

The Case for Better Parliamentary Scrutiny of Legislation

I began as a sceptic of a Regulatory Responsibility Bill. It was obviously a deliberate echo of the Fiscal Responsibility Act 1994. And of all the reforms for which the reform period of the 1980s and 1990s is now remembered (the State-Owned Enterprises Act 1986, the State Sector Act 1988, Public Finance Act 1989, Reserve Bank Act 1989 and so on) the Fiscal Responsibility Act I have always regarded as the least significant.

The Fiscal Responsibility Act's mandatory requirement to use generally accepted accounting standards in the government's accounts was a step forward, even if it merely made obligatory what was by then happening anyway. Arguably this helped reduce the risk of a future government sliding backwards into creative accounting. But the requirement to report against certain principles of responsible fiscal management seemed subjective. That is, the principles themselves seemed to leave too much room for interpretation. I thought it would be too easy to nominate

soft targets as to what was prudent. And too easy to explain away poor performance.

Yet over the years since 1994 a remarkable number of countries have adopted fiscal responsibility regimes, even down to copying the name. Of course, that doesn't prove that the regime is worthwhile here. But Brazil, Germany, Ghana, India, Nigeria and the United States presumably thought they were doing something worthwhile when they adopted similar rules.

What these regimes share with the Regulatory Responsibility Bill, and, for that matter, the Reserve Bank Act, is that they are all about transparency. Notoriously, the Reserve Bank regime doesn't stop a government changing the bank's inflation target. But it can't do so secretly, as happened when the government rather than the bank used to manipulate the country's money supply. What the act ensures is not low inflation,

but transparency.

Similarly, the Fiscal Responsibility Act (which is now part of the Public Finance Act) and the proposed Regulatory Responsibility Act both involve open reporting against pre-set principles. The Fiscal Responsibility Act doesn't stop the government running a deficit – i.e. spending more than it is raising in taxes, as it is right now. And the Regulatory Responsibility Act wouldn't stop a government (or an individual member of Parliament) introducing legislation that cut across established principles (such as those in the Legislation Advisory Committee's guidelines) any more than at present. But they would have to be more transparent about it.

So the approach of defining key principles in advance and assessing legislation against them is not new. Apart from the Public Finance Act and the Reserve Bank Act, officials and ministers

David Caygill served in senior ministerial roles during the fourth Labour Government (1984-90), including Health and Finance, and retired from Parliament in 1996. Since then he has been a member or chair of various boards, including the Accident Compensation Corporation and the Electricity Commission. He was a member of the Regulatory Responsibility Taskforce.

are currently supposed to consider whether draft bills comply with the Legislation Advisory Committee's guidelines. But, as their name implies, these are merely guidelines; in practice they are often ignored, especially, where it matters most, by the Cabinet.

Another regime, close to the heart of the legislative process, also judges one subset of laws – namely regulations – in the light of pre-set principles. I refer to the Regulations Review Committee. As presumably most readers will know well, this is a standing committee of the House of Representatives whose terms of reference are set out in the Standing Orders of the House. The committee customarily examines all regulations shortly after they are promulgated. It does this against nine criteria, any of which can form grounds for drawing a regulation to the attention of parliament.

Some of these grounds use archaic language, such as that a regulation 'trespasses unduly on personal rights and liberties'. Some are narrow: for example, that the regulation 'excludes the jurisdiction of the courts without explicit authorisation in the enabling statute'. Others are broader and more subjective: for example, that the regulation 'contains matter more appropriate for parliamentary enactment', or it 'appears to make some unusual or unexpected use of the [statutory] ... powers under which it was made'.

These latter grounds of review remind us that this system of review applies only to regulations, although this term is defined broadly in the Regulations (Disallowance) Act 1989. In fact the Regulations Review Committee also looks at a number of bills, to the extent that they contain the powers to make regulations. The committee considers whether these powers have been framed too broadly or would allow the imposition of retrospective penalties, for example. On occasion the committee has also been asked to advise on regulations that have not yet been promulgated.

Despite having operated for many years, this system is not well known.¹ Nevertheless, in the writer's opinion it works well. I am influenced in this view by the experience of having chaired the committee between 1990 and 1993. It is a

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specialist committee and operates largely away from the public eye. But it provides a means of reviewing any regulation, whenever it was made. So, something that seemed innocuous at the time it was drafted and promulgated can be examined years later, but only against those nine pre-set principles or criteria, the last of which is something of a catch-all: 'for any other reason concerning its form or purport [the regulation] calls for elucidation'.

The mechanism of reviewing bills and regulations against a small number of fundamental principles is the core procedure now proposed in the Regulatory Responsibility Bill. Earlier versions of this bill put more emphasis on officials reviewing their department's attention to key regulatory principles and producing annual statements of compliance. The taskforce, which reviewed the previous proposals, saw more benefit in a mechanism which applied at the front end, so to speak, and to every proposed bill or regulation. Yet the mechanism we suggested is not without precedent. Nor would it, in our judgment, involve very much more effort than is in theory at least already supposed to be devoted to such compliance activity. The Regulations Review Committee is a form of *ex post* scrutiny rather than an *ex ante* safeguard. Another, closer analogy to our recommended approach is the requirement that the attorney-general consider whether proposed bills will comply with or breach the principles in the New Zealand Bill of Rights Act. Our recommendation would neither usurp nor duplicate that process. In effect it would add a further set of principles as review criteria and would impose a review and disclosure obligation on all ministers or agencies proposing bills or regulations.

The points raised thus far in debate on this proposal echo discussion which took place amongst the taskforce itself. Is

it right to encompass all regulations and all bills? Well, all regulations are currently reviewed, albeit after the event. Bills are even more important and categorising them into some that matter and some that don't seems problematic. On the other hand, the 'principles of responsible regulation' we proffer are unlikely to be the last word on things that matter. Is the list proposed too narrow? The taskforce did consider simply giving some form of legal force to the current Legislation Advisory Committee guidelines, from which these principles have largely been derived. Those included in the draft bill are indeed only a selection of what seem to be the most important issues to consider and principles to preserve. The LAC guidelines will remain an important source of advice for ministers and law drafters. But, bluntly, since they are often ignored at present it seems we need something more.

Then there is the suggestion that in any event our suggested process may be ineffective, since ministers will remain free to propose and parliament to adopt legislation which does not comply with these selected principles. Partly this query underlines the point made earlier that the essence of the process is transparency. The same point may be said of the parallel provision in the New Zealand Bill of Rights Act. This too does not prevent legislation which violates these rights. But it does draw attention to such infringements, arguably adding to the quality of public debate.

I would argue that if what is proposed is not the final answer, it is at least a reasonable start. More, it would be an improvement on the present legislative processes. But perhaps the most important question to consider in response to these proposals is: do we accept that our current approach to legislation presents problems? What does seem widely accepted is that

our system contains fewer checks and balances compared to many others. Our unicameral legislature, the supremacy our courts accord to acts of parliament, and the absence of any single, clear statement of constitutional principles are all well known as disadvantages or at least risks in our current parliamentary system.

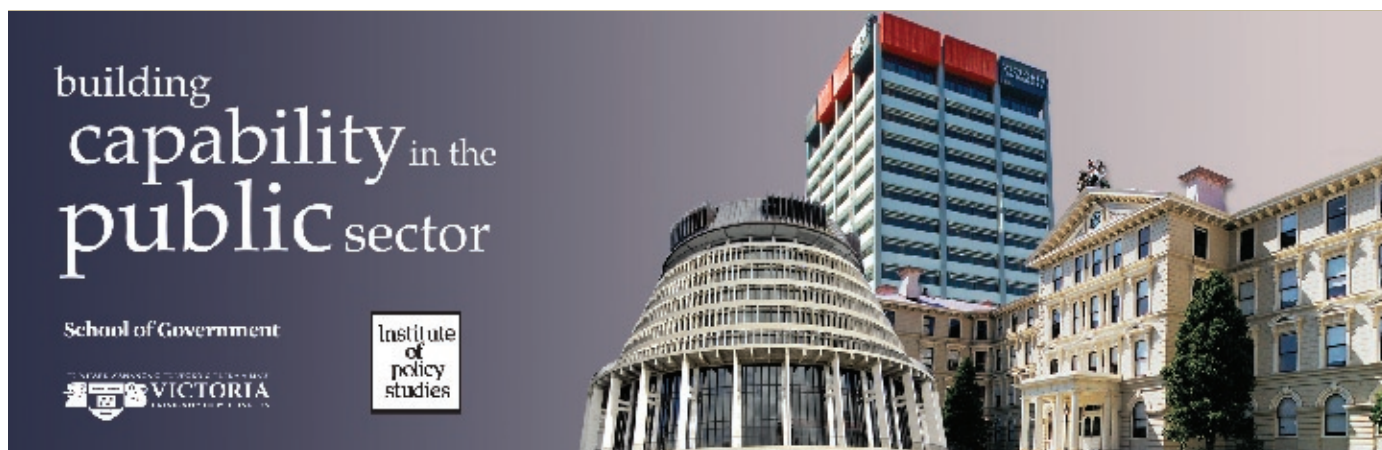
The adoption of MMP – mixed-member proportional representation – as the means of electing members of parliament has not diminished these risks or deficiencies. Nor has it made the legislative process more principled. Indeed, it may have made it less so, at least in the sense that the introduction of more parties has at times made the process more opaque as well as slower. The speed with which legislation was enacted under the

first-past-the-post electoral system was certainly a source of criticism. But I would argue that slowing down the legislative process has not made it more principled.

The taskforce's report gives examples of legislation that has generated controversy in recent years. These include the cancellation of the West Coast Accord whilst specifically denying a right to compensation; the passage of the Foreshore and Seabed Act; the unbundling of Telecom's local loop; and the amendment to the Overseas Investment Regulations in the context of the Canadian bid for Auckland airport. Whatever one thinks of these issues, none of them could be thought trivial.

My own favourite example of unprincipled legislation (or in this

case regulation) is cited on page 47 of the taskforce's report. It concerns a 1993 amendment to the Freshwater Fish Farming Regulations. A previous government had allowed the farming of marron, or freshwater crayfish. A new government changed this policy, as it was entirely entitled to do. It also decided that the country's sole freshwater crayfish farm needed to close. But instead of purchasing this farm, or negotiating some form of compensated exit, the government promulgated regulations that prohibited the sale (or transfer from the farm by anyone other than an official) of freshwater crayfish. The farm was, in short, ring-fenced. It was also rendered valueless. About the only lawful activity left would have been to cook the remaining crayfish



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and eat them, on that site. This was a classic case of expropriation without compensation.

Understandably, the case came before the Regulations Review Committee. The committee directed its chair to discuss the matter with the minister. He agreed to reconsider the measure, including the issue of compensation; a satisfactory conclusion was reached. The result was a good outcome of a poor process. In one sense, I would argue, it vindicated the regulations review process: at least the disadvantaged business had a 'court' to which to appeal. But not before the regulations had been promulgated. And not without giving the property owners considerable heartache. Expropriation without compensation is just one example of where ministers and parliament on occasion pay insufficient attention to the basic principles. But such oversight does occur. It shouldn't, and it's wrong.

In essence, the taskforce report simply argues that a principle as clear and obvious and well-settled as this needs to be given greater status. I would make exactly the same argument for the principle that public agencies and parliament should not adversely affect people's rights and liberties or impose obligations on people retrospectively. Nor should they seek to protect administrative decisions from judicial review. Or impose charges for goods and services that are not reasonable in relation to their benefits or costs. All of these I witnessed on more than one occasion during my time in parliament.

None of these are new principles. They have been argued for by many over many years. But instead of having to turn to *ad hoc* reports of the Audit Office (on the reasonableness of charges) or past speakers' rulings or parliamentary debates, the taskforce suggests bringing the key principles from these and the Legislation Advisory Committee's guidelines into one high-profile document. We then advocate requiring them to be considered, and making each minister accountable for that happening, and allowing the courts to rule if they don't.

None of these steps is novel, not even the last. A similar jurisdiction already exists under our Human Rights Act 1993, as well as the United Kingdom's Human

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Rights Act 1998. Our proposal would not allow the courts to strike down any act or regulation. But it might, as appears to be the case in the United Kingdom, cause a government to rethink a law found contrary to any of the act's principles. That seems to me to be exactly what the courts are there for.

Some years ago I was one of those who were prepared to contemplate giving New Zealand courts the powers to strike down acts of our parliament that were found to be contrary to a bill of rights. That proposal went too far for many, even though it is commonplace in a number of other developed democracies. The proposals made in this bill would do much less. But they are motivated by the same sense that on too many occasions, governments and parliament ignore fundamental principle. The Regulatory Responsibility Bill proposes a set of processes which will help invigilate our parliamentary system without undermining its authority. To my mind they are the least our situation calls for.

The taskforce also suggested, with appropriate deference, that parliament might care to strengthen its own internal systems. A Regulatory Responsibility Act would be reinforced in practice if a committee such as the Regulations Review Committee were to routinely consider all bills, as it now considers all regulations, but on their way through parliament rather than after the event. As we noted, this happens already with bills, but only with respect to their regulation-making or empowering clauses, not wider issues of principle.

Many parliaments which, like New Zealand's, draw their heritage from the House of Commons have committees like our Regulations Review Committee. Some of these do look at bills as well as regulations, and from a wider perspective than our committee. The Australian federal

parliament is one example. Queensland's legislature is another: its Scrutiny of Legislation Committee applies something called the Legislative Standards Act, which sets out 'fundamental legislative principles', including that draft laws 'provide for the compulsory acquisition of property only with fair compensation'. It seems a weak argument that if Queensland can do this, why can't we? But it is still a good question.

Let me end this call for action where I began, with a comparison with past, similar efforts to judge the actions of governments on a principled basis and so improve the quality of the country's performance. Recently the British Labour government has proposed a fiscal responsibility law. It included this measure in the latest speech from the throne, in preparation for forthcoming elections and in response to grave fiscal and economic challenges. Fortunately, the international recession seems to have done less damage here. But the challenge of legislating without damage to long-standing rights seems no less a one here than in the mother of parliaments.

The answer to both sets of challenges, economic and legislative, seems appropriately similar: identify the key principles that governments should honour and examine actions openly against them. Continuing to rely on tenuous acceptance of unarticulated principles and *ad hoc* reviews seems inadequate. A general review of both problem and solutions has led to this suggested reform. It deserves better consideration than it has so far received.

¹ Before the Regulations Review Committee was established in 1985 a similar jurisdiction was exercised by the Statutes Revision Committee.