprise of law making as an exercise involving a series of rebuttable presumptions quite unsuited to the resolution of complex policy and resource allocation issues.

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appeals. There is no merits appeal against a decision to issue a search warrant. The Search and Surveillance Powers Bill currently before parliament provides for search warrants to be issued by issuing officers, but there will be no right of appeal. Search warrants are issued every day. The process would collapse if there was a right of appeal on the merits to a court or tribunal. Statutes that confer exemption powers on ministers and public entities do not provide for merits appeals. There is no merits appeal against a decision of the Reserve Bank to refuse an application for bank registration or to cancel registration once granted. Neither the Overseas Investment Act 2006 nor the regulations provide for merits appeals. Lots of appeals are subject to a leave filter: it is not clear how they would fare under the bill.

#### *Good law making*

The final category of principles relates to good law making. The bill expressly precludes a court making a declaration of incompatibility in relation to these principles except as regards the duty to consult (see clause 12), on the basis that the issues are not suitable for judicial consideration because of the institutional limits of the adversarial process. While that may be so as far as declarations of incompatibility go, the fact is that the principles themselves are not entirely non-justiciable under the bill. Clause 11 requires a court to prefer an interpretation of an enactment that is compatible with the principles over any other meaning, and the principles of good law making are no exception. They will still be engaged by the courts in their interpretation function and receive the same judicial consideration the bill appears to regard as inappropriate.

The first principle requires consultation with persons likely to be affected by the proposed legislation. It might be thought overly broad. Statutory obligations to consult are commonly limited to requiring consultation with persons or organisations or representatives of persons or organisations rather than with everyone. How does the principle relate to the obligation of the Crown as a Treaty partner to consult with Māori?

The second principle requires careful consideration to be given in developing legislation to a variety of matters, including the effectiveness of existing legislation and the common law, whether the public interest requires legislation at all, other options (including non-legislative ones), who will benefit and who will suffer, and possible adverse consequences.

Some of the principles of responsible regulation which the bill states are themselves little more than restatements of existing legislation and the common law. The Interpretation Act provides that legislation does not have retrospective effect; the Bill of Rights Act protects freedoms which the bill also seeks to protect; the Constitution Act provides that taxes cannot be imposed or authorised except by statute; and the common law has long recognised the role of the courts in making authoritative interpretations of legislation. In this regard, the bill appears to trip over itself and it is no excuse to say that the principles are the same only expressed differently. They deal fundamentally with the same issues. This kind of overlap would not be tolerated in other statutes.

Does the public interest require that the issue be addressed? I confess to considerable unease whenever the words 'public interest' appear in legislation. It is a concept of uncertain scope. I have seldom if ever employed the term in legislation I have drafted because it has always seemed an easy way out of saying what one means and merely subcontracting the problem to someone else, usually the courts.

Is the state of the New Zealand statute book such that a law is required to say that it must be clear and accessible? Are there sufficient examples of legislation having seriously adverse retrospective effect to justify another statutory enactment of the principle against retrospectivity? Indeed, are there any? Are there examples of arbitrary or subjective decision making that require a law that issues of legal right and liability be resolved by application of the law and not administrative discretion? Are the protections under the New Zealand Bill of Rights so inadequate that further legislation is required to protect aspects of liberty? The commentary does not make a compelling case that the state



of New Zealand's law and its law-making institutions is so deficient that legislative intervention is essential.

The bill would require careful evaluation of other options that are reasonably available. The commentary suggests that unless the guiding principles in the bill, including the LAC guidelines, are backed by meaningful consequences, they are unlikely to achieve significant adherence. The commentary does not, however, consider alternatives to legislation. Even if it were assumed that there is less than adequate adherence to the standards of good legislation, it does not follow that a statute is the only way forward. There are several possible alternatives that should be seriously evaluated.

The LAC does a good job with limited resources. It relies heavily on the time of its busy members and the contributions they are able to make alongside their other commitments. The members are senior practising and government lawyers, law commissioners, sitting and retired judges and economists. Apart from producing and updating the guidelines and providing limited educative support for them, the LAC's involvement tends to occur after bills are introduced rather than in the design and development stages. As a result, its impact on the finished product is often limited. Its interventions can be too late.

The Legislation Design Committee (LDC) was set up in 2006 to provide advice in developing legislative proposals.<sup>13</sup> The idea is that departments can engage with the LDC early on in the process and seek its input into the best ways to implement a particular policy. The LDC is concerned with things like design issues, instrument choice and the coherence of the statute book. Like the LAC, it relies heavily on the individual contributions of members and its advisers.

The LDC can be effective and some of its engagements have resulted in resolution of difficult issues and better legislation. It is a place to which policy advisers and lawyers can go and ask questions such as: 'can we do this?'; 'this is new territory for us, how should we go about it?'; 'are we on the right track?' The LDC meets infrequently and usually

only when there is a request for assistance. There is, however, a degree of confusion about the overlapping roles of the LAC and the LDC.

Combining the LAC and LDC into a single body (a Legislation Standards Committee?) with pre- and post-legislative scrutiny functions and adequate resources to carry them out could provide a highly effective institutional mechanism for ensuring proper legislative standards are met. It could have a certifying function, which would arguably be preferable to the certifying role envisaged by the bill, where the promoters of a proposed bill are in effect required to say that they have done a good job. It could also be required to report to parliament through a minister on compliance with legislative standards. The taskforce has recommended establishing a permanent group responsible for reviewing existing and proposed legislation against the principles of responsible regulation and guidelines that would be issued by a minister. What I am suggesting is not dissimilar.

Another option is to mandate the adoption of an equivalent to the generic tax policy process which has been used since 1994 in developing tax policy. The process was formalised to ensure effective tax policy development through early consideration of key policy elements such as revenue implications, compliance and administrative costs, and economic and social objectives. It brings external consultation into policy development and helps understanding of the rationale that underlies it. It also brings transparency into the process. A key feature is that draft legislation can be included in discussion documents.<sup>14</sup>

A further option is a well-supported ministerial office with responsibility for the promotion of good legislation. Similar institutional arrangements exist in New South Wales, which has a minister for regulatory reform and a Better Regulations Office in the Department of the Premier and Cabinet. Such mechanisms or variants of them could usefully be examined before recourse to legislation as the panacea.

Another of the good law-making principles is that legislation must be the most effective, efficient and proportionate response. In this regard, I consider that

the proposal fails in the area of problem definition. It is not clear from the commentary that the problems with New Zealand legislation are such that the bill is needed to fix them. Apart from a few instances the taskforce cites as examples of bad law making, there is nothing to indicate where the problems lie or what they are. A careful and comprehensive analysis of the state of the statute book should be required to establish that the enactment of the bill is necessary.

Clause 16 of the bill requires all public entities to use their best endeavours to

**Many of our principal statutes and regulations have been so extensively and frequently amended that they bear little resemblance to the original: they have lost their coherence.**

review the legislation they administer for compatibility and report both the steps taken and the outcomes. As already noted, there is a ten-year grace period to get existing legislation into shape before the courts can pronounce it incompatible. The bill is not confined to statutes and regulations. It applies also to legislative instruments: that is, rules, orders in council, bylaws, proclamations, notices, warrants, determinations, authorisations, and other documents that determine the law or alter the content of the law and that directly or indirectly affect privileges or interests, impose obligations, create rights or vary or remove obligations or rights. I doubt if anyone has come up with a number for instruments of this kind, but a conservative guess would put it in the thousands.

Reviewing such a body of legislation for compatibility would be a massive undertaking. Take the Income Tax Act 2007 as an example. The act is the result

of a project to rewrite the Income Tax Act 1976 in plain language. The job was done in two stages. The first stage began in the early 1990s with the enactment of the Income Tax Act 1994, a reorganised version of the 1976 act. The second stage was not completed until the enactment of the rewritten statute in 2007. The object was to produce a tax statute in clear and accessible language without changing tax policy. A few policy changes were necessary and they are identified, but in essence the rewrite was just that, a rewrite

## The bill would force a return to rules, principles, presumptions and canons; to the kind of approach advocated by Bennion.

not a reform. If account is taken of the 1994 Act, the process has taken over 15 years to complete.

Imagine a similar process for all legislation. Not only would it have to be decided whether a particular act, regulation or instrument needed rewriting to make it clear, it would be necessary to evaluate it against all the other principles in the Regulatory Responsibility Bill. Many of our principal statutes and regulations have been so extensively and frequently amended that they bear little resemblance to the original: they have lost their coherence. They are drafted in a mix of different styles reflecting their age. Many of these acts and regulations are referred to every day by lawyers and non-lawyers alike. They would not pass the test of clarity and accessibility. Rewriting them just to make them clear and accessible would be a massive job. It would be impossible to avoid making policy changes. There are not the resources to do it. Parliament would have to re-enact the statutes and might want to reconsider and

debate the original policy. The executive would have to remake the regulations and other instruments. Is this a proportionate response?

The principle of limited liability is a central feature of legislation about companies. The principle is that the liability of the shareholders in the liquidation of a company is limited to the amount unpaid on their shares. A company and its shareholders are separate legal persons and a shareholder is not liable for the debts of the company except to the limit of their unpaid capital. This principle has been around for a long time. It is seen as serving an important economic and social objective in providing for the aggregation of capital for business purposes. What it means, however, is that shareholders can effectively protect themselves from liability to creditors and in tort for the acts and omissions of the business venture they have formed. Does this not diminish the freedom of action that would otherwise be available to another person to seek redress for a wrong committed by the shareholders were they to carry on business in unincorporated form, for example as partners or in an unincorporated joint venture?

It would seem heretical in this day and age to question company limited liability. Professor John Smillie has, however, argued that there are significant issues with the concept. Limited liability can be seen as shifting the costs of risk-taking in a manner that is morally indefensible and violates the fundamental principle of equality before the law (a key principle the bill seeks to protect); it was originally conceived as desirable to provide perpetual succession; it was never clear that limited liability was necessary to promote industrial development; economists are divided about the merits of the concept; it provides undesirable incentives for shareholders and managers to take risks with other people's money; it is questionable whether the vehicle is necessary to raise capital by public subscription, since few companies raise capital by public share offers (Smillie, 2008, p.133). While a reassessment of corporate liability would be seen as threatening the foundations of business, it seems to me that the bill requires it.

The insider trading laws prohibit the use that may be made of information that is price sensitive. Insider trading is a criminal offence under provisions in the Securities Markets Act 1988, as it is in some overseas jurisdictions. The legislation effectively restricts the use a person may make of information that may have been acquired through ownership of a controlling interest in a company or through board representation. If the information is property, does the legislation diminish the person's right to use it? Is the requirement to make a takeover offer under the takeover code for additional shares in a company once a threshold has been reached a restriction on the ownership of property? Is the obligation to disclose under the Securities Markets Act an interest in a listed company a restriction on the ownership of shares that constitute or give rise to the interest?

It would be impossible to rewrite and re-enact all legislation just to make it clear and accessible, let alone rewrite and re-enact it to make it compliant with the principles.

### Some related observations

#### *Changing the approach to interpreting legislation*

If enacted, the bill will materially alter the approach of the courts to the interpretation of legislation. That approach is set out in precise terms in section 5(1) of the Interpretation Act 1999. The section requires the court to ascertain the meaning of legislation from its text in the light of its purpose. Text is constrained by purpose and purpose is constrained by text. The courts are required to look at the text without being limited to it, thus avoiding overly literal constructions. At the same time they must look at the purpose of an enactment, but not so as to get carried away by taking account of factors of marginal or no relevance, speculating, or substituting their own views. The provision achieves a nice balance.

The section is, however, no more than a statutory statement of what had become by the time it was enacted a well-established legal principle. The early New Zealand interpretation ordinances and statutes required our courts to

interpret legislation purposively, but the courts did not always do so. Instead, they applied rules, principles, presumptions and canons. Through the latter part of the last century the courts moved away from a rigid, rule-based approach to a purposive approach. They still refer to rules, principles and presumptions, and to the occasional canon, but these are now regarded more as indicative than determinative.

The bill would force a return to rules, principles, presumptions and canons; to the kind of approach advocated by Bennion. It would be at odds with the principle that underlies section 5 and which drives the work of the judiciary of the modern era. The bill would force a seismic shift away from the purposive approach to interpretation. It is not the function of courts to pass judgment about the integrity and quality of legislation. Instead of interpreting legislation as part of the process of resolving disputes, the courts would now have to evaluate it.

**The bill will bring the courts into areas of law making that are not within their province and for which they lack institutional competence, requiring them to adjudicate on choices made by democratically-elected governments on complex social and economic issues and the allocation of resources.**

*Increased litigation*

The bill enlarges the scope for challenging legislation in the courts, making an increase in the amount of litigation inevitable. Cases involving challenge to a statute or other legislative instrument on the grounds of incompatibility may be expensive to run, adding to the cost of litigation for both citizen and the state.

*A new role for the courts*

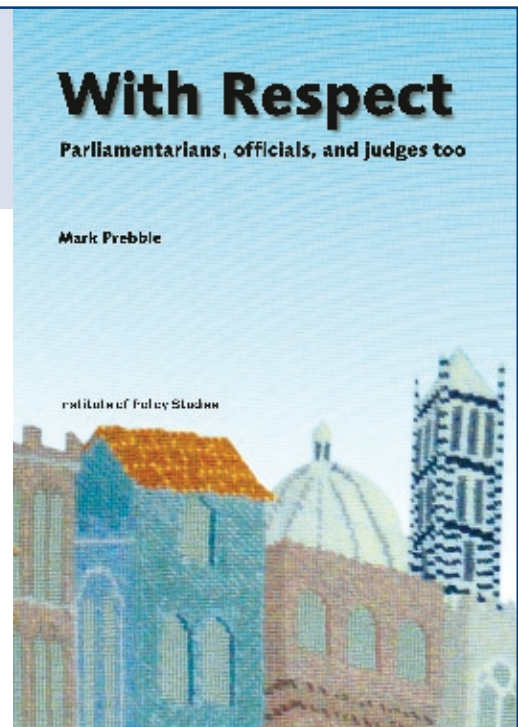
The courts are reluctant to venture into matters falling within the area of legislative competence. In *Arthur J S Hall v Simons* Lord Hoffmann spoke of the sensitivity needed on the part of judges in entering into areas of law which are properly matters for democratic decision, and referred to his earlier judgment in *Southwark London BC v Mills*, in which he said that in a field such as housing law, which is very much a matter for the allocation of resources in accordance with democratically determined priorities, the development of the common law should

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not get out of step with legislative policy.<sup>15</sup> If enacted, the bill is likely to require the courts to make decisions on matters that involve policy choices and to bring them much closer to areas of political and legislative competence. It is no accident that the Bill of Rights Act confers no power to make declarations of inconsistency. That would have been incompatible with a proper appreciation of the role courts play in modern society.

#### *Political and other realities*

The bill takes no account of political, governmental and parliamentary realities. The three-year parliamentary term is not particularly conducive to good law making. It creates perverse incentives in which compromising standards is sometimes a price of democracy. Governments have agendas and promises on which to deliver. Timing becomes critical. Political deadlines and lack of time are constant enemies of good law making. Pressure on scarce parliamentary time is another factor. Bills undergo extensive change during the parliamentary process to a far greater degree than in many other legislatures. The problems of continuous redesign are well understood by those who draft the law and by some of their advisers, but not, one suspects, by many others. MMP has made correction of legislative error more difficult than it used to be. These are all features of New Zealand's parliamentary system of government that conspire against the enactment of perfect laws. Fundamental change to the system

might result in better laws. What is certain is that this bill will not.

#### **Conclusions**

The bill falls short of complying with many of its own principles. Its use of open-textured language leads to uncertainty of meaning. It attempts to define good law making by reference to a set of simple principles: in doing so it obscures the complexities inherent in them and creates the same lack of clarity and uncertainty that it seeks to prevent. Legislating is a complex business. The bill suggests it is not. The bill suffers from an acute lack of problem definition and does not properly identify and assess workable alternatives. Without massive additional resources, it would be impossible to make all existing legislation compliant with the principles in the bill within ten years: the time frame is unrealistic and unachievable. The bill is a disproportionate and inappropriate response to the issue it seeks to redress.

The bill overlaps with existing legislation, restating provisions of current statutes in subtly different ways, and in doing so risks creating uncertainty and confusion. It is inevitable that the bill would alter the way legislation is interpreted, forcing a return to a methodology long ago abandoned by the courts in favour of an approach that explicitly recognises the paramount role of the legislature in a modern parliamentary democracy. There is a failure to recognise the impact that the short parliamentary term and other features of the political and parliamentary

system have on law making.

The bill will bring the courts into areas of law making that are not within their province and for which they lack institutional competence, requiring them to adjudicate on choices made by democratically-elected governments on complex social and economic issues and the allocation of resources. It will redefine the relationship between the legislative, executive and judicial branches of government and risks damaging the comity between them that is critical to a stable society.

- 1 Frustrated Contracts Act 1944, Illegal Contracts Act 1970, Contractual Mistakes Act 1977, Contractual Remedies Act 1979, Contracts (Privity) Act 1982.
- 2 Evidence Act 2006.
- 3 Animal Products Act 1999, Wines Act 2003, Forests Act 1949.
- 4 Judge Baragwanath in *Progressive Meats v Ministry of Health* (2006) and NZELC 98, 487, [2006] 1 ERNZ 892 para [30] referred to in Burrows and Carter (2009).
- 5 The commentary adopts the three-dimensional meaning given to the term 'accessible' by Burrows and Carter (2009). There is a helpful discussion in the report of the Law Commission, *Presentation of New Zealand Statute Law*, NZLC report 104, chapter 1, pp.13-22.
- 6 See the discussion on prospective overruling in *Re Spectrum Plus* [2005] 4 All ER 209 and *Chamberlains v Lai* [2006] NZSC 70.
- 7 [1976] S.C.R. 1349.
- 8 [2008] 3 NZLR 774, 786.
- 9 [2002] 2 AC 115, 131.
- 10 *Lochner v New York* 198 US (1905).
- 11 *Miller v Schoene* 276 U.S. 272.
- 12 *Smith v ANL Ltd* 204 CLR 493; *Newcrest Mining (WA) Limited v The Commonwealth* (1997) 190 CLR 513.
- 13 The members are the president of the Law Commission (chair), the solicitor-general, the secretary to the Treasury, chief executive of the Department of the Prime Minister and Cabinet, secretary for Justice and the chief parliamentary counsel or their nominees. It has three advisers: Dr Warren Young, Emeritus Professor Burrows QC and the writer.
- 14 I am grateful to Dr Craig Latham, general manager, policy advice division, Inland Revenue Department for providing me with a copy of his paper 'Flying horses and magic carpets: a view of tax policy making in a dynamic environment' (December 2009).
- 15 [2000] 3 All ER 673, 704; [1999] 4 ER 449, 454.

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