

The Regulatory Responsibility Bill: Some Issues in the Debate

The Institute of Policy Studies seminar held in response to the publication of the report of the Regulatory Responsibility Taskforce, which I chaired, provided a useful forum in which to expose and debate issues raised by the report and its proposed Regulatory Responsibility Bill. I expect that it will be one of many such occasions over the coming months for those with an interest in the issues it raised to refine their understanding and their positions. I appreciate this opportunity to respond to some of the more significant issues that contributors to the seminar raised. However, in doing so I must declare that, as the taskforce was disbanded when it completed its assignment, I can contribute only as an individual and cannot represent the views of the taskforce on the issues beyond what is in its report. I gratefully acknowledge the comments I have received from Richard Clarke and Bryce Wilkinson that were given on the same basis.

While in my view some of the criticisms raised are unrealistic, defeatist or just plain wrong, I will not attempt a detailed response to all of them. Some are about the problem the bill addresses; some are from a particular ideological perspective, questioning the real or imagined ideological foundations of the bill; others concern public policy issues and the values and capabilities of the policy advisory system, weaknesses in our democratic institutions, and quite technical legal and constitutional issues. No one has professional expertise in all of these matters, and so the issues would best be debated in depth amongst people with the various skills appropriate to the different kinds of issues being raised.

In setting up the taskforce to 'carry forward the work of the Commerce Committee', the terms of reference from the government state:

National and ACT have agreed that it is desirable in principle to legislate for principle-based regulatory policies as a complement to the principles for fiscal policy that are contained in the Public Finance Act ... The prime objective of the Taskforce is to determine what, if any amendments to the Bill would best achieve its objectives as specified in its preamble, while addressing where necessary the concerns about it that

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were considered by the Commerce Committee, or are raised in the course of the Taskforce's deliberations.

This is what the taskforce did. Questions about the problem the bill addresses and alternative solutions are covered briefly in the report, but the response to these quotes from the terms of reference is the core of its report.

For readers unfamiliar with the content of the bill, it can be briefly summarised as follows:

- Purpose: an accountability and transparency measure to improve the quality of parliamentary laws, regulations, and other kinds of legislation. 'Legislation' is very broadly defined to avoid distorting the flow of regulation into uncontrolled channels.
- The scheme:
 - specifies regulatory principles;
 - requires statements of compatibility with the principles;
 - allows for declared departures from the principles, similar to the New Zealand Bill of Rights Act;
 - grants courts the power to declare incompatibility.
- There are six principles of sound regulation, drawn from the Legislation Advisory Committee (LAC) guidelines, Cabinet Manual, parliamentary standing orders relating to review of regulations, and other sources:
 - 1 Rule of law: legislation should observe the rule of law, meaning in particular: equality before the law; access and clarity; no retrospectivity; rights and liabilities determined by the law rather than by administrative discretion.
 - 2 Liberty: legislation should not diminish a person's liberty, personal security, freedom of choice or property rights except as necessary to protect the liberty of others.
 - 3 Taking of property: legislation should not take or impair property without consent unless necessary in the public interest and with compensation.
 - 4 Taxes and charges: taxes should not be imposed except by an act and charges should not exceed reasonable cost or the benefit received.

5 Role of the courts: legislation should preserve the role of courts in determining the meaning of legislation; and, where legislation provides for administrative decisions affecting people or property, it should make clear the criteria for such decisions and provide a right of appeal on the merits to a court or other independent body.

6 Good law-making: consultation is required; there is evaluation of the need for the legislation and its effects and possible adverse consequences; benefits should outweigh costs, and legislation should be effective, efficient and proportionate.

- 'Any incompatibility with the principles is justified to the extent that it is reasonable and can be demonstrably justified in a free and democratic society' (New Zealand Bill of Rights Act).
- Certification of compatibility or otherwise with these principles is required by a minister (and responsible official except for the justified incompatibility provision).
- The superior courts may make declarations of incompatibility with the principles, but may not grant injunctions or compensatory orders for breach of the principles or the bill. Declarations are not binding on the parties to the proceedings, and have no effect on the validity or enforcement of the legislation at issue.
- Interpretation of provisions is similar to the New Zealand Bill of Rights Act.

The problem

While some of the criticisms made are peripheral to the mandate of the taskforce, some of these deserve comment as they will continue to come up in the debate over the coming months. One such issue is whether there is a problem of poor-quality legislation. Of the critical presentations at the Institute of Policy Studies seminar, some questioned whether there is a problem to be addressed at all, others said there is, and one said both of these things. Those who see a problem divide into those who think it cannot be solved and is just the price of democracy;

those who don't think the bill provides a workable solution; those who worry that the bill would chill the processes of regulation and leave things that should be regulated unregulated; and those who think alternative proposals would work better.

The submissions to the Commerce Committee produced a stream of views that there is a serious problem with the extent and quality of regulation. The government has accepted this in principle, as seen in the terms of reference it mandated the taskforce with. The previous government introduced important changes in regulatory processes, and the current government expressed its concerns with its statement in August 2009 (English and Hide, 2009). The perspective of the taskforce on the problem is presented in its report and highlights basic constitutional principles about good law that are described in various documents, including standing orders of Parliament, the Cabinet Manual and LAC guidelines. The last describe in effect a checklist of processes and substantive principles for testing legislative proposals. New Zealand's unicameral legislature and its courts, which abide by the doctrine of parliamentary supremacy, provide few

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checks and balances once legislation is introduced into the House. George Tanner's paper to the seminar sees the problem in the three-year parliamentary term, and that it has possibly been made worse by MMP. He has commented that many of the 1,900 or so statutes and thousands of regulations are pretty low grade (see Fallow, 2010). Some experienced former ministers have described the process of legislation as being occasionally fraught, messy, pressured, poorly informed and characterised by political point scoring, horse trading and compromising.

The process through which the proposal for a law to promote better legislation has come thus far has revealed a widespread agreement that there is a problem to be addressed. No doubt the definition of the problem and its probable causes will be refined as attempts to raise quality evolve. But two governments, of different persuasions, have acknowledged the problem and taken administrative steps to improve it. The problem requires a more muscular solution which tests the process against principles of good legislation, improves transparency and tightens accountability for quality with an independent mechanism for review. The taskforce's advice is based on the proposition that the LAC guidelines, the requirements for regulatory impact statements and the work of the Regulations Review Committee have not had the desired effect, and that something stronger is needed to require policy makers to take more care in the exercise of regulatory

powers by embedding more deeply into the processes principles that provide a standard by which to judge the quality of legislation. The LAC noted its concerns in 2007 that policy development is weakened by the absence of mandatory compliance with its guidelines. The proposed bill addresses this concern among other matters.

The principles

The principles included in the bill have been criticised by George Tanner because they are too briefly stated whereas the underlying jurisprudence reflects great complexity that cannot be rendered down into simple statements. This, he argues, invites novel interpretations as new meanings may be imported by the courts. I am not a lawyer but this is very surprising. The Ten Commandments did not seem to be compromised by a lack of attention to interpretative detail and why courts could be expected to attribute novel meanings to well-established principles just because they are stated simply is unclear. The state of Queensland has fundamental principles for a similar purpose.

Another criticism is that the bill gives no guidance as to how the principles are to be traded off in situations where they potentially conflict. I cannot see how it could do this, as the number of possible trade-offs that might be faced would be very large. Legislators trade off competing principles all the time. The bill would invite them to be clearer about this. The possibility that a superior court might form a view about whether parliament has been clear about why it has set aside one or more principles in a particular case should be a worry only to the extent that one thinks the courts might do this incompetently. Yet even if that unworthy fear is realised, it is hard to see what the policy problem would be, given that a government minister would then find it easy to rebut any resulting pressure to revisit the legislation. The courts have no powers to change the legislation or interfere with its implementation as a result of the bill. Guidelines issued under clause 15 of the bill would assist in applying the principles, as would government decisions on the application of the principles in particular cases, and

Regulations Review Committee and court decisions. The meaning of the principles in operation would be elucidated in this context in a considered manner for the benefit of future policy makers.

Some critics say the principles are not universally accepted and reflect a neo-liberal view of the role of the state. However, the principles are really nothing more than a 'plain English' statement of very long-established elements of our law, as evidenced by the LAC guidelines and other sources.

There is, of course, ample room for discussion as to whether the statement of the principles in the bill could be improved if more minds were brought to bear on them in good faith. The taskforce debated the statement of the liberty principle at length, with a strong view being expressed that an even shorter statement than the one adopted would be better. The point is that the statement of a principle is one thing and the discussion of accepted applications of and departures from it is another. For example, the statement of the simple commandment 'thou shalt not kill' leaves the examination of whether it applies to plants and animals or times of war or self-defence to another place. The taskforce catered for the need for clarification or elaboration by providing in the proposed bill for ministerial guidelines to be promulgated. Some of the critics of the proposed principles seem to have overlooked this mechanism for answering their objections.

Another suggestion is that the merits appeal provisions could be limited by excluding circumstances where such review is impractical. Again, this looks like confusion between the statement of the principle and a statement of valid reasons for departing from it. Under the proposed bill, the minister would state that merit appeal was not being provided for because it would be impractical to provide it in the particular case. Just being difficult to provide should not, of course, be reason enough to exclude appeal rights. The discretion in immigration policy, for example, is an area where appeal processes involve complex judgments of individual human circumstances, but also an area where oversight of the use of discretion through appeal is essential.

The property right principle is not as innovative as some critics have suggested. It extends the protection of land under the Public Works Act to a wider definition of property. I have already responded in another article to a point made by Richard Ekins that the concept of compensation for impairment of property is new (Wilkinson and Scott, 2010). It already exists as 'injurious affection' and 'damage' in the Public Works Act, and was in the Town and Country Planning Act.

Common law and the role of the courts

Critics of the bill seem to take a hard line on the role of the courts in commenting on the quality of legislation. Elements of the argument are that judge-made common law has receded into near insignificance in New Zealand: we are now a country run by statute and parliament reigns supreme. One critic asserts that 'statute law is not only king but emperor'. The implication is that there has been a very rapid decline in the common law influence since the 2001 drafting of the LAC guidelines, which require consideration of whether fundamental common law principles have been respected and describe statute law as 'a continent within the ocean of the common law'. With the common law diminished to near insignificance, the argument goes that parliament is supreme and that for courts to form views – albeit without legal consequences – on legislation is to bring the courts into the political domain and to risk their independence. Their role is only to interpret laws in accordance with what parliament intended, regardless of their conformity with common law principles.

This view, which was in evidence at the seminar, looks revolutionary, is contrary to the LAC guidelines, is inconsistent with the approach of section 6 of New Zealand Bill of Rights Act, and would, I am sure, come as an unpleasant surprise to most of those New Zealanders who think about these things. No doubt there are subtleties in this position that I am missing, not being a constitutional lawyer. But one does not have to resort to the florid argument that much of what was done by the Nazis was legal to raise concerns over the risk from poor legislation to the welfare of New Zealanders arising from the exercise of power by the government restrained

only by an obedient civil service and a somewhat supine parliament.

Protection of the rights of the minority from the will of the majority is fundamental to sustaining civil society and thereby democracy. The rule of law does not mean that any law a legislative body passes is beyond rebuke by the courts, even in a country without a written constitution and with a preponderance of statute over common law. The rule of law and the protection of citizen rights are intertwined, as is explained simply and powerfully in a recent book by Tom Bingham, an eminent British judge (Bingham, 2010). He explains how a commitment to the rule of law implies a commitment to the observance of fundamental rights, and acknowledges the possibility that parliament might pass laws that are not sufficiently respectful of them. Given that the courts have established expertise in the finer points of the rule of law and are operated under requirements of great transparency and pressure for consistency, they are the natural parties to provide opinions on these matters.

Bad laws are more than a theoretical possibility. The non-transparent and chaotic use of regulatory powers in the economic realm in the early 1980s under the Economic Stabilisation Act, the National Development Act, the Public Finance Act and the Reserve Bank Act caused great economic harm. More recent episodes over the foreshore and seabed legislation, the anti-terrorism legislation and the campaign Finance legislation show that parliament can pass legislation it quickly regrets and barely bothers to defend when the consequences of poor policy and drafting become apparent. The anti-terrorism legislation was particularly disturbing in this regard. No one took any responsibility for passing a law that the solicitor-general stated after the fact was not capable of implementation. These are not trivial issues either, as these acts have fundamental consequences for property rights, democratic rights and civil rights. Our parliament should not get these things so badly wrong.

Also, tension between the will of the majority and principles of good law making is not a remote and rare event, but a day-to-day affair. The recent debate

over the government's welfare reform requiring some but not all beneficiaries to be the subject of work requirements is a typical example. The minister said that most people would agree with the changes, which may well be right, but where a fundamental principle about non-discrimination may be involved it would be no bad thing for the policy makers to have stronger incentives to think through the trade-off being made, and to be transparent about how they view it and possibly subject to authoritative comment. At the time of writing it would seem that there is similarly a need for greater clarity about how principles of non-discrimination are being applied or traded off in the development of legislation for the whānau ora policy.

Some of the opponents of the taskforce's bill would likely respond to these concerns by arguing that democracies make mistakes, and fix some of them; that there are other ways to deal with these issues; and that the courts have no place in commenting on whether laws are consistent with well-established principles of good law in a democratic society. But what the courts are invited to do by the bill is not to interfere with the laws themselves but to use their accumulated knowledge and wisdom to make declarations, which are binding on no one, if they are of the view that a law is inconsistent with these principles. This is about transparency in relation to established principles that judges are best placed to consider. This no more politicises the courts than their

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long-established judicial review powers do.

Furthermore, courts already have the power to make declarations about consistency with section 19 of the New Zealand Bill of Rights Act (freedom from discrimination), and probably also other provisions of that act. United Kingdom courts have made declarations about compatibility with the Bill of Rights Act there. Critics note that this is backed by European constitutional arrangements that render the example irrelevant to New Zealand, although many of the rights in question are ones that are precious to New Zealanders as well.

Implementation and administration

There has been resistance within the bureaucracy to the bill on the grounds that the capability to do the work is low. Obviously, this is a transitional matter of resource management and capability development, other things being equal. The taskforce viewed the potential rate of return on improved business regulation in particular as being very high if the bill contributed to even a small improvement in productivity. Much of the cost would be in reallocating existing expenditure by changing the methods of policy analysis to incorporate consideration of the matters in the bill. If parliament does legislate for improved quality of legislation, then public servants will have to add capability in regard to these requirements to the skill requirements of policy advisers. That they do not have it now when most of it is already required under the LAC guidelines, regulatory impact statements and the Cabinet Manual is disappointing. The taskforce recommends that the implementation of the bill would be controlled by the relevant minister, who could phase its introduction to match the build-up of analytical capability.

In order to ensure that the bill provides

a positive influence on dynamic change in the policy advisory system over time, its provisions are designed to support and add strength to the incentives to lift the quality of policy development. If it is to succeed it would work with the grain of the policy development system by being embedded in the processes and in the methods of analysis, along with everything else these contain. Otherwise, there would be some validity to the criticism, fairly made in respect of the LAC guidelines, that the bill would lead to check-box compliance that undermines the achievement of its objectives. The bill's implicit requirement for all legislation to be examined for consistency with the principles within ten years has aroused particular criticism as being unrealistic. George Tanner notes that it took 15 years to revise the Income Tax Act, as an example of the level of effort imposed by this clause. But the bill does not require all legislation to be revised within that period. After ten years a court declaration in respect of an act could be applied for. If that application is successful, examination of that act could be brought forward, and surely should be brought forward.

Alternatives to legislation

The dominant view in the select committee consideration of the original bill was that self-imposed measures by executive government had been shown not to work, and there is the experience of other countries to support this view. The view of the taskforce was aligned with this in the sense that, while it saw merit in the moves the government is making to improve its regulatory performance, it recommended a legislative footing to underpin these changes and to overcome the resistance within government that has rendered past efforts at self-improvement disappointing. The taskforce also recommended that the standing orders

be modified to reflect a more robust role for the Regulations Review Committee. This could, for example, put roadblocks in the way of hidden taxes and excessive delegations of parliament's powers, such as happened, in my opinion (expressed to the select committee at the time), in connection with the creation of the Electricity Commission. Legislating for a set of principles will provide a stronger footing for parliament's measures to improve the quality of legislation. This footing seems necessary – remembering that standing orders can be amended or even suspended very simply and so amendments to the orders on their own may not be a sufficiently strong protection for the principles.

Conclusion

Support for the bill was more evident in the select committee than in the Institute of Policy Studies seminar. But it is more important in the progress of the debate over it for the proponents to test their arguments against their critics than to recite from their supporters. The seminar was a useful step in this process, and I hope that coming debate over the issues raised by the bill will sift the wheat from the chaff and isolate and refine what really is in contention.

References

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