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Special Issue: The Regulatory Responsibility Bill

A Second Bill of Rights for New Zealand?

Paul Rishworth

3

The Regulatory Responsibility Bill
and the Constitution

Richard Ekins

9

The Regulatory Responsibility
Taskforce: A View From
Inside the Room

Tim Smith

14

How Does the Proposed Regulatory
Responsibility Bill Measure Up Against
the Principles? Changing the Role of
Parliament and the Courts

George Tanner

21

A View of the Legal Debate

Geoffrey Palmer

33

‘Regulatory Responsibility’: Embedded
Neoliberalism and its Contradictions

Jane Kelsey

36

Regulatory Lessons from the
Leaky Home Experience

Brian Easton

42

Deregulatory Irresponsibility:
Takings, Transfers and
Transcendental Institutionalism

Geoff Bertram

48

The Case for Better Parliamentary
Scrutiny of Legislation

David Caygill

54

The Regulatory Responsibility Bill:
Some Issues in the Debate

Graham Scott

58

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Editorial Note

Nearly 2,400 years ago Plato in *The Republic* grappled with the dilemma of how a society could secure good government and avoid the evils of military dictatorship, oligarchic rent-seeking, mob rule, and tyranny. His solution was to develop a class of Guardians, philosophically trained to identify and pursue the good, from amongst whom rulers, or a philosopher king, would be selected. From philosophy should come the fundamental guiding principles of good government, and the Guardians' role was to prevent political power from being misused in breach of those principles.

Down the centuries since, two questions have recurred: who, in a platonic ideal state, might guard the guardians and certify the correctness of philosophy itself; and how far can democracy (which Plato mistrusted because of the tendency for populist hysteria to overwhelm sound philosophy) be made compatible with pursuit of the good for society?

The quest for good government is therefore nothing new, and history has sparked a wide range of institutional answers to the challenge outlined in David Caygill's contribution to this issue of *Policy Quarterly*, namely, how to 'identify the key principles that governments should honour and examine actions openly against them'.

Modern democratic constitutions generally address this issue by installing checks and balances, so that each of the institutions of government is held to account in some way, and at least some non-elected repositories of philosophical wisdom are preserved. The legislature, executive, Crown, judiciary, media, and the wider voting public interact under constitutional rules and conventions that have evolved into a distinctive mix in each democratic polity.

One familiar device for holding government to account is to have two chambers in the legislature, either elected on different franchises as with the US and Australian Senates, or with one chamber (largely) appointed as in the British House of Lords and the New Zealand Legislative Council which was abolished in 1951. Another approach is to give an independent judiciary the role of interpreting the meaning and implications of legislation passed by the legislature. Yet another is to enshrine the independence and integrity of separate institutions such as the news media, and the role of the university as 'critic and conscience of society' – as specified in Section 162 of the Education Act (1989).

According to Caygill, 'governments and parliament ignore fundamental principle' on 'too many occasions' in New Zealand. If so, can this deficiency be remedied by establishing, as he puts it, 'a set of processes that will help invigilate our parliamentary system without undermining its authority'?

The Regulatory Responsibility Taskforce, which reported to the government in September

2009 and of which Caygill was a member, recommended adoption of a Regulatory Responsibility Bill that would allocate to the judiciary the task of evaluating legislation and regulations against pre-specified 'principles of good legislation', and require government officials to subject legislative and regulatory proposals to a new set of political and economic tests.

The papers in this issue of *Policy Quarterly* provide a range of responses to the Taskforce's recommendations. All but two – those by David Caygill and Graham Scott (who chaired the Taskforce) – were presented at a one-day symposium organized by the Institute of Policy Studies in February 2010. The majority of the papers are critical of the core proposals advanced by the Taskforce. In particular, concerns are raised about the content of the suggested principles of responsible regulation, the risk of conflict and overlaps with existing statutes such as the Bill of Rights Act (1989), the costs of adding yet more procedural layers to the legislative process, and the notion that the proposals could be effective without undermining the authority of Parliament.

Some of the papers also suggest other, potentially less contentious, ways of achieving the main goals of the Taskforce – such as greater adherence to the Legislation Advisory Committee's guidelines on the process and content of legislation, and amendments to the Bill of Rights Act to strengthen the protection of property rights. Other papers suggest alternative ways of approaching the whole question of what good government requires, and how to pursue it. Brian Easton advocates applying a standard 'Murphy test' to all policies to establish what is to happen if a policy fails. Jane Kelsey argues for a much wider range of views than those represented on the Taskforce to be brought to bear in order to build a wide consensus before undertaking major constitutional changes. Several papers oppose bringing the notion of 'takings' into New Zealand law, especially in the unusually strong form ('takings or impairment') advocated by the Taskforce, and point towards a more pragmatic, case-by-case approach to the issue of when the state should or should not limit the rights attached to private property. Further options might equally be worth considering, including a possible extra-parliamentary legislative Ombudsman; a re-thinking of the role of the Governor-General in relation to legislation; a revival of high-quality, non-commercial, public-interest-focused media and independent non-partisan think-tanks; and the recurrent question of whether New Zealand should return to a two-chamber Parliament.

The Minister of Local Government and Regulatory Reform, Hon Rodney Hide, has expressed his hope that Parliament will make early progress on the Regulatory Reform Bill. But the proposed legislative reforms are highly controversial and raise issues of major constitutional and political significance; they deserve the widest possible informed public debate. The Institute of Policy Studies presents this issue of *Policy Quarterly* as a contribution to that debate.

Geoff Bertram and Jonathan Boston

A Second Bill of Rights for New Zealand?

Introduction

The Regulatory Responsibility Bill (RRB) would set out what it calls ‘principles of responsible regulation’ (clause 7). Regulation means all legislation, including secondary regulation and tertiary regulation such as codes and rules.

The RRB takes the New Zealand Bill of Rights Act 1990 as a model for its design. The idea is that the principles set a standard against which legislation is measured, both before it is introduced into parliament and after it has been enacted. When the legislation is secondary or tertiary legislation, the assessment for compatibility with the principles is to be made before the legislation is made.

The RRB hinges, then, around the concept of ‘compatibility’ with the principles. What are these ‘principles’?

They are set out in proposed section 7. They are essentially in two categories,

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what I will call substantive principles (what the legislation ought to be like in its substance) and procedural principles (how legislation ought to be made). Legislation should:

- be consistent with the rule of law: that is immediately specified in greater detail to mean (1) law should be clear, (2) it should not be adversely retrospective in the way it affects existing rights, (3) people should be equal before the law in the sense that it applies uniformly to all, and (4) issues of legal right and liability should be resolved by law and not administrative discretion;
- not diminish a person’s liberty, personal security, freedom of choice or action, or rights to own, use or dispose of property;
- not take or impair property without consent of owner, save when the taking or impairing is in the public interest, and

full compensation is provided by the persons who benefit from the taking.

Though expressed as a principle about what legislation should not do, the outcome is functionally equivalent to a right that people should not have such things done to them through legislation. Indeed, one of the ways in which rights are created in law is by creating duties on another not to infringe them. I will come back to that.

Then there are other substantive principles. Legislation should:

- not impose a tax unless it is in an act (a repetition of basic constitutional principle found elsewhere in our law);
- not impose charges for goods or services unless the charge is reasonable (essentially the inverse of that same constitutional principle);
- preserve the courts’ role in determining the meaning of legislation;
- provide a right of appeal on the merits whenever legislation authorises an official or a minister to take away a person’s rights or affect one of their freedoms or liberties.

These, too, are essentially rights (that legislation should have this substance). That said, they are not rights of the classic sort that get included in bills of

rights (though the last could be, albeit that it is quite expansive and potentially problematic in practice). But they could be invoked by individuals in the context of specific cases.

Then follows a list of procedural principles. These are that legislation should not be made unless persons to be affected have been consulted to the extent practicable, and unless there has been a careful evaluation of the issue concerned, and of the effectiveness of any relevant existing legislation and common law, etc.

... the line between what is acceptable and unacceptable is marked by the concept of reasonable limits that may be demonstrably justified in a free and democratic society.

These, then, are the principles against which legislation is to be measured for its compatibility. When does the compatibility assessment take place? When a bill is introduced into the house, the responsible minister and the chief executive of the relevant department are to certify as to one of three possible things:

- that the proposed legislation is compatible with the stated principles;
- that a provision is incompatible, but the incompatibility is reasonable and demonstrably justified in a free and democratic society (a possibility set out in clause 7(2));
- that it is incompatible and the incompatibility is not justified, and that there are reasons for proceeding with it despite the unjustified incompatibility (surely a very rare possibility).

Obviously there is a fourth possibility that need not be spelled out: legislation may be incompatible and unjustified, with no reason for proceeding with it. In that event one assumes a bill won't be introduced at all and parliament need not be troubled.

A certificate must be given also before the third reading of the bill in parliament. This is designed to ensure that proper attention is given to any amendments that have been made to a parliamentary

bill as it makes its way through the select committee process, or by way of supplementary order paper.

After legislation is enacted, there are further occasions on which it may be measured against the principles for compatibility. Courts are empowered – indeed required – to give an enactment a meaning that is compatible with the principles in preference to any other meaning (clause 11(1)). It follows that any court faced with the argument that meaning A should be preferred

over meaning B, because meaning B is incompatible with the principles, will have to actually inquire into whether meaning B truly is incompatible. And this will involve it deciding whether the incompatibility is reasonable and demonstrably justified in a free and democratic society. This is judicial review.

The bill recognises that this is all in the cause of interpretation of legislation; not a licence to re-write statutes. So it follows that a court may have made the inquiry and satisfied itself that meaning B is indeed incompatible with the principles to an extent that is not justified, yet conclude that meaning B is in fact the meaning to be given because no other meaning is plausibly available. Any court that does that, going through those reasoning steps, has in fact declared meaning B to be incompatible with the principles, while (of necessity) applying meaning B.

So to this point the RRB follows exactly the methodology of the New Zealand Bill of Rights Act 1990, which similarly requires judges to measure legislation against the rights and freedoms in that bill. The Bill of Rights uses the language of consistency rather than compatibility, but it is the same thing. In a Bill of Rights case, a court is required to prefer statutory meanings that are consistent with the Bill of Rights

over those that are not. And, of course, in order to do this, it has to decide whether a meaning (the one it is being urged to avoid) is in fact inconsistent. If it decides that it is inconsistent but that it cannot legitimately avoid that meaning because no plausible alternative meaning is available, the outcome is in fact a declaration of the inconsistency of that legislative provision with the Bill of Rights. This happens not infrequently, most recently in *R v Hansen* (2007). (Incidentally, in the Bill of Rights context, courts have been rather coy about this process and whether they are truly making 'declarations of inconsistency'. But in my view and that of most commentators they plainly are, because it is implicit in the operation of the Bill of Rights that it requires legislation to be assessed against the standard of respect for rights.)

The RRB goes further than the Bill of Rights and makes it quite explicit that the courts are to make declarations of incompatibility in relation to a legislative provision, if that is their conclusion. They can do this only after the department responsible for the legislation has had the chance to provide its view on the legislation's compatibility, and only after the solicitor-general has been given notice. No further consequence attaches to a judicial declaration that legislation is incompatible with the principles and that the incompatibilities cannot be justified in a free and democratic society. That is the same as under the Bill of Rights. It is moral suasion, the courts being able to be enlisted by litigants to express a view about the consistency of legislation. This is the model under the Human Rights Act 1998 (UK) as well, where legislative adherence to the judicial declaration is the norm.

It can immediately be seen that there is a very close connection between the RRB and the existing New Zealand Bill of Rights Act. Each sets standards for legislation. The standard comprises a set of principles, in one case, or rights, in the other, and also recognises that these are not absolute. They can be reasonably limited. But they can also be unreasonably limited. And the line between what is acceptable and unacceptable is marked by the concept of reasonable limits that may be demonstrably justified in a free and democratic society.

Why the Regulatory Responsibility Bill is a bill of rights

I want to start with what a bill of rights is, and then explain why this RRB is rather like having a second one.

The idea of a bill of rights is to set standards: a baseline below which law and executive action should not fall. The classic bill of rights is imposed upon a legislature by a higher law: as is the US one (ratified and adopted by constitutional conventions of 'the People'), and the Canadian one, imposed by the UK parliament upon Canada. Once imposed, they set the terms on which all law is allowed to operate. They are, in a sense, a message from the people to the organs of their government. Or in the case of Canada, from a superior legislature to an inferior one.

More recently, beginning in Canada with the 1960 Canadian Bill of Rights, there has emerged the subtly-different phenomenon of legislative bills of rights that are essentially messages from the legislature to the courts. These bills of rights, passed as ordinary statutes, say 'here are the rights and freedoms that we in parliament think are fundamental in our society, and we affirm them in the law'. Then, because just affirming them does not necessarily accomplish anything in itself, these statutory bills of rights give instructions as to what happens when confronted with legislation that does not meet the standard. In the case of the New Zealand Bill of Rights Act 1990, and some of its recent counterparts in other countries,¹ interpreters are told to interpret legislation consistently with the affirmed rights (recognising of course that legislation will be consistent with them if it limits rights only to the extent that is reasonable in a free and democratic society).

What goes with the territory, with this sort of bill of rights, whether it is laid out explicitly or not, is that a court can declare that a provision in legislation is actually inconsistent with a right or freedom in a bill of rights. This is inevitable because the inquiry into whether a meaning ought to be avoided for bill-of-rights reasons is necessarily an inquiry into whether it is inconsistent with the bill of rights.

The RRB commentary claims that by setting out principles of responsible

regulation, the bill is not creating free-standing rights for individuals. The claim is that the RRB is simply saying 'here is what legislation should be like: it should not diminish a person's liberty or personal security or take or impair their property [etc]'. The argument is that this is different from saying that 'everyone has a right to liberty, security and property'. But it isn't different.

Let's consider the most famous bill of rights, the US one. The First Amendment is explicitly a set of prohibitions on Congress. It says:

Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech; or of the press, or the right of people peaceably to assemble, and to petition the government for a redress of grievances.

In New Zealand ... a law that diminishes liberty, or that takes or impairs property, would be incompatible with the principle but would not for that reason be 'dis-applied'.

The rights of persons in the United States to freedom of religion and speech flow from that provision. To say that Congress has no power to make certain laws is to say that persons have a right to be free from such laws. Or, to put it in the language of W.S. Hohfeld's jural relations, when Congress has 'no power' to infringe a right, persons have an immunity from their rights being infringed by Congress. That is what a bill of rights is.

In fact, as it happens in the United States the First Amendment is not construed just as a limitation on the power of Congress. It is routinely applied against executive action – against municipalities and school boards and public sector employers. The principle is that the executive and other state actors cannot be taken as empowered to do things that Congress could not itself enact and command by law. So in that way, too, the First Amendment truly does

equate to a right of free exercise of religion and free speech.

So when the taskforce commentary says that the principles are guidelines for good legislation rather than individual rights that have as their bases respect for human dignity and freedom, I don't agree. To say that there is a principle that legislation should not diminish a person's liberty is functionally equivalent to saying that there is a principle that a person's liberty should not be diminished by legislation. And it would, obviously, be the person whose liberty (or property) is diminished (or impaired) who seeks to bring the arguments to a court.

Though the RRB calls them 'principles', they are a *standard* for legislation (against which legislation can be declared incompatible, or alternative meanings chosen on the basis of the standard not being met). But it hardly matters what they are called. And nothing can be

made of the fact that the RRB would say 'legislation *should not*' whereas in the US the First Amendment says Congress '*shall make*' no law. In the RRB context (of declarations of incompatibility being possible), *should not* means *must not*.

Indeed, the very idea of the guideline about liberty and security of the person owes everything to the importance of those concepts as rights. That is why they are there. That is why the principle is important.

The only difference between the US formulation and the RRB formulation is that in the US a law that does abridge free speech (say) to the point of being ruled inconsistent with the Constitution is not applied. (People often say it is 'struck down', but that is a figure of speech. The real point is that laws inconsistent with the Constitution are not applied.) In New Zealand, in contrast, a law that

diminishes liberty, or that takes or impairs property, would be incompatible with the principle but would not for that reason be 'dis-applied'. Still, a court could declare that it does diminish liberty or wrongly takes property and so amounts to incompatibility with the principles. That is, it could do under the RRB for liberty and security, etc precisely what it can do under the Bill of Rights for the rights in that document. That is why, in its key provisions – in its truly novel provisions – the RRB is functionally equivalent to a bill of rights.²

What flows from this?

While civil and political rights are often reasons for restricting what governments can do (whether by legislation or otherwise), it is the social and economic imperatives that prompt the doing of something, rather than nothing.

Having two bills of rights is not a good idea

I think it a needless confusion and dangerous to have foundational civil and political rights spread around two statutes that operate in different ways. Here is why. First, I think it a bad idea to begin to proliferate statutes purporting to lay down a vision of the nation's fundamental values, against which legislation is to be compared. If rights in the RRB are of the sort that should be in the New Zealand Bill of Rights Act, then that is where they should be.

Second, the RRB's right of 'liberty' is the general concept of which the rights in sections 12 to 18 of the Bill of Rights are specific iterations. So the RRB effectively overlaps with the Bill of Rights Act, and this will be confusing for reasons I come to shortly.

Proliferating statutes dealing with law-making values

Recall that a statutory bill of rights is effectively one parliament saying 'here is what we think is really important. Courts from now are on are to resolve interpretation issues by preferring *our* set

of values. If they can't resolve them within the rubric of interpretation, but consider the legislation of another parliament (a later or an earlier one) to be inconsistent with what we said, then declare that inconsistency.'

Law students learn early on that the law set its face against one parliament trying to control the sphere of law-making power of later parliaments. It goes without saying, for example, that if our 2010 parliament were to enact a law today that said that all its own laws were to set a standard against which future laws are to be measured, then this would be illegitimate. That seems

intuitively wrong, as being contrary to the idea of democracy.

A bill of rights is not exactly like that but it is close. It is saying to future parliaments, and in respect of past ones: prefer interpretive solutions that give effect to our values and standards. This is generally regarded as acceptable because the values and standards are heavily abstracted and have a transcendent appeal; they are relatively timeless and attract a great deal of support in the community.

Statutes that do this need to have a sort of sanctity. Statutes about human rights tend to have this. Ours is drawn from the International Covenant on Civil and Political Rights, which itself reflects the Universal Declaration of Human Rights, proclaimed in force after a consultation involving most countries of the world. Another example of a statute with sanctity, drawn from another context, is the English statute by which the United Kingdom joined the European Economic Community in 1972. In that statute it was said that henceforth, in cases where UK law was inconsistent with European Union law operating in the UK, then the

European law was to prevail. In a famous 1990 case called *Factortame*, and in another famous 2003 case called *Thoburn*, the English courts held that the 1972 statute actually set the rules: EU law overrode English law. That statute really *did* mean that even if a later parliament enacted a law inconsistent with EU law, then courts were bound to give effect to EU law. The 1972 statute (requiring this result) had a sort of sanctity because of the political commitment to Europe which the people had come to accept.

So, even ordinary statutes setting standards on fundamental matters like rights, or giving effect to international treaties such as the Treaty of Rome, can have quasi-constitutional effect – controlling or at least influencing the substance of earlier and later law. Such statutes are sometimes called superstatutes. They are unlikely to be repealed. Even though it is technically possible to override them, for example by a later parliament passing a law saying that the law must prevail despite the superstatute, this is not often done.³

Now, I think it unwise to attempt too many of these statutes. I fear that if the RRB is enacted as it is, then it would invite further articulations of standards by subsequent parliaments.

There are indeed deep principles in our constitutional system that we have not thought it right, so far, to articulate in law. They are like reasons for action (as opposed to limits on action, which is what bills of rights tend to be). Cass Sunstein has called them constitutive commitments (Sunstein, 2004). Consider this list drawn from President Franklin D. Roosevelt's wartime speech to Congress in which he proposed a 'second bill of rights', to include:

the right to a useful and remunerative job in the industries or shops or farms or mines of the nation;

the right to earn enough to provide adequate food and clothing and recreation;

the right of every farmer to raise and sell his products at a return which will give him and his family a decent living ...⁴ (from Sunstein, p.243)

Now, Roosevelt did not propose these for inclusion in the Constitution as such,

but he did see these rights as an imperative for political action, which would of course include appropriate legislation. The truth is that all governments do likewise: politicians and parliaments of various persuasions do their honest best to formulate laws and policies that promote economic prosperity and well-being. Obviously, politicians differ amongst themselves as to the best ways of achieving these aims; they may place different emphases, for example, on sustainability and foreign policy, or individual initiative and collective responsibility. But these sorts of basic commitments are foundational to New Zealand society, as they are elsewhere. While civil and political rights are often reasons for *restricting* what governments can do (whether by legislation or otherwise), it is the social and economic imperatives that prompt the doing of something, rather than nothing.

I do not think that social and economic rights are matters for affirmation in statutes as standards for all law – certainly not if they are to be judicially enforced. But some might. Some might want an enactment that contains a set of welfare principles with which our law should be compared for consistency. Their set would be a very different one from the RRB's. Such people might point to the fact that the RRB expresses its principles in a way that tends to demote environmental or welfare concerns by conceiving them as being incompatible with liberty, when it might be said that they are intrinsically part of it. Here I am referring to the particular construction of proposed section 7(1) (b), which suggests that the only reason for restricting liberty is to protect the liberty of others. Restrictions based on sustainability or other imperatives must be conceived as incompatible with liberty (though they may then be rescued under proposed section 7(2) as 'reasonable limits' on liberty!). That formulation does seem to demote communitarian concerns.

I do not favour the multiplication of statutes that purport to lay down standards for law and public conduct. I think that where rights are appropriate for it, they should be in the Bill of Rights. That is the place where civil and political rights belong. The RRB if enacted might be countered by further articulations of

principles for responsible law making, and we would not be advanced by multiple principles of this type.

Liberty and overlap with the Bill of Rights

A second reason why the RRB would be confusing if enacted is this. 'Liberty' in clause 7(1) denotes all the fundamental freedoms in sections 13 to 18 of the Bill of Rights: freedom of expression, freedom of religion, association and assembly. Hence the word liberty is the window through which (much of) the Bill of Rights is incorporated into the RRB, rather like the due process clause of the 14th Amendment of the US Constitution through which (much of) the US Bill of Rights is made

The simple fact is that the Bill of Rights ought to contain the full catalogue of fundamental rights that we want to protect. It would make no sense to have two statutes dealing with the same set of rights in slightly different ways.

applicable to the states. The US Bill of Rights was initially aimed at imposing limits on Congress and the federal government, and not the states, and it was only with the Civil War amendments in 1865 that civil rights obligations were constitutionally imposed upon the states. The 14th Amendment says: 'no State shall deprive a person of life, liberty or property save by due process of law'.

The United States Supreme Court has said that the concept of liberty includes 'fundamental rights', of which those set out in the First Amendment are examples, and in this way the First Amendment has been applied to the states. Something similar would happen with the RRB. Assessing a bill for its consistency with liberty would involve assessing it for its impact on freedom of expression, religion, association and assembly, and so replicate these rights in the Bill of Rights. But because the RRB has more protections built in than the New Zealand Bill of Rights Act 1990 (to which I come below), the rights would be protected more stringently.

I am not complaining about that, but it is complex and also a little incoherent. The simple fact is that the Bill of Rights ought to contain the full catalogue of fundamental rights that we want to protect. It would make no sense to have two statutes dealing with the same set of rights in slightly different ways.

We have already faced a period of needless confusion from 1993 to 2001 when the Human Rights Act 1993 and the Bill of Rights each purported to cover public sector discrimination but in different language, and happily that was resolved by the 2001 amendment which made our Bill of Rights the sole standard. I believe there would be needless confusion if the

RRB were enacted, particularly in relation to the certification requirement against the standards of liberty and security.

Recommendation 1: Put the appropriate rights into the Bill of Rights

I come, then, to my recommendations. Firstly, I would be in favour of amending the Bill of Rights to include some of the rights in the RRB.

First, 'security of the person'. The New Zealand Bill of Rights Act 1990 mentions 'security of the person' but only elliptically. It is in the marginal note to sections 8 through 11, which deal with the rights to life and against medical experimentation and torture. These are all iterations of the general right to security of the person. But they do not quite capture its full scope. It make sense to add 'security' of the person to the Bill of Rights.

Next, property. It would be appropriate to consider amending the Bill of Rights to include a right to property. This is found in most modern bills of rights, including the South African one and the Victorian one.

I hasten to add that amending the Bill of Rights is a serious business and would have to be done after much study and consultation and in a bi-partisan way. We would need to be clear about the implications. But I think that a right to property should now be explored.

So in this respect I am inclined to go further than the taskforce. The Bill of Rights is the place for these rights. They do not belong in a list of principles for good legislation; not, at least, when there is a New Zealand Bill of Rights on the landscape.

I would be prepared to consider also a right to 'liberty' in the Bill of Rights. It is in the Canadian Charter and also the Victorian one. At its core it denotes physical liberty, and the well-charted risk is that it may be judicially interpreted to allow for substantive review (that if liberty is to be taken from a person, then there should not simply be fair procedure, but substantively fair laws that do not invade deep personal rights).

And then there is the spectre of the *Lochner* era, when the US Supreme Court held that liberty included 'freedom of contract' and invalidated (that is, refrained from applying) some labour and welfare laws. That spectre might be reason enough for rejecting the RRB, but nonetheless I think it has to be said that for the last 70 years the concept of 'liberty' has been cautiously applied in the US, and since 1982 in Canada also. And if it were in the New Zealand Bill of Rights it would reach some aspects of rights that are not dealt with in the Bill of Rights, particularly the ability to make intimate decisions about one's life and one's children. Recognising the statutory nature of our Bill of Rights, a right to liberty is worth seriously exploring, but for the Bill of Rights and not an RRB.

Recommendation 2

The RRB includes 'operational provisions' that are an improvement on the Bill of Rights, and these could usefully be incorporated into the Bill of Rights. These are:

- *The need for certification of consistency as well as inconsistency.* It would be useful if the Bill of Rights required the tabling of advice about every bill

in parliament, including those where the advice is that the bill is consistent. While such advice is available on the Ministry of Justice website, it would be good for it to be publicly available within the parliamentary process.

- *The third-reading certification of consistency.* At present there is no Bill of Rights requirement for inconsistency reports after introduction of a bill, and so the effects of select committee amendments and supplementary order papers can go unexamined, in a formal sense.
- *Explicit judicial declaration power.* It would be beneficial to make explicit the courts' power to declare enactments inconsistent with the Bill of Rights. They have asserted such a power since the *Moonen* case in 1999, and acted on the basis that such a power exists since at least 1998 in *Quilter*. Courts in the United Kingdom and in the Australian states with statutory bills of rights have such power.

Recommendation 3

Beyond it being a catalogue of possible improvements to the Bill of Rights, I do not see advantages in the RRB as proposed, and many disadvantages. Essentially my reasons are as follows.

It would be a wasteful and needless distraction from the business of government if the government were to be required to defend its legislation in court against challenges that it had legislated inconsistently with these principles.

Some of the principles themselves are restatements of what is required (or prohibited) anyway – the taxation ones – and I do not find persuasive the idea that the RRB would in this respect be a useful reminder or discipline.

The strictly process principles (about the need to consider alternatives to legislation, etc) are not apt at all for interpretation principles (and are rightly excluded from the scope of declarations of incompatibility). So why have them at all? Isn't the alternative to build a culture that asks such questions? And if there isn't such a culture, it is certain that the RRB won't have any effect at all because it is essentially a set of boxes to tick. The promoters recognise that, and

that explains the concern to get judicial opinions on compatibility, but that comes at the cost of bringing judges into matters of politics and economics for which they are not trained (and of the diversion of state resources into litigation, as already mentioned).

Conclusion

I think we need to continue to build a political culture in which the answers are sought to the sorts of problems that the taskforce accepted to exist with legislation. But I do not think that bringing the judiciary in, as some sort of outside 'check', is either useful or productive, and I think that it is likely to be counter-productive. With that excised, the RRB could be parliament's message to itself, and to the executive, as to how it should behave (and how secondary and tertiary legislation should be made). But with the principles largely replicated in the Cabinet Office Manual and constitutional principle, one wonders if the RRB is necessary once the provision about judicial involvement is excised.

- 1 In fact, the Canadian Bill of Rights was the most radical 'statutory bill of rights', being held to authorise the non-application of even later inconsistent statutes, a fact to which our section 4 of the Bill of Rights is a response (and which has counterparts in section 10 of the UK Human Rights Act).
- 2 Perhaps this is why the proponents of the bill do not suggest that there should be a power to make judicial declarations of incompatibility with those process principles. And the idea of reasonable limits on those process principles is incoherent: can it really be said to be reasonable and demonstrably justified in a free and democratic society to not undertake a careful evaluation of the issue concerned?
- 3 It is significant that our Bill of Rights is essentially sacrosanct, even though it was passed in the very final stages of the 1987 Labour government with the votes only of the Labour Party.
- 4 Some of these are not too far from the Bill of Rights that was proposed for New Zealand by the Constitutional Society in 1958. Article 16 provided that no person should be denied a fair and reasonable opportunity to engage in any lawful trade, business profession or employment for which he may be properly qualified. Lest there be an argument that people could get only fair and reasonable returns, another provision said: 'nothing in this article shall prevent the making of any provision for ensuring to any person an adequate reward for his special skill or ingenuity'. Then there was the right to 'stability in the purchasing value of money in New Zealand'.

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The Regulatory Responsibility Bill and the Constitution

The Regulatory Responsibility Taskforce has recommended that Parliament enact its proposed Regulatory Responsibility Bill. The bill aims to rule out certain statutes and regulations as ‘unconstitutional’ by specifying principles of responsible regulation and by introducing three mechanisms – certification, judicial declarations of incompatibility and interpretation – to ensure that legislation conforms to those principles. I argue that the bill itself is unconstitutional: Parliament should not enact it. Many of the principles are contentious and affirming them would distort law making and democratic politics. Authorising judges to police conformity compounds the problem. The content of the principles is likely to be settled by judicial decision, which means Parliament will face improper political pressure to do as the courts direct and the validity of much delegated legislation will be called into question.

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The principles of responsible regulation

The central clause in the taskforce’s draft bill is clause 7, entitled ‘Principles’. The first sub-clause sets out 11 ‘principles of responsible regulation’ in paragraphs (a)–(k), grouped under six subheadings. The second echoes section 5 of the New Zealand Bill of Rights Act 1990 and

states that ‘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.’ It is these principles, duly limited, that are the focus of the three mechanisms.

Many of the principles are drawn from the Legislation Advisory Committee Guidelines and Cabinet Manual. The taskforce stresses the orthodoxy of the principles, saying it aimed ‘to provide a simplified and streamlined set of criteria that accord with and reflect broadly accepted principles of good legislation rather than novel principles’ (paragraph 1.11; the same phrase, minus the final four words, is used at paragraph 4.25). However, not all are orthodox – the taskforce has modified some of them. And many are not fit to be justiciable. I now outline the principles, noting what is heterodox and what should not be justiciable, arguing that they do not all warrant affirmation, either in their own right (as principles of good legislation) or as ‘constitutional’ principle.

Rule of law

The bill affirms the rule of law (paragraph (a)), but happily the taskforce has avoided one obvious trap. That is, the bill specifies four aspects of the rule of law. This is preferable to affirming ‘the rule of law’ in the abstract, for many vague conceptions of the ideal abound. The third aspect

is that every person is equal before the law. The report argues that this concerns equality in the administration of law rather than substantive equality, which would preclude unjustifiable distinctions amongst persons. The report eschews this broader right to equality on the grounds that it was considered and rejected in enacting the New Zealand Bill of Rights Act. The taskforce places (far too) much weight on the Supreme Court of Canada's argument that 'equality under the law' introduces substantive equality but 'equality before the law' does not (*Andrews v. Law Society of British Columbia* [1989] 1

Paragraph (d) states that legislation should 'not impose, or authorise the imposition of, a tax except by or under an Act'. This is orthodox but largely redundant for ... section 22 of the Constitution Act 1986 already renders invalid any tax that is not imposed by or under an act.

SCR 143). Specifying this aspect of the rule of law is risky. It is perfectly conceivable that the courts will, either now or in ten years time, interpret the phrase to introduce substantive equality and so to require judicial assessment of the merit of any distinction made amongst classes of person.

Liberties

The bill also affirms liberty, paragraph (b) stating that 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.

Very many legislative acts diminish a person's liberty or freedom of choice. This principle bars the imposition of duties unless those duties are necessary to protect 'any such liberty, freedom, or right of another' (the phrase omits 'personal security', although the later discussion, at paragraph 4.53, implies that this is an oversight). Imagine an act like the Bakeshop Act 1896 (New York), which prohibits any person from employing another to work in a bakery for more than 10 hours per day or 60 hours per week. That act would depart from paragraph (b), for it restricts the freedom of contract of employer (and employee), and is not necessary to protect any existing liberty or freedom of the employee (or any other person). The legislators might attempt, per clause 7(2), to justify their act by reference to the health of the worker or the need to protect him or her from economic exploitation. It would be open to the courts to consider this rationale and to decide that the legislation is an unjustifiable limit on liberty. This is precisely what took place in the infamous United States Supreme Court decision *Lochner v. New York* 198 U.S. 45 (1905). Enacting this principle opens the policy of almost every statute up to review on *Lochner* grounds, with that review informing interpretation and declarations (on which more below). There are very good reasons for courts not to carry out this kind of review.

Taking of property

The bill also states, in paragraph (c), that legislation should 'not take or impair ... property' unless this is necessary in the public interest and full compensation is paid, such compensation to be paid if practicable by those who benefit from the taking. This principle seems to have been the taskforce's main concern – its five examples of bad law making each concern property rights (paragraphs 2.9-2.11).

The Legislation Advisory Committee objected to Rodney Hide's original Regulatory Responsibility Bill in part because that bill purported to reflect orthodox legal principle but in truth

introduced an unorthodox conception of compensation for impairment, as distinct from expropriation, of property rights. Paragraph (c) is an improvement on its precursor in the original bill, clause 6(2)(e), which proscribed taking or impairing property save for an essential public interest and on payment of full compensation. However, this paragraph is still objectionable. It conflates takings and impairment. The effect is that limiting how one uses property attracts full compensation. The taskforce argues in paragraph 4.63 that severe impairment of property rights is tantamount to a taking. This is not true, or at least not always true: banning a certain kind of dangerous vehicle from the road constitutes a severe impairment of property rights but is not a taking of those rights for communal use. In any event, the taskforce moves from its premise that severe impairment is a taking to the conclusion in the terms of clause 7(c) that there should be 'full compensation for the taking or impairment' – no mention of severity here.

The point of the principle is to make it very expensive to limit how property owners may act, for any property owner who suffers loss from regulatory change is entitled to be made whole. Thus, if Parliament wishes to ban dangerous weapons, it must buy them. Legislation imposing mandatory closing times on certain pubs would be an impairment attracting compensation. And legislation criminalising prostitution would arguably be a taking of the goodwill of what would otherwise have been lawful brothels (the report in paragraph 4.60 takes goodwill to be property). This principle smuggles in a doctrine of regulatory takings that is foreign to our constitution. Law makers should consider the impact that legislation has on persons and their property, but this assessment is politically contentious and should not be justiciable. I note in passing that the taskforce's requirement that compensation should be paid by those who benefit from the taking is entirely novel (paragraph 4.62).

Taxes and charges

Paragraph (d) states that legislation should 'not impose, or authorise the imposition of, a tax except by or under an Act'. This

is orthodox but largely redundant for, as the report notes at paragraph 4.67, section 22 of the Constitution Act 1986 already renders invalid any tax that is not imposed by or under an act. Paragraph (e), which concerns charges, is less orthodox. It goes beyond the truth that charges should be limited to actual cost recovery, instead introducing the novel idea that charges should be proportionate to the benefits the payer receives. This would rule out, for example, a charge on manufacturers to meet the costs of a public inspectorate, the purpose of which is to benefit consumers. Further, this paragraph limits charges to ‘the costs of efficiently providing the goods or service’, which seems designed to limit actual cost recovery and to enable argument that a proposed service, function or power should be carried out by an ‘efficient’ (that is, lower cost) private provider.

The role of the courts

Paragraph (f) affirms the superiority of the courts in interpreting legislation. This is unremarkable but does affirm judicial supremacy in settling the scope and meaning of the principles of responsible regulation. Paragraph (g) states that if legislation authorises a minister or other public body or official to make decisions adverse to any person’s right or liberty, the legislation should ‘provide a right of appeal on the merits against those decisions to a court or other independent body’. This principle is novel: there is no general entitlement to an appeal on the merits in our constitution. The principle also has a very broad scope, perhaps extending to delegated law making itself, and ignores the legitimacy of decision making by ministers.

Good law making

The final four paragraphs set out the principles of ‘Good law-making’. Paragraph (h) states that legislation should not be made unless there has been consultation. Contra the report, there is no general duty of consultation in our law. Further, it is extraordinary and quite contrary to the Bill of Rights 1688 that on this principle the adequacy of the parliamentary process itself is open to legal argument and judicial ruling.

The remaining three principles amount to the truism that one should not make law unless there is good reason to make law. Paragraph (i) states that legislation should not be made (or introduced to the House of Representatives) unless there has been a careful evaluation of the issue, the existing law, the public interest, the relevant options (including non-legislative options), the identity of winners and losers and foreseeable consequences. I agree. I doubt, however, that policy makers often propose and adopt legislation in any other way (although the taskforce itself violates this principle). Their analysis may be hasty or weak, but that is different.

Paragraph (j) states that legislation should produce benefits that outweigh its costs. This is unobjectionable if it is understood to be just a vague direction to consider costs. However, if policy makers and judges take it to enjoin cost-benefit analysis then it is dangerous. The common good is not an aggregate capable of calculation. The injunction to weigh costs and benefits makes it likely that quantifiable outputs will loom too large in the law-making process. The report’s reference to maximal net public benefit suggests as much (paragraph 4.84) and the taskforce’s analysis of its own bill is not encouraging. In the final section of part 2 of its report, the taskforce purports to weigh costs and benefits. The focus is on economic benefits, weighed against actual compliance costs. This is objectionable because it ignores other reasons for good law making and non-economic objections to the proposal. Finally, paragraph (k) states that legislation should be the most effective, efficient and proportionate response to the issue. This is close to a truism, although it may (wrongly) preclude legislation that aims to support other arrangements.

The certification regime

The central mechanism for ensuring that legislation is compatible with the principles (subject to reasonable limits per clause 7(2)) is the certification regime. Clauses 8 and 9 require various persons to certify whether the legislation is compatible with each of the principles, and if not how it is incompatible and whether this is justified under clause 7(2). In respect of a

government bill, the minister responsible for the bill and the chief executive of the public entity that will be responsible for administering the resulting act must certify the bill. For regulations (broadly understood), the minister responsible for the regulation, if any, and the chief executive of the public entity that will be responsible for administering it must each certify it before making it.

The chief executive does not have to state whether or why an incompatibility is justified if a minister also gives a certificate under clause 8. The reason for this, the report states, is that the minister is the

... certification is at best a modest component in a careful deliberative process; much more important are time to consider the detail of proposals and an opportunity for experts, interested parties and other legislators to be heard.

appropriate person to judge whether a departure is justified (paragraph 4.106). The taskforce concludes that in such cases the chief executive’s role ‘is best limited to the proposal’s technical compliance with the principles set out in clause 7(1)’. However, the final two principles require the chief executive to certify whether he or she thinks the benefits outweigh the costs and whether the legislation is the most effective, efficient and proportionate response available. This means the chief executive must in effect certify whether he or she would enact this law. The certification regime thus promises to grossly politicise chief executives and to

arm them to veto government policy in a way that is flatly inconsistent with our constitutional arrangements.

If the minister does not certify the legislation, the chief executive will be obliged to certify it in full. The taskforce opines that this will be rare (paragraph 4.107) ‘as generally the power to make legislation will be interpreted not to delegate the power to make legislation inconsistent with the principles of responsible regulation’. If my analysis above of liberty and takings is sound, then the taskforce’s speculation is plainly

The problems with the certification regime are compounded by the jurisdiction to declare legislation incompatible. This jurisdiction makes what should be arguable the object of authoritative judicial ruling.

unsound. Legislation will (and should) routinely authorise delegated law makers other than ministers to depart from the principles.

It is deeply problematic to require chief executives to certify legislation. However, if one sets aside this problem, certification may seem unobjectionable: legislators should think carefully before proposing legislation. However, affirming these principles is likely to distort law making. The scheme is weighted against departures from the principles: it imposes a burden of proof on laws that limit liberty or impair property, for example. The principles are not obvious truths about what should be done. They at least require further reasoning and argument to specify them. Further, some of the principles, such as those concerning liberty, takings, charges and cost-benefit analysis, are contentious. Affirming these principles inevitably

prioritises them, through salience if nothing else, over other values.

The bill demands that law makers give reasons when they depart from the principles. Legislators should give reasons for any legislative act, reasons that substantiate the claim to have made good law. More to the point, legislation should be made by way of a process that enables assertions about a proposal’s justification to be tested carefully. Unsound principles are likely to distort reasoning. Even if the principles are sound, certification is at best a modest component in a careful deliberative process; much more important are time to consider the detail of proposals and an opportunity for experts, interested parties and other legislators to be heard.

Declarations of incompatibility

The bill introduces judicial declarations of incompatibility as a mechanism to support certification. Clause 12 authorises the superior courts to declare that legislation is incompatible with the principles specified in sections 7(1)(a)–(h), unless the incompatibility is justified under section 7(2). The power is discretionary and is subject to a temporal limit: for ten years after the commencement of this bill the courts may only issue declarations in respect of statutes that post-date it. The point of the delay is to give law makers an incentive to revise the statute book before the ten-year period expires (this incentive is reinforced by a duty on public entities, per clause 16, to review relevant legislation). The power is modelled on section 4 of the Human Rights Act 1998 (UK), not section 3(2) as the report states. Clause 13 of the bill makes clear that a declaration of incompatibility does not render the relevant legislation invalid.

The taskforce is aware of the general reasons for courts to abstain from considering the merits of legislative choices. However, the report goes on to argue that the power to issue declarations ‘is justified and necessary’ to ensure compliance (paragraph 4.121). The possibility of a judicial declaration, the report suggests, is valuable primarily because it will imprint on policy makers the importance of the principles and the need to take them seriously throughout the legislative process. If those principles ‘are

demonstrably given careful consideration by policy-makers, the Taskforce considers that the Courts are likely to give substantial deference to the judgment of the policy-makers’ (paragraph 4.122). This is speculation. The courts may well review strictly, reasoning that Parliament has charged them to police irresponsible law making.

Oddly, while the report gestures towards the experience of the United Kingdom, it says only that the jurisdiction to issue declarations ‘has been used in a number of significant cases, including consideration of anti-terrorism provisions’ (paragraph 4.118). This lack of detailed analysis is striking, for that experience would seem highly relevant to the taskforce’s proposals. The United Kingdom political authorities have repeatedly changed the law to conform to judicial declarations of incompatibility. This experience suggests that the proposed power might be very effective; however, it also suggests that the proposed power risks illegitimately prioritising judicial analysis of the merits of legislation. That is, Parliament may defer to the courts on questions that are its responsibility to answer.

The problems with the certification regime are compounded by the jurisdiction to declare legislation incompatible. This jurisdiction makes what should be arguable the object of authoritative judicial ruling. That is, the scope and meaning of the principles is settled by legal argument. The courts should not review legislation against these principles. Interestingly, the taskforce is aware of the problem. The bill excludes the final three principles (clause 7(1)(i)–(k)) from the scope of the jurisdiction. The reason for this is that ‘[t]he Taskforce considers that those issues are particularly unsuitable for judicial consideration, given the institutional limits of the adversarial process’ (paragraph 4.124). This argument proves too much. Determining whether legislation unreasonably limits liberty or property is equally unsuitable for judicial consideration, yet the draft bill authorises just such review. The danger of the jurisdiction is that it invites the courts to review the reasonableness of all legislation. The courts lack the competence for that task and yet citizens and legislators may

defer uncritically to their judgment about the merits of the law. The jurisdiction may also consume time and resources which the courts ought to devote to adjudicating disputes and which the parties ought to devote directly to law reform.

The jurisdiction is plainly a tool for the wealthy and organised to contest policy outside of the political process. It is also an opportunity to reopen past decisions. The point of the delay in applying the jurisdiction to legislation that predates the bill is to prompt law makers to revise the statute book to avoid declarations of incompatibility. The implication is that law makers should identify and change legislation that, for example, unreasonably impaired property without compensation. This entails that law makers should either remove the impairment (the limitation on use) or compensate. Hence, if this bill is enacted, property owners will after ten years sue for a judicial declaration that legislation that predates the bill impaired their property without compensation. In other words, the jurisdiction arms property owners to reopen and to challenge the legitimacy of past regulatory takings.

The interpretive direction

The bill introduces another supporting mechanism in clause 11, which states that '[w]herever an enactment can be given a meaning that is compatible with the principles (after taking account of section 7(2)), that meaning is to be preferred to any other meaning.' This clause is not prominent in the scheme of the bill – it is not included in the purpose provision in clause 3 – or in the report at large. In the introduction to the report, the taskforce emphasises the jurisdiction to declare legislation incompatible (paragraphs 1.5, 1.18–1.20), but mentions the interpretive direction only in passing. That one reference, in paragraph 1.20, is interesting for the report states that 'the existing judicial review jurisdiction would be enlivened by an interpretation provision'.

In its commentary on clause 11, the report observes that the clause is adapted from section 6 of the New Zealand Bill of Rights Act 1990. The report states that this is preferable to alternative directives such as section 8 of the (UK) Human Rights Act (the reference should be to section 3).

The taskforce reasons that the language they have adopted is more familiar to the New Zealand legal community and is 'less likely to result in unduly strained interpretations being given to legislation' (paragraph 4.110). The report provides no justification whatsoever for the inclusion of this clause in the draft bill, apart from the earlier reference to enlivening judicial review. The report implies that this clause is not intended to support strained interpretations. However, the courts have struggled to identify the limits of section 6 of the New Zealand Bill of Rights Act, and while the status quo (*R v Hansen* [2007] 3 NZLR 1) may seem stable this is by no means set in stone. The British experience is not encouraging.

The clause does not apply to legislation that pre-dates the bill until ten years after its commencement. When the interpretive direction applies to legislation that post-dates the bill, the courts 'will be considering a legislative text which has already been considered in terms of compatibility with those principles by' legislators and officials (paragraph 4.113). Therefore, 'this is likely to substantially reduce the prospect of interpretations being given to legislation that are contrary to the understanding of the Minister and public entities proposing the legislation'. The taskforce's concern to protect the understanding of legislators is laudable but hard to square with the generality of the principles the report affirms. This interpretive direction would pressure the courts to prefer their view of sound policy to that of Parliament.

The interpretive direction is not limited to principles (a)–(h). The courts must prefer a meaning of legislation that is consistent with all four principles of 'Good law-making', three of which the taskforce elsewhere notes are unsuitable for judicial consideration. The interpretive direction requires legal argument and judicial decision on these very issues. I expect this is an oversight. Even if the direction were limited, however, it would be very likely to undermine the clarity and stability of statute law, because the principles (subject to reasonable limits) are extremely vague. Further, as with section 6 of the New Zealand Bill of Rights Act (*Drew v Attorney-General* [2002] 1 NZLR 58), empowering statutes may be

read to authorise only reasonable limits on liberty, or to entail compensation for impairment of property, or not to authorise any regulation that fails a cost-benefit analysis. This interpretive approach will destabilise regulations as law, for they will be subject to invalidation at any time on vague grounds.

The report makes clear, at paragraphs 4.114 and 4.130, that the point of the ten-year delay in applying clause 11 (and clause 12) to legislation that pre-dates the bill is to give legislators and their advisors sufficient time to review and update the statute book. The implication is that after ten years it is sound for the courts to adopt novel meanings that depart from the understanding and intentions of the relevant law maker. On the taskforce's understanding, clause 11 of its draft bill

The bill politicises chief executives, enabling them to undermine ministers.

constitutes a contingent amendment of all statutes that pre-date the act. The bill amends every such statute to the extent that the courts can give a novel meaning to the legislation that is consistent with the principles of responsible regulation (as the courts understand them). Parliament should not amend legislation in this reckless way.

Conclusion

The bill is hostile to our democratic constitutional order. Many of the principles it affirms are heterodox and should not be justiciable. The principles jointly form a vague and distorted code for law making, which judges will have authority to interpret and to specify. The bill politicises chief executives, enabling them to undermine ministers. It also authorises courts to review the detail of policy, illegitimately constraining Parliament and calling into question the validity of delegated legislation. Parliament should not disrupt the constitution by enacting this bill.

Tim Smith

The Regulatory Responsibility Taskforce: A View From Inside the Room

Introduction

Together with another of my Chapman Tripp colleagues, Colin Fife, I provided support to the Regulatory Responsibility Taskforce and assisted in the preparation of the taskforce's report. Graham Scott, the chair of the taskforce, proposed that I participate in this symposium. In this capacity, I obviously do not speak for the taskforce, which has itself disbanded.¹ The report of the taskforce must speak for itself, without elaboration. Rather, I offer my perspective, as a person who was 'in the room' with the taskforce during its deliberations, on what I take as the major legal themes emerging from the taskforce's report and the proposed bill.

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Assessing the taskforce's report and the proposed bill, I suggest, requires us to answer three primary questions:

- Is there an issue with the current state of New Zealand's legislative and regulatory system – the process of legislation – and the results of that system – the substance of legislation – that requires a solution? The taskforce's terms of reference did not require it to address this issue, but it is a question that inevitably arises from the initiative.²
- If there is an issue, does the guidance of selected principles, both procedural and substantive, with which legislation and the legislative process should comply provide at least a partial answer to that issue?
- Are the mechanisms proposed by the taskforce to encourage early, thorough and transparent consideration of those principles likely to be effective, and consistent with New Zealand's public law arrangements?

To answer those questions a range of expertise and experience must be brought to bear, by lawyers, economists, and those with in-depth experience of the legislative process. In that context, it is appropriate to recall the diversity of professional experience captured by the taskforce's membership. That membership included people with extensive experience in business, law and economics. Most importantly, the taskforce also included those whose primary experience has been

in the public sector, both as legislators and as senior advisers to legislators. It also bears mentioning that two members of the taskforce had experience on the Legislation Advisory Committee (LAC), one as a former chair whose tenure coincided with the last major revision of the LAC guidelines. The taskforce thus included experience that covered the entire life cycle of legislation: from policy development, drafting legislation, advocating for (and against) legislation and implementing legislation, to litigating questions arising from legislation and advocating for its reform. That range of experiences was critical in developing the proposals in the bill.

With that emphasis on experience in mind, I turn briefly to the first two questions raised by the taskforce's report: is there a problem, and are legislated principles the solution?

Is there an issue?

The starting point for the taskforce – a majority of submitters to the commerce committee considering the original bill, from a wide range of backgrounds – agreed that:

- there were real and important problems with the quality of legislation produced by the current law-making processes;
- current non-legislative initiatives were not capable of producing the change in quality desired; and accordingly
- a legislative solution was required.

That view was shared by the taskforce. It concluded, in its report, that:

as matters of principle and practicability, there can and should be less legislation and better legislation; and second, the existing constitutional and operational framework cannot be expected to deliver those outcomes without significant change. (para 1.3)

I leave it to others to debate that assessment. I would, however, note that at least one eminent New Zealander has previously suggested that, as least as far as delegated legislation is concerned, there is an issue worth addressing. Geoffrey Palmer, in his review of the use of delegated legislation in New Zealand in 1999, concluded that regulatory

interventions in the form of secondary and tertiary legislation:

should be more carefully judged than they are in New Zealand. The New Zealand Government system still lacks both an intellectual and practical framework for arriving at those judgments within the Executive Government system. ... [t]here are dangers in entrusting too much power to public agencies. (Palmer, 1999, p.36)

A brief comparison of Palmer's description of matters in 1999 with the present day suggests that similar comments could be made about delegated legislation now. In 1995, 461 regulations were formally published in

... there is merit in the statement of the principles being, to the extent possible, short, expressed in plain English and self-contained.

the New Zealand Statutory Regulations, apparently a record then (*ibid.*, p.2). The record still stands but it is routinely threatened: in 2008, 456 regulations were published. Moreover, the book of delegated legislation is getting noticeably thicker. While the 1999 statutory regulations were housed in three volumes, seven volumes were necessary in 2009.

The scope of regulation has also expanded. The rejection of light-handed regulation since Palmer wrote has led to increasingly complex industry-specific economic regulation. Much of the detail of that regulation is determined not by parliament but by ministers and regulatory agencies. The effect of the recent amendments to part 4 of the Commerce Act 1986 reinforces this approach.

A statement of principles as the solution?

Consistent with the views of a majority of submitters to the commerce select committee, the taskforce's terms of reference established it to 'carry forward the Commerce Committee's work on the

[Regulatory Reform Bill]', to 'determine what, if any, amendments to the Bill would best achieve its objectives' and to produce a report that, *inter alia*, 'recommends a draft Bill'.

The proposed bill has, at its core, an elevation of principles covering both substantive and procedural matters which have previously either been tacitly assumed to guide the legislative process, or have expressly guided the process through the LAC guidelines or the Regulations Review Committee, to legislative status. Those principles are then reinforced by various mechanisms designed to encourage early, thorough and transparent consideration of policy proposals and draft legislation against those principles.

The matters addressed by the principles were well stated in the forward to the 2001 revision to the advisory committee guidelines by Margaret Wilson, when she said:

We must –

ask whether legislation is needed to give effect to the policy which the Government is planning to implement;

follow proper procedures in preparing the legislation, in particular by consulting appropriately outside Government and within it;

ensure that the legislation complies with established principles, unless there is good reason for departing from them.

The inclusion or exclusion of particular principles within the proposed bill, and the precise formulation of those principles, is itself a substantial topic. It should be no surprise that, in the commentary to the bill in the taskforce's report, the commentary on clause 7 is

the same length as that for the rest of the bill combined. Here, I make only two general comments, before turning to the primary novelty in the bill – that the mechanisms encourage consideration of the principles.

The first comment is that there is merit in the statement of the principles being, to the extent possible, short, expressed in plain English and self-contained. If

accurate in stating what the principles will and will not achieve. The principles are not absolutes. They are, first, able to be justifiably departed from under clause 7(2), to the extent that it is reasonable and can be demonstrably justified in a free and democratic society. Second, even thus limited the principles are only matters that legislation *should* comply with, not that legislation *must* comply

- It does not set up new specialist bodies to review legislation, and complaints concerning legislation.

Aside from the two limited respects in which a judicial role is allowed for, the bill explicitly limits judicial consideration of legislation against the principles. Clause 14 provides that the principles do not have force of law (except as provided in relation to interpretation and the declaratory jurisdiction), and no court may decline to apply any provision by reason only that the provision is incompatible with the principles, or any provision of the bill has not been complied with. Clause 13 in turn expressly limits the effect of any declaration, and excludes any judicial remedies in respect of the certification process.

I turn to the mechanisms contained in the bill.

... the certification requirements serve a function similar to the requirement that the attorney-general report inconsistencies between the New Zealand Bill of Rights Act and proposed bills to the House

the object is for the principles to guide policy development, and not merely act as a checkbox at the end of the process, it is unrealistic to expect policy makers, who are expected to have their primary field of expertise in some other area, to internalise an overly elaborate statement. This is an area in which the LAC guidelines can be validly criticised. The 2001 edition of the guidelines runs to 480 pages; the checklist at the beginning comprises six pages of text, in a small font size, and contains 92 separate questions to be addressed.³ Further, some of those questions are not self-explanatory. For example, question 3.1 requires the legislator to ask: does the legislation comply with fundamental common law principles? To obtain insight into what are to be regulated as ‘fundamental’, the policy analyst must turn to chapter 3. There, there are 16 separate principles listed across two and a half pages. In comparison, clause 7 of the bill takes two and a half pages of legislative text. Not all concepts are capable of simple expression, of course, but, as a short form text for policy makers to commit to head (if not to heart), it is largely self-contained and relatively digestible.

The second is that it is important, in assessing the impact of the bill, to be

with. To accurately assess the utility of the principles, those limitations must be recognised.

Are the mechanisms appropriate?

The bill, though, does more than provide a statement of principles. It also includes three legislative mechanisms designed to encourage early, thorough and transparent consideration of the principles in the policy development and legislative process: certification, interpretation and declarations of incompatibility. Each requires justification. However, before addressing those mechanisms, it is worthwhile emphasising what the bill does *not* do:

- It does not set up the principles as supreme law, in respect either of acts or of delegated legislation.
- It does not set up a process which can result in any injunctive or monetary relief for non-compliance by legislators or their advisers.
- It does not set up a judicially enforceable process for evidence-gathering in the legislative process, or otherwise increase the intensity of judicial review of even delegated legislation (effectively the United States position under the Administrative Procedure Act 1946).

Certification

The first and primary mechanism by which the bill seeks to encourage consideration of the principles is certification. The bill (clauses 8 and 9) requires both those who propose legislation (the minister responsible for a government bill, or the member in the case of a member’s bill) and those who would administer it to certify:

- whether the legislation is compatible with each of the principles;
- if not, in what respects, and whether the incompatibility is justified (with reasons); and
- if the incompatibility is not justified, the reasons for proceeding in the absence of justification.

Those last two matters are, where possible, reserved for politically accountable actors.

The certification process is intended to assist in the quantity and quality of informed debate concerning proposed legislation. In this informational purpose, the certification requirements serve a function similar to the requirement that the attorney-general report inconsistencies between the New Zealand Bill of Rights Act and proposed bills to the House (New Zealand Bill of Rights Act 1990, section 7). However, in requiring those who propose legislation

(and their principal advisers) to execute certificates, the certification provisions serve a broader, and potentially more significant, function, by placing a political and/or moral responsibility for confirming compatibility (or not) with the principles on those who are responsible for the policy-making process itself.

When one is asked to sign a document, one is more inclined to read it carefully, and make certain of its truth. That sense of personal responsibility engendered by certification is intended both to encourage law makers to take seriously the question of the compatibility of their proposals with the principles, and to encourage their advisers – who will be asked the inevitable question, ‘can I sign this?’ – to be in a position to answer that question by taking early account of the principles in their policy development process.

It is interesting to observe that the Australian state of Victoria, in passing their Charter of Human Rights and Responsibilities Act 2006, has taken a similar approach. The Victorian Charter is, like our New Zealand Bill of Rights Act, not supreme law. Under the Charter a reasoned Statement of Compatibility is obligatory from the person introducing the bill (sections 29, 36, 28; see Williams, 2006, p.880). Justice Kirby has at a recent conference indicated that the view of the chief parliamentary counsel for Victoria is that in her experience the certification process has been the greatest benefit of the Charter (Kirby, 2010). Similarly, certification can be regarded as the primary mechanism contained in the bill to encourage early, thorough and transparent reasons for legislation.

Interpretation

The second mechanism proposed by the bill – in clause 11 – is the requirement that, for all new legislation, wherever an enactment can be given a meaning that is compatible with the principles (after taking into account clause 7(2)), that meaning is to be preferred (clause 11(1)). The language of this clause is expressly taken from section 6 of the New Zealand Bill of Rights Act, to enable the significant body of precedent developed under that section to be available to the courts in approaching clause 11. The primary

significance of this clause, I suggest, is to create a ‘preference eliciting rule’, as that term is used by American commentators in discussing common law canons of construction (Elhauge, 2002, p.2162; see also Elhauge, 2008). The classic example of a preference-eliciting rule is the rule that ambiguity in criminal statutes should be construed against the defendant. It is difficult to contemplate a legislative preference for this result. However, the

the bill provides for a 10-year window for review (clause 11(3)).

Such a default rule might be objectionable if there was a substantial risk that the judiciary, in seeking a principles-consistent interpretation, would calibrate the default rule such that legislative preference could not overcome the default position. The risk of such judicial over-reaching is, however, in my view, limited, for three reasons.

... the taskforce concluded that the availability of a judicial remedy, even if in a declaratory, non-binding form, would provide the necessary political ‘teeth’ to encourage ministers and their advisers to carefully consider compliance of legislative proposals with the principles, and whether any inconsistencies are justified.

effect of the default rule is that legislators, faced with the predictable default rule, can, and are encouraged to, carefully calibrate their choice of legislative language to define the scope of conduct desired to be criminalised.

Under clause 11 a similar analysis is possible for legislation that is incompatible with, for example, the principle concerning liberties (clause 7(1)(b)), or the taking of property (clause 7(1)(c)). Indeed, such a preference-eliciting default rule in relation to legislative takings already exists in common law (*Manitoba Fisheries Ltd v The Queen* [1979] 1 SCR 101), which is why legislation with that effect routinely includes a ‘no compensation’ clause.

The interpretative default rule of clause 11 encourages careful consideration and selection of legislative language to codify a determination that an incompatibility with the principles is justified under clause 7(2). The opportunity to undertake that consideration applies only to legislation passed after the enactment of the bill: the bill expressly limits clause 11 directive to legislation passed after bill comes into force; in the case of pre-existing legislation

First, a clear difference in approach has emerged between the courts of the United Kingdom and New Zealand courts. The New Zealand approach to section 6 of the New Zealand Bill of Rights Act, confirmed recently by the Supreme Court in *R v Hansen*, is that the courts will not consider giving legislation a meaning other than that produced by ordinary legislative techniques unless that normal meaning constitutes an unjustified incompatibility with the principles and an alternative meaning is available.⁴ Second, even if that approach to section 6 is subsequently revisited, the approach in *R v Hansen*, and the consequential divergence from the UK courts, is noted and endorsed in relation to clause 11 of the Regulatory Reform Bill by the taskforce’s report. That reference can be expected to assist in entrenching that approach in respect of the bill.⁵

Third, and perhaps most importantly, in contrast to the position usually faced by the courts in interpreting legislation under section 6 of the Bill of Rights Act, a court faced with a claim that legislation should be given a particular meaning by virtue of clause 11 of the bill will have the assistance

of the pre-enactment certifications. That will both clarify legislative purpose, and provide a basis for the court to defer to legislative judgment on any determination of whether an incompatibility is justified.

Declaration of incompatibility

The third mechanism proposed in the bill is the creation of special jurisdiction for the High Court to grant a declaration of incompatibility. Clause 12 of the bill provides that a ‘Court may, in any proceedings’, defined as limited proceedings for a declaratory judgment or judicial review, ‘declare that a provision of any legislation is incompatible with 1 or more of the principles specified in clauses 7(1)(a) to (h), unless the incompatibility is justified under section 7(2)’. As with the other mechanisms proposed, two related questions arise in relation to the

carefully consider compliance of legislative proposals with the principles, and whether any inconsistencies are justified. Whether that assessment is correct must be for others, particularly those with experience in government at the highest levels, to judge. I note only that the experience of the members of the taskforce was reinforced by its consultation within the public service.

I turn to the second question, whether the grant of a jurisdiction to grant declarations of incompatibility is appropriate, and, in particular, whether it is compatible with New Zealand’s public law arrangements. It is necessary to say something briefly about the doctrine of ‘parliamentary sovereignty’. The relative merits of that doctrine as a way of understanding New Zealand’s constitutional arrangements

to the judicial role or the judiciary has nothing useful to say given its institutional limitations).

The first point may be shortly dealt with. The possibility of a declaration of incompatibility must have some political or moral force for law makers, otherwise there is no point in its inclusion in the bill. At the same time, a *de facto* transfer of the ultimate legislative power from the law makers to the judiciary on the issues dealt with by the bill is not desirable. On this issue, balance is required. In fact, however, the New Zealand experience with the New Zealand Bill of Rights Act suggests that this is unlikely. Andrew Geddis’s recent study of the effect of the Bill of Rights Act on the legislative process persuasively argues that New Zealand politicians have not been substantially cowed by the threat of judicial remonstrance in enacting legislation that is inconsistent with the rights stated in act (Geddis, 2009). Petra Butler reached a similar conclusion in her earlier analysis.

As to the second objection, the concept of the courts having an institutional role as non-binding ‘advisers’ to the legislature on constitutional issues is not a new one (Varuhas, 2009). In Westminster democracies that role has been played by courts in the context of ‘parliamentary bills of rights’ for at least 20 years. Of course, there remains the question of whether any advice received from the court is likely to be useful. The institutional disadvantages faced by courts in considering issues of social policy are well known: the adversarial system is ill-equipped for consideration of broad poly-factorial policy questions; courts lack necessary expertise and the means of readily obtaining it; they also suffer a democratic deficit (at least in comparison with Parliament). However, to assess the significance of those institutional disadvantages it is necessary to consider the questions that will be asked of the judiciary under the bill. In fact, I suggest that none of the questions actually to be asked of the court raises significant institutional disadvantages that cannot be overcome through the application of well-established doctrines.

In considering whether to grant a declaration of incompatibility, a court will

In considering whether to grant a declaration of incompatibility, a court will be faced with three questions.

proposed jurisdiction: is it necessary, and is it appropriate?

On the first question, the view of the taskforce, and in particular the advice of the members of the taskforce with significant experience as senior advisers to ministers and elsewhere within government, was that the certification process alone would likely be insufficient to encourage serious consideration being given to the principles in the legislative process. The taskforce concluded that:

The experience of the Taskforce strongly suggests that guiding principles (including, but not limited to, the LAC Guidelines), when not reinforced with meaningful consequences in the event of non-compliance, are unlikely to achieve significant adherence. (paragraph 4.121)

Here, the taskforce concluded that the availability of a judicial remedy, even if in a declaratory, non-binding form, would provide the necessary political ‘teeth’ to encourage ministers and their advisers to

is, of course, controversial (see, for example, Goldsworthy, 2005). Happily, it is not necessary to enter into that debate in considering the taskforce’s recommendations. To the extent that the doctrine has a meaning, it must be that Parliament has unfettered ability to make and unmake laws. That ability is expressly preserved by the bill.

Given that the bill preserves *formal* parliamentary sovereignty, there seem to me to be two possible *functional* objections to the jurisdiction (see Elias, 2004):

- first, that, notwithstanding preservation of *de jure* parliamentary sovereignty, the *de facto* position is that there will be a transfer of law-making power to the courts, because legislators will have a tendency to unquestioningly adopt the courts’ advice;
- second, that the questions required to be answered in the jurisdiction are inappropriate for judicial determination (either because answering the question is harmful

be faced with three questions. The first is an issue of interpretation: what is the proper interpretation of the principle concerned. That is plainly a matter to which the judiciary is not only suited, but has special expertise. The second is a mixed question of law and fact: is the legislative measure proposed in fact inconsistent with the principle, properly interpreted. Here, the exclusion of certain principles from the jurisdiction is important. No declaration of incompatibility with the principles of good law making can be made other than in respect of the principle that, to the extent practicable, the persons likely to be affected have been consulted. Thus, no declaration of incompatibility can be sought on the basis that:

- there has not been a careful evaluation of the necessity for a legislative response to an issue;
- the legislation does not produce benefits that outweigh the costs of the legislation; or
- the legislation is not the most effective, efficient and proportionate response to the issue concerned.

These were matters not regarded by the taskforce as being suitable for judicial consideration; plainly, any consideration of whether particular legislation was in breach of those principles would require the sort of poly-factorial analysis to which the courts are ill-suited. The remaining principles, I suggest, are capable of judicial application, and the questions that arise (for example, the meaning of 'impairment' in clause 7(1)(c)), are likely to be primarily questions of interpretation. Moreover, in the most part the remaining principles are matters that the courts are already asked to apply to legislation through the existing common law canons of construction.

The third question for the courts will be, if there is an incompatibility, whether that incompatibility is 'reasonable, and justified in a free and democratic society' under clause 7(2). This would seemingly threaten to move the court into territory beyond its core institutional competencies. However, in addressing the same question in considering parliamentary bills of rights, the courts have developed a jurisprudence of 'deference' to legislative judgment that recognises and seeks to mitigate those difficulties. As Tipping has explained in *R*

v Hansen, under the equivalent provision in the New Zealand Bill of Rights Act:

the Courts perform a review function rather than one of simply substituting their own view. How much latitude the Courts give to Parliament's appreciation of the matter will depend on a variety of circumstances. There is a spectrum which extends from matters which involve major political, social or economic decisions at one end to matters which have a substantial legal content at the other. The closer to the legal end of the spectrum, the greater the intensity of the Court's review is likely to be.⁶

At least two matters suggest that the New Zealand courts are likely to

even the right of free speech.⁸ Further, in the field of economic regulation the courts currently show marked deference to regulators.⁹

An example from the United Kingdom illustrates the likely approach. In the *Countryside Alliance* case¹⁰ the House of Lords was called on to consider a challenge to the United Kingdom's ban on fox hunting under article 1 of the first protocol to the European Convention on Human Rights. That provision establishes a right to 'peaceful enjoyment of possessions'. The pro-hunting advocates claimed, successfully, that this right to peaceful enjoyment of possessions was engaged by the ban, as land could not be used for hunting and owners of businesses

In short, the New Zealand judiciary is well aware of its institutional limitations, and has developed mechanisms to avoid inappropriate substitution of judicial judgment for legislative assessment.

give appropriate deference to legislative judgments on whether incompatibilities with the bill's principles are justified. First, the courts are likely to be more insistent on process (including consideration of justification in terms of the *Oakestest*) than on substance. The extent to which the law-making body has rendered a 'considered opinion' on the issue is likely to determine in part the level of deference given.⁷ If a certification, or any additional statement provided to the court under clause 12(2) (a), provides through reasoning for the legislative judgment, that is more likely to attract deference. The courts' approach can therefore be expected to encourage transparent consideration and thorough weighing of the issues.

Second, many of the principles are likely to be regarded by the courts as falling towards the opposite end of Tipping's spectrum to that occupied by fundamental human rights. The principles concerned with economic values, such as compensation for takings, are in practice routinely limited, as distinct from rights not to be tortured or tried unfairly, or

associated with hunting had lost goodwill. Nonetheless, the House of Lords unanimously held that the ban was justified and proportional. The moral objection to inhumane treatment of animals was an appropriate policy objective, and given that the interference in property was slight, the ban was a proportionate response to that objective. The speeches of their lordships emphasise that in reaching this conclusion, significant deference was due to the recently expressed democratic will of the legislature. Lord Bingham stated:

Here we are dealing with a law which is very recent and must (unless and until reversed) be taken to reflect the conscience of a majority of the nation. ... The present case seems to me to be pre-eminently one in which respect should be shown to what the House of Commons decided. The democratic process is liable to be subverted if, on a question of moral and political judgment, opponents of the 2004 Act achieve through the courts what they could not achieve in Parliament.¹¹

In short, the New Zealand judiciary is well aware of its institutional limitations, and has developed mechanisms to avoid inappropriate substitution of judicial judgment for legislative assessment. What is likely to attract judicial attention is not poor quality legislation in substance, but a poor quality process: where principles have not been addressed or have simply been glossed over, and credible alternatives which are more consistent with the principles have either not been assessed or have been casually dismissed without evidence or logic. The likely judicial approach to the declaratory jurisdiction is therefore one which reinforces both the certification regime and the ultimate objective: that legislators and their advisers give early, thorough and transparent consideration to the principles in developing legislation.

Conclusions

To conclude, I suggest not answers to the questions I proposed at the outset, but four tentative observations:

First, that the bill proposed by the taskforce has a heritage in previous law reform in both New Zealand and in other jurisdictions. While the ultimate proposal is a novel one, most if not all of the mechanisms that comprise that proposal

are not. That provides us with, in most cases, practical experience on which to draw in assessing the likely impact of the proposed bill.

Second, but related to that first point, that in assessing the impact of the taskforce's recommendations, practical expectations based, to the extent possible, on experience are more relevant than theoretical predictions based on Madisonian insights as to the self-aggrandising nature of public actors.¹² Here, the characteristics of New Zealand's political and legal culture – what Matthew Palmer has referred to as 'New Zealand constitutional culture' (Palmer, 2007) – must be taken into account, particularly when reference is had to the experience of other jurisdictions.

Third, that while it is perhaps natural that a primary focus should rest on the bill's impact on parliamentary processes, that should be resisted. The bill's proposals are equally aimed at delegated legislation, and their appropriateness and effectiveness should be assessed in relation to all legislative acts to which the bill applies.

Finally, it is important to recall the rationale for the taskforce's creation. That was that a majority of submitters to the commerce select committee held the

view that there was an issue of quality with New Zealand's body of legislation and with its policy-making process, and that a legislative process which placed greater incentives on law makers and their advisers to deliver quality policy and legislation was desirable. If that remains true, then the taskforce's proposals are worthy of serious consideration.

- 1 The standard qualification that the views expressed in this article are those of the author alone therefore apply with particular force to the taskforce.
- 2 In this article I use the term 'legislation' in the sense it is used in the report and bill, to cover all primary, secondary and tertiary legislation promulgated by public agencies – essentially all statutory agencies of central government.
- 3 http://www2.justice.govt.nz/lac/pubs/2001/legislative_guide_2000/combined-guidelines-2007v2.pdf
- 4 *R v Hansen* [2007] 3 NZLR 1 at [60] – [61] per Blanchard J; [92] per Tipping J; [191] per McGrath J; [266] per Anderson J (SC).
- 5 See *Ports of Auckland v Southpac Trucks Limited* [2009] NZSC 112, at [26]: 'in order to comprehend the scheme and intended operation of the Carriage of Goods Act it is necessary to have full regard to the intentions of the Law Reform Committee on whose work the Act is based.'
- 6 *R v Hansen* [2007] NZSC 7; [2007] 3 NZLR 1 at [116] per Tipping J.
- 7 *R v Hansen*, above, at [118]. See, for example, *R v Governing Body of JFS* [2009] UKSC 15, where JFS's policy was held to be unjustified indirect discrimination by Lord Mance in part because of the 'absence of any actual consideration or weighing of the need (to pursue the school's aim) against the seriousness of the detriment to the disadvantaged group' (at [100]).
- 8 *R v Hansen*, above at [65] per Blanchard J.
- 9 *Unison Networks Ltd v Commerce Commission* [2008] 1 NZLR 42 at [54] (SC). See also *Lab Tests Auckland Ltd v Auckland District Health Board* [2009] 1 NZLR 776, at [366] (CA).
- 10 [2008] 2 All ER 95 (HL).
- 11 *R (on the application of the Countryside Alliance) v Attorney General*, above, at [45].
- 12 *Federalist* No 47, No 48 (1787).

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George Tanner

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'¹ 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.² 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.³ Significant statutes

[The Bill] says nothing about the design of sanctions to enforce legislative obligations, or what matters parliament must legislate upon and what matters may be delegated.

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'.⁴

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

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.

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?).⁵ 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). 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.⁶

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

... parliament does not intend to override fundamental rights unless it does so expressly or by necessary implication

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

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.

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*⁸ 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,⁹ 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.¹⁰ 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);¹¹ 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.¹²

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

Vast numbers of statutes and regulations confer power on ministers, public entities and officials to make decisions; many do not provide for merits appeals.

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.

Vast numbers of statutes and regulations confer power on ministers, public entities and officials to make decisions; many do not provide for merits

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.¹³ 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.¹⁴

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

With Respect Parliamentarians, officials and judges too By Mark Prebble

With Respect is an important and practical book about the people involved at the heart of government in New Zealand. It covers history, constitutional principles and the law, but it is mostly about people and the roles they play. Recent events in New Zealand are used to illustrate the key issues. The examples include court cases, parliamentary inquiries and debates. Subjects range from the high drama of military deployments to the day-to-day business of parliamentary expenses. Events are brought to life with a combination of wisdom and wit, to give a clear picture of how government really works. *With Respect* is an invaluable resource for

parliamentarians, public servants and students of politics, public law, public policy and public management.

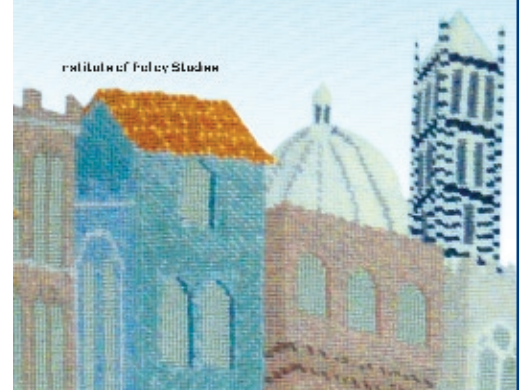
Mark Prebble is a Senior Associate at the Institute of Policy Studies. He was State Services Commissioner during 2004-2008. In the course of his distinguished public service career he was Chief Executive of the Department of Prime Minister and Cabinet and Deputy Secretary to the Treasury.

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With Respect Parliamentarians, officials, and judges too

Mark Prebble

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not get out of step with legislative policy.¹⁵ 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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Geoffrey Palmer

A View of the Legal Debate¹

What is proposed amounts to a substantial constitutional change. It can be seen as a shift in power away from the executive branch of government towards the courts. The legitimate source for this shift of power remains unclear. To be successful, constitutional changes have to be enduring. I do not detect any widespread public consensus on the issues surrounding this set of changes.

In New Zealand regulation at present is carried out by a series of ad hoc balancing processes, each specific to its own piece of legislation. Probably we often get it wrong. Certainly there are problems. It has been a problem all my adult life in all the various connections I have had with the New Zealand government over a period now of 40 years. Government regulation and the quality of it has been an enduring issue. The prime issue is whether the proposed solution is acceptable and will actually fix the problem.

One significant gap in these presentations has been that no ministers have spoken. Yet the rights and prerogatives of ministers are greatly affected by these proposals. What is proposed is a

weakening of the capacity of ministers to decide how regulatory policy decisions should be made. I really do wonder what ministers will think of this. Ministers tend to take the view, in my experience, that they are elected to make decisions. That is their function. Measures that inhibit their capacity to take decisions are often not welcome.

What is proposed here is a serious diminution in the range of ministerial responsibility. We have to contemplate the suggested changes against that background principle of our parliamentary democracy. Ministerial responsibility is the prime instrument of accountability in our democratic framework. Ministers must answer to the House and defend their policies to the public. Cabinet has a collective responsibility. What is proposed here cuts across that and imposes a set of self-denying ordinances on ministers. My prediction is that ministers will not support such an arrangement. The reason is that the proposal will reduce their ability

to address the concerns of the public and it will reduce their capacity to govern in accordance with their policy preferences.

The implied message in the changes proposed are that ministers make bad choices and must be prevented from making them. In democratic terms this is a highly arguable proposition.

We can learn something about this from the experience with the Regulations (Disallowance) Act 1989. That legislation provided for parliamentary disallowance of statutory regulations. No motion for disallowance has ever yet succeeded in having a regulation disallowed. Parliament has not shown courage in this matter.

If the parliament is not prepared to deal to the executive, the question arises, who is? The experience with the Regulations (Disallowance) Act raises the whole question of whether what is proposed in this set of proposals is practical. What was designed to be a heavy check on executive power has not proved to be much of an inhibition on it in respect to regulations.

There is no doubt that the Regulations Review Committee has done great work. There is no doubt that it has developed a very important body of jurisprudence. But the fact that Parliament has never been prepared to actually disallow a regulation suggests to me that the House of Representatives is not really prepared to take on the executive on regulation in any serious way.

If that is the case, and that is the true

Sir Geoffrey Palmer is the President of the Law Commission and is one of New Zealand's leading constitutional experts. He has previously held senior academic positions at Victoria University of Wellington and was Prime Minister of New Zealand during 1989-90.

lesson from our recent history, it seems to me unlikely that the situation can be rectified by *ex ante* legislative controls of the type contained in the proposal we are discussing.

The biggest problem that law making faces in New Zealand is the three-year term. That is the greatest enemy of good policy development and good law making. Things have to be hurried. Particularly when a new government comes to office, it takes them some time to settle in. It takes them quite a while to sort out their legislative priorities once they have the benefit of advice. If they are engaged in big policy changes with complex issues involving large acts of parliament, then it takes a long time to get the policy decisions made and the legislation drafted, introduced and passed. The biggest change that we could make that would be likely to produce higher quality law is to extend the term of parliament from three years to four and make it a fixed term. But the prospects of that happening are not high given the fact that a referendum rejected that possibility in 1990. Probably most members of the public regard a general election as the only real power they have to turn a government out.

In his paper Paul Rishworth is admirably clear on some changes he felt could be made to the New Zealand Bill of Rights Act 1990. He would add a property protection to the act. The difficulty with including property in the New Zealand Bill of Rights Act is that it would be necessary to go through the whole statute book and look at 1,100 existing statutes to work out which of those involved interference with property rights now and how that matter should be handled. Otherwise, the costs and consequences of such a change would be drastic and uncertain. Such work would take some years.

Professor Rishworth's other point, that there should be only one New Zealand Bill of Rights Act and not a second one, seems to me to be a strong point with which I agree. He would add some features of this proposal to that. I think that such a process would need to be handled with some care.

Richard Ekins makes the case about

Professor Rishworth's other point, that there should be only one New Zealand Bill of Rights Act and not a second one, seems to me to be a strong point with which I agree.

juridical law making quite strongly. He is opposed to it. He thinks it should be left to the democratic polity. He argued that the rules in the bill are not constitutionally orthodox, and I agree with him.

The major point that arises out of all the papers is the justiciable character of the proposal. To have court cases and forensic battles over procedural matters concerning legislative regulatory proposals opens a fresh dimension not contemplated in New Zealand before. Judges in New Zealand have handled the provisions of the New Zealand Bill of Rights Act very well, in my opinion. They are used to dealing with the matters covered by the International Covenant on Civil and Political Rights. They always have been, long before 1990. Most of those matters, such as search and seizure, arrest, legal advice, detention and police powers are familiar to judges and to criminal lawyers.

Neither the judges nor the legal profession are proficient in policy analysis of the type that leads to regulatory legislative proposals. It does seem to me that it is rather a stretch to ask the judiciary to take on this new role and expect it to be performed in a way that does not disrupt the processes of the executive government.

Tim Smith's case for the proposal is that it really isn't so bad and we don't have anything to fear. The courts will not be too assertive, he argues. I doubt this. I also doubt that ministers will share that view. Taking power away from ministers and giving it to the courts is bound to produce a different set of dynamics from

what occurs now. The mechanism of certification, the power of interpretation and the ability to issue declarations of incompatibility, in my view, all amount to a very significant transfer of power, notwithstanding protestations to the contrary.

In many ways making legislation is difficult enough without adding further complexities to the process. I have in mind Bismark's observation that making law is a bit like making sausages and best not observed. This, of course, suggests that the process shouldn't be transparent. I certainly think the legislative process should be as transparent as possible. But the part of it that is conducted within the executive branch of government is different on every occasion, with different interests, different topics and different departments involved.

I come now to George Tanner's powerful paper. Let me stress the conclusion which he did not read to you but I want to set out in full again:

"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.

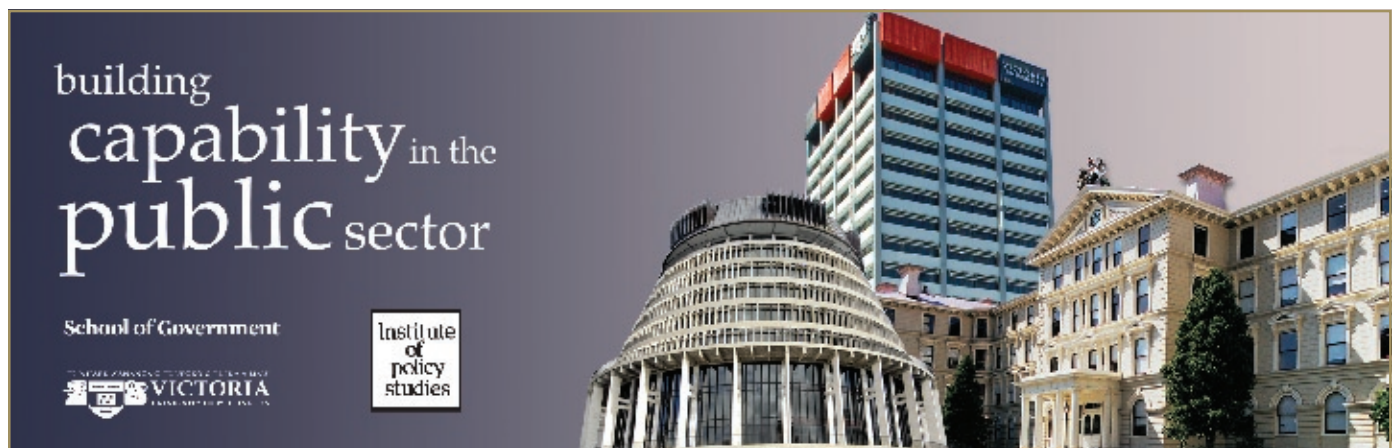
“The bill will bring the courts into areas of law making that are not within their province and for which they lack institutional competence, requiring them to adjudicate on choices made by

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.”

The dance of legislation is always different from one instance to another and pretty difficult to generalise about.

Economic benefits are not the sole factor to be taken into account. Constitutional principle, ministerial responsibility and the capacity of ministers to govern are also important elements.

¹ The article is a summation of the preceding four articles on legal issues which were presented as papers in the first part of the February 2010 IPS symposium chaired by Sir Geoffrey.



New Ideas for Old Problems

A series of lunchtime seminars introducing new members of staff in the School of Government of Victoria University of Wellington

New Zealand, Australia and the Asia-Pacific Strategic Balance: Ideas and policies

Dr Robert Ayson

12.30 pm-1.30 pm Friday 28 May Room 501, Railway West Wing

Robert Ayson is Professor of Strategic Studies and Director of the School of Government's Centre for Strategic Studies. He has held academic positions with the Australian National University, Massey University and the University of Waikato, and official positions in Wellington with the Foreign Affairs, Defence and Trade Select Committee and the

External Assessments Bureau. He is also a Senior Research Associate with Oxford University's Centre for International Studies. His research interests include strategic concepts, nuclear proliferation, Asia-Pacific security and New Zealand and Australian defence policies.

Politics and Ecology: Case studies in negotiating ecology in conservation, preservation and restoration policymaking

Dr Mike McGinnis

12.30 pm-1.30 pm Friday 25 June Room 501, Railway West Wing

Mike McGinnis was Director of the Ocean and Coastal Policy Center at the University of California Santa Barbara from 1995-2010. He has published over 40 articles in peer reviewed journals on the subject of large-scale environmental policymaking. His edited compendium, *Bioregionalism* (Routledge, 1999), is the primary text on the subject.

He has taught undergraduate and graduate level courses in environmental policy, coastal marine policy, ethics and policy analysis, among other courses. His new position is with the School of Government's Institute of Policy Studies.

Leadership, Political Parties and Parliamentary Performance in the Pacific Islands

Associate Professor Graham Hassall

12.30 pm-1.30 pm Friday 16 July Room 501, Railway West Wing

Graham Hassall took up his position as Associate Professor, Public Policy and Administration, in the School of Government in January 2010 after teaching at the University of the South Pacific from 2004-2009, the Landegg Academy in Switzerland from 2000-2003, and

the University of Melbourne during 1990-2000. He has also had visiting positions at the University of Papua New Guinea, the National Research Institute in Papua New Guinea, and the Graduate School of International Development, Nagoya University, Japan.

Jane Kelsey

‘Regulatory Responsibility’: Embedded Neoliberalism and its Contradictions

The proposed Regulatory Responsibility Bill is part of the unfinished business of regime change (Wade, 2008) from Keynesian welfarism to neoliberalism between 1984 and 1994. The imposition of far-reaching pro-market disciplines on domestic regulation is intended to complement the codification of monetarism and fiscal austerity through the Reserve Bank Act 1989 and Fiscal Responsibility Act 1994 (since absorbed into the Public Finance Act). Although these disciplines are inscribed in ordinary legislation they are attributed a ‘constitutional’ standing that their proponents hope will embed them in perpetuity.

Jane Kelsey is a Professor of Law at the University of Auckland, and is one of New Zealand’s best-known critical commentators on issues of globalisation, structural adjustment and decolonisation. She is the author of numerous books and articles on the neoliberal restructuring of New Zealand since 1984, including the best-selling *The New Zealand Experiment. A World Model for Structural Adjustment?*. Her latest book on globalisation, *Serving Whose Interests? The Political Economy of Trade in Services Agreements*, was published by Routledge in 2008.

The strategy aims to prevent New Zealand governments from making monetary, fiscal and regulatory decisions that erode wealth, by removing such decisions from cyclical politics. Former Treasury secretary Graham Scott encapsulated this ideal shortly before the 2008 election when he called for action to ‘address the agenda of quasi-constitutional issues that might, either in specific areas or perhaps more generally, address openly the clash between short-term political incentives and long-term wealth creation.’ The Reserve Bank Act offered the ‘prime example of success

of this kind of design’ (Scott, 2008).

This article examines the prospects for ‘regulatory responsibility’ as an instrument for embedded neoliberalism and concludes that the necessary conditions are either not there or not sustainable. It argues that political consensus is eroding. Faith in markets to regulate has been severely damaged in New Zealand and internationally. New Zealand’s track record contradicts the article of faith that less regulation holds the key to international competitiveness. Threats of investor backlash if governments re-regulate markets and redistribute wealth generate a sterile spectator democracy which cannot deal effectively with crises. Moves to lock governments into a neoliberal paradigm deliberately constrain the generation and pursuit of necessary alternatives.

If at First You Don't Succeed

The neoliberal regulatory regime has proved more difficult to enact than its monetary and fiscal counterparts, so far spanning 15 years. In 1994 the Finance and Expenditure Committee on the Fiscal Responsibility Bill, chaired by Ruth Richardson, called for work to address ‘the adequacy of existing regulatory processes to produce quality regulation’. In November 1997 the Cabinet Committee on

Strategy and Priorities agreed in principle to a proposal by National's commerce minister John Luxton for a Regulatory Responsibility Act modeled on the Fiscal Responsibility Act (CSP(97)M42/9).

When the momentum stalled, the New Zealand Business Roundtable hosted a workshop, Towards a Regulatory Constitution, which featured Richard Epstein (Epstein, 2000). With other business groups it commissioned Bryce Wilkinson's report *Constraining Government Regulation* (Wilkinson, 2001), which expanded the Luxton proposal into a draft bill with a long list of profoundly ideological regulatory principles. A slightly reworked version was introduced as ACT MP Rodney Hide's Regulatory Responsibility Bill 2006. In May 2008 the Commerce Committee recommended that the Hide bill not be passed and that a high-level expert task force should examine various options to improve regulatory review and decision making.

Given this history, it was obvious that the incoming National-led government would come under strong pressure to pass the legislation. A key plank in the confidence and supply agreement between National and ACT was the establishment of a taskforce to carry forward work on the Hide bill. Hide became the minister for regulatory reform. Roger Douglas became responsible for the bill. Graham Scott was appointed to chair the Regulatory Taskforce, which reported with a refined version of the Hide legislation in September 2009.

'Better Regulation, Less Regulation'

For reasons discussed below, the legislative passage of the Regulatory Responsibility Bill is not guaranteed. Perhaps in anticipation of this, a month before the release of the taskforce report Cabinet endorsed a ministerial statement entitled 'Better Regulation, Less Regulation' (CAB Min (09) 27/11). The August 2009 package serves two functions: it strengthens the existing regulatory impact assessment mechanisms and reorients them towards risk-tolerant deregulation which aims to accept or manage rather than eliminate risk (Dodds, 2006, p.527); and it provides a fall-back position in case the bill is defeated.

An annual Regulatory Reform Bill, presumably of an omnibus kind, will 'make it quicker and easier to remove or simplify unnecessary, ineffective or excessively costly requirements in primary legislation'.

The centrepiece is the statement from the ministers of finance and regulatory reform, 'Better Regulation, Less Regulation', with which ministers and officials must now comply. New regulation will be introduced only where it is 'required, reasonable and robust', while existing regulation will be reviewed 'to identify and remove requirements that are unnecessary, ineffective or excessively costly'. Specifically, the government will not take a regulatory decision without considering 'the evidence, advice and feedback from consultation', and being fully satisfied that:

- the problem cannot be adequately addressed through private arrangements and a regulatory solution is required in the public interest;
- all practical options for addressing the problem have been considered;
- the benefits of the preferred option not only exceed the costs (taking account of all relevant considerations) but will deliver the highest level of net benefit of the practical regulatory options available;
- the proposed obligations or entitlements are clear, easily understood and conform as far as possible to established legislative principles and best practice formulations; and
- implementation issues, costs and risks have been fully assessed and addressed.

A higher burden of proof applies to regulatory proposals that are likely to:

- impose additional costs on business during the current economic recession;
- impair private property rights, market competition or the incentives on businesses to innovate and invest; or
- override fundamental common law principles (as referenced in chapter 3 of the Legislation Advisory Committee guidelines).

Cabinet imposed a raft of *ex ante* and *ex post* requirements on ministers and officials. The *ex ante* measures involve more rigorous market-focused audit mechanisms, open-ended advice from officials on regulatory options, stricter surveillance by the Treasury-based Regulatory Impact Assessment Team (RIAT) and certification of consistency by ministers and officials.

Departments must prepare an annual regulatory plan of all known and anticipated proposals to introduce, amend, repeal or review legislation or regulation, to the extent possible. Regulatory impact statements (RIS) become government documents that advise Cabinet on problem definition, objectives, identification and analysis for the full range of practical options, without necessarily recommending a preferred policy. Agency certification of the RIS must disclose any gaps, assumptions, deficiencies or uncertainties in the analysis and indicate policy options whose effects are not likely to align to the government statement. Independent quality assurance of RIS will be provided by the RIAT where regulation has significant effects on economic growth, and otherwise by a person in the sponsoring agency independent of the authors. Ministers must certify that they have carefully considered whether the proposals to Cabinet are consistent with the expectations in the government statement.

The *ex post* measures require a post-implementation review of 'significant' regulations that Cabinet may agree to despite non-compliance with the government statement. Such reviews must be signed off by the responsible minister and the ministers of finance and regulatory reform. All departments must

develop systems for regulatory scans that identify all primary, secondary and where possible tertiary regulation under their responsibility that is or maybe unnecessary, ineffective or excessively costly. The initial scan must be completed by 30 June 2010, with subsequent six-monthly reports. An annual Regulatory Reform Bill, presumably of an omnibus kind, will 'make it quicker and easier to remove or simplify unnecessary, ineffective or excessively costly requirements in primary legislation'. A raft of existing reviews of regulatory regimes will continue, particularly those considered to have a significant impact on productivity. These requirements are to be fully operational by mid-2010.

Adoption of the taskforce's recommendations would add six further elements to the regime. First, the proposed Regulatory Responsibility Act sets out principles categorised under 'Rule of Law', 'Liberties', 'Taking of Property', 'Taxes and Charges', 'Role of Courts' and 'Good Lawmaking', and compliance obligations including certification. Second, ministerial guidelines would be issued pursuant to the act. Third, private actors could seek judicial declarations of incompatibility stating that proposed legislation is incompatible with the principles in the act, extending to existing legislation after ten years. Fourth, judges would have to adopt a statutory interpretation that is consistent with the principles, where possible. Fifth, a permanent external Statutory Advisory Council would be mandated to review the general body of legislation, and specific proposed or existing legislation, against the principles in the act and ministerial guidelines, and consult with public entities where appropriate. Lastly, the parliamentary Regulations Review Committee would be empowered to consider submissions that proposed or existing legislation departs from the principles.

There is obvious overlap between the criteria in the government statement and the taskforce principles, especially on regulatory 'takings', and in various procedures, such as ministerial certification and regular reviews of existing legislation for compatibility with the principles.

It is understandable that most debate has focused on the taskforce.

Various of its proposals would unsettle the traditional distribution of formal constitutional responsibilities between the executive, parliament and judiciary. Its recommendations aim to empower corporations and investors to pressure governments to advance their vested interests through a range of judicial, parliamentary and 'expert' mechanisms. And it has an ideological agenda that builds on previous proposals that are linked directly or indirectly to ACT and the Business Roundtable.

By comparison, cabinet's August package has come in under the radar. Like the taskforce report, it sets out to reorder the priorities, activities and resources of government agencies to privilege market interests and mechanisms. Its more rigorous mechanisms will strengthen Treasury's surveillance role over all other state agencies, and presumably will be reinforced through performance indicators and purchasing contracts. The requirement that these new obligations are met from within existing departmental budgets will divert resources from substantive policy and regulatory initiatives and subordinate pro-social interventions.

Embedded neoliberalism?

This section of the article examines whether the 'responsible regulation'

strategy is likely to succeed as an instrument for embedded neoliberalism. It considers and rejects claims to legitimacy based on its quasi-constitutional status, preferring to describe the legislation as 'meta-regulation'. It then argues that the political, normative, economic, reputational and institutional conditions that are necessary for its enactment, effective implementation and long-term sustainability do not exist.

Constitutionalism

Successfully ascribing 'constitutional' status to a piece of ordinary legislation bolsters its credibility and durability. Advocates of a Regulatory Responsibility Bill have consistently talked up its constitutional pedigree. A prime example is the Business Roundtable's workshop 'Towards a Regulatory Constitution'. Keynote speaker Richard Epstein argued for protection against regulatory takings that violated constitutional guarantees of private property, with other aspects of 'government intrusion' to be addressed through 'either a major regulatory constitution or some other means of imposing constitutional restraint on government' (Epstein, 2000, p.5).

That discourse draws on the 'constitutional economics' of James Buchanan, leader of the public choice school with its deeply cynical view of electoral politics and state bureaucracy. Buchanan's fiscal and monetary constitutionalism centres on protecting wealth and removing the constraints on accumulation that were imposed during the 20th century. His ideal of 'constitutional politics' provides a set of quasi-permanent rules that define the parameters for 'ordinary politics' and law making and impose disciplines that require governments to make 'choices within constraints' (Buchanan, 1991, pp.4-5).

The segue from the public-law meaning of 'constitutional' as supreme law which distributes sovereign power within a state to the 'constitutional' status of ordinary legislation is seductive and misleading. The Buchanan and Epstein theories of economic constitutionalism rely on a narrow 17th-century version of the rule of law and the presence of

The segue from the public-law meaning of 'constitutional' as supreme law which distributes sovereign power within a state to the 'constitutional' status of ordinary legislation is seductive and misleading.

constitution-like characteristics, notably pre-established criteria and processes that aim to depoliticise decisions of elected governments and pre-commit governments to a set of general principles, norms or outcomes. The state is relegated to a self-limiting role vis-à-vis capital. State actors are required to regulate in the interests of wealth accumulation, while non-market and pro-social objectives are constrained.

The international literature has developed a number of alternative terms that depict the neoliberal regulatory regime more accurately and with less hyperbole. Cass Sunstein described the Reaganite Republicans' proposed *Contract with America* (Gingrich and Armev, 1994) and alternative regulatory charters as 'supermandates' whose requirements, if implemented, would have cut across all regulatory statutes (Sunstein, 1996, p.270). He distinguished between 'substantive supermandates' that enact new decisional criteria that agencies must follow, such as a general requirement for cost-benefit balancing, and 'procedural supermandates' that dictate processes. In the European context Claudio Radaelli has described the regulatory impact assessment as a 'meta-policy' that sets rules on the process of rule formation (Radaelli, 2007, p.196). Bronwen Morgan, writing of Australian competition policy, applies the term meta-regulation to describe 'a set of institutions and processes that embed regulatory review mechanisms into the every-day routines of governmental policy-making' (Morgan, 1999, p.50).

Political conditions

Because meta-regulation assumes the power to constrain the government's options, it still requires legitimation. The Regulatory Responsibility Bill draws heavily on analogies with the Reserve Bank Act 1989 and the Fiscal Responsibility Act 1994, which until recently have been treated as qualitatively superior to ordinary statutes. But the political climate has turned. There was cross-party consensus when the Reserve Bank Act and Fiscal Responsibility Act were introduced. That no longer exists. In November 2009 Labour formally ended the

... a series of high-profile regulatory failures, from leaky buildings and finance companies to electricity and telecommunications, has generated scepticism that markets and corporate interests can deliver 'responsible' regulation.

bipartisan consensus on the monetary policy targets and tools of the Reserve Bank (Goff, 2009). It seems untenable that Labour would embrace a better drafted but in some ways more extreme version of the Hide bill, when the need for the legislation is commonly blamed on Labour's preference for central planning and redistribution (Scott, 2008).

The troubled history of the Regulatory Responsibility Bill shows that there never was a bipartisan consensus, despite the assertion in the taskforce's terms of reference that it was 'carrying forward the Commerce Committee's work' on the Hide bill in the Labour era. The implication of seamless continuity is disingenuous. The select committee proposed a high-level taskforce to consider options for improving regulatory review and decision making, including through legislation and standing orders, but not limited to the options that were placed before it. The National/ACT taskforce was required to recommend a draft bill.

Moreover, the select committee said the chair should be an expert who has not been involved in advocating for or against any of the options. Graham Scott was a strong advocate of a Hide-style bill, as were many of the committee members. The announcement of its membership

suggests a desire to downplay their partisan positions: Don Turkington was described blandly as a 'company director', rather than the director of the Centre for Independent Studies in Sydney. Confirming its ideological predilections, the foreword to the report gives special thanks to Richard Epstein.

Indeed, the bill may not even secure consensus support from the governing coalition, especially in election year. Ministers might justifiably fear that populist legislation like ACT's three strikes law or National's emissions trading regime would fail any rigorous cost-benefit analysis, including the proposed bill. A pre-election audit of National, ACT, Future NZ and Māori Party manifestos against the bill's principles could prove embarrassing. An attack by Labour and the Greens which cites examples of popular moderate laws that could be struck down by the return of neoliberal extremism would generate real political traction.

Even if the legislation were to be passed under National, there is no guarantee it would survive a change of government in one or four years time. The Cabinet regime that was implemented without the need for any parliamentary scrutiny is an even less secure vehicle for embedding neoliberalism.

Normative conditions

The principles and objectives of meta-regulation also need some normative grounding. At the most superficial level, slogans like 'better regulation' and 'regulatory responsibility' have positive connotations that marginalise critics: who wants to defend worse regulation or regulatory irresponsibility? The principles of 'responsible regulation' are also equated to the national interest. According to the explanatory note to Hide's bill: 'Regardless of differences over policy, Acts and regulations will be constitutionally sound and in the public interest if they respect such principles.'

But light-handed pro-market regulation can no longer claim to be uncontested orthodoxy. A generation of New Zealanders rejected its economic fundamentalism in the 1990s. More recently, a series of high-profile regulatory failures,

from leaky buildings and finance companies to electricity and telecommunications, has generated scepticism that markets and corporate interests can deliver 'responsible' regulation.

Similar shifts are evident internationally. The Reserve Bank and fiscal responsibility legislation drew on the ascendant international orthodoxy of monetarism and fiscal austerity, encapsulated in the Washington Consensus. The regulatory responsibility regime rests its claim to orthodoxy on the adoption by most OECD countries of regulatory management regimes that use regulatory impact assessments and cost-benefit analysis (Malyshev, 2006) and the guidelines and checklists for 'quality regulation' developed by the OECD and APEC (OECD, 1995; APEC/OECD, 2005). Again, 'orthodoxy' overstates the case. Many of the New Zealand proposals, such as declarations of incompatibility and compensation for 'takings', are at the extreme end of the OECD spectrum. They are closest to the United Kingdom approach, where the flagship financial services regime failed so dramatically in the post-2007 financial crisis.

Economic conditions

The economic rationale for a neoliberal regulatory regime is that over-regulation is damaging New Zealand's international competitiveness. The Cabinet paper in August 2009 argued that New Zealand needs a 'better' regulatory environment than its OECD peers to boost its international competitiveness. In support it cited the OECD's opinion that 'mediocre policies will not be enough to overcome the economic disadvantages of New Zealand's small size and geographical isolation', and the fact that other OECD countries often struggled to maintain regulatory discipline.

There is no logical nexus. As Chye-Ching Huang points out, New Zealand already has a relatively high international ranking for core economic regulation: second in the world in the World Bank's Ease of Doing Business rankings, and fifth in the Heritage Foundation and Wall Street Journal Economic Freedom Index (Huang, 2010, p.95). Moreover, the OECD's 2009 Economic Survey highlighted the

paradox that New Zealand was at the forefront in adopting purportedly high-growth policies, but still ranks toward the bottom end of the OECD's productivity league. 'Better Regulation, Less Regulation' and the Regulatory Responsibility Bill are seeking to embed that strategy.

Reputational conditions

When political, normative and economic conditions turn sour, the most reliable bulwark against regime change is to create fear of reputational damage to politicians and the country from a crisis of business confidence. In a return to pre-democratic 17th-century politics, the propertied become privileged political actors who are empowered to promote and protect their individual and class interests. Positive political economists colourfully describe the support mechanisms as 'stacking the deck' and setting up the 'fire alarms'.

Radaelli argues that regulatory impact assessments do not exist to ensure 'quality' for its own sake (Radaelli, 2008, p.6). Principles, such as 'the benefits must exceed the costs', and hurdles, such as 'no new rules unless a market failure is proven beyond doubt', 'stack the deck' to ensure the broad political trajectories of policies are maintained, even if majorities change. Fire alarms, such as published regulatory impact analyses, alert the business constituency when something 'dangerous' is under contemplation.

Lessons can and should be learned from the historical compromise of the 20th century, where the state was forced to step in to absorb, collectivise and redistribute risks arising from a barely-regulated market.

While the August 2009 ministerial statement both stacks the deck and installs the fire alarms, the taskforce goes much further. It creates opportunities for business interests to intervene at select committees, through judicial processes, seeking reviews by the Regulation Review Committee or by participating in the 'independent oversight' of regulation. The paradox of public choice comes to the fore: the rent-seeking business community becomes the guardian of the public interest while elected politicians are pincered between threats of investor flight and credit downgrades and an electoral backlash against corporate dominance, failure to deliver on manifesto promises or impotence in the face of crises.

Institutional conditions

The sustainability of the proposed regime also depends on its impact on effective public administration and the regulatory interventions that people expect from their governments. Both the Cabinet package and the proposed bill impose contested, complex and costly obligations on diverse public agencies in the guise of improving quality through rational and objective procedures and criteria. The methodology of 'cost-benefit analysis' is imbued with scientific qualities of certainty, precision and objectivity. But these assessments are not conducted in an antiseptic laboratory:

Law making is not a de-contextualised exercise in rational policy analysis, and tools like the standard cost model or cost benefit analysis are operated in a process that is contingent on specific institutional settings, history, and purposeful political action. (Radaelli, 2007, p.7)

'Better Regulation, Less Regulation' requires officials and ministers to apply pro-market criteria for 'quality regulation' that are highly subjective and operate as closed reference points that exclude 'competing visions for the good society, different regulatory motivations and concerns about political and public legitimacy' (Haines and Gurney, 2003, p.354). Ministries and communities of interest that have non-commercial responsibilities and appeal to different

ideological premises, values, priorities and constituencies will need to reconstruct their rationale in market terms if they are to be heard at all.

The primacy of economic analysis over political bargains places the responsibility for 'quality regulation' on professional economists ahead of sector-specific policy experts. Scott presaged this reordering in his speech to the New Zealand Institute of Economic Research in 2008, when he recommended putting Treasury 'back into high level regulatory policy from an economic development perspective' after some of its functions were transferred 'to organisations that are less concerned with economic analysis and more in tune with the central planning and coordination methods that have replaced it' (Scott, 2008).

Finally, government agencies must be able to function. The August Cabinet paper acknowledged that some departments had concerns that ongoing regulatory scans would divert resources from other priorities and that implementation timeframes were unreasonable. Cabinet

made it clear that there was no new funding. Presumably, resources would be re-allocated to the deregulation project from regulatory activities that are likely to fall foul of the ministers' statement and Treasury surveillance.

Far from improving the quality of government, Sunstein suggests that onerous, complex and subjective obligations are likely to have the reverse effect:

A system in which agencies decide what is to be done only after considering all costs and benefits is likely to be time-consuming and will inevitably produce large-scale errors. Such a system imposes enormous data collection requirements on agencies and forces them to make difficult and unscientific judgments about basic values. (Sunstein, 1996, p.301)

Contradictions

This article has argued that the necessary conditions do not exist for the 'regulatory responsibility' regime to advance its goal of

embedding neoliberalism. The dogmatic pursuit of that project is profoundly irresponsible.

It exemplifies what John Toye called the 'Empowering Myth', which freezes or concretises ideas, 'losing sight of the fact that they are always in flux, always embedded in critical debate' (Toye, 1994, p.39). Dominant paradigms are not set in stone. History shows that they are fluid and contested. Lessons can and should be learned from the historical compromise of the 20th century, where the state was forced to step in to absorb, collectivise and redistribute risks arising from a barely-regulated market. The turmoil of successive financial crises raises the spectre of history repeating itself.

Tragically, the obsession with paradigm maintenance prevents the exploration of viable alternatives. Truly responsible regulation would actively stimulate new ideas to meet the imminent challenges of global financial instability, energy scarcity, food shortages, global warming and the obscene imbalance of wealth and poverty.

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Brian Easton

Regulatory Lessons from the Leaky Home Experience

I begin this paper with a manufacturer's warning: that I use the term 'regulation' slightly differently from the way it is used in some other papers presented in this symposium, coming as I do as an economist from the tradition of mathematical systems analysis. By that tradition's standards, a market is a regulatory system, so it finds limiting the use of the term 'regulation' to just statutes and the regulations that are derived from them. It also recognises that some administrative practices are regulatory. The legal framework for regulation may be quite adequate but the administrators may fail to implement it effectively. So when I write about the global financial crisis being a result of regulatory failure I am allowing that the law, the market and the administration may all have had a role in that failure. Thus the statement has little informational content; its importance is that when we try to disentangle what happened, or remedy it, we do not concentrate on one element of the regulatory system: they are intricately interrelated.

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Behind this is a view that much public policy is concerned with designing or improving the regulatory system of the economy (and sometimes of non-economic activities). Typically, the change is not the imposition or removal of regulation, but a modification of the current regulatory system to one which is intended to be more effective. In particular the so-called 'deregulation' of 1984–1994 is better thought of as a change in the overall regulatory system, with greater emphasis on market regulation. Hence my preference for calling this 'market liberalisation'. Even the most extreme proponents of this liberalisation knew that there was a need for law to enable the effective working of markets.

Humpty Dumpty said that he could make words mean what he chose them to mean. While that may be true, the danger is that others will misunderstand what their meaning is and that they get trapped into sterile and misleading uses. That has happened, I think, with 'regulation'.

The size of economic crises

I do not propose to give much attention to the global financial crisis, whose regulation is outside the scope of this symposium. But we might note that its direct costs to the United States government from the bail-outs are estimated at US\$90 billion, or about 0.6% of US annual output. The equivalent cost in New Zealand would be NZ\$1.1 billion. The cost of fixing leaky buildings is put at least ten times as much. There are a variety of estimates, depending on assumptions, but currently the lowest is NZ\$11.3 billion (i.e. 6 % of annual GDP), with estimates going up to \$33 billion (18% of annual GDP), based

on 110,000 dwellings costing an average of \$300,000 to fix or replace.

Comparing the two figures is not quite right, since the American one does not include the private costs of the crisis, and the leaky building figure does not include health and trauma costs. However, the comparison does suggest that the failure to build watertight homes is an economic disaster comparable in magnitude locally to the global financial crisis internationally.

Thus, the leaky buildings episode is a major instance of regulatory failure in New Zealand. This paper uses the experience to evaluate the proposed Regulatory Responsibility Bill.

Leaky homes: the beginnings

There is no authoritative account of how the leaky building syndrome (LBS) arose. Here follows a sketch, with particular attention to the role of regulation.

[In the 1990s] The system of regulating dwelling construction was changed dramatically through a building code which set performance criteria to be achieved rather than prescribing the manner in which buildings were to be constructed.

Home construction is a long-established industry, which historically might be characterised as a craft one. Technology was slowly changing, and learning was on the job, with an increasingly formalised system of apprenticeship training. Quality control was by reputation, by professional membership of organisations such as the Master Builders Association (which has been around for over 100 years), and by local government which approved plans and had building inspectors check a builder's work. Typically the inspectors were retired builders – retired perhaps because of physical infirmity but very knowledgeable about building practices. (The role of the building inspector was nicely recalled by one person who said the

builder of his now 30-year-plus-old home was described by his building inspector as 'your friend'. No doubt some builders took a less charitable view of the inspector.) Some new housing also involved architects or engineers.

Until the late 1980s, local authority by-laws prescribed the manner in which construction was to be carried out, although different councils prescribed different building methods, a heterogeneity which the building industry found unsatisfactory. Of course mistakes were made, but they were not widespread and the building industry learned from them and corrected its methods.

From about the 1970s the rate of technological innovation in house construction began to accelerate. How the innovations were incorporated into the building programme is not clear. Probably at some point it became evident that 'learning on the job' would no longer

be sufficient to ensure that the new technologies could be used effectively, although it is not clear what happened instead. By 1979 the innovation challenge was sufficiently serious to be mentioned in public fora.

Various institutions had been developed to protect new house purchasers, including the Building Performance Guarantee Corporation. This was decommissioned in 1987. By doing this the government may have markedly reduced the Crown's financial exposure to risk from poor quality building and, with hindsight, the enormous LBS bill. Had the Building Performance Guarantee Corporation existed in the 1990s, it might have identified the problem earlier or even encouraged better standards of building.

(The parallel here is the Earthquake and War Damage Corporation (now the Earthquake Commission), which has insufficient funds to deal with a major earthquake but deals expeditiously with the consequences of smaller ones, while pursuing an active programme of prevention.)

Another institution disestablished in the late 1980s was the Ministry of Works and Development. This decision is usually seen as reflecting the downgrading of engineering relative to accounting in the priorities of policy makers. The extent to which it had an impact on the housing construction sector is unclear, so it is uncertain whether the LBS can be grouped with the Cave Creek tragedy and the Auckland CBD blackout. However, the Ministry of Works and Development's disestablishment symbolises the fact that engineering standards became less significant in public policy thinking.

Some of the functions of the ministry, including those involving housing construction, were transferred to the Department of Internal Affairs which established a Building Industries Commission, whose 1990 report is discussed below.

Other events of the 1980s also contributed to the concatenation which led to the LBS. One was the reform of local government, which must have led to upheaval in many planning approval offices and among building inspectors. There is a view that funding was reduced, so there was poorer supervision. A second was the labour market upheaval in the late 1980s, as many manufacturing workers were laid off, which may have resulted in many under-qualified workers becoming self-employed builders. A third was the reduction in apprenticeship training.

Leaky buildings: the 1990s

In January 1990 the Department of Internal Affairs' Building Industry Commission reported. Its general recommendations were incorporated in a bill introduced into parliament by the Labour government later in the year, to be passed under the National government, with bipartisan agreement, as the Building Industry Act 1991. Instructively for this story, the report's proposal to reintroduce something

like the recently disestablished Building Performance Guarantee Corporation was not proceeded with.

The system of regulating dwelling construction was changed dramatically through a building code which set performance criteria to be achieved rather than prescribing the manner in which buildings were to be constructed. For instance, builders were told just that the structure must last 50 years, the cladding 15 years, and that the walls and roofs must be impermeable to water. The belief was that the old regime had stifled the use of new materials, design and construction, thereby discouraging innovation and raising building costs. Under the new regime new methods would be introduced more easily. The minister in charge of the bill, Graham Lee, who was once a builder, said its most important element was the development of private building inspectors. (If only that had been correct.)

The act came into force in 1992 with the introduction of the Building Code. There is a view that the code was the 'cause' of LBS. However, as the preceding section indicates, there were numerous factors coming together which led to the failure.

The early 1990s was a period when the market extremists were still triumphant, and there was frequent reference to 'light-handed regulation', referring to a regulatory system in which the government is not very active but the regulation is based upon normal market practices, including litigation for breach of contract (perhaps under the Consumer Guarantees Act in cases where the contract was not very elaborate). Ideally, the threat of litigation is sufficient to ensure that the contractor maintains the agreed standards.

It appears that little thought was put into considering the issue of what redress the house owner would have if the performance standards were not attained. Suppose the cladding fell off after 14 years? Under light-handed regulation the aggrieved party can take the matter to litigation, but who exactly is to be sued? The above account suggests that there are many involved, and all, to some extent, may be at fault: the local authority, its building inspector, the builder, the architect, the

buildings material supplier, the developer, the home owner who onsold, and even the legislators and their advisers who passed the relevant legislation. In such situations fault can be very difficult to establish in law. A favoured explanation is James Reason's 'Swiss cheese causative model', in which there are a series of slices with holes in them and a particular untoward event occurs when there is an alignment of the holes. While this may be useful for explaining a single event, its relevance to explaining a repeated failure is less clear. The LBS involves thousands – perhaps over 100,000 – homes. Alignment of the holes in all these cases cannot be an unfortunate coincidence. The failure was systemic.

Given so many potential groups at fault, and given that the building failures took time to identify, that litigation is not

there was no self-correcting mechanism. Or, to use a much-loved New Zealand image, why there was inadequate fencing at the top of the cliff instead of relying on courts at the bottom.

The LBS appears to be associated with at least two innovations which, no doubt, were cost-saving at the time. The first was the use of a 'monolithic cladding' which has proved not to be watertight unless it was used strictly according to specification. The second was the use of untreated timber, without the realisation that treating for borer also better sealed the wood from water. Additionally, some house designers cut back water-protecting features such as eaves.

The problems of construction may not be confined to leaky homes. They extend to apartments and may involve commercial buildings. The collapse of the

... litigation is not always quick, ... many of those involved will have passed on and companies will have disappeared, and ... in any case they cannot possibly collectively find the \$11–\$33 billion required to fix the problem ...

always quick, that many of those involved will have passed on and companies will have disappeared, and that in any case they cannot possibly collectively find the \$11–\$33 billion required to fix the problem, outcomes for the victims of LBS have frequently been unsatisfactory and costly. (Suing the government is not really an option. Parliament is too clever to allow that, yet many think the government of the day has the greatest culpability – although were it to own up it would be the taxpayer who would pay. In any case the current Minister for Building and Construction has said (New Zealand Herald, 27 February 2010) that the fiscal realities are that even the government's pockets are not that deep.)

The Swiss cheese model which might be useful for a particular court case is not particularly helpful when the cases get repeated. In the end one must ask why

apprenticeship system and the operation of some not-very-qualified builders has meant that the quality of the workmanship has not always been high. The use of other new materials, often imported – following the ending of import controls – means that poor and unsustainable construction may plague other elements of the housing stock in a manner similar to leaky houses.

Ironically, the LBS should not have been as much of a surprise as it was. The Canadians experienced it too, but a little earlier. I have heard it claimed that there were people who knew of the construction failures long before they were a public issue, but their response was inadequate. If that is true, then a further regulatory failure was that there was a political environment in which individuals were discouraged from speaking out.

We might summarise the conclusion by noting that when Marcellus in Hamlet

said 'Something is rotten in the state of Denmark', he was not referring to the buildings but to the governance.

The Major Projects

The LBS may not be the greatest regulatory failure in New Zealand's economic history – even ignoring macroeconomic crises such as the Great Depression, which, in any case, can be attributed to a severe external shock arising from offshore regulatory failure. Although there is no authoritative estimate of the collective cost to the economy of the energy-based Major Projects (Think Big) programme, it is likely to have been of a similar order of magnitude as leaky buildings.

The Major Projects taught some of us an important lesson. In the early 1980s, considerable effort was put into evaluating the public return on the investments and

development of the Building Code, insufficient attention was paid to what would happen if something went wrong. It is true that in both cases there were means to settle the failure. In the case of the Major Projects the financial deficits were covered by taxpayers and motorists. In the case of leaky buildings, a slow, cumbersome and expensive process of litigation is settling the costs of redress erratically. Part is borne by the house owner, part by the private suppliers and the local authorities, with the central government offering to pay about 10%. Many would say that the costs are not being borne equitably.

Murphy's law and regulatory assessment

This is all a nice example of Murphy's law. Not the 'if anything can go wrong, it will' version, but Edward Murphy's original aim to design a system on the assumption

so in the past. As far as I can judge, it is not there in current policy evaluation, and it was certainly not in terms of the two major regulatory failures I have just identified.

The Major Projects were handled outside the legal process as entirely an administrative matter. As it happens, some of the omissions are covered by the 1989 Public Finance Act, in so far as the risks the government exposed itself to should now appear as contingent liabilities in the government accounts. However, I am not sure whether the guarantees the government gave, which ended up as additional costs to motorists, are covered by the new procedures. The precise guarantees could not occur today, because of the greater use of market regulation – such as there being no restrictions on imports of oil. They resulted in tax increases which would not have been anticipated at the time of the agreement, and so would not be mentioned under the contingent liabilities provisions.

However, the LBS, with the benefit of hindsight, is very revealing as to the inadequacy of our approach to regulation in the early 1990s. It demonstrates that 'light-handed regulation' with recourse to the courts if there is failure may not always be an adequate answer.

... accident prevention cannot be all-encompassing. Murphy was in the aircraft industry trying to minimise crashes; the easiest way to do this is to not let planes fly.

there was much debate on the criteria to measure this. However, with hindsight we know the evaluation exercises missed the point. Suppose the assumptions were not fulfilled. Who would bear the cost of the failure?

Those doing the evaluations in the private sector were unaware that the downside risks were not borne equally, while those in the public sector, who did know, did not seem to have taken these asymmetries into account. In particular, it turned out that if there were cost overruns (there were some), or the world price of oil was lower than projected (as it proved to be), the cost of the failure was borne almost entirely by taxpayers and consumer-motorists, because the corporate investors had their returns guaranteed – one way and another – by the state.

There is a parallel here with the leaky buildings. As in the case of the

that anything which can go wrong will go wrong. I doubt that this thought was uppermost in the minds of the designers of the Building Code, and I don't recall much attention to it in the evaluation of the Major Projects.

Of course, accident prevention cannot be all-encompassing. Murphy was in the aircraft industry trying to minimise crashes; the easiest way to do this is to not let planes fly. Similarly, there are going to be some risks from the building code. However, a lot of grief could have been prevented had its designers asked 'if things go wrong, what happens next?' That so few aircraft crashes have occurred compared to the total number of flights, and that even fewer have led to death, indicates the value of the design principle that Murphy enunciated.

Should we build Murphy's design principle into our policy process? The evidence is that we have often not done

Regulatory impact analysis

Suppose the Building Industries Act and the Building Code had been reviewed under the current regulatory impact analysis procedures. It would be too much to expect the review to forecast the LBS, but reasonable questions, like our earlier one – what if the cladding fell off the house after 14 years? – would have anticipated the issue of what happens if the construction did not meet the performance standards in the code. (Note the importance of the time horizon: if the cladding fell off during the construction process there is a reasonably effective redress process.)

The checklist in the Treasury's Regulatory Impact Analysis Handbook is set out in the appendix to this article. While each of its items may be reasonable in its own right, at no point is the evaluator asked to consider what might go wrong and what would be the consequences if that happened. The

analysis is not interested in what redress process might be triggered if something goes wrong. (One colleague argued that the going-wrong issue is implicitly in the handbook, and she explicitly teaches it in her training sessions. So much the better for her students, but I have no doubt the checklist dominates consultants' thinking when they are doing regulatory impact reports.)

The handbook is a lineal descendant of the project evaluation approach that was used in the Major Project appraisals. It does not require a cost-benefit analysis (although these are sometimes included for particular cases), but it adds the sort of caveat analysis which should be done with a cost-benefit analysis (but was often not in the early 1980s). The handbook shows no evidence of having learned the chief lesson of the application of cost-benefit analysis to the Major Projects – to ask what happens if things go wrong? The basis of the approach seems to be that 'the policy will work, but there may be some collateral impacts. Please identify them.' Thus, the handbook approach would have

done nothing to prevent the LBS, nor the enormous costs which it has generated.

The proposed Regulatory Responsibility Bill

The Regulatory Responsibility Taskforce submitted a Regulatory Responsibility Bill in September 2009. Again we ask: would the bill, were it a statute at the time, have done anything to prevent or forewarn of the inadequacies of the Building Act and the Building Code?

Again, the answer is no. The bill establishes a set of principles, not one of which addresses the issue of what happens if some statute or regulation fails to deliver on its intent. From this perspective the proposed Regulatory Responsibility Bill is ineffective. It would not have made a single difference to the adoption of the Building Act or the Building Code, nor resulted in a single additional watertight home. This is surely a major test of its relevance. If the proposed bill would have been useless for dealing with one of our greatest past crises, it is unlikely to be much use for preventing future ones.

One could well argue that that is not

the intention of the bill, whose purpose is described as 'to improve the quality of Acts of Parliament and other kinds of legislation by specifying principles of responsible regulation ... and requiring those proposing new legislation to state whether the legislation is compatible with those principles ... and granting courts the power to declare legislation to be incompatible with those principles.' If so, the bill has the wrong name, not only in terms of the definition of regulation given earlier in this article, but also in terms of the normal meanings of the narrow legalistic term regulation. Its title is a Humpty Dumpty exercise of choosing a phrase which appears to mean something quite different to the public generally. I leave others to find a more appropriate name, but the proposed bill seems to me to be more one about legislative process than one about regulatory responsibility.

This failure is all the more surprising given that three of the members of the taskforce were deeply involved with the Major Projects. They were on the side of the angels, but are repeating the previous

Appendix: Checklist in the *Regulatory Impact Analysis Handbook* (pp.33-4)

Will any policy options that may be considered, potentially

- Take or impair existing private property rights?
- Affect the structure or openness of a particular market or industry?
- Impact on the environment, such as regulations that affect the use and management of natural resources?
- Have any significant distributional or equity effects? ...
- Alter the human rights or freedoms of choice and action of individuals?
- Have any other significant costs or benefits on businesses, individuals or not-for-profit organisations? ...

Is the evidence-base for the effectiveness of different policy options weak or absent?

Are the expected benefits or costs of the policy options likely to be highly uncertain?

Is the success of any of the options likely to be dependent on other policy initiatives or legislative changes?

Are any of the legislative options likely to have flow-on implications for the future form or effectiveness of related legislation?

Are any of the legislative options likely to be novel, or unprecedented?

Are any of the legislative options likely to be inconsistent with fundamental common law principles?

Are any of the legislative options likely to be inconsistent with New Zealand's international obligations, or New Zealand's commitment toward a single economic market with Australia?

Are any of the legislative options likely to include a new power to create delegated legislation, or grant a broad discretionary power to a public body?

Are any of the legislative options likely to include provisions that depart from existing legislative norms for like issues or situations?

Are there other issues with the clarity or navigability of, or costs of compliance with, the current legislation that it might be good to address at the same time?

Will people with expertise in implementation provide input on the policy design before policy decisions are taken?

Are implementation timeframes likely to be challenging?

Are the actual costs or benefits highly dependent on the capability or discretionary action of the regulator?

mistake by assuming that the intent of the policy will be carried out, rather than asking what happens if the policy outcome is different from the intent. As the taskforce report makes clear, this proposal belongs to the same stable as regulatory impact analysis, the lineal descendent of the cost-benefit analysis which was so misleading during the Major Projects debate.

Conclusion: the Murphy gap

What this paper has identified is a major gap in the formal policy process. Let us call it the 'Murphy gap'. There is not built into the policy process a test of what happens when a policy outcome differs from that which was promised. Of course it is rare for promises to be exactly attained, but what we have shown is that in the case of the Building Code (and the

Major Projects) the failure was very large – gigantic. While in principle it could have been anticipated, it was not.

Neither the Regulatory Impact Analysis Handbook nor the proposed Regulatory Responsibility Bill address the Murphy gap. One might argue that by ignoring it, and yet giving the impression that they provide a comprehensive review of regulatory impact, they exacerbate it by complacency.

Who knows whether a current or future piece of legislation (and associated regulations) may result in a failure with an economic impact the size of the Major Projects, the LBS or the global financial crisis? There is still no systematic way of such a possibility being brought to the attention of those who are passing or implementing the laws. From this

perspective, the proposed bill is irrelevant as a means of improving regulatory responsibility.

Acknowledgements

This has proved a bigger project than I initially expected, partly because there are many differing viewpoints and professions involved. I am grateful to the following without whom this article would be less comprehensive in both content and analysis: Rob Bowie, Elizabeth Caffin, Peter Foster, Geoff Fougere, Paul Grimshaw, Roger Hay, Warwick Massey, Julienne Molineaux, Diane Salter, John Tizard, and public servants who were involved in the management of the LBS crisis, but being still active must remain anonymous.

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Deregulatory Irresponsibility: Takings, Transfers and Transcendental Institutionalism

Introduction

The taskforce on the Regulatory Responsibility Bill has put forward what it considers to be six ‘broadly accepted principles of good legislation’. I shall argue, from the standpoint of an economist, against this description. In their present form, several of the principles have extreme implications for policy; and some fundamental requirements of good legislation are missing entirely from the taskforce’s list, and apparently will have to be defended before the courts every time they are implemented.

A central deficiency is the absence of a satisfactory underlying theory of justice and politics to provide a reference point for the proper function of government and legislation, and recognition that issues of fairness are central to real-world policy making. This is not to say that the taskforce ought itself to have engaged in moral philosophy, but it certainly ought to have shown more awareness of the ethical dilemmas with which legislators must grapple, dilemmas requiring political judgments for which economic theory and cost-benefit cast no light. One interpretation that could be placed on the taskforce’s selection of

‘principles’ is that it seeks to privilege one group’s views of what is ‘right’ over other, competing views. In democratic politics a range of competing views is legitimate, and there are good grounds for resisting any rewriting of the rules of the political process to give primacy, or advantage, to some of those views. The proposed bill looks like an attempt to do that.

The taskforce report comes with entirely the wrong body language if the intention really is to improve the quality and effectiveness of legislation and regulation in this country. The report starts from a prior hostility to government *per se*, a desire to rein in the extent of state intervention in economic and social matters,¹ and an unqualified adoption of the views of strict property-rights adherents. Consequently, the six ‘principles’ around which the recommendations hang

are strongly biased against any extension of government activity, and carry a presumption that any policy intervention (especially one that offends the business community’s sensitivities) is guilty until proven innocent. A heavy and essentially undemocratic burden of proof² is thrust upon officials and ministers carrying out their normal duties under democratic mandate. The proposed procedures for discharging that burden of proof seem designed, whether intentionally or not, to have high transaction costs and to trigger repeated confrontations between the courts and the elected government of the day. Far from ‘cutting red tape’, the proposed bill would create a morass of new red tape.³ Players with deep enough pockets to afford high-powered lawyers would be able to use the measure to obstruct government attempts to regulate

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their activities, and this is the core of my concern with the bill and the report.

It is simply not true that responsible regulation means less or none. Responsible regulation means effective regulation, targeted tightly and effectively at people whose activities deserve regulation. Sometimes that will mean less, and sometimes more.

I confine my comments in this article to elements of just two of the principles: the proposition that any 'taking or impairment of property' should be accompanied by mandatory full compensation, and the notion that all legislation must be subjected to some sort of prior certified cost-benefit analysis.⁴ Both of these are, I suggest, likely to prove recipes for bad legislation and bad government, and I do not believe them to be as 'broadly accepted' as the taskforce would have us believe.

The article has a second theme, regarding the proper application of cost-benefit analysis. Far too great a burden is placed on the notion that cost-benefit analysis somehow offers a means of resolving issues involving deep policy choices.⁵ Economists have known for half a century now that cost-benefit is an effective tool only within a restricted domain; that key elements of most policy decisions require the exercise of judgment on matters where economic theory is necessarily silent; that cost-benefit cannot answer ethical questions, it can only help identify efficient and effective ways to implement ethical judgments once these have been reached; and that 'winners being able to compensate losers' is not a valid test for distinguishing good policy from bad.

Takings, impairment and compensation

Consider the issue of transfers of income and wealth within the community. The taskforce's principle (c) recommends mandatory, unqualified full compensation for any 'taking or impairment' of a property right when this is justified in the public interest. The taskforce contemplates no situation where 'full compensation' might not be paid. Compare this with the wording of the United States' Fifth Amendment, which requires only 'just compensation' and includes a 'due process' qualifier: 'No

person shall be ... deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use, without just compensation.'

The US wording leaves open the possibility that there can be situations in which justice may point to no compensation, or partial compensation. The extreme wording adopted by the taskforce conspicuously avoids using the word 'just', which would raise the question of what justice is and what it may require.

Right-wing commentators and analysts in New Zealand have consistently argued over the past two decades that transfers of wealth or income have no welfare consequences ...

The Magna Carta was the founding document not only of the English common law and bill of rights doctrines regarding private property, but also of feudalism, a social and economic order that proved unsustainable because it was an obstacle to economic progress and because it embodied significant elements of injustice.

The Fifth Amendment to the US Constitution was adopted in 1789, at a time when slavery was considered fully compatible with Enlightenment thinking and the Magna Carta. It was more than half a century before slavery was abolished, in one of the more spectacular uncompensated takings of the 19th century. The slavery example reminds us that notions of what can be and what cannot be 'property rights' have evolved over time, as conceptions of justice have

moved along with human progress. Once one abandons the idea that people can be the private property of others, the right of dispossessed slave owners to be compensated evaporates – because compensation is not required by justice.

Justice has been a central concern of major economists in the past. Adam Smith's list of the three duties of the sovereign included 'the duty of protecting, as far as possible, every member of the society from the injustice or oppression of every other member of it, or the duty of establishing an exact administration of justice' (*Wealth of Nations*, book 4, chapter 9). This included policy measures that would encroach on the interests of property and wealth. Smith, as Viner noted,

... saw that self-interest and competition were sometimes treacherous to the public interest they were supposed to serve, and ... was prepared to have government exercise some measure of control over them where the need could be shown and the competence of government for the task demonstrated. His sympathy with the humble and the lowly, with the farmer and the laborer, was made plain for all to see. ... his prejudices, such as they were, were against the powerful and the grasping, and it was the interests of the general masses that he wished above all to promote. (Viner, 1927, pp.231-2; see also Rosenberg, 1960, p.560)

Right-wing commentators and analysts in New Zealand have consistently argued over the past two decades that transfers of wealth or income have no welfare consequences – a matter I return to shortly – which means that their conception of 'policy justified by the public interest' is tightly constrained to policies which expand the total flow of goods and services available to the community, and does not allow for the possibility of net welfare gains achieved by uncompensated taking from the rich to give to the poor. So-called 'economic efficiency' thus becomes the be-all and end-all of legitimate policy. The narrowing of focus since Smith is dramatic.

To see where this narrowing of 'economic' discourse leads, consider the

following passage from a recent paper by two New Zealand economists:

[T]he key political economy question is this: Is there a government that, having attained power to implement their agenda, would then be willing to impose on itself the discipline of weighing private costs from the taking of rights against an explicit assessment of the claimed public benefits *through a requirement to compensate the private loss*? This is obviously a task for a statesman or woman with an understanding of both economics and the law. (Evans and Quigley, 2009, p.33)

The suggested 'discipline' would prohibit any policy or legislation that simply set out to redistribute income and wealth within the community, with no effect on output (or possibly some negative effect on output as measured by GDP).

Let us be clear: the welfare state involves uncompensated taking from some to give to others. If all such taking had to be fully compensated, the redistribution would be nullified and the project aborted. If, like me, you think the welfare state was one of the 20th century's greatest historical achievements, you will be worried about any extreme claim that all takings (not to mention 'impairments', however that is to be understood) must be *fully* compensated, for such a requirement would remove government at a stroke from the business of remedying rank injustice in the distribution of the benefits from economic activity. Precisely such an outcome has been, I fear, in the minds of some of the proponents of the Regulatory Responsibility Bill.

Evans and Quigley include 'promotion of the welfare state' in their list of 'Government interventions that result in uncompensated takings of property rights'. They acknowledge that one of the arguments against the sort of measures the taskforce recommends 'is that a wider protection of property rights would unreasonably constrain a modern government in the exercise of actions that were in the public interest' (Evans and Quigley, 2009, pp.1, 33). This indeed is the argument I am making here. They

then go on, in the passage I quoted first, to treat the payment of actual financial compensation as defining the outer limit of good legislation. But the ability to pay financial compensation to those who lose is neither a necessary nor a sufficient condition for good policy. The effect of the Evans–Quigley test is not to control the quality of legislation, but to rule out *as a matter of principle* any legislation with redistributive effects.

Redistribution in pursuit of social justice, and the prevention of redistribution in the opposite direction, is a fundamental component of good legislation and good government. Justice is not easily quantifiable ...

Redistribution in pursuit of social justice, and the prevention of redistribution in the opposite direction, is a fundamental component of good legislation and good government. Justice is not easily quantifiable, so it is not generally reasonable to demand, as in the proposed bill, that officials and ministers must certify (subject to court scrutiny on appeal) that legislation will 'produce benefits that outweigh the costs' (section 7(j)), if by this we are to understand that a formal cost-benefit analysis is being proposed. (If not, then the certification is redundant red tape for purely tokenistic purposes.)

Income distribution and cost-benefit

Transfers of wealth or income have obvious implications for social welfare. But cost-benefit analysis and neoclassical

economic theory cannot illuminate those implications until some prior judgment calls have been made: firstly to enable different individuals' interests to be weighted, aggregated and compared in quantitative terms; and secondly to provide some intelligible equivalent evaluation of things that are inherently unquantifiable. To date mainstream economic theory has come up with no satisfactory ('broadly accepted') way of doing either.

Redistribution and weighting schemes

'Pareto gains' are changes which produce no losers and at least some winners. Very few policies in the real world meet this test. For evaluating the great raft of policies that have losers as well as winners, neoclassical mainstream economic theory offers only the very restricted Hicks–Kaldor test for a *potential* pareto gain: that the winners could in principle compensate the losers and still come out ahead. That is neither a necessary nor a sufficient condition for a policy to be a good one.

To reach any clear balance of costs and benefits of a policy one must start with some prior view about the weighting to be attached to the interests of the losers as compared with those of the winners. Suppose a government has been elected with a clear mandate to raise the incomes of the poor by a programme of taxes on the rich to fund transfers to the poor. That programme will probably not result in a pareto gain. If you think that a dollar taken from rich people represents a cost exactly equal to the benefit gained from giving a dollar to the poor, you would conclude that the policy has zero net benefit, and so you would not proceed. But then you could not honestly have stood for election on a redistributive programme. The manifesto on which the electorate voted will have already embodied (explicitly or implicitly) the prior judgment that a dollar transferred from rich to poor advances the national interest.

In standard cost-benefit analysis it is usually assumed that there have already taken place any uncompensated transfers of wealth and/or income that may have been required to ensure that the requirements of justice and equity have been met. Only under this assumption can it be legitimate to array monetary costs and

benefits without regard to the distributive consequences of the proposed measure – ‘a dollar is a dollar’, which implies that all groups’ welfares are weighted equally. The notion that transfers are value-neutral is sometimes elevated to dogma by conservative economists, is vigorously supported by the spokespersons of the rich, and has been central to some recent New Zealand regulatory decisions (notably the Commerce Commission’s notorious ‘public benefit test’: see Bertram, 2004), but it lacks any foundation in economic theory, let alone in any theory of justice. It is entirely an arbitrary *ad hoc* device imported into public discourse by economists who in fact have nothing to say, professionally, about how to adjudicate the distributional consequences when there are losers as well as winners (Coase, 1946, p.172; Williamson, 1968, pp.28-9).

Since economists are unable themselves to offer any conclusive criterion for comparing gains and losses for different groups, their appropriate course of action is to respect whatever weighting scheme emerges from the political process. ‘Efficiency’ would then be not an end in itself, but simply a matter of finding the most effective means to socially-defined ends.

Those ends would include a conception of social justice. Rawls, for example, includes amongst his ‘principles of justice’ the idea that ‘social and economic inequalities ... are to be to the greatest benefit of the least-advantaged members of society (the difference principle)’ (Rawls, 2001, pp.42-3). To a Rawlsian, inequalities that do not satisfy this requirement must be eliminated before a society can be judged to be a just society – and in Rawls’ view, if a society is unjust, then social co-operation itself is not ultimately sustainable. Nozick, even in his far more minimalist frame of reference, similarly argues that restraint on the untrammelled exercise of property rights is necessary as part of a social contract to sustain society’s escape from ‘anarchy’ (Nozick, 1986, pp.ix, 10-11, 178-80).

Rawls’ approach did not emerge simply from an exercise in pure logic. It embodied recognition of the historical fact of the 20th-century welfare state. The essence of the welfare state is that

some redistribution of income and wealth is necessary to hold capitalism within the boundaries of justice. Without both redistribution and regulation, capitalism has inherent tendencies to stray outside those boundaries, and when it does so it places in jeopardy the entire project of social co-operation.

Because the history of economic thought is not widely taught or read these days, the point I am making here may not be immediately recognised, but it was one

The taskforce, it seems to me, wants to shift much of the job to the courts. Where ‘merits’ are a matter of political judgment, ‘appeal on the merits’ will inescapably impose a shift of this kind.

of the most fundamental areas of debate within neoclassical welfare economics in the mid-20th century. I return to this shortly.

Non-quantifiables

The existence of unquantifiables – for example, public goods such as trust, goodwill and sanctity of contracts – is fundamental to the successful operation of markets and societies. But it cannot be quantitatively shown that the benefits of the Fair Trading Act or the Consumer Guarantees Act outweigh their costs: the passing of such laws requires policy makers to reach the prior judgment that protection of the general public from predation by unprincipled businesspeople is a good thing. The same applies to the courts themselves, which are paid for by society on the basis that the rule of law is worth having for its own sake.

The existence of unquantifiables is

sufficient to rule out cost-benefit analysis as a universal ‘principle of good legislation’. Whether or not cost-benefit is helpful to good policy making in any particular case is a matter of contingent circumstance, not constitutional principle. Cost-benefit analysts and economists have to renounce any wish to carry their analysis beyond the tightly-constrained limits of what their discipline can actually do, and to accept as legitimate the reasonable and informed judgment calls of those elected to make judgment calls. Elected policy makers do not have to answer to economists (nor to the courts) for their value judgments on matters involving the public interest.

The notion that properly formed judgments by elected law makers on matters that are unquantifiable ought to be subject to relitigation before the courts is a contradiction. If the policy maker has the role of making those judgments, then that is where the final word lies. If the courts have that role, then we can save ourselves the expense of keeping policy makers. At the end of the day somebody somewhere has to make a judgment on the unquantifiables before cost-benefit analysis can be any use at all (see Moore, 2003, p.1220). The taskforce, it seems to me, wants to shift much of the job to the courts. Where ‘merits’ are a matter of political judgment, ‘appeal on the merits’ will inescapably impose a shift of this kind.

It is obviously sensible to get as good an estimate as possible of the costs of any policy, and to seek to minimise the cost of implementing any given policy judgment. But that is a long way from any suggestion that benefit-cost assessment as understood by economists can always precede key policy decisions.

Some history of economic thought

Utilitarian philosophers such as Bentham and Mill believed in the idea that welfare could be calculated, aggregated and compared across individuals. Neoclassical economics in the 1870s added the principle of diminishing marginal utility: as each individual’s income rises, so does their utility, but each additional dollar received gives less additional utility than its predecessors. This made (and makes) perfect sense for each individual in

isolation, but it presents a problem when we aggregate individuals into a society. If utility can be measured and added up, and if the principle of diminishing marginal utility holds, then unless individuals are very different from one another the welfare-maximising (optimal) distribution of income and wealth must be complete equality. Neoclassical economics thus slid, by the sheer force of its own internal logic as developed by Pigou, into a radically egalitarian position which subsequently became the basis for the welfare state policies of the mid-20th century.

The great intellectual achievement of so-called ordinalist theorists in the 1930s and 1940s was to persuade economists that their discipline could in principle say nothing about redistribution, which meant that economic theory could no longer be brought to bear in support of the welfare state. Lionel Robbins in 1931 argued that it is not in fact possible to compare the utilities of individuals one with another and hence to compute a utilitarian social welfare function (Robbins, 1931; Backhouse, 2006). John Hicks tightened up the analysis in 1934: utility itself cannot be measured at all, so that economics is left only with ordinal, non-utilitarian analysis. It then took two decades more of development in pure theory before Ian Little and J. de V. Graaff in the 1950s brought out the logical implication: neoclassical welfare economics had nothing at all to say *a priori* about the optimal distribution of wealth and income.

Taken on its own, this abdication of neoclassical economics from having anything to say about policy issues where no pareto improvement can be demonstrated is harmless, because it leaves policy makers free to exercise their judgment without fear of being contradicted by ‘economic theory’. Properly applied, the insights of neoclassical theory immediately rule out any notion of requiring legislation to pass in advance a cost-benefit test, because there is no conclusive cost-benefit test for any policy outside the restricted set of pareto-improving changes.

Transcendental institutionalism and its critics
Rawls and Nozick, probably the two best-known 20th-century ‘contractarian’

philosophers of justice, have been jointly labeled ‘transcendental institutionalists’ by Amartya Sen (Sen, 2009). Sen’s complaint, directed specifically at Rawls, is that while Rawls lays out the requirements for a perfect scheme of social co-operation on the basis of principles of justice that individuals would hypothetically converge upon in an ‘original position’ behind a ‘veil of ignorance’, he fails to address the everyday problems of relative justice that confront policy makers in a real world

The outcome was the failure of what looked at one time to be a potentially fruitful exercise in achieving social co-operation in pursuit of both efficiency and justice. We ended up with neither ...

where injustice is prevalent. Once a just set of institutions has been established, it remains to be seen whether the individuals upon whose agreement the whole edifice rests will behave ‘reasonably’, in the sense of (1) acting in a way that sustains the institutions, and (2) refraining from doing things that subvert the institutions.

I think that the proposed Regulatory Responsibility Bill is recognisable as an exercise in the sort of transcendental institutionalism that worries Sen. It is a commonplace for economists to observe that the mere act of setting up a regulatory provision is apt to trigger a set of behavioural responses as individuals seek to evade or subvert the regulation in pursuit of their own interests. In that spirit I anticipate that if the Regulatory Responsibility Bill were passed, a range of behaviours would be triggered in response as policy makers and officials

try to get around the restrictive and often counter-intuitive requirements of the alleged ‘principles of good legislation’; and as well-funded business interests use the courts to obstruct reasonable attempts to regulate their profit-taking.

Many of the regulatory measures of the past two decades in New Zealand have fallen foul of the problem that rational behaviour is often ‘unreasonable’ in the Rawlsian sense, and that ‘reasonable’ behaviour in the Rawls sense is often not rational. I offer two quick examples.

The Fiscal Responsibility Act 1994 aimed to force ministers of finance to account fully to Parliament for all transactions that might affect present and future taxpayers, and to explain the full consequences of budgetary measures. It has left us with a policy environment in which politically-contentious transactions have simply been shifted off the Crown balance sheet, as fiscal policy has drifted towards increasing reliance on state-owned enterprise profits and asset revaluations, accounted for by separate entities over which ministers ostentatiously pretend to have little or no control and for whose behaviour they evade accountability. The emissions trading scheme, I have argued in a joint paper with Simon Terry, is another exercise in creating an off-balance-sheet vehicle to evade political accountability (Bertram and Terry, 2008, chapter 9).

Second, the regime of ‘light-handed regulation’ applied at the end of the 1980s and in the early 1990s to utility operators with market power – electricity, gas, telecommunications – was promoted on the basis of a transcendental-institutionalist set of propositions about:

- 1 market participants behaving in a socially-responsible (‘reasonable’) manner;
- 2 information disclosure providing customers with information that they could use to countervail price-gouging and other abuses of market power; and
- 3 transparency encouraging good behaviour rather than simply providing a focal point for industry collusion.

As I have outlined elsewhere (Bertram, 2009), those expectations (assuming they were genuinely held by the policy

makers at the time) quickly fell foul of actual behaviour by corporate managers driven by profit and the quest for untaxed capital gains, in an environment where government took no effective steps to reward reasonableness or penalise rational but unreasonable (in the Rawlsian sense) action. The outcome was the failure of what looked at one time to be a potentially fruitful exercise in achieving social co-operation in pursuit of both efficiency and justice. We ended up with neither – unless you happen to be one of those who regard

price-gouging and uncompensated asset revaluations as hallmarks of ‘efficiency’. This was an area where effective regulation could have been less cumbersome, intrusive and wasteful of everyone’s time and money, if it had been designed tightly and enforced.

- 1 Page 8, para 1.2: ‘there can and should be less legislation ...’.
- 2 Page 6, para B.I: ‘broadly accepted principles of good legislation, incompatibility with which is justified only to the extent that it is reasonable and can be demonstrably justified in a free and democratic society’. It is not stated what the standard of reasonableness is, nor to whom exactly and to what standard of proof a policy has to be ‘justified’.

- 3 Page 8, para 1.4: ‘statements of responsible regulatory management for each proposal for a new Act or regulation, signed off by the relevant Minister, chief executive and control agency...’; p.19, para 2.16 (and same point page 20, para 2.24): ‘the potential benefit ... significantly outweighs the additional compliance costs placed on the Government by the Bill’; page 19, para 2.29: ‘the introduction of the RR Bill will raise public sector administrative costs ...’. There is, rather conspicuously, no serious analysis or estimation by the taskforce of the scale of the costs, nor demonstration of the quantified benefits.
- 4 I note in Tim Smith’s article the assurance that the taskforce did not intend that any formal benefit-cost analysis be required for the purposes of certifying compliance with the ‘principles of good legislation’, but I think that in practice this is exactly where we would be heading.
- 5 A useful review of the partisan use of cost-benefit analysis in the Republican campaign to subvert high-quality regulation in the United States from Reagan onward is in Judis, 2010. The New Zealand Business Roundtable has promoted similar practices here.

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New Zealand’s public management system was designed to operate in stable and predictable conditions. This Working Paper presents the results of a scan of available futures’ material to identify the cross-cutting challenges facing New Zealand over the next 20 years, and considers the ability of the current public management system to address those challenges. It identifies the powerful global forces that are likely to shape New Zealand’s development as well as the important domestic pressures. Looking ahead to the conditions likely during the

21st century, the paper identifies four key challenges and a range of possible responses.

From this analysis, the Working Paper identifies priority areas for future research, including ocean governance, the evolving relationship between the Crown and Māori, citizen-centred alternative service delivery, reframing the practice of policy, and directions for reform of the public management system.

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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

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.

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.

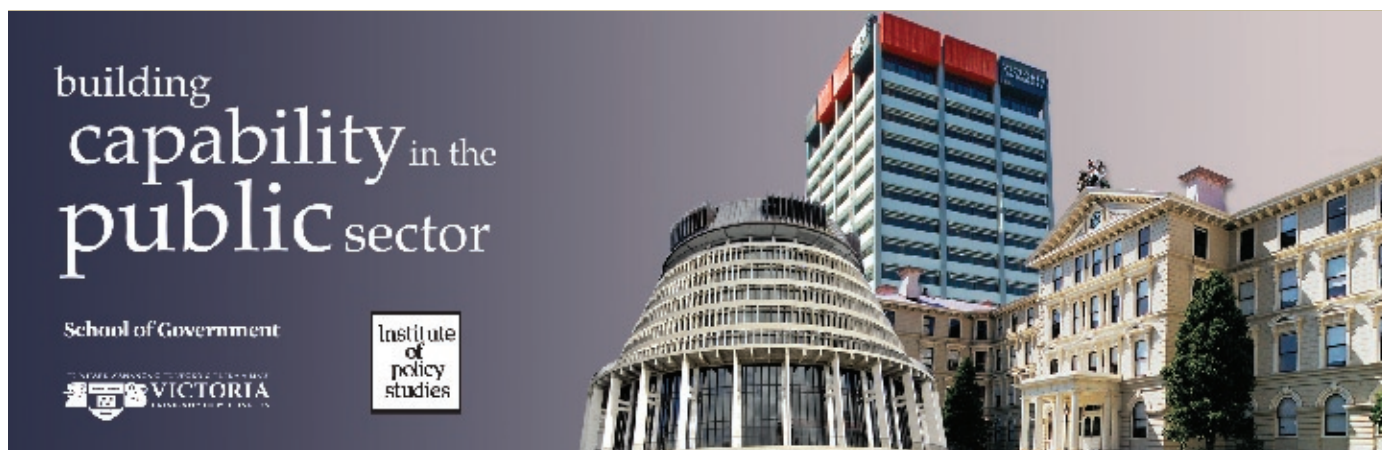
The adoption of MMP – mixed-member proportional representation – as the means of electing members of parliament has not diminished these risks or deficiencies. Nor has it made the legislative process more principled. Indeed, it may have made it less so, at least in the sense that the introduction of 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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Professor John Hattie *Faculty of Education, University of Auckland*

5.30 pm-6.30 pm Wednesday 16 June Lecture theatre three, Government Buildings

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

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.

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.

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

Graham Scott was the Chair of the Regulatory Responsibility Taskforce and is a former Secretary to the Treasury.

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

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.

Another suggestion is that the merits appeal provisions could be limited by excluding circumstances where such review is impractical.

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

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 ...

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.

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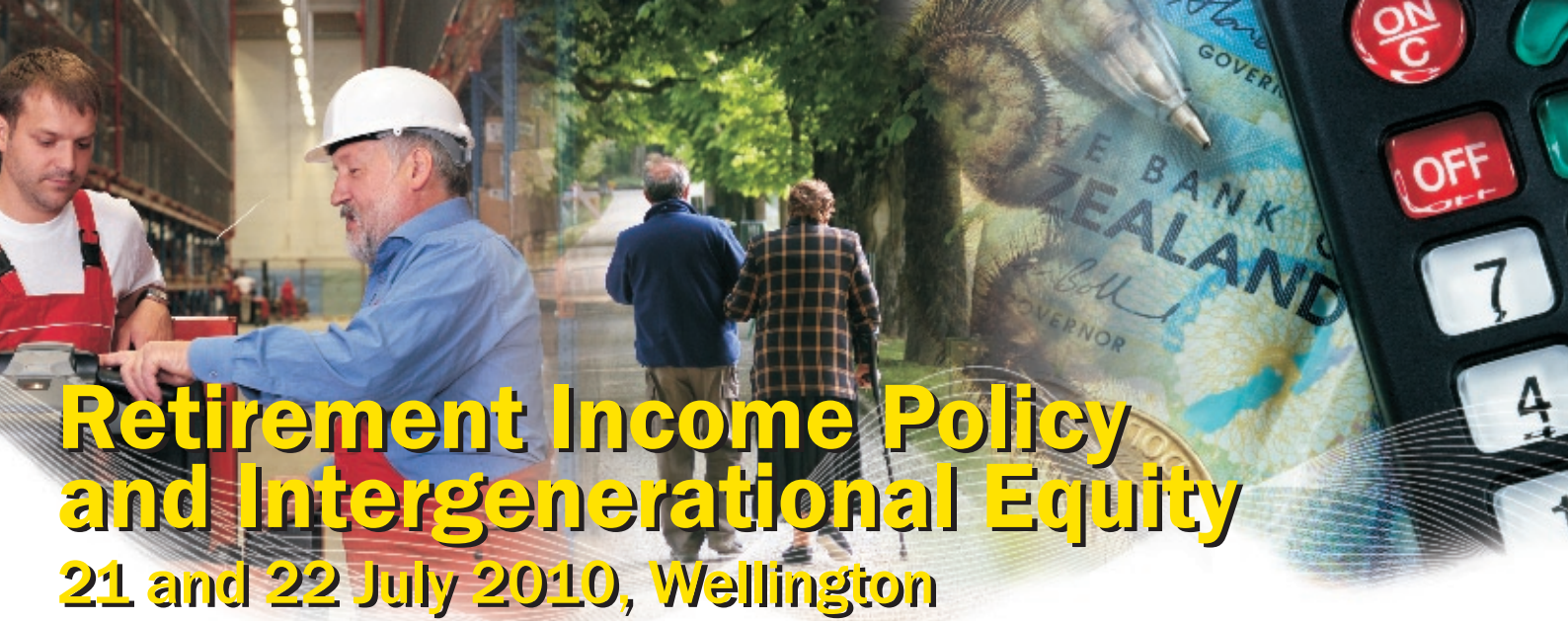
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21 and 22 July 2010, Wellington

A conference being hosted by the Institute of Policy Studies,
School of Government, Victoria University of Wellington,
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Retirement income policy affects everyone. It also raises big issues and questions of fairness, adequacy and intergenerational equity.

This year, the Retirement Commissioner is carrying out the mandated three-yearly review of retirement income policies. To contribute to this work, the Institute of Policy Studies, in conjunction with the Commissioner, is organising a conference to discuss retirement income policy from an intergenerational perspective. The Treasury report *Challenges and Choices: New Zealand's Long-term Fiscal Statement*, released in October last year, provides a relevant context for the conference.

The conference will provide a platform for experts from New Zealand and overseas to set out the key issues and lead discussion on how these issues may be addressed.

Keynote Speakers

Kent Weaver Professor of Public Policy and Government, Georgetown University, Washington, D.C, USA. Prior to his appointment at Georgetown Kent spent almost two decades at the Brookings Institution, a Washington think tank. His major fields of interest are American and comparative social policy, comparative political institutions, and policy implementation. He is currently completing a book on what the United States can learn from the experiences of other advanced industrial countries in reforming their public pension systems. He received his Ph.D in Political Science from Harvard University.

Peter Whiteford Professor, Social Policy Research Centre, University of New South Wales, Australia Peter is an expert on social security policy, particularly pension policies, family assistance policies, and welfare reform. His research has concentrated on international

comparisons of systems of social protection and comparisons of poverty and income distribution, and his areas of interest include: international comparisons of income inequality and poverty; comparative social policy and the welfare state; social policy and the life course; social assistance policies; pension policies and Australian social policy, especially social security policy. In July 2008, he was appointed by the Australian government to the Reference Group for the Review of the Australian pension system.

Other Speakers

Bob Buckle – Andrew Coleman – Len Cook – Judith Davey – Peter Harris – Peggy Koopman-Boyden – Gabriel Makhlof – Ganesh Nana – Alison O'Connell – Nigel Pinkerton – Geoff Rashbrooke – Susan St John – Suzanne Snively – Bob Stephens – Ralph Stewart



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