

POLICY Quarterly

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The journal welcomes contributions of about 4,000 words, written on any topic relating to governance, public policy and management. Articles submitted will be reviewed by members of the journal's Editorial Board and/or by selected reviewers, depending on the topic. Although issues will not usually have single themes, special issues may be published from time to time on specific or general themes, perhaps to mark significant events. In such cases, and on other occasions, contributions may be invited from particular people.

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Editorial Note

As most readers are aware, *Policy Quarterly* is also available on-line at <http://igps.victoria.ac.nz/publications/publications/list/10>. Complete issues can be downloaded as can individual articles. As we all make the transition from paper to digital formats, we have been watching the website traffic with interest.

In 2014, the volume has increased significantly. So far this year, *Policy Quarterly* articles have been accessed online over 19,000 times, an increase of almost 47% over 2013.

Policy Quarterly's goal is to contribute usefully to public policy and management dialogue in Aotearoa New Zealand. The increasing traffic suggests that we are succeeding in this goal and encourages us to aim even higher.

This issue features two symposia, the first dealing with New Zealand's regulatory system.

The system for assuring high quality regulation across all regulatory regimes is the point of focus rather than issues with specific matters such as competition law, or occupational health and safety, or regulatory philosophies such as performance-based or disclosure-based regulation.

Well-known regulatory failures in the areas of building regulation (leaky buildings), financial market regulation (finance companies) and occupational health and safety regulation (Pike River) have demonstrated the importance of each and every phase of the regulatory cycle, from design through to implementation. A system perspective demands a holistic perspective, treating performance as a whole-of-system property. But this also introduces a new level of difficulty, as regulation is both inherently complex and must adapt to changing circumstances over time.

Five articles discuss the performance of New Zealand's regulatory system in the light of this complexity. The article by Bailey and Kavanagh reports on the findings of a year-long inquiry by the Productivity Commission into regulatory institutions and practices. Their 500-page report is a compendium of the current state of New Zealand's approach to regulation, noting strengths and weaknesses. Bailey and Kavanagh make the case for a learning and adaptive regulatory system embracing both design and implementation. Manch then takes up the challenge by examining the critical role of front line regulators and then outlining the steps that are being taken to improve regulatory implementation through enhancing the capability of regulatory agencies and practitioners.

Ayto takes a step back and suggests that New Zealand's stock of regulation should be thought of an asset in the same way we think about the Crown's physical, financial and other assets. He then points to a recent change to the State Sector Act which, among other things, assigns a 'stewardship' role to departmental chief executives for the legislation administered by the department, concluding that 'The expectations for regulatory stewardship, therefore, seek to encourage better management of New Zealand's important regulatory assets'.

Finally, Mumford and then Frankel address the interface between trade and domestic regulatory policy. Mumford shows that, when trade policy goes 'behind the border' regulatory barriers to the development of international markets, the two policy domains become increasingly blended. Frankel examines this trend

through an intellectual property lens, and argues that restricting the domestic regulatory policy space through trade agreements may limit our ability to grow innovation opportunities.

The 2008 supply and confidence agreement between the National and Maori Parties included provision for a review of New Zealand's constitutional arrangements. Subsequently, a Constitutional Advisory Panel of 12 notable New Zealanders was created, charged with engaging in a conversation with the public.

In November of 2013, this Panel released its report. It contained recommendations including some directed towards the New Zealand Bill of Rights Act 1990. The Panel suggested a process, with public consultation and participation, to explore in more detail the options for amending the Act to improve its effectiveness such as

- adding economic, social and cultural rights, property rights and environmental rights;
- improving compliance by the Executive and Parliament with the standards in the Act;
- giving the Judiciary powers to assess legislation for consistency with the Act;
- entrenching all or part of the Act.

Andrew Geddis, Claudia Geiringer and Paul Rishworth, of Otago, Victoria and Auckland Law Schools respectively, organised a symposium in June 2014 to discuss the report's recommendations. Held at the Legislative Council Chamber of Parliament with the support of the Attorney-General and financial backing of the New Zealand Law Foundation, this event brought three overseas speakers to New Zealand to provide comparative insight into the experience of nations with similar rights instruments. Their presentations are published here.

Professor Garbbaum draws on his recently published book, *The New Commonwealth Model of Constitutionalism*, to provide a cautiously favourable review of the NZBORA. Tom Hickman argues for a stronger role for the courts regarding legislation that unjustifiably limits guaranteed rights. He also argues for remedies such as declaring the law to be invalid. Joanna Davidson draws on her considerable experience with Victoria's equivalent to the NZBORA to make a series of suggestions as to how our legislation might be improved.

The final items in this issue of *Policy Quarterly*, direct attention elsewhere. Colin James provides a condensed version of his IGPS Working Paper on 'Vested Interests'. He differentiates between types of interests and inequalities and concludes that recently "successful pursuit of injurious special interests has also been high, at least in the sense of a loop having developed which generates and protects policies that benefit those who have already benefited."

The last two papers were held over from our August issue and were both presented at a roundtable on lobbying hosted by the Institute for Governance and Policy Studies in Wellington in May 2014. Holly Walker, at the time a parliamentarian, has been a staunch proponent of lobbying disclosure and, in her paper, she argues the case. Barry Unsworth, himself a lobbyist, is less convinced.

Editors Bill Ryan, Peter Mumford and Andrew Geddis.

Peter Mumford

Regulatory Coherence blending trade and regulatory policy

Regulatory coherence has over the past four years become a term of art for domestic regulatory systems which interface seamlessly with the systems of other countries. And yet a precise or at least agreed definition remains elusive and descriptions often confuse ends and means. This article sets out to provide greater clarity, and in doing so illustrates that regulatory coherence can be thought of as both an ‘end’ (regulation that supports international trade and investment) and a ‘means’ (good regulatory practice). The adoption by countries of regulatory coherence objectives and practices increasingly blends trade and domestic regulatory policy.

Peter Mumford is policy director, Trade and International Environment Branch at the Ministry of Business, Innovation and Employment.

‘Behind the border’ barriers – the new frontier for trade policy?

For those of us who have been involved in negotiating international agreements in areas as diverse as technical barriers to trade (TBTs), services regulation, intellectual property and competition policy, the idea that ‘behind the border barriers’ to trade is the new frontier for trade policy is unsurprising. What has been discussed and agreed in international forums has for a long time had implications for domestic regulatory policy settings. Notwithstanding this, there are now a large number of reports which highlight the importance of ‘behind the border’ regulatory barriers to trade, relative to ‘traditional’ barriers, and in particular tariffs. The following passage is representative:¹

As much as 80 percent of the total potential gains from the TTIP [Transatlantic Trade and Investment Partnership] would

come from cutting costs that arise from administrative procedures and divergent regulations (so-called non-tariff barriers or NTBs), as well as from liberalising trade in services and public procurement. Although tariffs between the US and the EU are already low (on average 4 percent), the cost of dealing with unnecessary bureaucracy can add a tariff-equivalent of 10–20 percent to the price of goods. (Karmakar, 2013, p.2)

A number of factors are contributing to this ‘behind the border’ narrative, with two having particularly important effects. The first is that tariff barriers have come down very significantly for most traded goods in most major markets,

domestic regulation on global business operations, including value chains. In recent years this ‘voice’ has used the term ‘regulatory coherence’ as an expression of what it wants.

There are concerns that this ‘business-centric’ impetus will result in the interests of businesses, and in particular large international businesses, being put ahead of broader social, economic or environmental objectives in the design of new laws, and this ‘contrary voice’ has also expressed its concerns in the language of regulatory coherence (Kelsey, 2013). Advocates for regulatory coherence have pushed back at this concern, arguing that the objective is efficient and effective regulation which is good for consumers as well as business, and neither the right of countries to regulate nor important

and Transatlantic Trade and Investment Partnership (TTIP), and in international forums such as the Asia Pacific Economic Community (APEC). It is also used in the Bipartisan Congressional Trade Priorities Act of 2014 which is currently before the United States Congress and which proposes a new set of negotiating objectives for the Trade Promotion Authority (TPA – the power granted to the US president to negotiate international agreements). If one assumes that the bill is a product of intensive engagement between multiple parties in Washington over a period of time (and which spill over into US trade discussions and forums such as APEC), then the increasing prominence of the term becomes explicable.

However, within the literature on regulatory coherence the various descriptions are somewhat mixed. For example, there is a confusion of ‘ends’, such as lower regulatory costs for businesses operating across borders, and the means to achieve these ends, such as harmonised standards. In addition, some descriptions focus on cooperation between states to achieve regulatory coherence, and others on the improvement of regulation and regulatory processes within states. The following is an example that combines many of these elements:

With a view to providing clarity, New Zealand has articulated an outcome-based description which grounds regulatory coherence firmly at the interface between domestic regulation and international trade and investment liberalisation.

which makes other barriers both more obvious and more material (constituting a relatively higher proportion of the cost of goods). The second is that the growth of both global value chains and services trade is exposing a broader range of domestic regulatory barriers. For example, occupational regulation is becoming a constraint on cross-border services exports, and international firms which operate in more than one country (the implication of locating different parts of the value chain in different countries) develop a keen interest in both the quality and ‘interoperability’ of domestic laws and institutions that affect both their global and domestic business operations.

The practical implication of this is that firms, and those who represent business, are using their ‘voice’ to argue that more attention should be given to ‘behind the border’ barriers to trade, or, to be absolutely clear, the effect of

objectives in areas such as health, safety and the environment will be compromised (Clancy, 2013).

Are ‘behind the border barriers’ and their expression in the goal of regulatory coherence the new frontier of trade policy? There is certainly a view that this is the case.

Regulatory coherence defined

Regulatory coherence in a trade context is relatively recent. For example, prior to 2010 the main references to it in Google Scholar, such as they were, were in the context of coherence between multiple levels of government (in federal systems) and ‘policy coherence’: for example, the alignment of domestic agencies and laws with a national regulatory reform objective. This changed in 2010–11, and the probable reason for this is that the term started to be used in relation to major trade negotiations, and in particular the Trans-Pacific Partnership (TPP)

Regulatory coherence is not about less regulation nor is it about more regulation. It is about improving the process by which APEC economies develop regulations, generate best practices, and find common acceptable standards and timings in which to implement them. It doesn’t require loss of regulatory power or sovereignty. It results in more effective regulation that does not distort markets. Regulatory coherence fosters an optimal regulatory environment that allows the market to be more open, competitive, and innovative. (National Center for APEC and APEC Business Advisory Council, 2012, p.1)

With a view to providing clarity, New Zealand has articulated an outcome-based description which grounds regulatory coherence firmly at the interface between

domestic regulation and international trade and investment liberalisation. In doing so, it reiterates that regulatory coherence is as much to do with what countries do internally, as what happens between countries.²

Regulatory coherence requires a multidimensional strategy that has the following interrelated elements:

- a. *Coherence between domestic and international policy goals.* When developing domestic regulatory policies that may have an impact on trade and investment, these impacts should be identified and taken into account as part of the policy process.
- b. *Coherence between domestic laws and agencies.* In situations where a number of domestic regulatory agencies all deal with the same trade or investment transaction – for example, a good or service that must comply with multiple laws and be dealt with by multiple regulatory agencies – a consistent and efficient approach is taken.
- c. *Coherence between the laws and agencies of two or more economies.* The third element is generally known as regulatory cooperation. It reflects the goal of reducing the regulatory barriers to trade and investment created by different laws in different countries through cooperation between economies.

There are two main explanations for the apparent lack of ‘coherence’ in descriptions of regulatory coherence. The first is that different businesses have different experiences in the international trading environment, reflecting different markets, goods and services, and locations in value chains. One business might find that it has to deal with a lot of red tape in a market and would like fewer and more certain procedures. Another might find that its product is having to meet different standards in multiple markets and would like greater standardisation. Some may experience issues with border controls; others with migration requirements. Businesses, markets and regulatory regimes are highly heterogeneous, and hence so are the issues of concern to business. And business generally focuses on ends, not means.

The second reason emerges from public policy, or, to be specific, the public policy responses to the issues raised by business. Relative to business, public policy focuses as much on means as on ends, and in relation to ends has a broader set of objectives. For example, businesses may seek global standards, as this makes it easier for them to do business. Public policy must have regard to the broader purposes of standards, such as health, safety and environmental outcomes. It is not unnatural for businesses to give primacy to business impacts, whereas public policy will treat such impacts as one factor among the mix that need to be taken into account.

Different governments will also focus on different public policy prescriptions,

has its genesis in the work of the OECD in the 1990s, commencing with the 1995 OECD Recommendation on Improving the Quality of Government Regulation and followed by the 1997 OECD Policy Recommendations on Regulatory Reform. The centerpiece of regulatory management was regulatory impact analysis (RIA), a systematic approach to the development of regulation. The US was the first mover, and the OECD’s approach to regulatory management was based on the US model. New Zealand was an early follower when it implemented an RIA regime in the late 1990s. Today, most OECD countries have implemented RIA regimes, along with other elements of regulatory management.

The process of diffusion continued

In 2011 APEC leaders committed to taking ‘specific steps by 2013 to implement good regulatory practices in our economies, including by ensuring internal coordination of regulatory work; assessing regulatory impacts; and conducting public consultation’.

depending on where they think the main pressure points are, and their assessment of what is within the art of the possible. For example, one government might at a particular point in time focus on customs facilitation, while another will seek to reduce the costs of doing business within the country or on improving consultation.

Notwithstanding the complexity which arises out of the different ways in which goals are framed and the heterogeneity of ambitions and experiences, it is possible to describe some common elements, and to illustrate through these an increased blending of trade policy and mechanisms to ensure the quality of domestic regulation (regulatory management).

The domestic context – good regulatory practice

The dominant approach to regulatory management in domestic jurisdictions

through APEC in particular, with a key initiative being the 2005 APEC–OECD Integrated Checklist on Regulatory Reform, and now some non-OECD APEC economies have implemented regulatory management practices, including regulatory impact analysis. The OECD has also continued both to refine its approach to regulatory management and its advocacy. Initiatives include the 2005 OECD Guidelines for Regulatory Quality and Performance, and, most recently, the 2012 OECD Recommendation on Regulatory Policy and Governance. In 2011 APEC leaders committed to taking ‘specific steps by 2013 to implement good regulatory practices in our economies, including by ensuring internal coordination of regulatory work; assessing regulatory impacts; and conducting public consultation’.³ APEC’s 2014 *Economic Policy Report* will focus on good regulatory practices.

Evolutions or adaptations have also taken place within countries. In New Zealand these have included scanning and planning, best regulatory practice principles and performance indicators, and, more recently, stewardship requirements.⁴

At the most basic level, regulatory management requires countries to maintain robust and transparent processes and supporting governance arrangements (such as clear government expectations and oversight bodies) to provide an assurance that both new and existing regulation is efficient and effective. Regulatory impact analysis is a key feature of regulatory management and incorporates other features such as evidence-based policy, effective consultation, and risk and cost-benefit analysis. Collectively the strategies and tools for regulatory management are known as good regulatory practice (GRP).

Good regulatory practice in an international context

Partial elements of GRP can be found in existing international agreements. For example, the World Trade Organization (WTO) Agreement on Technical Barriers to Trade includes a provision that:

technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfillment would create. ... In assessing such risks, relevant elements of consideration are, *inter alia*: available scientific and technical information, related processing technology or intended end-uses of products. (Article 2.2)

Elements of GRP can also be found in the domestic regulation provisions in the WTO General Agreement on Trade in Services, including the following:

With a view to ensuring that measures relating to qualification requirements and procedures, technical standards and licensing requirements do not constitute unnecessary barriers to trade in

RISs will normally contain:

- A description of existing arrangements and the status quo (base case in the absence of further government intervention);
- A problem definition;
- Objectives;
- Options: identification of the full range of practical options;
- An impact analysis: analysis of the costs (or possible economic losses), benefits and risks of options, with quantification (to the extent possible);
- Consultation undertaken;
- Conclusions and recommendations;
- Implementation plans and risks;
- Likely levels of compliance and enforcement; and
- Arrangements for monitoring, evaluation and review

(drawn from NZ CabGuide)

services, the Council for Trade in Services shall, through appropriate bodies it may establish, develop any necessary disciplines. Such disciplines shall aim to ensure that such requirements are, *inter alia*:

- (a) based on objective and transparent criteria, such as competence and the ability to supply the service;
- (b) not more burdensome than necessary to ensure the quality of the service;
- (c) in the case of licensing procedures, not in themselves a restriction on the supply of the service. (Article VI (4))

Until such time as these disciplines are developed, WTO parties are required to observe such requirements, to the extent that could be reasonably expected, in a way that does not nullify or impair market access commitments made under the agreement (article VI (5a)).

Such provisions, with their emphasis on least-cost regulation and evidence-based policy, are features of GRP but do not represent a complete system. In fact, one commentator has noted: 'In practice, however, the objectives of domestic regulation and international trade have been difficult to reconcile. WTO rules are effective in limiting discriminatory regulatory measures, but have done little to eliminate the inefficient, unclear, redundant but non-discriminatory regulations that hinder international trade' (Bollyky, 2012, p.173).

There are at least two known examples of more comprehensive GRP provisions in regional and bilateral contexts:⁵

- The 1996 Trans-Tasman Mutual Recognition Arrangement (TTMRA), which provides that: 'Standards for Goods and Occupations may be determined by Ministerial Councils under the terms of the Arrangement. Such determinations will be governed by the *Principles and Guidelines for Standard Setting and Regulatory Action by Ministerial Councils and Standard-Setting Bodies* endorsed by the Council of Australian Governments in April 1995.' These are in effect GRP guidelines.
- The introduction of an RIA regime for European Union legislation in 2002.

The TTMRA, as an arrangement within the framework of the Australia–New Zealand Closer Economic Relations Trade Agreement (CER), and the European Union RIA requirement can be regarded as special cases, as CER and the EU are the most comprehensive economic partnerships in the world.

The proposition in this article is that GRP is assuming more prominence in trade policy generally as a means of achieving regulatory coherence.⁶ Currently, the clearest evidence of this can be found in the report of the United States–European Union High Level Working Group on Jobs and Growth, which set the scene for the Transatlantic Trade and Investment Partnership currently being negotiated, and the Bipartisan Congressional Trade

Priorities Act of 2014, containing the principal negotiating objectives for the United States in the context of the Trade Promotion Authority. The current TPA, given to the president pursuant to the Bipartisan Congressional Trade Priorities Act of 2002, has expired, and the 2014 act has not yet passed, but the negotiating objectives in the latter will nonetheless be significant in congressional consideration of the TPP and in the development of the TTIP.

In a section on regulatory issues and non-tariff barriers, the High Level Working Group notes that:

A significant portion of the benefit of a potential transatlantic agreement turns on the ability of the United States and EU to pursue new and innovative approaches to reduce the adverse impact on trade and investment of non-tariff barriers, with the aim of moving progressively toward a more integrated transatlantic marketplace.

It recommends that the two sides should seek to negotiate (inter alia):

Cross-cutting disciplines on regulatory coherence and transparency for the development and implementation of efficient, cost-effective, and more compatible regulations for goods and services, including early consultations on significant regulations, use of impact assessments, periodic review of existing regulatory measures, and application of good regulatory practices. (High Level Working Group on Jobs and Growth, 2013)

In fact, the Council of the European Union's 'Directives for the negotiation on the Transatlantic Trade and Investment Partnership' has recently been declassified, and in the section on regulatory coherence confirms that:

The Agreement will include cross-cutting disciplines on regulatory coherence and transparency for the development and implementation of efficient, cost-effective, and more

Bipartisan Trade Promotion Authority Act of 2002 (US Code 3802)

REGULATORY PRACTICES – The principal negotiating objectives of the United States regarding the use of government regulation or other practices by foreign governments to provide a competitive advantage to their domestic producers, service providers, or investors and thereby reduce market access for United States goods, services, and investments are –

- (a) to achieve increased transparency and opportunity for the participation of affected parties in the development of regulations;
- (b) to require that proposed regulations be based on sound science, cost-benefit analysis, risk assessment, or other objective evidence;
- (c) to establish consultative mechanisms among parties to trade agreements to promote increased transparency in developing guidelines, rules, regulations, and laws for government procurement and other regulatory regimes

compatible regulations for goods and services, including early consultations on significant regulations, use of impact assessments, evaluations,

Bipartisan Congressional Trade Priorities Act of 2014 (HR 3830), pp.19-21

REGULATORY PRACTICES – The principal negotiating objectives of the United States regarding the use of government regulation or other practices to reduce market access for United States goods, services, and investments are –

- (a) to achieve increased transparency and opportunity for the participation of affected parties in the development of regulations;
- (b) to require that proposed regulations be based on sound science, cost-benefit analysis, risk assessment, or other objective evidence;
- (c) to establish consultative mechanisms and seek other commitments, as appropriate, to improve regulatory practices and promote increased regulatory coherence, including through —
 - (i) transparency in developing guidelines, rules, regulations, and laws for government procurement and other regulatory regimes;
 - (ii) the elimination of redundancies in testing and certification;
 - (iii) early consultations on significant regulations;
 - (iv) the use of impact assessments;
 - (v) the periodic review of existing regulatory measures; and
 - (vi) the application of good regulatory practices;
- (d) to seek greater openness, transparency, and convergence of standards-development processes, and enhance cooperation on standards issues globally;
- (e) to promote regulatory compatibility through harmonization, equivalence, or mutual recognition of different regulations and standards and to encourage the use of international and interoperable standards, as appropriate

periodic review of existing regulatory measures, and application of good regulatory practices.⁷

In the case of the US, if we compare the 2002 and 2014 acts it can be seen that in the corresponding sections on regulatory practices, paragraph C in particular has significantly elaborated on the scope of good regulatory practices (as well as including a catch-all 'good regulatory practices' clause). Notable in both the EU documents and the 2014 act are references to the use of impact assessments and reviews of existing regulation.

The relationship between GRP and regulatory cooperation

GRP in the form of regulatory impact analysis and reviews of existing regulation, with its associated elements such as risk and cost-benefit analysis, evidence-based policy, transparency and consultation, is not, of course, the only pathway to regulatory coherence. Regulatory cooperation, which can take the form of harmonisation, mutual recognition, equivalence, cooperation between regulators, policy coordination and unilateral alignment or recognition of standards that apply in other countries, is a familiar approach which deals explicitly with differences between the regulatory requirements of different countries (and echoes paragraph (E) in the Bipartisan Congressional Trade Priorities Act of 2014). One commentator has described the relationship as follows:

Regulatory coherence is likely to consist of a number of mechanisms, including mutual recognition agreements in which officials on each side agree to accept products or services for the other side based on a 'tested once' criterion of specific sectors and products. Where harmonization or mutual recognition of existing regulations and standards cannot be achieved, then the TTIP seeks to create other forward-looking mechanisms to head off conflicts, including early consultations, impact assessments and regulatory reviews. (Hamilton, 2014, p.93)

Hamilton may be correct that GRP elements such consultations, impact assessments and regulatory reviews are

sometimes seen as an easier alternative to formal regulatory cooperation such as harmonisation and mutual recognition. However, it is equally plausible that GRP is an end in itself. Specifically, the benefits of GRP in a trade policy context can accrue from:

- more effective and efficient domestic regulatory systems: i.e. systems that achieve their primary objectives while keeping regulatory costs as low as possible;
- assessments of both new regulatory proposals and existing regulation that explicitly take trade openness objectives into account (Morrall, 2011) and consider options that facilitate trade; these could include the unilateral adoption of international standards or standards that are commonly used in international trade, or provision for formal cooperation mechanisms;
- more consultative processes for the development of new regulation or the review of existing regulation, which means that interested groups in other countries can participate and bring their perspectives to bear in what are normally domestic policy processes;
- greater transparency and engagement by regulators, which may result in better trust and understanding between regulators of the same goods or services in different jurisdictions of the regulatory approach taken by the other, paving the way for greater cooperation, acceptance of the standards that apply in the other jurisdiction, and potentially 'mutual recognition of compatible regulatory regimes' (ibid, p.i);⁸
- greater transparency and certainty for those wishing to enter or operating in a market about the regulatory requirements they face (von Lamp and Jeong, 2013).

Conclusion

Regulatory coherence has become a term of art for domestic regulatory systems which interface as seamlessly as possible with the systems of other countries, but what it means in practice can only really be understood with reference to

the practices that accompany it. Some of these are common features of trade policy agendas, such as regulatory cooperation, transparency and the adoption of least trade restrictive regulatory measures. Others are less known in trade policy contexts, but are commonly adopted as elements of domestic regulatory management. These can be grouped under the general heading of good regulatory practice. A particularly significant element is regulatory impact analysis, with systematic reviews of existing regulation emerging as a new element with equal significance.

Good regulatory practice has been promoted in international forums such as APEC for some time, but, with a limited number of exceptions, it has not been formally part of trade policy agendas. This is now changing. It is less clear where this will end up. Will there be joint trans-national regulatory impact analysis as recommended by one commentator in a TTIP context (Morrall, 2011), or will GRP retain its current status as 'best practice' rather than being formally mandated in trade agreements?

In my view, GRP is likely to retain its status as best practice, with a strong normative presumption that modern regulatory states embed GRP, including regulatory impact analysis and reviews of existing regulation, in their regulatory management systems. However, it is also likely that regulatory coherence as an outcome will become a more explicit objective when countries examine the impacts of new regulatory proposals and existing regulation, and the regulatory impact analysis process, which is inherently public, will make these impacts more transparent.

1 It should be noted that regulation may be excessive at the national level with commensurate costs to those who trade within those markets. However, regulation can be efficient at the national level but still impose costs for firms operating across multiple markets simply because the requirements they need to meet are different.

2 This definition was first presented at an APEC workshop on regulatory coherence (Moscow, 2012) and is now incorporated into a guide being developed by the Ministry of Business, Innovation and Employment on 'Regulatory cooperation in APEC within the framework of FTAs'.

3 The Honolulu Declaration: Toward a Seamless Regional Economy, http://www.apec.org/Meeting-Papers/Leaders-Declarations/2011/2011_aelm.aspx.

4 See <http://www.treasury.govt.nz/economy/regulation>.

5 The Agreement between New Zealand and the Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu on Economic Cooperation has an objective to: 'encourage the use of good regulatory practices (as set out in Annex D ("Strengthening Implementation of Good Regulatory

Practices") of the 2011 APEC Leaders' Declaration) for the planning, design, implementation and review of regulation" (article. 2.f).

- 6 In addition to the examples used here, there are also interesting regulatory coherence-related developments in Latin America. There are outlined in Romero (2014).
- 7 http://www.access-info.org/documents/Access_Docs/Advancing/EU/ST_11103_2013_DCL_1_EN.pdf, downloaded 20 October 2014.
- 8 Hoekman has, however, noted: 'While such processes [consultation and information exchanges in relation to new regulatory measures] are important to building trust and understanding of the operation of counterpart regulatory processes and norms, their effect in lowering trade costs may be limited' (Hoekman, 2013, p.29), suggesting that

something in addition is required, such as using a supply chain approach to look across regulatory areas to identify the package of feasible measures that can be taken to facilitate trade and investment. That being said, the evidence for Hoekman's conclusion on limited impacts was drawn from the EU-US experience and may be different for other jurisdictions.

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Upcoming Events

Date	Title	Speaker	Venue
Monday 1 December 12.30pm – 1.30pm	Comparative Situations of Maori and First Nations in the US	Professor Alan Parker Director, Northwest Indian Applied Research Institute	Victoria University of Wellington, Pipitea Campus, Old Government Buildings (Law School) GBLT2 <i>All Welcome – No RSVP's required</i>
Tuesday 2 December 5.30pm – 7.00pm	Adding Public Value at the Interface Between Government and the Community: Achieving a strong customer and client focus	John Benington Emeritus Professor, Warwick Business School	<i>Russell McVeagh Boardroom</i> <i>RSVP Essential*</i>
Wednesday 3 December 12pm – 1.45pm	Public Managers and Political Astuteness: Lessons for the New Zealand State sector	Professor Jean Hartley Department of Public Leadership and Social Enterprise, The Open University	<i>Rydges Hotel</i> <i>75 Featherston Street, Wellington</i> <i>RSVP Essential*</i>

*RSVP's can be sent to igps@vuw.ac.nz

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Steven Bailey and Judy Kavanagh

Regulatory Systems, Institutions and Practices

Regulation is a fact of life. It affects the food we eat, the safety of our workplace, the goods and services we buy and sell and the quality of our natural environment. It plays an important role in guarding New Zealanders from harm, protecting our rights, and ensuring that markets work fairly and efficiently. However, when regulation is badly designed or implemented it can fail to provide these protections, or place unnecessary burdens on personal freedoms and business efficiency. So is the New Zealand regulatory system as good as it should be, and how could it be improved?

Steven Bailey is a director at the Productivity Commission and led the commission's inquiry into regulatory institutions and practices. Judy Kavanagh is a principal advisor at the New Zealand Productivity Commission.

In 2013 the government asked the New Zealand Productivity Commission to develop guidance for improving the design of new regulatory regimes and recommend system-wide improvements to the operation of existing regimes. That report has recently been published¹. The origin of the inquiry was concern about a number of high-profile regulatory failures, the proliferation and complexity of the regulatory system where solutions to failure add ever more layers of regulation, the fragmentation and lack of coherence across the whole regulatory system, and the difficulty of regulatory architects to judge, *ex ante*, the impact and effects of particular design settings.

The interest in regulation in New Zealand also stems from a number of important developments:

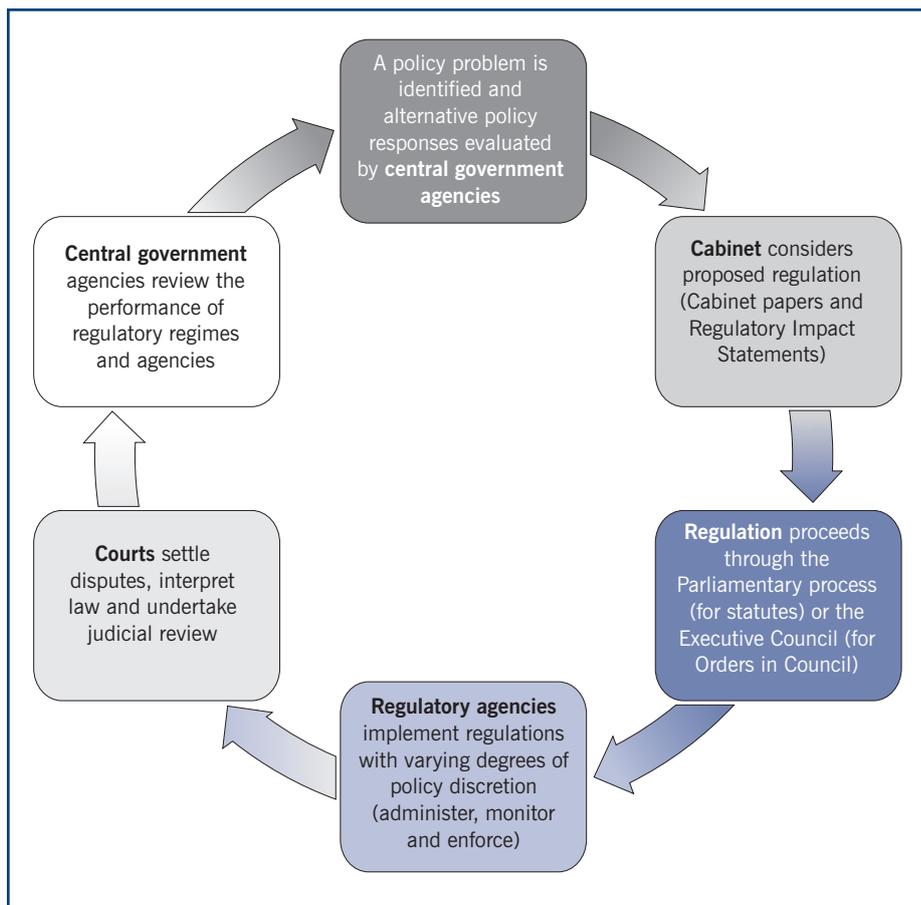
- Reforms over the last quarter of the 20th century have changed how governments organise themselves, provide services and deliver policy. A range of decisions once taken centrally by a minister or within a public service department are now taken by state providers, private firms and individuals. But governments have retained (in some cases setting rules or standards through regulation) their ability to affect the quantity, quality, safety and distribution of services. These changes have made regulation a more visible and important government activity (Yeung, 2010; Majone, 1994).
- There has been a growing awareness of the role that good-quality regulation and institutions can play in promoting economic growth (Nicoletti and Scarpetta, 2003; Crafts, 2006; Conway et al., 2006).
- Society has become much more diverse, with a broader range of attitudes to risk and expectations about what government can and should do.
- Individual freedoms and human rights have taken on greater importance in New Zealand society, as signalled by the passing of the Bill of Rights Act in 1990 and the Human Rights Act in 1993.

New Zealand's regulatory system

The 'regulatory system' is the institutions, principles and processes through which regulations are made, implemented, enforced and reviewed. It involves all three arms of government: the executive, Parliament and the judiciary. Together these shape the incentives faced by regulators and those regulated and their behaviour, and ultimately determine the success of regulation.

New Zealand has a large and complex regulatory system, with as many as 200 different regimes, a large number of regulatory agencies, and more than 10,000 people employed in administering regulation. It is a major piece of government infrastructure,

Figure 1: The regulatory system



and is as significant as the tax and spending systems in terms of its impact on the lives of New Zealanders. Figure 1 provides a stylised representation of the New Zealand regulatory system. The focus of our inquiry was on public sector organisations which have regulatory responsibilities.

What was our evidence?

Our year-long inquiry covered much ground. We received 104 submissions from a wide range of interested parties. We also held over 100 engagement meetings with individuals and groups and surveyed 1,500 regulated businesses, surveyed 23 chief executives of regulatory institutions, and undertook 13 structured interviews with members of the boards of regulatory institutions and their departmental monitors. The commission was also able to make use of a large survey (over 15,000 respondents) undertaken for the Public Service Association (PSA) of their public sector union members by Victoria University of Wellington. Four hundred and forty respondents worked in regulatory roles, in either central or local

government (300 and 140 respondents respectively).

We undertook four case studies – the regulatory settings around financial markets, the provision of aged care, and the regulatory operations of the Environmental Protection Authority and the Ministry for Primary Industries – to achieve an in-depth understanding of the challenges of implementing particular regimes. We received reaction and feedback from inquiry participants to our draft findings and recommendations through release of a draft report.

Together the evidence gathered provided a rich picture of New Zealand's regulatory landscape. We also reviewed 18 official reports of major disasters in New Zealand and overseas – from leaky buildings to mining tragedies, to the mis-selling of financial products. The failure of regulation was a central theme identified in all the reports.² We were able to extract insights into the specific institutional and practice factors that contributed to the failure of regulation and what needed to be present and working well to be effective and achieve regulatory objectives.

How did New Zealand's regulatory system perform?

A number of strong themes emerged, which confirms that New Zealand's regulatory system is not performing as well as it could be.

Quality checks are under strain

New Zealand has a number of institutions and processes to test whether a new regulation is needed, its potential impact and whether it is well designed. However, many of these checks are under-resourced or are not having the impact they should.

Parliament's Regulations Review Committee, which reviews regulations and can recommend their cancellation,

in 2013 were 'materially deficient' (Legislation Advisory Committee, 2012). Moreover, the Law Commission has had to curtail its review activities, citing declining funding. The submission to our inquiry from Parliament's legal drafters attributed much of the quality problem to the speed of the policy and legislative process.

There are also questions about the quality of regulatory policy analysis. Even after 16 years of experience, our process of regulatory impact analysis is not as robust as it could be. Analysis of the merits of regulatory interventions versus alternative policy responses is too often weak, as are the assessments of

costs on both the regulator and the regulated parties.

A key reason for this lack of flexibility is New Zealand's heavy reliance on primary legislation (acts of Parliament). New Zealand appears to produce more laws than countries such as the United Kingdom, and puts more detailed material in statutes.³ This approach generates severe capacity constraints. Parliamentary time is scarce, which means that it can be hard to update legislation to meet changing circumstances or for fixing flaws.⁴ Maritime New Zealand submitted to our inquiry that even the ability to make fundamental shifts in regulatory regimes is hampered by more urgent matters on the political and social landscape. Changes to existing regulatory regimes are generally only made in response to a significant event or crisis. And then, it is done in haste.

In other countries legislatures delegate more rule-making powers, allowing faster responses to emerging issues. There is scope in New Zealand to delegate more rule-making powers, provided these powers are appropriately defined and controlled. This proviso highlights the difficulty in making changes to regulatory regimes to improve their effectiveness and performance. The critical elements of the regulatory system are self-reinforcing and display a level of interdependency. This means that a problem in one part of the system cannot be solved simply by making a single change. For example, delegating more regulation-making authority to regulators, especially where the rules are technical in nature, or allowing regulators to amend rules to improve workability would relieve the parliamentary bottleneck, but there is a reluctance to do so because of other features or weaknesses in New Zealand's regulatory system. A number of submissions to the inquiry expressed the view that while delegating more to the Executive Council might be desirable, delegating regulation-making authority to regulatory Crown entities lacked the necessary checks and balances. The Parliamentary Counsel Office agreed that there is scope for greater delegation of authority to regulators, subject to controls, but it also noted risks, including

New Zealand's heavy reliance on primary legislation ... appears to produce more laws than countries such as the United Kingdom, and puts more detailed material in statutes

has seen its membership drop over the past 15 years and needs more staff. The committee meets for one hour per week, when the House is in session. It has little more than one dedicated policy researcher to support it and its membership has declined in recent years from eight to five MPs. It operates with perfectly adequate guidelines and criteria for assessing the merits of new or existing regulation, but struggles to ensure that those guidelines are applied in practice.

There have also been longstanding concerns about the quality of law-making in New Zealand. The Law Commission told the incoming minister of justice in 2008 that legislative proposals receive inadequate scrutiny before they are introduced into Parliament, and that the mechanisms for scrutiny that do exist are fragmented. Of the 42 bills reviewed by the Law Commission in 2012, 20 did not comply with its guidelines, and the Law Commission told us that approximately half of the 46 bills they had reviewed

the efficiency and costs associated with regulation. External independent review of regulatory impact statements revealed that only a small proportion actually meet adequate quality standards for regulatory impact analysis (NZIER, 2010; Castalia, 2012, 2013).

These essential quality checks need to be revitalised. Regulators cannot deliver better regulation than their legislative frameworks allow.

New Zealand regulation struggles to keep up with change ...

Regulation in New Zealand can easily become obsolete and fail to keep up with technology or public expectations. Worryingly, almost two thirds of regulator chief executives surveyed by the commission reported that agencies often work with legislation that is outdated or not fit-for-purpose. As a result, regulators can be hamstrung, unable to respond to emerging problems or relying on 'work arounds' which can impose unnecessary

the proliferation of subordinate legislation as a result of poor regime design.

Weak feedback mechanisms can also hamper responsiveness to a changing regulatory environment. Several survey results provided perceptions about New Zealand regulators' attentiveness to their performance, and their ability to learn from experience. Our survey of 1,500 New Zealand businesses found that only 15% of businesses perceived that regulators 'always' or 'mostly' review their performance and seek opportunities to improve, although 48% thought that this happened 'sometimes'. A second but more equivocal source of evidence came from our survey of 23 regulator chief executives. The chief executives were fairly evenly split on whether they agreed with the statement that 'there are effective feedback loops between frontline regulatory staff and policy functions', which is one important avenue for identifying opportunities to improve over time. Six respondents agreed or strongly agreed that there were effective feedback loops, but seven respondents disagreed or strongly disagreed (eight respondents neither agreed nor disagreed and two did not know).

The most detailed source of evidence came from the survey of PSA members. Respondents were asked how they perceive 'their organisation's ability to learn from their mistakes and successes'. There was general disagreement among PSA members that their organisations are good at learning from their mistakes and successes, but, notably, central government regulatory staff showed the highest level of disagreement. This was significantly different compared to the responses of regulatory staff working in local government and district health boards, and to the responses of non-regulatory staff.

A resistance to sharing experiences and thus learning from mistakes and successes may be the result of negative experiences in the past, where raising issues has negatively affected the 'success' of a group. The Ministry of Business, Innovation and Employment submitted that the official response to issues or risks being raised has resulted in a cultural tendency to work around systemic issues rather than addressing them. They observed

that this tendency was a key component of the regulatory failures that it (and its predecessor agencies) were responsible for. The ministry questioned whether barriers to raising issues and risks existed just within regulatory organisations or extended across the public service more generally; however, our inquiry found that the picture is not uniform. For example, a review of the New Zealand Customs Service undertaken in 2012 noted positively its learning culture (SSC, Treasury and DPMC, 2012).

The PSA survey reveals that few central government regulatory workers believe that the management systems in their organisations are flexible enough to allow them to respond quickly to changes

since the mid-1990s. Keeping the stock of regulation up to date is an important task of the government. This means ensuring that outcomes are still being achieved, unnecessary and inefficient rules are weeded out, and needed rules are adapted to new economic and social conditions.

New Zealand does not have strong processes for reviewing its regulatory regimes and this has been recognised as a longstanding gap in New Zealand's state sector arrangements for some time. New Zealand tends to have a 'set and forget' approach to its regulation and legislative frameworks. Although there have been improvements in regulatory management systems, departments still do not, in general, systematically apply

There needs to be a clearer strategy for managing the stock of regulation, with clear principles or targets to guide departments, and greater transparency from departments about how they will ensure that the regimes they administer are relevant, effective and necessary.

or evolve rapidly in response to shifts in priorities. However, while the PSA survey presents a picture of inflexibility and a lack of speed among central government regulators in responding to changes in priorities, there is some evidence that regulators are attentive to and scan for changes in risks in the regulated environment. For example, the Reserve Bank of New Zealand publishes a six-monthly Financial Stability Report which includes a systemic risk assessment. The Ministry for Primary Industries monitors changes to New Zealand's biosecurity risks.

Regime evaluation: taking a more systematic approach

New Zealand has a large and growing stock of regulation. On average, 100–150 acts and about 350 legislative instruments have been passed each year

basic good management principles and practices to the regulatory regimes that they administer (Offices of the Ministers of Finance and Regulatory Reform, 2013a, 2013b; Law Commission, 2008). Government initiatives aimed at improving the review and evaluation of regulatory regimes have struggled to gain traction in the face of other priorities and limited follow-up from central agencies. Across a number of our inquiries we have found weak capability for, and limited attention to, evaluation. There is little to guide post-implementation review and determine what would actually constitute success, and whether a particular regime is achieving this.

There needs to be a clearer strategy for managing the stock of regulation, with clear principles or targets to guide departments, and greater transparency from departments about how they will

ensure that the regimes they administer are relevant, effective and necessary.

More attention should be paid to improving regulatory skills ...

Effective regulation depends on skilled and capable staff. As regulatory regimes have become more sophisticated, the demands on regulatory staff have risen. When we asked chief executives of New Zealand's regulatory agencies about the capability of their workforce, around 20% thought that regulators faced significant skill gaps among their staff. The PSA survey and our survey of business give a different picture, with a more widespread perception of inadequacies in skills and training.

are guided by a common code of professional conduct; and

- share a 'professional language' and culture that instils a sense of 'belonging to the regulatory profession'.

To meet the capability challenges facing regulatory agencies requires a purposeful, structured and integrated approach to professionalising New Zealand's regulatory workforce. There are a number of initiatives already under way to promote a national framework of compliance qualifications and professional networks. For example, the New Zealand Qualifications Authority has approved the development of five

poor planning, and patchy induction for new board members.

The Treasury and the State Services Commission play a significant role in appointments to departments and state-owned enterprises. Departments should draw on this central experience and expertise in making appointments to regulator boards. Better-run appointment processes, which properly assess and fill skills gaps on boards, will deliver better candidates and better regulator performance.

High-quality leadership is also important for developing the cultures within agencies that support effective regulation, in particular the ability of agencies to learn from their earlier mistakes and successes. Some New Zealand regulators need to work harder at building these cultures. Evidence collected through this inquiry highlighted poor internal communication within some agencies, with workers feeling unable to challenge poor practices or not hearing a clear organisational mission from their senior managers. Previous restructuring of regulatory organisations has also been disruptive, with insufficient attention paid to the cultural impacts of change or the smooth operation of regulatory functions.

Our inquiry found a high level of dissatisfaction among regulator board members ... [f]ew felt that the monitoring effort of the lead department was adding value either for the minister, ... or to the Crown agency itself.

Regulatory agencies face challenges in attracting, training and retaining key staff to meet these challenges.

Delivering better and more consistent regulatory services will require a more professionalised workforce, with training and qualifications that recognise common skill sets and clearer career paths across agencies. Professionalisation involves creating a workforce where staff:

- possess a core set of theoretical, practical and contextual knowledge;
- are recognised and respected by others in the profession and by the broader community for the knowledge they hold;
- have opportunities to meet, network with and learn from others undertaking similar tasks;
- are continually challenged to stay up to date with the latest developments in their field;
- share a world view about the role and purpose of their profession and

new qualifications designed to support the capability development needs of regulatory staff in local and central government organisations.

The Treasury and the State Services Commission need to provide greater support, to ensure that efforts to professionalise the workforce take root across the whole system.

... including at the very top of regulatory organisations

Much of New Zealand's regulatory activity is carried out through Crown agencies, at arm's length from ministers. Highly capable boards with the right mix of skills are important for the performance of these bodies, and of regulatory regimes. It is the responsibility of policy departments to identify suitable candidates for appointment to regulator boards. However, we found that departmental appointment processes were highly variable, including inadequate assessments of the skill needs of boards,

Monitoring of regulators is missing the mark
Crown agencies are subject to monitoring by an overseeing government department. Crown agencies also typically have an external board for governance purposes, and some have statutory independence from ministerial involvement in their regulatory functions. Under state sector legislation, the boards of regulators are accountable to ministers for their performance.

Our inquiry found a high level of dissatisfaction among regulator board members with the monitoring function. Few felt that the monitoring effort of the lead department was adding value either for the minister, who is the intended beneficiary of the monitor's work, or to the Crown agency itself. This dissatisfaction is compounded by a considerable amount of role confusion with respect to ministers, monitors, board chairs and chief executives. Too often

boards and their chairs are disempowered by the monitoring and ministers reach over boards to work directly with the chief executive of the agency concerned.

A larger question is how well placed policy departments are to assess the effectiveness of a regulator's practices and strategies: that is, whether they have chosen the best compliance tools and policies. The inquiry heard from a number of parties that the best judges of regulatory practice are other regulators. We found these arguments persuasive and recommended that a system of peer reviews be established, where panels of senior regulatory leaders – such as current and former chief executives – would examine and provide feedback to regulators on their strategies. These peer reviews would be embedded within the existing Performance Improvement Framework audits run by the State Services Commission.

The regulatory system needs clearer leadership, and a more active centre

The inquiry found weaknesses in the institutions responsible for oversight and management of the regulatory system. There is no overarching government strategy for regulation, no clear programme for its improvement, and no clear 'owner' of the system. When we look across New Zealand's public policy machinery, we find a few well-run systems with clear, coherent and functional governance supported by strong policy capability. For example, our tax system is run and owned by the Inland Revenue Department. Treasury owns and is responsible for the fiscal system, while monetary policy is the responsibility of the Reserve Bank of New Zealand. In each case the agencies concerned are clear about their role and are equipped to do the job. They are capable of thinking strategically about what they do, why they do it, how they judge success or failure and what they need to do to prepare for a different future.

In contrast, no one has clear responsibility for our regulatory system. The regulatory system is large and distributed across several departments, agencies and ministerial portfolios. This devolved model generally makes sense. Individual departments and agencies have

the knowledge needed to run specific regimes. But if the model is to work at its best there needs to be greater oversight and direction from the centre. Getting better performance from the regulatory system will require stronger leadership from ministers and central agencies, in particular the Treasury.

What was clear to us is that ministerial leadership of the regulatory system needs to be strengthened. The responsibilities of the minister responsible for regulatory management could be clarified and expanded to include:

- defining the overall objective of the system and bringing focus and attention to it;
- strategic prioritisation of effort across the system;

- specifying and allocating tasks for improving the system; and
- promoting continuous improvement in regulatory design and practice.

This needs to be properly designed and resourced, with appropriate political, institutional, managerial and intellectual support. Our inquiry report makes recommendations on how to achieve this.

A learning and adaptive regulatory system

Black (2014) describes the regulatory task as follows:

Regulation is a problem-based activity: 'society' in some form decides there is a problem, or that there is a risk of a problem in the future, and policy makers and regulators devise ways to address

that problem. But how we identify something as a problem is contingent on what we value (and therefore what we think is under threat), and how we analyse problems and create solutions for them is contingent on our knowledge and understanding of the world and our ideas of how it operates. (p.9)

Designing and implementing regulation, therefore, is extremely difficult. It is fraught with complexity, severe knowledge gaps, unintended consequences, speculation about the efficacy of different regulatory arrangements, and a regulatory environment which is in a state of constant change.

Given this reality, we cannot afford

A poorly-performing regulatory system is a significant drag on New Zealand's economy and society; there are heightened risks of regulatory failure; and, ultimately, there is a risk that society's trust in the integrity of the New Zealand regulatory system will be severely compromised.

to have a regulatory system that is poorly equipped to respond to implementation challenges, changes in the regulatory environment, or other performance issues. Yet it appears that institutional constraints within our regulatory system have rendered it virtually incapable of gradual evolution and incremental change. How can we develop a 'learning' regulatory system – one where regulatory regimes can adapt to meet future challenges without a major event like a regulatory failure or crisis as the catalyst for necessary change? How can we create regulatory regimes that are flexible and adaptive so that they don't suffer from a slower but more insidious fate, with regulators and regulated parties doing 'work arounds' to get around outmoded or outdated requirements or design flaws?

Streeck and Thelen (2005) suggest that we need to start by recognising and accepting the gap between design and practical implementation. An acknowledgement that regulation can never be designed with perfect foresight of the consequences allows us to accept that ambiguity is inherent and the ability to change must be built into regulatory regimes. It implies that we can place less emphasis on designing regulation (and the desirability of locking the details into primary legislation) and put more emphasis on monitoring, evaluation and feedback processes that identify priorities for readjustment. Rule designers and implementers can then see themselves in an ongoing/cyclic relationship that has as its goal effective regulation. The 'set and forget' tendency of regime designers would be replaced by more ownership of and responsibility for the continuous improvement of regulatory regimes.

This does not require modification to the structure of the regulatory system, but rather the adoption of a systems approach to how the regulatory

system is managed. Much of the focus of regulatory management in New Zealand, and in other parts of the world, has focused at the front end, on the quality of regulation-making. A systems approach to regulatory management would see monitoring and review of regimes not as the end of a process – or worse, forgotten about entirely – but as a fundamental part of enhancing the quality and impact of the regulatory system. As Streeck and Thelen observe, the lessons from hindsight are perhaps more important for design than foresight. Regime review needs to have a strong link with, and input into, the ongoing design process. In many cases, however, we have found that these processes are not well integrated. Regulatory management is often fragmented and concerned with the constituent parts of the system – regime design, implementation and review individually – and not on how these parts work together and reinforce the system. A systems approach to regulatory management recognises that making a change in one part of the system may

require changes to other parts to be made.

The inquiry's recommendations for improvement in New Zealand's regulatory system might appear daunting. However, the challenges are vastly outweighed by the costs of not making the effort. The stakes are high. A poorly-performing regulatory system is a significant drag on New Zealand's economy and society; there are heightened risks of regulatory failure; and, ultimately, there is a risk that society's trust in the integrity of the New Zealand regulatory system will be severely compromised.

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- 1 While this article draws on the Productivity Commission's inquiry into regulatory institutions and practices in New Zealand, the opinions expressed are those of the individual authors.
 - 2 This research was inspired by and built on the work of Professor Julia Black presented in her Sir Frank Holmes Memorial Lecture at Victoria University in April 2014 (Black, 2014).
 - 3 As a comparison, between 2009 and 2014 New Zealand created almost four times more statutes than the UK.
 - 4 New Zealand has a small Parliament (120 members) and a relatively short electoral term (three years); Parliament's rules of procedure require the House of Representatives to sit in total on about 90 days a year.

Keith Manch

Improving the Implementation of Regulation time for a systemic approach

The importance of an 'efficient and effective regulatory environment' (Offices of the Ministers of Finance and Regulatory Reform, 2013) has never been more prominent in New Zealand than it is at the present time. The New Zealand *Productivity Commission's Regulatory Institutions and Practices* report, which is both a product of and contributor to this

enhanced prominence, noted that there is growing interest in regulation in New Zealand stemming from the increased importance of individual freedoms and human rights, the growing awareness of the impacts of both good and bad regulation, the way government now organises itself to provide services and implement policy, and the diversity of society and its range of attitudes to risk and expectations about government's actions (New Zealand Productivity Commission, 2014, overview, p.1).

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There are many ways to enter into a discussion about an efficient and effective regulatory environment: for example, through the lens of boosting New Zealand's productivity growth, international competitiveness and living standards (Minister of Finance and Minister of Regulatory Reform, 2009); in relation to the increasing focus on good public sector management,¹ which includes regulatory system stewardship (Treasury, 2013); or by addressing the importance of avoiding, responding to and learning from regulatory disasters (Black, 2014). Discussions may or may

While the focus on improving the efficiency and effectiveness of the regulatory environment is prominent now, it is not new. What is new is that it is much more holistic and encompassing of the entire regulatory environment now than it has been before. Significantly, the light is now shining on implementation much more than it has in the past. Of course, the three elements – design, implementation and review – would not be separated in a comprehensive discussion about an efficient and effective regulatory environment, as each supports and drives the other. However, the primary

skill, knowledge and training of central government regulatory workers; the sheer scale of regulatory implementation activity across government as a whole should, in and of itself, suggest the need for good stewardship; and the apparent significance that the quality of regulatory implementation has played in regulatory disasters.

Effectively, implementation capability issues have been left to individual agencies, compared to, for example, the system-wide focus on leadership development through the Leadership Development Centre, and the system-wide focus on design and review³ represented by the Treasury's work in areas such as best practice regulation, the regulatory review work programme and regulatory impact analysis. However, the needs of regulatory practitioners and the organisations they work in relating to better implementation through improving regulatory practice and workforce capability have not been ignored completely from a system-wide perspective, at least since 2008.

... of 23 chief executives of regulatory agencies surveyed as part of the Productivity Commission's work on the Regulatory Institutions and Practices report, only five agreed that there are significant skill gaps among regulatory staff.

not include philosophical perspectives on the place or volume of regulation. But, whatever the view on more or less regulation, or the entry point to the discussion (broad economic performance, regulatory stewardship or avoiding regulatory failures), we probably all agree that regulation that is in place should provide benefits that would not accrue in its absence, at reasonable cost.

At this point it is useful to be clear about the words being used in this article. Reference to the 'regulatory environment' means the environment in which our regulatory systems operate. Reference to 'regulatory systems' means the end-to-end approach of government intending to influence or compel specific behaviour. This includes policy development and the design of instruments intended to achieve the intention; the implementation of those instruments; and identifying and understanding the outcomes achieved and assessing and reviewing the success of each of these components, and the whole.²

For the sake of convenience, it is useful to summarise the above into three main elements: *design*, *implementation* and *review*.

focus of this article is on improving the implementation component of this cycle of activity. Without question, one of the benefits of improving implementation capability is that contributions to design and review will be stronger.

Up until recently the main formal focus of implementation improvement has been through establishing best practice regulation principles (Treasury, 2012). While these principles establish what is required in terms of regulatory practice (used here to mean the operational practice of regulators, often referred to as 'compliance' work) and capability, there has been nothing formal or mandated to actually address these elements. On the one hand this is not remarkable, given that, of 23 chief executives of regulatory agencies surveyed as part of the Productivity Commission's work on the *Regulatory Institutions and Practices* report, only five agreed that there are significant skill gaps among regulatory staff. On the other hand, remarkably the commission's survey of Public Service Association members and also its business survey indicated considerable concern about the level of

The Compliance Common Capability Programme (CCCP)

In May 2008 a group of regulatory agency representatives attended a meeting hosted by the Department of Internal Affairs and Learning State (at that time the government's industry training organisation, the functions of which are now delivered through the Skills Organisation). The explicit purpose of the meeting was to create a joined-up approach to improving the competency of front-line staff involved in implementing regulation.

Agreement was reached to develop a commonly-accepted investigator qualification. As this commenced, it also seemed sensible to develop a more complete framework of qualifications relating to the typical functions undertaken in the course of the implementation of regulation, including informing, educating, advising, inspecting, monitoring, auditing, investigating and sanctioning. Additionally, there was an early decision to engage across both central and local government, and a view that improvement was required both at the front line and in areas of management and leader-

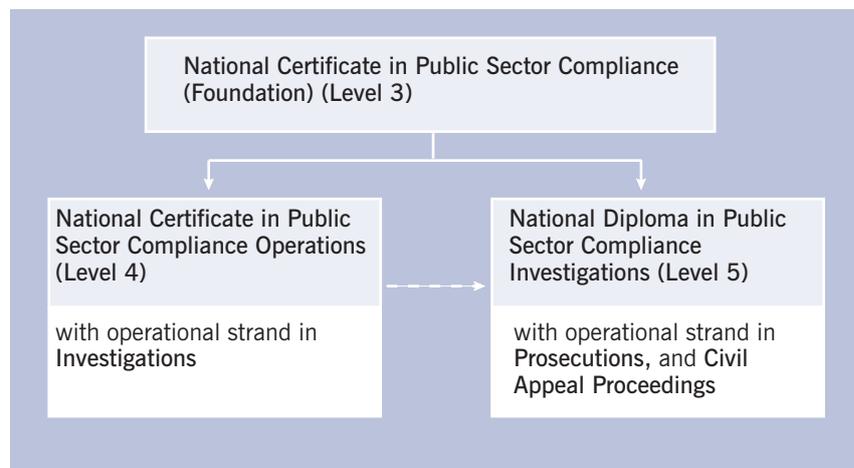
ship of regulatory functions. With strong support from 18 central and local government agencies, initial work on qualifications began with Learning State in May 2008 (see Box 1).

Operationally-focused regulators involved in the work were familiar with the challenges of being engaged in implementation of regulation as part of organisational structures that either paid this issue limited attention, or were not aware of the challenges and complexity of modern regulatory activity. It seemed logical, then, to also develop some kind of practical guide that might be useful for organisations, or functions in organisations, responsible for the implementation of regulation: something that would bring together organisational strategy and design thinking with current thinking on regulatory practice – drawing on both international and domestic experience – in a way that was useful for regulatory implementation practitioners and decision-makers. The key issue was that a focus on improving the capability of individuals needed to be supplemented with action to address organisational capability. The result was the development of *Achieving Compliance: a guide for compliance agencies in New Zealand* (CCCP, 2011) (see Box 2). This guide was described by the Productivity Commission in its report as ‘The main source of guidance on compliance and enforcement in New Zealand’ (p.128), having previously been cited as ‘best practice’ by the royal commission on the Pike River mine disaster (Royal Commission on the Pike River Coal Mine Tragedy, 2012).

The development of the qualifications and the guide inevitably brought together a wide range of people, expert in their own areas of work in the operational regulatory and compliance field, all with an inherent understanding that there is a lot of benefit to be gained from more sharing of ideas, standardisation of approaches and learning from the experience of others. It was clear to those of us who had been involved in regulatory work within and across central and local government agencies that there were significant benefits to be gained from a more joined-up approach for our organisations, our people and those we

Box 1

The initial phase of qualifications development led to three qualifications being listed on the New Zealand Qualifications Authority framework



regulate. From modest beginnings, the CCCP ended up with an overall plan that focused on professionalising and strengthening people, organisations and the community of people involved in the implementation of regulation. The vision is that professionally qualified people will bring their individual competency into business groups or agencies that have enhanced organisational competency in regulatory implementation work, with the additional benefit that they will be better placed to engage effectively with design and review activities.

The ‘value proposition’ of the CCCP was expressed in the following terms when the original qualifications and the guide were launched at Parliament:

Overall, government and its organisations have a strong interest in the quality of the body of regulation. However, getting the policy and the quality of regulation right is only half the story. If implementation is not efficient and effective, investments in improving the body of regulation won’t be realised. The CCCP supports the sharing of information and knowledge about better practice operational compliance work at low cost and in a practical way, alongside a ‘build once – use many times’ approach to improving people competency. The investment that compliance people make in

their professional development will provide transferable skills and better career prospects for them, while at the same time lowering recruitment risks and induction costs for their organisations. Overall, the compliance workforce will be better skilled, according to common standards, and more broadly aware of the strategic, tactical and operational requirements of their work. It will be easier for agencies to work together on joint problems when their people have common ways of operating.

The people and businesses we regulate will come to know and understand what to expect from the government as a whole at the operational regulatory level, rather than having to work out how to engage with different agencies, in different regions, that might have very different approaches to essentially the same thing – assisting and encouraging people to behave in ways that meet desired outcomes. (Manch, 2011)

The Minister of Internal Affairs at the time, Nathan Guy, made the following comments:

Regulation and compliance plays a big part in our society. It has a direct link to economic development, public safety, and protecting the

Box 2

Achieving Compliance provides guidance on effective strategies, practices and organisational design for compliance agencies engaged in the implementation of regulation. It covers:

- compliance models and strategies;
- governance and organisational design of compliance agencies;
- key compliance functions and activities;
- other organisational frameworks for compliance work.

This guide does not deal with the development of regulatory policy (design), although it does discuss ways in which compliance agencies' experiences in administering regulation feed back into and inform regulatory policy (review).

Box 3

The Targeted Review of Qualifications Process has identified a set of five proposed qualifications (which will ultimately replace those referred to in Box 1) to meet the needs of local and central government agencies carrying out regulatory compliance activities. These qualifications focus on the commonalities across the regulatory sector. The qualification outlines approved for development into qualifications are:

- New Zealand Certificate in Regulatory Compliance (Level 3);
- New Zealand Certificate in Regulatory Compliance (Operational Theory) (Level 4);
- New Zealand Certificate in Regulatory Compliance (Operational Practice) (Level 4);
- New Zealand Certificate in Regulatory Compliance (Level 5) with strands in Regulatory Compliance Audit, Investigation, and Operations;
- New Zealand Diploma in Regulatory Compliance (Investigations) (Level 6) with optional endorsements in Prosecutions, and Civil Proceedings.

environment. To get better outcomes, we need to lift the capability of the people and organisations that work to achieve compliance with regulation. In New Zealand, our public compliance sector is made up of around 30 central government agencies, 85 local authorities and around 12,000 individual staff members. So it's pretty sizeable. Until now, the level of collaboration by this important sector has been largely informal. Progress has been a bit piecemeal. (Guy, 2011)

Since its inception, the strength of the CCCP has been its entirely voluntary basis, which means that those who have engaged did so because they explicitly saw the benefits for their agencies, their people and the system as a whole. The strength is also a weakness, in that it is an arrangement that depends on the interest of individuals who are in positions that are relevant to the purpose of the CCCP,

and there is no lasting institutional or system-wide commitment to the success of the work it does – which, to succeed, by its nature needs to be long term. The existence of the CCCP has tended to give comfort that 'something is being done'.

Current state of the CCCP

Perhaps both because of and in spite of the voluntary nature of the CCCP, it has continued to develop in parallel with much of the growing focus on the efficiency and effectiveness of the regulatory environment. The following are among its current initiatives and offerings:

- The development of a Regulatory Compliance Learning Council (RCLC), formed in August 2012 as an operational arm of the CCCP in order to progress people capability development. It is comprised of a CCCP steering group sponsor, learning and development/human resources personnel and experienced operational staff people from central

and local government agencies, and the CCCP project manager. The RCLC's current capability development activities are based around two key topics: regulatory craftsmanship and investigations. It is also contributing actively to developing the next iteration of core compliance qualifications.

- In June 2014 the RCLC trialled effective regulator practice (core concepts) discussion workshops for managers and senior practitioners. Two sessions were run, attended by 52 participants from 15 local and central government agencies. The sessions were designed and delivered by senior practitioners employed by Maritime New Zealand and the Commerce Commission, and hosted by the Civil Aviation Authority. The workshops clearly filled a need: feedback was positive ('one of, if not the most, worthwhile meetings I've been to for a while'), and participants signalled a strong interest in staying connected and exploring the material covered at a deeper level.
- A DVD initially created to provide resource material for the above workshops, and which will be made available for little or no cost to as wide an audience as possible. Once a channel for distributing this material has been established, it is expected that other resources suitable for open-source sharing will be created and published.
- The programme has been progressing, as resources permit, the development of a draft Regulatory Practice Skills Framework. This is intended to provide a sector-wide view of common ground relating to regulatory practice, skills and knowledge. It is designed to be used in conjunction with other frameworks (where appropriate) and to be informed and improved by other similar work. Even when 'finished' it is intended as a living document that can be improved, amended and developed over time. In its current state it has proved useful in supporting the development of the latest suite of core regulatory

compliance qualifications (see below and Box 3). It has also been shared with Australian colleagues through the Australasian Environmental Law Enforcement and Regulators Network, where it has been very well received.

- The CCCP is actively involved in developing the next iteration of New Zealand qualifications for staff working in local and central government agencies that carry out regulatory compliance work.⁴ It is a member (alongside the Skills Organisation and New Zealand Police) of a consortium of qualification developers who are jointly responsible for producing compliance qualifications that meet the needs of the sector. To fulfil these duties, the CCCP is playing a key role in: drafting initial qualifications content; supporting and co-facilitating the development process; encouraging active participation from local and central government organisations; and drawing on its networks to source governance group and working group members, including from its own steering group and the RCLC. The qualifications development process is likely to require significant input until June 2015.
- The CCCP's organisational and people capability development activities have created informal knowledge-sharing networks among local and central government regulators. The CCCP communicates via an 'interested parties' database, and with compliance approved providers⁵ and the wider regulatory compliance sector.

Next steps

Although progress is being made, those of us involved in the CCCP are firmly of the view that while 'something is being done', a great deal more is required. In fact, one of the items on the CCCP's work programme for 2013 was to examine its future, with the strong sense that continuing to operate at the level it had been – albeit with some good initiatives – was not keeping pace with growing understanding and the need for improvements in the implementation

of regulation. The fact is that the nature of regulatory work is changing. While it has historically been seen as about 'simply' applying the law, it is now seen as being a discretion-laden activity. Regulators are expected to operate in a way that deals with risks and harm, and adds value, rather than 'just' addressing illegal behaviour. The depth and complexity of the task of the modern regulator is well described by Searancke et al. (2014): 'Experience, common sense and theory have combined to build a picture of a new sort of regulator, better equipped to deliver regulatory outcomes envisaged by Parliament in a complex and dynamic environment.' While they are referring specifically to building, financial and health and safety regulation as example areas, there is no reason to

the implementation of regulation today requires a level of capability up, down and across agencies that is simply not being delivered or supported comprehensively under current arrangements.

In this context, the two original 'products' of the CCCP, and its initiatives since, have been explicitly intended to focus on:

- the capability of people (through the focus on nationally-accepted qualifications and activities such as collaborative workshops and resource development and sharing);
- the capability of regulatory implementation organisations (through the development of the guide); and
- bringing people together as

The commissioning of the Productivity Commission to examine regulatory institutions and practices was welcomed by the CCCP on the basis that it might provide a thorough examination of the relevant issues.

think that the same issues are not relevant to any area of regulation.

This is true in the context of the CCCP. One of the key points that enabled widespread engagement from many regulatory areas across central and local government was the fundamental understanding that the knowledge, skills and understanding required – alongside the critical technical knowledge of the subject matter – to implement regulation successfully is more similar than different across regimes. It is, after all, about delivering outcomes for the benefit of society by managing risks, solving problems, setting standards, and changing behaviour in relation to people and equipment (or the operation of a combination of those things). While those of us at the regulatory implementation front line might quibble over whether the insight about the requirement for a new sort of regulator is new, or is simply now being acknowledged by parts of the system that have not noticed it before, it is clear that

a community of practice in a way that has sown the seeds for professionalising regulatory practice.

Each of these things is necessary, and must be advanced more significantly than before if improvement in the implementation of regulation, and its role in delivering the most efficient and effective regulatory environment possible in New Zealand, is to be achieved.

The commissioning of the Productivity Commission to examine regulatory institutions and practices was welcomed by the CCCP on the basis that it might provide a thorough examination of the relevant issues. The resulting Regulatory Institutions and Practices report has done this, and brings together issues relating to regulatory practice, regulator leadership and culture and workforce capability (chapters 3, 4 and 5) that provide a strong basis not just for the CCCP in considering its future, but for government to consider how best to focus on improving implementation.

A key element of the opportunity to move forward is presented in the report's recommendation relating to the introduction of a head of profession role. The Productivity Commission recommended that such a position should be created to provide intellectual leadership in the area of regulatory practice. It was recommended that the position would be responsible for:

- disseminating information on the latest developments in regulatory theory and practice;
- coordinating the development of professional development pathways and accredited qualifications;
- working with chief executives of regulatory bodies to identify common capability gaps and strategies for filling these gaps across the system;
- working with research organisations to investigate regulatory issues of importance to New Zealand agencies;
- developing and maintaining good practice guidance;
- promoting a common 'professional language' throughout New Zealand regulatory agencies;
- coordinating study tours and visits by international experts and leading academics in the field of regulatory studies; and

- leading and managing professional forums of regulators.

This has galvanised action by senior regulatory practitioners – coordinated by the Department of Internal Affairs, the CCCP, and representatives from the Ministry of Business, Innovation and Employment and Worksafe New Zealand – to take the initiative (rather than waiting for others to report back to government on the report) and consider putting in place a mechanism that would address the substance of the Productivity Commission's recommendations. The design, location, funding and activities are under consideration. The initiative will ideally draw from and build on the past and current work of the CCCP, with an effective funding base, a clear mandate, and people with the ability to lead, coordinate and support system-wide improvements in regulatory practice, leadership, culture and workforce capability. This will strengthen not only the implementation element of the regulatory system cycle, but enhance the ability of those involved in implementation to add value to design and review.

In conclusion, it is apparent that the combination of the increased attention being paid to the importance of an efficient and effective regulatory

environment, the changing nature of the regulatory task, the experience of the CCCP in its voluntary form, and the findings and recommendations of the *Regulatory Institutions and Practices* report provides a clear impetus for a significant next step in the way that we focus on the implementation of regulation in New Zealand. Emphasising the critical importance of improving implementation should not be taken as suggesting that design and review are separate or less important. Rather, improved implementation should be acknowledged as requiring a special focus both for its own sake, and in order to strengthen the necessary end-to-end focus on improved design, implementation and review.

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- 1 Changes to New Zealand's State Sector Act in 2013 reinforced the importance of improving the systemic focus on agency, sector and system-wide performance, the collective interest of government and stewardship: that is, paying attention to the longer-term sustainability, organisational health and capability of agencies.
 - 2 See the diagram in Offices of the Ministers of Finance and Regulatory Reform, 2013, paragraph 19.
 - 3 Although, in terms of review, refer to the Productivity Commission *Regulatory Institutions and Practices* report, which found that New Zealand doesn't have strong processes for reviewing regulatory regimes, leading frequently to a 'set and forget' mindset (p.28).
 - 4 The original three qualifications will be replaced as a result of the NZQA-initiated cross-sector Targeted Review of Qualification process, aiming to: reduce proliferation and duplication in qualifications; identify clear qualification pathways; ensure qualifications remain useful and relevant; and ensure qualifications meet the needs of learners, industry and stakeholders.
 - 5 Compliance approved providers are a group of 11 public and private sector organisations that have been selected by the CCCP as preferred providers of training and assessment services.

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Jonathan Ayto

Why Departments Need to be Regulatory Stewards

The latest Crown financial statements report that, at 30 June 2014, the New Zealand government held total assets valued at around \$256 billion (New Zealand Government, 2014). These included a diverse range of physical, financial and other assets, such as national parks, highways, state houses, electricity generation plant and equipment, Kiwibank mortgages, shares, deposits, and the National Library and Te Papa collections. But some of the most important assets that the New Zealand government develops and maintains are not recorded on the Crown's balance sheet. They are the

regulatory arrangements that have been developed, introduced and refined over many years to, among other things, protect the rights, safety, property and other interests of its citizens, residents and visitors, allocate responsibilities for various risks, and otherwise help them transact or engage with each other on fair and efficient terms.

Why do I suggest that regulatory arrangements are assets? Well, the definition of an asset, in the eyes of an accountant, is something within an entity's control from which future economic benefits are expected to flow. If we adopt a national perspective and include benefits beyond the merely economic, this corresponds pretty well

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with our expectations of any regulatory regime established by New Zealand legislation: namely, that it should deliver a future stream of benefits to New Zealanders that is greater than its costs. Leaving aside the measurement issues, the perceived legitimacy of regulation rests, at least in part, on satisfying this basic conceptual premise.

The response from some to this suggestion that regulation be viewed as an asset will be that they can think of many examples of regulation where the benefits do not exceed costs. And in some cases they are likely to be right. Regulatory regimes that the government intended to be an

'human errors' and 'system failures' that they argue have repeatedly produced major mistakes in policy design (King and Crewe, 2013). While their analysis is not specifically focused on regulation and is derived from UK cases, the human errors they have catalogued are likely to be found in a wide range of regulatory contexts. They include:

- cultural disconnect – where policy-makers unconsciously project onto others values, attitudes and even ways of life that are not remotely accurate;
- group-think – where there is such widespread agreement among a group, or such a desire to maintain

the strength of the narrative case for change, they are likely to be subject to ... judgements that are known to be subject to many important biases. (Hughes, 2013, p.38)

Some of the tools of policy or regulatory design, such as systematic impact analysis, consultation expectations, and other techniques for testing the robustness of regulatory proposals like regulatory pre-mortems (where you imagine a proposed regulation has failed and try to work out all the various ways that could have happened), are intended to help counter these risks.

Even without policy-maker biases, however, the design of effective regulation is an inherently challenging task. The essence of regulation is an attempt to alter the behaviour of others to meet a specified objective (Black, 2002). Since different people, through inclination or circumstances, will respond in different ways, a regulatory regime needs to be designed to be able to deal with a range of behavioural responses. The choice of regulatory approach (e.g. prescriptive, process-based or results-based regulation) must also take careful account of the potential for innovation or continuous improvement, the likely capability and resourcing of the regulator, and also differences in our inherent ability to observe or measure the regulated behaviour and outcomes.

To make matters even more difficult, regulation will frequently be applied within 'complex adaptive systems' (Dolphin and Nash, 2012; Eppel, Matheson and Walton, 2011). These are environments characterised by diverse, interdependent but self-organising actors, networks and institutions that continually influence, and in turn adapt to, each other's behaviour and the broader environment. The system's dynamics are typically non-linear and not geared toward equilibrium, making it inherently difficult or impossible to predict responses to and outcomes of regulatory policy change. Unanticipated and unintended consequences are therefore to be expected. In these circumstances, new regulation cannot be expected to be 'right first time', which means that many regulatory

The essence of regulation is an attempt to alter the behaviour of others to meet a specified objective ... Unanticipated and unintended consequences are therefore to be expected

asset for New Zealanders can in practice turn out to be a liability. We might call these cases of regulatory failure.

What disasters tell us about regulatory failure

There are, unfortunately, many ways in which regulatory regimes can fail. The failures that will spring to mind most readily are those associated with disasters – those highly salient events or discoveries that have or reveal major negative outcomes. We know quite a bit about these types of regulatory failure because they are usually the subject of a subsequent public inquiry seeking to learn lessons from the disaster. Oft-cited recent New Zealand examples include leaky buildings, failed finance companies, and the Pike River mining tragedy (Searancke et al., 2014).

Mistakes in policy design

It seems that the seeds of a future disaster are frequently sown at the policy design stage. In their very readable book about UK government policy 'blunders', Anthony King and Ivor Crewe identify a range of

group cohesion, that no one expresses dissent;

- intellectual prejudice – an unquestioned belief that some kinds of institutions and some kinds of policies can be counted on to work better than others; and
- operational disconnect – the lack of communication between policy makers and implementers.

King and Crewe argue that steps can be taken to counteract these common errors, but also note that this will not occur without prior recognition of the danger. The same point could be made about the various cognitive biases described in the behavioural economics literature, to which policy advisers and policy decision-makers can be just as prone as those whose behaviour government policy is seeking to influence. Tim Hughes wrote about this in a previous *Policy Quarterly* article, noting that:

To the extent that advice is given or decisions are taken quickly, on partial information, on gut feel or

interventions are best treated as policy experiments. What this implies, as Peter Mumford has previously suggested, is that 'If we do accept ... the proposition that regulatory regimes are experiments, and novel regimes even more so, then constant monitoring and evaluation over time are critical' (Mumford, 2011, p.37).

Mistakes in regulatory operations

Poor (or unlucky) policy design, however, is not the only cause of regulatory disasters. The evidence suggests that operational factors within the control of regulators are also important contributors.

Learning from regulatory disasters was the theme of Julia Black's Sir Frank Holmes Memorial Lecture in Wellington in April 2014. She defined a regulatory disaster as one that results from 'the unintended and unforeseen consequences of the design and/or operation of a regulatory system and its interaction with other systems' (Black, 2014, p.4). From her analysis of the reports on several regulatory disasters, Black noted that:

While the political and legal context has a role to play in shaping organisational processes, cultures and decision-making, a striking feature of all the regulatory disasters analysed here is the central role played by failures of governance and leadership within organisations, in both regulators and regulated firms. (ibid., p.6)

Her analysis of the failings of these organisations led her to conclude that:

- organisational culture matters;
- the training, skills and expertise of its personnel matters;
- organisational failures usually come from the top;
- organisations often take the path of least resistance, and as a result can fail to manage risks strategically; and
- where multiple regulators are involved, they consistently fail to coordinate among themselves in the operation of the regulatory system.

As part of its recent inquiry into regulatory institutions and practices, the Productivity Commission extended Black's analysis to cover 18 reports

of major disasters, seeking to test her hypothesis that regulatory failures were often a contributing cause, and to identify what aspects of regulation were implicated (New Zealand Productivity Commission, 2014, p.23). The commission found that a number of regulatory factors were frequently implicated, including:

- the lack of clarity of the regulator's role;
- the complexity of regulatory regimes;
- weak governance and management of both regulator and regulated parties;
- weak regulator accountability, monitoring and oversight;

regulatory failures due to the chronic underperformance of regulatory regimes ... have been called the 'silent killers', and should be considered a significant risk ...

- the capacity and resourcing of the regulator;
- failures of compliance and enforcement;
- failure to understand and assess risk;
- poor engagement and communication about regulatory requirements;
- the culture and leadership of both regulators and regulated parties; and
- out-of-date regulation or lack of review of regulation.

While Black and the Productivity Commission sought to draw attention to the frequency with which some factors are linked to regulatory disasters, their findings also serve to highlight the wide range of factors that can contribute to those disasters. If there were just one or two specific factors strongly linked to almost all regulatory disasters, it would be relatively straightforward either to design a regime to significantly limit those particular risks, or to identify indicators to enable periodic monitoring of risk levels at modest cost. But with so many factors potentially in play, that significantly increases the difficulty of

being able to design around, or spot the emergence of, possible future problems.

Disasters are not the only form that regulatory failures can take

Major disasters are a particularly visible form of regulatory failure, due to the terrible harm they cause to those directly affected. The attention this also creates means that very significant amounts of ministerial and public servant time are then diverted to support urgent inquiries and reviews and to develop and implement an inevitable government response. But while the risk of regulatory overreaction is very real in these

circumstances, there is at least a reasonable prospect that action will be taken that will improve the performance of the regulatory regime concerned.

By contrast, regulatory failures due to the chronic underperformance of a regulatory regime are far less likely to attract policy-maker attention. In the absence of a systematic approach to regime monitoring and review, it is possible for unnecessary, ineffective and excessively costly regulation to persist for a very long time without any action being taken. Regulations of this nature have been called the 'silent killers', and should be considered a significant risk because the review of New Zealand's regulatory regimes has been largely 'built around "alarms going off" rather than "regular routine patrols"' (Gill and Frankel, 2014, p.60).

Managing regulation as an asset

With so many different sources of potential regulatory failure, what should we be doing to ensure that New Zealand's regulatory regimes function as assets rather than liabilities?

Box 1: Cabinet's Initial Expectations for Regulatory Stewardship (March 2013)

Cabinet expects that departments, in exercising their stewardship role over government regulation, will:

- monitor, and thoroughly assess at appropriate intervals, the performance and condition of their regulatory regimes to ensure they are, and will remain, fit for purpose
- be able to clearly articulate what those regimes are trying to achieve, what types of costs and other impacts they may impose, and what factors pose the greatest risks to good regulatory performance
- have processes to use this information to identify and evaluate, and where appropriate report or act on, problems, vulnerabilities and opportunities for improvement in the design and operation of those regimes
- for the above purposes, maintain an up-to-date database of the legislative instruments for which they have policy responsibility, with oversight roles clearly assigned within the department
- not propose regulatory change without:
 - clearly identifying the policy or operational problem it needs to address, and undertaking impact analysis to provide assurance that the case for the proposed change is robust
 - careful implementation planning, including ensuring that implementation needs inform policy, and providing for appropriate review arrangements
- maintain a transparent, risk-based compliance and enforcement strategy, including providing accessible, timely information and support to help regulated entities understand and meet their regulatory requirements
- ensure that where regulatory functions are undertaken outside departments, appropriate monitoring and accountability arrangements are maintained, which reflect the above expectations.

Clearly it needs to start with good policy design, built around processes and tools that recognise and seek to counter the danger presented by common human decision-making errors and biases. While it is true that the practice rarely matches the rhetoric in any country, this is a key reason why governments in almost all OECD countries, and increasingly elsewhere, have introduced requirements for regulatory impact analysis and for consultation on regulatory proposals, in one form or another. Beyond these familiar requirements, the Treasury is considering whether there are simple ways to prompt policy advisers to, for instance, make appropriate allowance for unintended consequences and better identify the implementation challenges that need to inform the policy design stage.

But good policy design, even if that could be assured, is not enough to ensure

that regulation continues to deliver a flow of future benefits. Even if a particular regulatory environment of interest is very stable, with limited technical innovation or change in the strategies of regulated parties over time, a 'set and forget' approach to regulation is still quite a risky one. We never have full knowledge of the existing regulatory situation, and cannot reasonably anticipate all potential consequences of a regulatory change or all future opportunities for improvement. Consequently, it does not make sense to rely solely on regulatory processes and tools that operate only during the policy and legislative design stage. Once a regulatory regime is operational, we should also monitor, evaluate and then, if feasible and appropriate, seek to fix, maintain and improve the regime over time.

This is, after all, what we do with our other important assets. George Tanner,

the former chief parliamentary counsel and law commissioner, made just that point when he said, 'we paint our houses and service our cars, but we don't look after our laws in the same way' (Gill, 2011, p.195). Organisations routinely employ a range of asset management techniques to help get the best performance out of their assets. So why has the state sector not systematically sought out and implemented the regulatory equivalents of those techniques in order to reduce the frequency and scale of regulatory failures, or maintain and improve the performance of regulation that can or does provide benefits in excess of costs?

Regulatory stewardship

If the answer to that question is that state agencies did not think that this was one of their core responsibilities, then recent developments within the New Zealand state services should be starting to change that point of view. One low-profile but important change made as part of the government's Better Public Services initiative was to introduce the notion of 'stewardship' as a key responsibility of departmental chief executives. In particular, section 32 of the State Sector Act has been amended to provide that, among other things, the departmental chief executive is responsible for the stewardship of:

- the department itself, including its medium- and long-term sustainability, organisational health, capability, and capacity to offer free and frank advice to successive governments; *but also*
- the assets and liabilities that the department administers on behalf of the Crown; and
- the legislation administered by the department.

In support of this, the state services commissioner is also charged with 'promoting a culture of stewardship in the state services'. The Act defines stewardship as the 'active planning and management of medium- and long-term interests, along with associated advice'.

Much of the discussion of this new stewardship responsibility to date has highlighted that it requires departments to adopt a longer-term perspective on

their operations. At its core, however, being a steward simply means having a proactive duty of care for a resource that belongs to, or exists for the benefit of, others. The introduction of the stewardship responsibility sends a signal that departments can no longer just be passive, working only on those matters that their minister has deemed to be of interest or priority. They have a duty to systematically and proactively monitor, review and advise the minister on what can or should be done by the government to ensure New Zealanders obtain the best long-term benefit from the resources or assets for which they are steward.

Concerning regulation more specifically, the key point to note is that a department's statutory stewardship responsibility extends to the legislation administered by that department. To give departments a little more direction as to what this might mean, in March 2013 Cabinet agreed to a set of 'Initial Expectations for Regulatory Stewardship' (see Box 1).

Naturally enough, these regulatory stewardship expectations promote the ongoing monitoring, evaluation and

regulatory maintenance activities that I have suggested are essential if we wish to reduce the scope for and size of future regulatory failures, whether in the form of disasters or of the chronic underperformance of a regulatory regime. The prominence given to regulatory regimes in the expectations seeks to shift attention from a narrow focus on the 'flow' of proposed regulatory changes to a broader focus on the performance and condition of the underlying 'stock' of regulation. Lifting the attention level to regimes is also intended to help departments focus on the ultimate policy outcomes sought by the government, and encourage them to bring a systems perspective to their monitoring and analysis (i.e. looking at how related instruments and their associated institutional actors interact in pursuit of those key outcomes), which a focus on individual acts or regulations would be less likely to do.

The expectations for regulatory stewardship, therefore, seek to encourage better management of New Zealand's important regulatory assets. Indeed, the initial set of expectations agreed by

ministers can be viewed as introducing some very basic asset management concepts to the regulatory environment.

There is a long way to go, however, before we will be able to say that the techniques we have for managing New Zealand's regulatory arrangements are as good as those currently applied to the management of other assets important to New Zealanders. That is why these were deliberately described as a set of initial expectations. It is hoped that they will be further developed and refined as we all learn more about the range of practices that different departments introduce and find helpful in discharging their regulatory stewardship responsibilities. They may even need to be tailored for different agency roles, since the current expectations were developed primarily for departments with regulatory policy responsibilities, rather than agencies that primarily exercise regulatory powers. The development of regulatory stewardship practice, just as with some regulatory policy interventions, is a bit of an experiment, and so ongoing monitoring, evaluation and adjustment is likely to be required.

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Susy Frankel

Emerging Regulatory Issues intellectual property and global value chains

Intellectual property includes several areas of regulation which govern access to and uses of knowledge, information and technology. In addition to having many cultural and social benefits, knowledge, information and technology are key building blocks of an innovative economy. The central and perpetual challenge of intellectual property law and policy is to ensure that there are both adequate incentives for innovators and creators to generate these building blocks, and that those incentives do not overreach so as, in fact, to inhibit innovation. This description, however, no longer tells the whole intellectual property story. This article discusses the emergence through trade and investment agreements

of a changed approach to the objectives of intellectual property protection, and the challenges that approach presents for knowledge-based and innovation development of New Zealand interests.

Intellectual property after the TRIPS Agreement

After the giant leap forward that was the TRIPS (Trade-Related Aspects of Intellectual Property Rights) Agreement (World Trade Organization, 1994) there has been a relentless tide of demands for ever-increasing levels of intellectual property protection. The rhetoric that such increases are to support innovation is still maintained by some, but the United States has openly stated that it seeks increased intellectual property protection to further its export interests. In light of this, consider the following:

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“The [Productivity] Commission considers that Australia should not generally seek to include IP [intellectual property] provisions in further BRTAs [bilateral and regional trade agreements], and that any IP provisions that are proposed for a particular agreement should only be included after an economic assessment of the impacts, including on consumers, in Australia and partner countries. To safeguard against the prospect that acceptance of ‘negative sum game’ proposals [sic], the assessment would need to find that implementing the provisions would likely generate overall net benefits for members of the agreement. (Australian Productivity Commission, 2010, p.264)”

The requirement that there should be an overall benefit for there to be a case for increases in intellectual property protection applies to New Zealand, although such a firm statement as the above has not been publicly made here. The caution that the Australian Productivity Commission expressed arises because increased intellectual property protection is not necessarily desirable as it may be neither innovation- nor trade-enhancing. Intellectual property protection has moved from being primarily about incentives to innovate to becoming a tool that frequently over-protects. This move to over-protection (which is frequently boosted with the rhetoric of property) has been able to gain ground in part because it has been possible to increase protection within intellectual property’s existing framework. Demonstrating overall benefit through evidence before creating more intellectual property obligations should require differentiation between claims to support innovation. So, for example, if we accept the need for patents in order to encourage some types of innovation, then any increases in patent protection should be based on specific evidence of innovation-related problems, not the same bald claim that the increases are simply needed for innovation in a general sense. Identifying the ill-effects of over-protection, which is

in essence protectionist-style intellectual property, should not be mistaken for saying that intellectual property protection is not important. On the contrary, the importance of incentive-based intellectual property law is more crucial than ever.

“To restore a place for balance, international lawmakers and adjudicators must focus on the nature and purpose of that which is being protected. IP lawmakers need to be cognizant of other regimes and public-regarding concerns. In their analysis of issues and interpretation of agreements, decision makers should ensure they remain alert to IP

It might be said that just as the nature of trade negotiations has evolved, the same is true of intellectual property. As Peter Mumford notes, ‘behind the border’ regulation as part of trade discussions is not new to those working in diverse areas, including intellectual property (Mumford, 2014). What is new, however, is the way in which trade agreements are increasingly defining the details of intellectual property laws (which are and always have been behind the border), when these details were previously a matter largely of national discretion, provided certain internationally-agreed minimum standards were met. The framework of the main pre-TRIPS Agreement conventions (Berne and Paris) and the

At the forefront of the US trade-negotiating objectives are increasing protection and enforcement of intellectual property rights.

values and refrain from contributing to the reconceptualization of the IP regime in ways that lead to longer-term isolation of public regarding interests. As states consider their position in international negotiations, they too must recalibrate. Positions in the technology hierarchy change over time and every state must recognize that the flexibilities that it now wishes to limit may become indispensable to its society’s future well being. Even those in the strong position now may not have considered where this reconceptualization puts them in the future when they are not necessarily at the front of innovation or because they are not in control of the IP intensive part of an innovation-related value chain. In either situation those pushing assetization now may wish for more flexibility in the future. (Dreyfuss and Frankel, 2014, p.46)”

TRIPS Agreement is one of minimum standards of protection. These minimum standards often have flexibility because of undefined terms which national legislatures and courts shape, and there are broad permissions (rather than exact detail) for exceptions.¹ The freedom to provide more extensive protection than the minimum standards require has not just resulted in increased protection, but has also resulted in increased detail about how to implement that protection, and agreements to eliminate existing flexibilities and exceptions.

At the forefront of the US trade-negotiating objectives are increasing protection and enforcement of intellectual property rights. That increases in intellectual property protection are sought is not new, but the intensity of the demands and their impacts on areas of policy outside of intellectual property’s core functions, such as health policy, has become striking.

Existing free trade agreements (FTAs), such as the US–Korea FTA (KORUS), indicate the likely direction of

current negotiations in the Trans-Pacific Partnership (TPP) and the Transatlantic Trade and Investment Partnership (TTIP). There are numerous examples of ways in which intellectual property protection has increased. A small sample of examples includes: for copyright, increasing the term and reducing its flexibilities; for patents, allowing for term extension, requiring protection of incremental developments which might not otherwise be patentable (because they fail standards of novelty or inventive step), and increased data protection of information (such as clinical trial information) provided to regulatory agencies; and for trade marks, requiring

of 'rights.' The shift from TRIPS to FTAs and BITs was equally drastic: it converted IP into an investment asset subject to claims of direct and indirect expropriation, thereby emphasizing the rhetoric of 'property'. (Dreyfuss and Frankel, 2014, p.3)

As we note, the effect of these changes cannot be underestimated. Intellectual property law based on incentive rationales also has scope for exceptions to meet competing concerns in areas such as education and health. But some trade and investment rationales are comparatively impervious to flexibility and balancing.

Intellectual property protection should not be the enemy of innovation and creativity, or indeed health and environmental policy (to name a couple of overlapping areas).

protection of well-known marks even in instances where there is no consumer deception involved. As Rochelle Dreyfuss and I have noted, each change may look relatively small and be explainable (some perhaps more than others). Collectively, however, they are reconceptualising intellectual property protection away from a balanced regime designed to create and enhance innovation incentives to a mechanism which treats intellectual property both as a commodity in need of extensive protection and as an asset requiring investment protection.

The development has entrenched a new qualitative vision of IP, one that drives a fundamental reconceptualization. Thus, a comparison of the WTO's TRIPS Agreement with the original General Agreement on Tariffs and Trade (GATT) moved from framing IP as a barrier to trade into conceptualizing it as a tradable commodity in the name of facilitating trade. It put enforcement on the international agenda and emphasized the rhetoric

The shifting nature of intellectual property law and policy

If one looks at the role of intellectual property law from a domestic perspective, then the rationales are neither surprising nor indeed new. Using trade marks as an example, they are identifiers of goods and services in trade. They serve to distinguish one trader's goods from those of another trader and the legal protection of registered trade marks is based on this distinguishing, or badge of origin, function. Economists provide nuance to this badge of origin role and suggest that trade marks also lower consumer search costs and foster quality (Landes and Posner, 2003). Perhaps the greatest challenge to this traditional trade mark role has been online. Courts first stretched the law of passing off and registered trade mark law to prevent 'cybersquatters' on domain names (Frankel, 2011, pp.825-42). The next online challenge is whether Google advertising words can amount to trade mark infringement.² As isolated legal developments these look like natural progressions, but the expanding protection of trade marks is packaged into trade agreements. Through this

mechanism, trade mark law is likely to expand to require protection of foreign marks that are well known, even when use of those well-known marks does not cause consumer confusion.³ What is well known in New Zealand does not necessarily result in correlative protection overseas. It is harder to be well known internationally when originating from New Zealand when well-known is defined on an international scale.

This expansion matters because it moves trade mark law away from a badge of origin function, which has incentive values, to a property function which cannot easily be affected by other regimes. The central issue in an intellectual property-related investment dispute is not whether the incentive function of intellectual property is adversely affected, but whether the value of the intellectual property right has been impaired in some way. Of course, the exact details of each claim will vary depending on the investment agreement at issue and the subject matter involved. To be clear, investment agreements may have value; however, intellectual property as an investment is not a straightforward matter, as current disputes over trade marks (plain packaging)⁴ and patents (revocation of patents that have no utility)⁵ show.

The expanding nature of patent-related protection is no longer confined to patent law itself; regulatory measures, which have as their primary goal the health and safety of medicines, are fast becoming vehicles to extend patent life. Trade agreements include requirements to extend data protection of clinical trial information that has been provided for the medicines approval system, and especially where there is or has been a patent involved.

Intellectual property's progressive reconceptualisation is resulting in conflict with areas of policy that it should support. Intellectual property protection should not be the enemy of innovation and creativity, or indeed health and environmental policy (to name a couple of overlapping areas). For New Zealand this means that, more than ever, we cannot act as if increases in intellectual property protection will not matter. Precisely the

opposite is true. The goods and services of the 21st century frequently depend on intellectual property (they may themselves even be intellectual property which is tradable in its own right). We need to ensure that there is adequate flexibility within the system to incentivise local innovation and to create business opportunities for using and developing intellectual property. Such incentives do not come purely from importing technology, which may well be costly to license, or developing predominantly domestic-based businesses. They may well come from New Zealand-based entities (including businesses and researchers) being part of global value chains.

There is an overused statement that, as net importers of intellectual property, we are in a different position from net exporters. That's almost certainly so when it comes to products such as Hollywood movies and smart phones. Buyers always have different interests from sellers, but the position is now vastly more complex. Part of that complexity arises from the way in which intellectual property and global value chains are developing. If we use the definition of global value chain which includes research and development (R&D), manufacture and distribution, we can see that intellectual property can be involved at various points in that chain. Studies of global value chains will often show that the most valuable parts of the chain involve intellectual property (see, for example, NZPECC, 2013). New Zealand's traditional goods and even some service industries are generally adept at being at parts of the value chain other than where intellectual property resides. However, we do see examples of businesses where this is not so, and these include businesses that both generate intellectual property and contribute to R&D.

Globally, it has become a fallacy to treat R&D as always emanating from one entity based in one jurisdiction, with another entity (related or contracted) undertaking manufacturing and distribution. Global value chains are, of course, diverse in their make-up (Mumford, 2014), but they now include not only contributions of physical components or added services, but also contributions of intellectual property (including R&D) at different

parts of the chain. Much intellectual property law, however, has evolved from a system which assumes a type of business model in which R&D is mostly based in one jurisdiction (manufacturing may have moved offshore). This model assumes that, apart from unauthorised or even unavoidable free-riding, R&D and distribution remain components of a value chain within the control of the key player (which may be licensed in some instances). There seem, however, to be few New Zealand businesses that operate in this way. While nothing in the law requires use of an explicit business model, certain assumptions about the relationship between intellectual property and innovation are based on that model. Consequently, we can ask whether aspects of intellectual property law are a bad fit for differing business

and economic policy. The parameters of intellectual property law are multifaceted, and its impacts not always immediate. So sometimes (as with all forecasts) it has been difficult to predict long-term effects of over-protection. The expansive creep of intellectual property protection into business methods – know-how, for example – has already had significant impacts on innovation, and will continue to do so.

At the beginning of this article I noted the call of the Australian Productivity Commission to look at the costs and benefits of intellectual property protection before adding to it. There are many who are trying to do exactly that in a variety of ways. The evidence-based policy industry has spawned an evidence-based intellectual property research industry.

In New Zealand we lack sufficient

We need better data to answer some of the detailed questions because bad intellectual property law can have considerable adverse economic effects.

models, such as those that are part of a global value chain but not in control of that chain. The answer is almost certainly yes, as New Zealand businesses make very little use of the New Zealand patent system.⁶ Some businesses make more use of overseas patent registration where their markets are. This would be one reason why we need a patent system, but it is questionable whether that system is appropriately tuned for local interests. Do we, for example, have enough exceptions in patent law?

The overlap of intellectual property and other regulatory issues

Because intellectual property involves matters such as pharmaceuticals, it has an impact on the cost of health care. Patented green technologies have an impact on the environment (Blakeney, 2013). Protection of copyright works may control access to information and cultural goods, which in turn shapes our culture. In short, intellectual property law affects social

data to effectively answer all questions about the impacts of much regulation, including intellectual property law (Frankel and Yeabsley, 2014). We may not even have resources to gather all data, or indeed to answer all questions, but evidence about the effects of intellectual property law on New Zealand innovation is worth pursuing. We need better data to answer some of the detailed questions because bad intellectual property law can have considerable adverse economic effects. The relationship between New Zealand's service industries and their uses of intellectual property is one key example.

Like other countries, we need to better monitor and review intellectual property law, especially where we have New Zealand experimentation (Colon-Rios, 2014). An example is provided by the computer software exception in the Patents Act 2013. That ensures that computer software as such (which is really an algorithm) is not patentable.⁷ We will

need to review if and how this has helped New Zealand businesses. In copyright law, has our unique legislation around technological protection mechanisms benefited users of copyright works?

Conclusion

There are at least two key questions about New Zealand intellectual property law and our consequent approach to trade and investment agreements. What effect do increased standards have on businesses which generate intellectual property (including R&D) components in the value chain? And what effect does intellectual property law have on businesses where a commodity (e.g. milk, meat, dairy) is produced in New Zealand and the greatest value added to it is offshore and by others. The answers

are likely to be very different, but trade agreements create an alliance between these concerns. In both instances, the tighter the policy space around intellectual property, the less likely New Zealanders will be able to increase and benefit from innovation opportunities.

- 1 These agreements provide for minimum standards of protection in intellectual property and require that those minimums are enacted in domestic law. Flexibilities exist where terms are not defined, such as patent laws, criteria of novelty and inventive step. Exceptions are a matter of national discretion within compliance with certain parameters known broadly as the three-step test. There are some variations between these tests in the different areas of intellectual property. There are relatively few exceptions outside of this test, such the permitted act of attributed quotation in copyright and exceptions for methods of medical treatment in patent. Consequently, the ability as a practical matter to limit the making exceptions is open as a matter of practice in trade agreements; whereas the rights cannot be so limited they can only be expanded.
- 2 *In Intercity Group (NZ) Ltd v Nakedbus NZ Ltd* [2014] NZHC 124, the particular ad words at issue were found not to amount to trade mark infringement. In other situations, use of Google ad words may amount to trade mark infringement: see *Interflora v Marks and Spencer* [2013] EWHC 1291.

- 3 Protection of well-known marks is already required under the Paris Convention, which is incorporated into and expanded in the TRIPS Agreement, article 16. The protection of well-known trade marks from so-called diluting effects is an ever-expanding area of trade mark law. See WIPO and Assembly of the Paris Union for the Protection of Industrial Property, Joint Recommendation Concerning Provisions on the Protection of Well-Known Marks, available at <http://www.wipo.int/export/sites/www/freepublications/en/marks/833/pub833.pdf>, which some trade agreements are now requiring compliance with.
- 4 Australia is subject to an investment dispute claim brought by tobacco company Philip Morris Asia under the 1993 investment treaty between Australia and Hong Kong: see the claim and response, available at <http://www.ag.gov.au/tobaccoplainpackaging>.
- 5 Eli Lilly is presently suing the government of Canada for the revocation of two patents under the investment chapter of the North American Free Trade Agreement (NAFTA). The revocations in question have been considered by nine different judges in the Canadian system. See *Eli Lilly and Company v Canada* (ICSID case no. UNCT/14/2) claim and response, available at <https://icsid.worldbank.org/ICSID>.
- 6 The answer is likely different for trade marks, and different again for copyright.
- 7 Patents Act 2013, section 11.

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A Comparative Perspective on Reforming the New Zealand Bill of Rights Act

As an academic comparative constitutional lawyer, I come to the recent Constitutional Advisory Panel report and the issue of whether and how the New Zealand Bill of Rights Act 1990 (NZBORA) should be reformed from a particular – perhaps idiosyncratic – perspective. This is viewing the NZBORA as an influential version of a new general model of constitutionalism. This model grants to legislatures ultimate responsibility for the resolution of controversial rights issues while at the same time seeking to improve the rights sensitivity of the legislative process and increasing the rights protective powers of courts as compared with the traditional institutional form of parliamentary supremacy. At least in theory and aspiration, this general model provides an

alternative to both the latter, venerable form of constitutional arrangement and its conventional rival, the model of constitutional supremacy, involving a fully constitutionalised regime of supreme, entrenched law enforced by the power of one or more courts to invalidate inconsistent statutes. As an experiment, this new model seeks to create greater balance between courts and legislatures on the resolution of contested rights issues than the traditional alternatives, whilst also providing an effective regime of rights protection.

As a result of this particular perspective on the issue, of the many topics raised in the constitutional advisory report, my focus in this article will be on institutional, and particularly inter-institutional, relations and allocations of power under the NZBORA, rather than on the content of its rights provisions. In other words, I shall be concentrating on structural rights issues and not substantive ones. And within this subset of NZBORA issues, I

shall mostly be focusing specifically on two: (1) improving the legislative role, and (2) the appropriate scope of judicial power. In so doing, my aim is to bring comparative experience to bear on the discussion.

I think it is worth stating at the outset that from this vantage point, of the five jurisdictions to have adopted versions of this 'new Commonwealth model of constitutionalism' (Gardbaum, 2013), New Zealand is in my overall view performing the best, in that it is hewing most closely to the 'intermediate' aims and design structure of the model. At a very general level, courts are exercising the new rights-protecting powers granted

some possible reforms to each of its – and the general model's – three distinct stages. But it is perhaps useful to state this broader, 'macro' evaluation at the outset to help place this discussion in proper perspective.

Before setting out on this task, however, let me briefly state my view on an even more macro question, what Sir Geoffrey Palmer has recently referred to as 'the big issue' concerning the NZBORA (Palmer, 2013), as distinct from the 'tweaking' that I will mostly focus on. This, of course, is whether the NZBORA should be constitutionalised – made supreme law and enforced

more significant support now for giving the NZBORA supreme law status than there was in 1986.

There is also some separate discussion in the report on the issue of entrenching the NZBORA in whole or part by means of some special amendment procedure, such as a required three-quarter majority vote in Parliament or an ordinary majority in a referendum.¹ To the extent that this is intended as a distinct issue from the potential supreme law status of the NZBORA – i.e. that the entrenched provisions would still have only the force of ordinary law in the event of a conflict with another statute and section 4 would still apply – I am not sure it addresses a real concern. Unlike the HRA and the Victorian Charter in particular, the NZBORA does not appear to be politically endangered, as it currently has the support of both major parties. Unless inserted at the same time as any such entrenchment provision, this latter would of course be a two-way ratchet, making the addition of new rights – such as those discussed in the report – as difficult as repealing current ones.

Unlike the HRA and the Victorian Charter in particular, the NZBORA does not appear to be politically endangered, as it currently has the support of both major parties.

by the NZBORA, as distinct from either not using or misusing (i.e., over-using) them, but rights issues are still frequently resolved by Parliament. This contrasts most clearly, in my view, with the situations in Canada, where in practice the latter is no longer true given the strong reluctance to employ the section 33 legislative override mechanism, and the two sub-national Australian jurisdictions of ACT and Victoria, where the courts are mostly failing to use their new powers (Debaljak, 2011). Under its Human Rights Act 1998 (HRA), the United Kingdom I think is a closer call and comes second to New Zealand in terms of practice living up to theory, in that, while not lurching as closely towards the judicial supremacy pole as Canada, the preferred and intended legislative–judicial balance on rights issues is more off-kilter, due significantly to the skewing impact on the working of the model of the European Convention on Human Rights. That all said, the NZBORA is certainly not functioning in anything like an 'ideal' fashion, and in the third section of this article I explain the problems in its operation as I see them, and suggest

through a judicial power to strike down inconsistent statutes. Personally, I find the new Commonwealth model normatively attractive relative to the other two leading alternatives. If I had to choose between these other two, either generally or specifically in the New Zealand context, I might opt for constitutional supremacy, given what seem to me to be valid contemporary concerns about the concentration of power in parliamentary executives and the consequent undermining of political accountability and responsibility to legislatures that is the major continuous check within the theory and practice of parliamentary sovereignty (Gardbaum, 2014). But I believe comparative experience within established democracies more generally suggests that, even though courts can usefully be employed as an instrument of dispersal, some lesser judicial power is preferable because of the new risk of courts coming to monopolise authority themselves over rights issues. For this reason, 'tweaking' the current system seems to me the better path of reform. Moreover, as the Constitutional Advisory Panel report states, there appears to be no

Some comparative perspective

Common to the model in all five jurisdictions are three constitutive steps. The first is political rights review during the legislative process, which is designed as an *ex ante* mechanism to improve its outputs from a rights perspective by inculcating rights sensitivity among ministers, MPs and officials, focusing attention on the rights implications of bills and promoting rights deliberation at all stages of their passage into law. Secondly there is a form of *ex post* constitutional review by the courts, empowering them to engage in rights-friendly statutory interpretation and to assess the compatibility of legislation with protected rights, whether or not they have the power of invalidation. The third step is political review and reconsideration of a law in light of the prior exercise of judicial review, and a legislative power of final resolution of the rights issue, typically (though perhaps not necessarily) by ordinary majority vote.

Overall, certain general problems have arisen in practice among the various jurisdictions in all three areas.

Summarizing very briefly, the main problem at the first stage has been the quite limited role of specifically *legislative* deliberation, as distinct from the substantial impact that the required rights vetting has had on the formalised processes of developing, proposing and drafting government bills by the executive. This gap has primarily been due to the Westminster system of executive/party dominance, and obviously requires creative institutional reforms to address it. An only slightly lesser problem, at least to my mind, has been that too much of the rights scrutiny by both executives and legislatures has been exclusively *legal* in nature, rather than taking broader moral and political values into account.

Although reasonable people will and do differ on this, to my mind the major reason for rejecting judicial supremacy in the first place is the nature of many controversial rights issues, which, whether or not enshrined in a bill of rights, are not exclusively legal in content but necessarily implicate more general moral and political values, on which the judiciary has no special authority or expertise. This is particularly so where, as is often the case, vague, underdetermined or underspecified rights provisions are also subject to the modern proportionality principle. Simply labelling these legal issues does not make them so. It artificially narrows the type of reasoning employed, or licenses courts to roam beyond their subject-matter jurisdiction; either way, it overly empowers lawyers and judges at the expense of citizens and their elected representatives. Under the new model, the legislative role is designed in significant part to inject these broader values into rights deliberation. If simply having an available *ex ante* mechanism of rights review were the only reason for the first stage, continental-style abstract judicial review of legislation could be borrowed, perhaps through more routine advisory opinion jurisdiction.

As far as the second stage of judicial review is concerned, with the exception of the two Australian jurisdictions, I believe that, broadly speaking, courts have for the most part exercised their new powers in appropriate and expected ways, notwithstanding a few concerns at the

more detailed or micro level. With respect to the NZBORA, I shall be discussing these in the next section. In the UK, after a few early teething problems involving an overly robust understanding of the scope of the interpretative duty under section 3, the courts appear to have reached more of an equilibrium between section 3 and their declaratory power under section 4, employing them on a roughly similar number of occasions. Here I am putting to one side more substantive criticisms concerning the outcomes of particular cases or classes of cases as being either insufficiently or overly rights protective, and also about the courts' application

In New Zealand ... in almost every case the political branch has responded to judicial decisions on rights in one way or another, with an overall mixed record of accepting and not accepting ... decisions.

of section 2 directing them 'to take into account' decisions of the European Court of Human Rights. In Canada courts have generally done what courts do when they have the power to invalidate legislation: they have employed it quite forcefully and regularly, albeit that the judicially-created proportionality doctrine and remedy of suspended declarations of invalidity sometimes allow legislatures a slightly longer leash.

Finally, on political reconsideration following judicial review, certainly a key issue, thus far the record has not been particularly encouraging. In Canada, the temporary but renewable legislative override power under section 33 remains essentially dormant, leaving the courts' decision whether or not to uphold 'legislative sequels' under proportionality analysis the major claimed source of judicial-legislative 'dialogue'. In Australia there has only been one final declaration of inconsistency in either jurisdiction, whereas in the UK 18 out of 19 final declarations triggered amendment or repeal of the statute, with the vexed issue of prisoners' voting rights the outstanding and still unresolved one. Stated baldly, I think this figure is slightly misleading, in

that several of the declarations involved statutes that (1) had either been, or were in the process of being, amended at the time, or (2) had already been adjudged by the European Court of Human Rights to violate the convention, so creating an international legal obligation to change them. And with respect to a few others there has been some disagreement as to whether the amendment fully resolved the declared incompatibility. In New Zealand, again to be discussed in a little more detail below, in almost every case the political branches has responded to judicial decisions on rights in one way or another, with an overall mixed record

of accepting and not accepting these decisions. Notable among the latter is the *Hansen v R* decision applying section 4 of the NZBORA to the reverse onus of proof attaching to possession of specified quantities under the Misuse of Drugs Act 1975.² In neither the UK nor New Zealand instances of not acting on the judicial view did the quantity or quality of legislative rights deliberation come close to satisfying the normative standards that in my view are necessary for the justification of this power.

The NZBORA

Let me now turn specifically to the NZBORA and address some of the issues flagged in the Constitutional Advisory Panel's report. Once again my suggested reforms will all fall into Geoffrey Palmer's 'tweaking' category, so I obviously do not share his 'either make it supreme law or don't tinker' view, although I certainly respect it.

At the first, rights-vetting, stage the key weakness has been the role of the legislature, as Tessa Bromwich and Andrew Geddis have convincingly shown (Bromwich, 2009; Geddis, 2009). Accordingly, the focus should be on how

to improve legislative consideration of, and deliberation on, rights issues raised by proposed bills. To the significant extent that the underlying problem here is executive and party dominance in a Westminster-style system, any general measures to weaken this hold over the legislative process – including, perhaps, abolishing the ‘party vote’ in Parliament – are to be welcomed. But apart from such general or systemic reforms, what might be helpful in this regard with respect to NZBORA’s specific processes and requirements?

One idea is to require section 7 reports for *every* bill introduced into

reasoned statements for compatibility and incompatibility reports – whether *and how* they are consistent – could usefully be adopted.

I also believe that from a systemic or functional perspective, 62 section 7 reports since 1990, especially given the increased pace at which they have been issued in recent years, is too high. Not, I should immediately stress, because any were not merited on an individual basis or did not reflect the sincere fulfilment of the statutory duty by the attorney-general under the current standard, but because from a more functional standpoint the overall impact of such relatively frequent

think it is worth considering transferring responsibility for making reports from the attorney-general to the sponsoring minister, as again in the UK and Australia. The idea here is partly to help promote greater rights-consciousness among a larger group of government ministers and officials, and partly to spread the burden if a report is required for every bill. But it is mostly to overcome or reduce any perception that the NZBORA raises purely legal and technical issues that are separate and distinct from the normal and more central public policy concerns of politicians, to be handled and overcome by a specialist group of expert officials. In order to transcend any such perceived division of labour and to promote the injection of broader moral and political values into rights deliberation that is often both an inherent part of their resolution and a more appropriate task of the political branches than the courts, the final executive branch judgment at the time a bill is introduced should be made and presented by the responsible minister, albeit one who is fully informed by the prior legal advice of officials, including perhaps the attorney-general.

Once a bill is introduced into Parliament, comparative experience suggests that the best type of committee to engage in serious and detailed rights scrutiny is one that specialises in the subject, along the lines of the Joint Committee on Human Rights in the UK (and also now at the federal level in Australia). The Joint Committee on Human Rights has three characteristics in particular that enable it to function reasonably effectively in a difficult context in which even this level of success is at a premium: (1) as a specialised committee with a license to consider the rights implications of any bill, its members develop expertise which gives them additional credibility with their parliamentary colleagues and executive officials alike; (2) it has its own top-notch human rights lawyer to advise and provide legal opinions;³ and (3) as a joint committee of both houses of Parliament, it has no in-built government majority and has been able to operate on a broadly non-partisan basis.

In thinking about switching from the current system under the NZBORA,

Once a bill introduced into Parliament, comparative experience suggests that the best type of committee to engage in serious and detailed rights scrutiny is one that specialises in the subject ...

Parliament, rather than only those the attorney-general believes to be inconsistent with the NZBORA, as is the case in the UK, ACT and Victoria. That is, the rights implications of a bill should be reported whether or not it is deemed compatible. It is true that on occasion the attorney-general has elected to issue a ‘not a section 7 report’, and that the government usually makes available the advice provided to the attorney-general on all bills. Nonetheless, I believe that for Parliament and the relevant parliamentary committee to receive focused and politically accountable information on how the executive has identified and assessed the rights implications in the case of every government bill would be helpful in more deeply inculcating a norm of a rights-conscious legislative process. For one thing, it may reduce the reflex sense that any report produced is the occasion for partisan solidarity for or against the bill. In addition, to the extent that section 7 reports now (or any newly required ‘not a section 7 report’ would) sometimes provide rather conclusory assessments that do not afford a real basis for understanding how they were made, the Australian practice of requiring

reports threatens to routinise what ought to be a relative rarity: risks reducing the political significance or gravity of each one. Just as in legal systems in which each decision of an apex court is designed to be individually considered and digested for its potentially system-wide significance, the number of such decisions is deliberately kept low by means of fully discretionary jurisdiction, something similar is at work here. The high number also arguably sends a message that the cabinet does not take the NZBORA very seriously. So, although I am certainly not commending the opposite flaw as exhibited in Canada and the UK, where the numbers of incompatibility statements are zero and two respectively, the criteria or standard for triggering a section 7 report should be adjusted to try and ensure that such a finding is a more special event, attracting the type of attention that raises the costs of politics-as-usual. To the extent that section 7 reports take into account justified limits less than elsewhere, changing this practice might be another way to reduce the number.

On this score, but also relating to my earlier critique of pre-enactment rights-vetting as exclusively a legal issue, I

in which legislative rights scrutiny is undertaken by the ordinary subject-matter select committees, three practical problems of varying degrees of difficulty immediately present themselves. The first is possible resentment and hostility towards a specialist committee on the part of the existing select committees, which would continue to scrutinise the non-rights dimensions of bills – especially if its reports are treated differently or any exceptions are made to normal procedures for their discussion. I think the appropriate response is that any ‘special’ treatment of rights issues should be understood to reflect and express the ‘constitutional status’ of the NZBORA. Second is the problem of staffing such a specialist committee, given the small absolute (though clearly not per capita) number of MPs. This legitimate concern provides one reason to resist calls for reducing the size of Parliament towards more typical average international representation levels. The hardest problem is how to reproduce the relative independence and non-partisan nature of the Joint Committee on Human Rights in a unicameral legislature. I am not sure what the solution to this is short of the political non-starter of reviving the Legislative Council and electing its members on a different basis from the House. But even the most party-controlled of legislatures usually have a small corps of members who press and take a particular interest in rights issues, and these should be drafted first.

Finally, in thinking about the importance of the committee stage to legislative rights review, the practice of enacting bills under urgency seems inconsistent with the constitutional status of the NZBORA and the fact that, section 4 notwithstanding, it expressly applies to Parliament.⁴ This is especially so where the executive vetting stage has identified a bill as raising serious rights issues, and certainly where one is deemed inconsistent by the attorney-general.⁵

The overall sense here is that with fewer, less ‘technical’ section 7 reports and more rights concerns and amendments emanating from a specialised committee with the expertise, time and resources to invest in the task, the relevance of

the NZBORA to the legislative process and the amount of parliamentary rights deliberation will increase. This is essential because, as Andrew Geddis has suggested (Geddis, 2011), in this day and age no longer can any Parliament anywhere take for granted the right to the final say; it must earn it.

Turning to the role of courts under the NZBORA, the key problem in my view is that cases in which judges find an inconsistency and apply section 4 do not receive sufficient attention in the media and elsewhere to ensure that Parliament comes under political pressure to address and resolve the rights issue. Such publicity

mode of establishment does not hamper its full-fledged use, as seems to have been the case following *Moonen*.⁷ But if either the implication or the exercise of the power continue to be muted at best because of any sense of illegitimacy or judicial reluctance to criticise Parliament, then the NZBORA should be amended to grant it expressly. If this happens, consideration might even be given to *mandating* issuance of declarations, rather than the current discretionary power in the UK and Australia, thereby bringing it into line with the interpretative duty (not power) placed on courts in the various jurisdictions.

... the burden and political costs placed on the legislature by a default rule in favour of the judicial position have been too high to overcome

and attendant raising of political costs is an important structural feature of an institutional arrangement in which the default rule lies with parliament and its affirmative action is needed to affect the continuing operation of the law, as in all versions except the Canadian one; it is part of the model’s subtle combination of legal and political mechanisms. Again, *Hansen v R* is the best example here, and it is instructive to compare the reception of this decision with that of the House of Lords’ declaration of incompatibility in *A and Others*.⁶ In the latter, the UK government’s very first, reflex response was to do nothing, but this quickly became politically impossible due to the media and political reaction (Sathanapally, 2012, pp.191-2). Accordingly, as Claudia Geiringer has argued (Geiringer, 2009), New Zealand courts need to not *just* find an incompatibility where a statute cannot be interpreted in a rights-consistent manner, as section 4 implicitly requires (Rishworth, 2004), but to *declare* it. Otherwise, as in *Hansen*, the finding risks being buried beneath the judgment that the claimant loses.

It would be fine in my view, and arguably preferable, for courts to imply the declaratory power as long as this

In terms of the options for reform mentioned in the Constitutional Advisory Panel report, this I think is a better choice than a judicial invalidation power either with or without a legislative override provision. I have explained above why I think full constitutionalisation is generally not justified in the modern rights context. The addition of a legislative override power has not in practice proven to be an effective mechanism for resisting or avoiding judicial supremacy in the major jurisdiction in which it has been instituted, Canada. Rather, the burden and political costs placed on the legislature by a default rule in favour of the judicial position have been too high to overcome.⁸ To the extent that a declaratory power is thought to create too few incentives for individual claimants to pursue cases⁹ or to distort judicial analysis, I believe a law or norm that governments compensate individuals when they elect to amend or repeal a law previously declared incompatible by the courts, as currently in Ireland,¹⁰ or that such amendments/ repeals be given retrospective effect, provides a practical solution to the problem (Gardbaum, 2013, pp.198-201). Another, separately or in tandem, is to encourage litigation by public interest

groups, for whom any such disincentive effects will likely be smaller. I have no real issues with how New Zealand courts are interpreting and applying section 6, as I think that ‘reasonably possible meanings’ is a reasonable contextual interpretation of ‘wherever an enactment can be given a meaning that is consistent with the rights’. As just discussed, the problem is rather with the findings of incompatibility that are rendered more likely by this interpretation than by a stronger one.

At the final stage of political responses to judicial rights decisions, the main problem has been less unwillingness to disagree with the courts – or to act on that disagreement – than with the quality of rights engagement in so doing; that is, the concern is with process more than outcome. This contrasts with the situation in Canada, and at least according to some also in the UK, where courts have in practice mostly been given the final word on rights issues. In New Zealand, Parliament still decides most significant and contested issues and, equally importantly, the courts still believe that it should.

Overall, the political institutions have responded in one way or another to most of the important judicial rights decisions, with a mixed record of accepting or rejecting them. These include *Baigent’s Case* (reference to the Law Commission and no action on public law damages), *Quilter* (eventual passage of the Civil Unions Act 2004), *Taunoa* (modifying the judicial decision in enacting the Victims’ Compensation Act 2005), *Poumako* (resulting in amendment of the

Criminal Justice Amendment Act 1999 by the Sentencing Act 2002), Hansen (reference to the Law Commission but no amendment or repeal of the reverse onus provision found incompatible with the NZBORA) and *Ye* (amending the statute to overrule the court’s section 6-inspired interpretation of the Immigration Act 1987). So far so good, as it is fine under the NZBORA – and the general model – for the political branches to disagree with judicial rights resolutions and insist on their own. The problem is that, as with pre-enactment review, such insistence ought to be the product of serious rights deliberation rather than raw political power, and it has mostly not been.

Several of the other already suggested reforms are geared towards changing the equation at this juncture, perhaps most directly the judicial declaratory power. Another advantage of a specialised rights committee such as the Joint Committee on Human Rights, as compared with ordinary subject-matter select committees, is that it has the authority and expertise to follow up on findings of inconsistency and put pressure on the government for a response. To this end, a further reform of the NZBORA might bolster the others by requiring the responsible minister or the attorney-general to respond formally to a declaration (or even a finding) of inconsistency within six months or some other specified period of time, as with the Australian bills and declarations by the Human Rights Review Tribunal under New Zealand’s Human Rights Act 1993.

Conclusion

Under the NZBORA, as with the general model it instantiates, it is important not only that rights are taken seriously, but *who* takes them seriously. Because it has a tendency to focus only on the former, full constitutionalisation should be resisted until such time, if any, as suitable means for promoting both halves of the goal have been given sufficient opportunity to succeed and found to fail.

The general model is a notable constitutional experiment – in whether both greater balance between courts and legislatures and effective rights protection is possible, in whether judicial power can be increased without leading inexorably to judicial supremacy; in short, whether a stable middle ground exists and can be maintained. As with all experiments, the process of trial and error, of making adjustments in the light of experience, is an entirely sensible and appropriate one to employ before coming to any definitive conclusions. It is for this reason that I believe tinkering is currently the best course of action, not the worst.

- 1 The report also suggests that this entrenching provision could also itself be entrenched (‘double entrenchment’).
- 2 *Hansen v R* [2007] NZSC 7, [2007] 3 NZLR 1.
- 3 Initially David Feldman and now, for several years, Murray Hunt.
- 4 NZBORA, section 3(a).
- 5 See, for example, C. Geiringer, ‘Urgency, Parliament and the Bill of Rights – time for a cup of tea, guys?’, blog post at <http://55lambtonquay.blogspot.co.nz/2009/04/urgency-parliament-and-bill-of-rights.html>, April 2009, and A. Geddis, ‘I think National just broke our constitution’, at <http://pundit.co.nz>, 17 May 2013.
- 6 [2004] UKHL 56 (‘the Belmarsh case’).
- 7 *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9 (CA).
- 8 From a pragmatic perspective, Canada presents the only empirical evidence we have of a constitutionalised system combined with a legislative override power, so that unless the near-dormancy of section 33 is due to Canada-specific reasons, its experience ought to remain a cautionary tale.
- 9 As powerfully argued by Tom Hickman in his contribution to this issue of *Policy Quarterly*.
- 10 Under section 5(4)(c) of the European Convention on Human Rights Act 2003.

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Tom Hickman

The New Zealand Bill of Rights Act going beyond declarations

The process of capturing and entrenching fundamental rights remains very much a live one in both New Zealand and the United Kingdom. In both countries there is pressure to move on from the current bill of rights legislation: the UK Human Rights Act 1998 (HRA) and the New Zealand Bill of Rights Act 1990 (NZBORA). While the two jurisdictions are subject to quite different political and cultural pressures, there remains a great deal of scope for exchange of ideas and experiences.

The Constitutional Advisory Panel report has recommended that the New Zealand government set up a process with public consultation and participation to examine options for, among other things, improving compliance by the executive and Parliament with standards contained

in the NZBORA (or, by implication, any future bill of rights) and giving the judiciary powers to review legislation for consistency with the NZBORA. My argument is that New Zealand should not be persuaded to adopt the approach to judicial review of legislation found

in the HRA, what I will call for ease the 'declaration of incompatibility model'. To meet the objectives identified by the Constitutional Advisory Panel, New Zealand should go a step further than the UK in protecting human rights against legislative encroachment. The declaration of incompatibility model is unprincipled and unfair, and, moreover, is not a particularly effective mechanism for securing compliance of the legislature with protected rights through the courts. It serves as a useful constitutional fallback or placeholder, which is the function it performs in the UK; it should not be viewed as a principled destination for constitutional reform.

These arguments challenge the views of many that the declaration of incompatibility model is both principled and effective, including the views of a number of scholars whose writings portray it as inculcating a form of debate or 'dialogue' with political branches. In challenging this view I want not only to draw attention to the theoretical problems with such a view, but also to descend from the ivory towers of constitutional and political theorists to consider how the model operates in practice and its

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practical deficiencies as a mechanism of ensuring that legislation is human rights compliant.

The declaration of incompatibility model

Two features of the HRA are relevant to present discussions. The first relates to the *nature* of the rights to which it gives effect. These are the rights set out in the European Convention on Human Rights. Most of ‘the Convention rights’, as the act describes them – albeit not quite all of them – are scheduled to the HRA and given effect by section 2.

There is thus no mechanism under the NZBORA to bring a challenge on the ground that legislation is *not* compatible with protected rights, as opposed to a challenge claiming that it *can be made* compatible.

The second feature of the HRA that I wish to highlight is the *manner* in which it gives effect to the convention rights. It does so in three ways. Section 6 of the HRA makes it unlawful for any public authority to act incompatibly with the convention rights. Section 3 of the HRA requires all legislation to be read as far as it is possible to do so in a manner that is compatible with the convention rights. Finally, section 4 of the HRA allows higher courts in the UK to make a formal declaration that primary legislation does not comply with a convention right. The way this was reconciled with parliamentary sovereignty was by the stipulation that such a declaration does not affect the ‘validity, continuing operation or enforcement’ of that legislation (s.4(6)(a)) and ‘is not binding on the parties to the proceedings in which it is made’ (s.4(6)(b)). It is this final ‘declaratory’ feature of the HRA that I wish to focus on most directly.

Legislative compatibility with protected rights

Let me turn then to New Zealand. In its report the Constitutional Advisory Panel registered support in New Zealand for

‘exploring increased judicial powers that preserve parliamentary sovereignty ... to ensure legislation is consistent’ with the NZBORA (Constitutional Advisory Panel, 2013, p.56). The NZBORA does not contain any express mechanism for scrutinising legislation and this is an obvious area for considering enhancement. Such a power would also tie in with another of the panel’s recommendations, which is to improve compliance by Parliament with the standards set out in the NZBORA.

In these comments the Constitutional Advisory Panel has, I suggest, nodded

in the direction of the HRA and the power provided by section 4 for courts to declare primary legislation incompatible with the convention rights. While there is no such power in the NZBORA, the New Zealand courts have nonetheless taken a significant step in this direction, holding that the courts will indicate whether a particular legislative provision constitutes a justified limitation on a protected right in circumstances in which it is unable give the legislation a rights-consistent reading under section 6 of the NZBORA. The courts have said that they will give such an indication for the benefit of the New Zealand Parliament, society as a whole and the United Nations Human Rights Committee.¹ In *R v Hansen*, Justice McGrath stated that ‘a New Zealand court must never shirk its responsibility to indicate, in any case where it concludes that the measure being considered is inconsistent with protected rights, that ... there is a measure on the statute book which infringes protective rights and freedoms’. He also went as far as to say that there is a ‘reasonable constitutional expectation that there will be a reappraisal’ of the measure by the government and the executive.² It has even been suggested

that in an appropriate case the court might make a more formal declaration recording the fact that the legislation has been found to be inconsistent with the NZBORA, although the jurisdiction to do so has not yet been determined.³

This nonetheless falls short of a declaration of incompatibility in two important respects. First, the courts’ responsibility to provide an advisory indication was expressed by Justice McGrath as arising in any case in which it is considering whether legislation can be read compatibly with protected rights under section 6 but concludes that it cannot be. On this approach, a claim cannot be brought squarely challenging legislation as contrary to protected rights. In an excellent article, Claudia Geiringer has suggested that the advisory indication might be sufficiently elastic to provide courts with a freestanding jurisdiction to make declarations of inconsistency (Geiringer, 2009). But that is not presently the law, as Geiringer herself accepts. In *R v Manawatu* the Supreme Court refused permission to challenge legislation concerned with criminal appeals, noting: ‘It is not suggested that it is open to the Court to interpret the legislation in a way that would be more consistent with rights protected by the Bill of Rights’, and therefore the court had no jurisdiction.⁴ There is thus no mechanism under the NZBORA to bring a challenge on the ground that legislation is *not* compatible with protected rights, as opposed to a challenge claiming that it *can be made* compatible.

From my admittedly distant perspective as an English lawyer, it would seem very difficult for the courts to create such a right of action – which is really what it would amount to – that the New Zealand Parliament has not seen fit to include in the NZBORA. The fact that bill of rights reform continues to be a live issue, and the fact that such declaratory powers have been expressly included in the HRA and the two subsequent Australian bills of rights, makes such a judicial innovation even more unlikely because it underscores the fact that it is a matter for legislative and not judicial innovation.

There is also an important practical issue here. Unless a rights-consistent interpretation has substantial merit, litigants are unlikely to bring proceedings if all they are likely to end up with is an advisory indication in a judgment dismissing their case. All they will have to take away with them is a judgment of the court that records their lack of success and the fact that the legislation itself authorises a violation of protected rights.

Furthermore, since the costs rule in New Zealand is the same as in England, namely that costs follow the event, this holds the consequence that if a litigant fails to obtain a favourable reading of legislation under section 6 they will be liable not only for their costs but for the costs of the other side, since they will have lost the case. A litigant who obtains a judgment that contains an advisory indication that legislation is contrary to protected rights will not only come away empty-handed; they will come away empty-pocketed as well. If declarations of incompatibility under the HRA are, as they have been aptly described by one commentator, a constitutional ‘booby prize’ (Leigh, 2002, p.324), an advisory indication under the NZBORA – at least in their current form – is little more than a constitutional custard pie.

Any present jurisdiction of the New Zealand courts to give advisory indications is therefore necessarily far more circumscribed in law and in its practical availability than a declaration of incompatibility under the HRA. Indeed, I suggest that in reality it is no different from the ability of courts in *any* case to state that a statute that falls to be applied in that case causes unjust or unintended effects. Judicial statements of this kind are not uncommon, they are not by any means exclusively a public law phenomenon, and they often provoke legislative reform. But no well-advised litigant would bring a claim in the hope of getting such a helpful comment from a judge in the course of losing a case.

The second reason that the position in New Zealand is substantially different to the declaration of incompatibility model is that declarations of incompatibility in the UK are not entirely devoid of legal effect. When made, they trigger a power,

contained in section 10 of the HRA, for the executive to make amendments to offending legislation by way of statutory instrument if there are compelling reasons for doing so. This is a significant feature of the HRA and one that has been under-analysed. It has much in common with section 2(2) of the European Communities Act 1972, which permits amendments to primary legislation by way of statutory instrument to give effect to European Union law. Section 2(2) of that act provides a mechanism for making necessary changes required by EU law; section 4 of the HRA provides a

of the various UK reports on bills of rights would provide support for such a move. One 2007 report praised the way that the HRA scheme, like other recent Commonwealth bills of rights, promotes dialogue between the courts and political branches, and was favourable to the declaration of incompatibility model (JUSTICE, 2007). The UK Parliament’s Joint Committee on Human Rights stated in its 2008 report that going further and conferring on the courts a power to strike down legislation would be ‘fundamentally at odds’ with the tradition of parliamentary sovereignty, and it

One 2007 report praised the way that the HRA scheme, like other recent Commonwealth bills of rights, promotes dialogue between the courts and political branches, and was favourable to the declaration of incompatibility model ...

mechanism to give effect to the European Convention on Human Rights as declared domestically or in Strasbourg, at least in cases where Parliament cannot be expected to act.

I have previously argued that section 10 supports the view that the HRA is best understood as expressing a form of constitutionalism in which the government and Parliament should accept the findings of courts as to the meaning of the convention rights, rather than providing, as some have argued, a means for engaging in a debate about their scope and content (Hickman, 2010, p.83). This is because it suggests that declarations of incompatibility should lead to a change in the law, but since judges are not terribly good at writing law, section 10 enables this to be done by delegated legislation. In relation to New Zealand, the key point is that any advisory declarations under the NZBORA do not trigger any such implementing power.

Given the current position under the NZBORA, it is unsurprising that New Zealand would consider following the UK in enacting a declaration of incompatibility power. Consultation

said the declaration of incompatibility was ‘innovative and widely admired’. It also recommended the adoption of the additional reporting requirement found in the Australian Capital Territories Human Rights Act 2004 and the Victoria Charter, 2006, which adopted the declaration of incompatibility model but with some modifications, including a requirement for the government to report to Parliament when such a declaration is made (Joint Committee on Human Rights, 2008, para. 218).

Equally, a recent commission looking at a bill of rights for the UK found this to be one of the few issues on which its members could agree. They reported that the declaration of incompatibility has been ‘widely seen as striking a sophisticated and sensible balance between Parliament and the courts’. The commission concurred with this view.⁵

I, however, do not. I do not consider that the declaration of incompatibility is sophisticated, fair or consistent with the constitutional traditions of the UK, or, for that matter, New Zealand. Nor do I think it is particularly effective. It is a fudge. I do not suggest that it is without

any merit. It has considerable merit. But its merit derives from the fact that it is a fudge. In my view it is useful as a constitutional fall-back solution or – the function it currently occupies in the UK – as a constitutional placeholder.

What is wrong with the declaration of incompatibility model? The vices are principally three.

Decoupling rights and remedies

The declaration of incompatibility is unfair and unprincipled because it denies individuals whose rights have been infringed any remedy in domestic

covered by legislative programmes current at the time the declaration was made.

There are four reasons why a focus on the political response does not provide an answer. The first is that it does not meet the point that as a matter of principle it is constitutionally unsatisfactory for the courts to be given a power to declare whether a fundamental right has been violated but to deny the courts the power to provide a remedy for a violation they identify. Section 4 is clear: legislation remains in force and effect and the declaration is not binding, even on the parties.

inseparable connection between the means of enforcing a right and the right to be enforced ... (Dicey, 1920, pp.193-4)

Dicey's censure of foreign proclamations of rights applies equally to section 4 of the HRA. Lord Bingham more recently expressed this idea in terms of a rule of public policy. He said: 'the rule of public policy which has first claim on the loyalty of the law' is 'that wrongs should be remedied'.⁶

Much more could be made of this point, but reference to these authorities grounds my submission that the correlativity of right and remedy is at the heart of our constitutional traditions, and that it is associated with an aversion to abstract declarations of rights which fail to provide concrete benefits to individuals. Indeed, it is the essence of the rule of law as it has been secured and understood under the British constitution that individuals can obtain relief from the courts where the law is infringed; for as long as the courts do not have any power to provide a remedy for a breach of a right, they are therefore placed in a constitutionally unprincipled and unsatisfactory situation.

The second reason why it is no answer to look at the legislative and executive responses to declarations of incompatibility to identify an effective remedy is that it remains open to the government and Parliament to do nothing at all in response to such a declaration. It is difficult to regard the mere power to provide a remedy as even an effective *political* remedy. This has been recognised by the Grand Chamber of the European Court of Human Rights, which has held that unless and until individuals can be completely confident of receiving a satisfactory political response following a declaration of incompatibility, section 4 of the HRA does not provide an effective domestic remedy that individuals must exhaust before applying to the Strasbourg court.⁷

The third reason why it is no answer to look at the political postscript to declarations of incompatibility is that the political responses to declarations of incompatibility are rarely retrospective,

King has shown that there have been substantial periods of delay after declarations of incompatibility have been made, ... this ... raises serious questions about the compatibility of the declaration of incompatibility model with our constitutional traditions.

law, even though the law has been found to be contrary to a basic, constitutional right. It decouples an individual's so-called fundamental right from the ability to obtain an effective remedy. Perhaps the most stark example of the unprincipled nature of this decoupling arises in the context of criminal convictions. Without a power of invalidation or disapplication of legislation which has been found to violate a protected right, a defendant whose conviction is found to be unfair and unsafe because of the necessary effect of primary legislation would nonetheless stand convicted.

It might be objected that while it might be the case in strict legal terms that a declaration of incompatibility does not provide a remedy, the *substance* of the position is quite different. It might be said that of the 20 declarations of incompatibility that had been made in the UK by May 2013, all but one (prisoner voting rights) had been the subject of either secondary or primary legislation removing the violation, or were already

It has been suggested that this arrangement is in the best traditions of the British constitution. I would argue that actually it is *contrary* to our most basic constitutional traditions. It is hard to find areas of agreement between Dicey and Bentham, but one thing they did agree on was an opposition to abstract declarations of rights that were not legally enforceable. Bentham famously described them as 'nonsense upon stilts' (Bentham, 1843, p.501). Likewise, Dicey emphasised that such declarations were objectionable unless the 'rights of individuals are really secure' through the provision of legal remedies. He wrote:

any knowledge of history suffices to show that foreign constitutionalists have, while occupied in defining rights, given insufficient attention to the absolute necessity for the provision of adequate remedies by which the rights they have proclaimed might be enforced. ... On the other hand, there runs through the English constitution that

and therefore they fall short of providing a remedy even where they are forthcoming. Recent research by Jeff King at University College London has shown that of the 20 declarations of incompatibility then made, there is only one instance in which remedial legislation following a section 4 declaration has been retrospective (King, 2014).

The fourth point relates to delay. Even if a political remedy *is* forthcoming, it may not be forthcoming for a considerable period of time. Again, we have the benefit of recent empirical work by Jeff King to highlight this point. King has shown that there have been substantial periods of delay after declarations of incompatibility have been made, with most cases taking over a year to result in remedial measures (*ibid.*, pp.7-8). This is not a marginal issue, but also raises serious questions about the compatibility of the declaration of incompatibility model with our constitutional traditions. Chapter 29 of the Magna Carta, which is still on the statute book, provides: 'we will not deny or defer to any man either Justice or Right'.

Incentives to bring claims

Connected to the fact that there is no effective remedy for people who obtain declarations of incompatibility is the fact that there is often a very weak incentive for people to bring claims, particularly where it is the only remedy they can realistically expect to obtain. Therefore, the problem is not just that individuals do not get an effective remedy if they manage to obtain a declaration of incompatibility, but that an unknown number of cases never get brought before the courts at all because of the lack of incentives to litigate. In designing a bill of rights which, in the words of the Constitutional Advisory Panel, is intended to be a tool to 'assess legislation for consistency with the [NZBORA]' and improve 'compliance by... Parliament with the standards in the Act', it is important that potentially rights-defying legislation is actually brought before the courts and that there is an appropriate balance of incentives to ensure this.

To be sure, the availability of a declaration of incompatibility does provide *something* of an incentive; more,

certainly, than the prospect of an advisory indication from the New Zealand courts. There are contexts, particularly where there are wider interests at stake, where claims will be brought merely for a declaration of incompatibility in the hope of a favourable change in the law. Such cases are more likely, certainly in England and Wales, where the claimant can obtain public funding. Where legal aid is available individuals do not have to pay their lawyers, and the claimants also have costs protection against the costs of the other side's lawyers if the case is lost.⁸

primary legislation violates their human rights. Looked at from this perspective, the declaration of incompatibility does look decidedly unappealing; and if that is so, then the declaration of incompatibility model, although providing better incentives for better human rights scrutiny of legislation than is found under the NZBORA, still fails to provide an effective means of ensuring that legislation is human rights compliant.

Enhancing democratic legitimacy

We have seen that it has been suggested that declarations of incompatibility are

... a democratic principle does tell strongly in favour of allowing Parliament ... to have the last word on what the law should be, and that Parliament if it sees fit should be able to enact law knowing that it is contrary to fundamental rights.

Legal aid will sometimes be available, particularly in cases where there is a wider public interest in the claim because of the potential benefits to other people if the primary legislation is amended, and in such cases there is perhaps more prospect of claims being pursued.

However, take the case of an ordinary private litigant or company. Ordinarily, the costs and risks of public law litigation are high for such litigants; they only bring claims if faced with little alternative (a separate problem which I will reluctantly leave aside). But then add to the mix the fact that even if such potential litigants succeed they will not obtain any remedy from the court that will affect their rights one jot. Can it really be expected that they would bring a claim to the courts for a declaration of incompatibility?

To conclude on this point about incentives, I suggest that while the declaration of incompatibility model might look like a neat way of reconciling sovereignty with human rights from a distance, or from the ivory towers of the academy, one has a different picture if you adopt the perspective of a lawyer advising his or her clients on whether they should litigate in circumstances in which

sophisticated. It is said that they locate the responsibility for infringements of individual rights with Parliament, and it is also said that they inculcate a dialogue with the political branches. Again, I disagree. I will take first the point that the declaration of incompatibility model locates responsibility for legislative infringements of protected rights with Parliament.

Let us assume, as I happen to believe, that a democratic principle does tell strongly in favour of allowing Parliament (although not necessarily acting by simple majority) to have the last word on what the law should be, and that Parliament if it sees fit should be able to enact law knowing that it is contrary to fundamental rights. The problem with declarations of incompatibility is that they do not put the ball into Parliament's court. They trigger no more than a power in the government to amend the infringing provision. There is no mechanism at all for Parliament to express the view that it wishes the law to remain in its rights-infringing state. Although one might assume this from its inaction, it would be a dubious assumption to make, as in all likelihood Parliament would not have considered

the court's judgment. Moreover, the legislation will very likely have been enacted together with a declaration under section 19(1)(a) of the HRA that it is believed to be compatible with the European Convention on Human Rights. That belief is to be attributed to Parliament. If, therefore, it is desirable for responsibility for rights-defying laws to be located clearly with Parliament, the declaration of incompatibility model is not fit for purpose because Parliament has expressed no such intention, let alone done so unequivocally. Parliament

considers and takes responsibility for legislation that infringes rights than a section 3 read-down seems to me to get things the wrong way around.

To my mind, a better system for ensuring that rights-defying laws remain law only if Parliament so intends, and which locates responsibility for rights-defying laws with Parliament, is a variant of the system under the Canadian Charter of Rights and Freedoms, 1982. That allows courts to invalidate laws, but permits legislatures to re-enact them, expressly stating that it is being

(Klug, 2001, p.370). Tom Campbell has written that under the HRA the courts should be 'regarded as having the right to make only provisional determinations' which can 'be challenged and overturned' by Parliament (Campbell, 2001, p.82).

I have elsewhere explained why I regard this view as misguided and as resting on an inaccurate and undesirable conception of the separation of powers (Hickman, 2010, ch.3; Hickman, 2008). There is no difficulty in principle with Parliament having a residual power to enact legislation in the face of court judgments – precisely the power it has in respect of common law rights – but I do not think court judgments should be regarded as mere *provisional* determinations as to the scope or content of individual rights. That does not fit with what courts do or how they see their role, which is to determine what rights are. It would also undermine the legitimacy of judicial pronouncements if they were taken to be mere arguments for others – politicians – to accept or reject.

We must therefore conclude that the declaration of incompatibility model neither provides a good way of locating responsibility for legislation that violates fundamental rights with Parliament and the political branches, nor has the advantage of promoting a beneficial dialogue between courts and politicians.

The New Zealand situation

Now let us turn to New Zealand. I hope it can now be seen that New Zealand should be very cautious before going down the declaration of incompatibility model route. There are a number of reasons why it would be more problematic and less effective even than it is in the UK.

First, the context is quite different. New Zealand is not facing the problem that was addressed by the HRA of numerous applications being made each year to an international court, the judgments of which the government there is required to implement. The purpose of bill of rights reform is not to give effect to international law, but to develop the constitutional evolution of New Zealand (of course this must be consistent with New Zealand's international obligations, but that is rather different).

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instead should be required to make clear by an affirmative act that it does intend the legislation to continue in force, notwithstanding that it has been found to be incompatible with a protected right. This would ensure that Parliament clearly endorses and takes responsibility for laws that violate basic rights.

Indeed, the declaration of incompatibility is actually *less effective* at enhancing democratic responsibility for rights violations than the interpretation provision contained in section 3 of the HRA and section 6 of the NZBORA. Where the courts invoke these provisions to give legislation a rights-compliant interpretation, it remains open to Parliament to overrule the decision and make clear that the rights-violating effect is intended. This involves Parliament taking responsibility for the law by unequivocal positive action. And that will require a Parliamentary debate.

For this reason, to suggest that a section 4 declaration of incompatibility (which results in Parliament taking responsibility for rights violations, if it does intend them to continue, only by omission) is *more effective* at ensuring that Parliament

done 'notwithstanding' that they are not compatible with convention rights.⁹ This seems to me to better achieve the objective of ensuring Parliament addresses and takes responsibility for rights violations, and also preserves the ability of Parliament to have the last word. It also ensures that courts can provide remedies in a manner much more consistent with our constitutional traditions.

It is also said that section 4 has the happy consequence of enabling a *debate* to take place between Parliament and the political branches as to what the scope of our rights should be. Stephen Gardbaum argues, for instance, that following a court pronouncement on legislation, the legislature should 'engage in a serious and principled reconsideration of the rights issue' (Gardbaum, 2013, p.89). Gardbaum is the latest and one of the most sophisticated proponents of this view, but this notion of dialogue under the HRA has been a common theme in academic writing on the HRA since its inception. Francesca Klug, for instance, has argued that section 4 of the HRA enables the courts to generate public debate about the scope of human rights

Second, there is also not the same safety net in New Zealand of an international court able to provide an individual remedy where the continuing effect of primary legislation denies an individual a remedy in the case brought before the New Zealand courts. In New Zealand a declaration of incompatibility would be the end of the road: consideration by the UN Human Rights Committee (which is not a court, which is not binding and which confers remedies) is not equivalent to an application to the European Court of Human Rights. The absence of a remedy issue is therefore more acute in New Zealand.

Third, the absence of an incentive for claims to be brought to test legislation would also be more pronounced in New Zealand. Two incentives that have played a part in litigation in the UK – the ability to disapply legislation within the scope of EU law; and the need to exhaust remedies under article 34 of the European Convention on Human Rights – do not arise in New Zealand. While there would be some cases brought and there would be more of an incentive for claims to test legislation than there is currently under the NZBORA, it is still likely to provide a very patchy approach to human rights protection.

I emphasise that these three points do not exhaust the reasons for not adopting a declaration of incompatibility; they *compound* the problems and deficiencies that are to be found in the declaration of incompatibility as it operates in the UK which I have set out above.

Tested against the objectives identified by the Constitutional Advisory Panel of an enhanced judicial power to ensure legislation complies with protected rights and that there are effective means of ensuring that Parliament complies with standards in the bill of rights, the declaration of incompatibility does not, I suggest, make the grade.

Conclusion

I hope I have said enough to suggest at least that New Zealand should be very cautious before adopting the mechanism for protecting human rights against legislative curtailment found in the HRA as a means of meeting the objectives identified in the Constitutional Advisory Panel report. The declaration of incompatibility model was developed in the context of the system of individual petition to the European Court of Human Rights, which does not pertain in New Zealand. As a system of giving effect to constitutionally protected rights, the declaration of incompatibility model, I have argued, is unfair, unprincipled and not particularly effective as a means of ensuring legislation is rights-compliant. The benefit of the declaration of incompatibility model is that it forms a reasonably workable placeholder in an ongoing process of constitutionalising human rights. But New Zealand should have higher ambitions. The Constitutional Advisory Panel report has higher ambitions for New Zealand. New Zealand already has a non-entrenched, non-supreme bill of rights. I doubt that it needs another one.

To contend that New Zealand, or the UK, should give fundamental rights entrenched and higher-order protection is not radical. Far from it: of the 53 members of the Commonwealth, almost every one gives fundamental rights such status in their law; a number still have final appeals in the UK before the very judges that decide the cases under the HRA (Leckey, 2015, ch.3). New Zealand and the UK, together with Australia, are outliers. New Zealand set the pace for the UK and Australia back in 1990. In this article I have set out the case for it doing so again.

- 1 *Moonen v Film and Literature Board of Review* [1999] NZCA 329; [2000] 2 NZLR 9.
- 2 *Hansen v R* [2007] NZSC 7; [2007] 3 NZLR 1 at [253]–[254].
- 3 *Hansen* at [153] (McGrath J); *McDonnell v Chief Executive of the Department of Corrections* [2009] NZCA 252, at [123(b)]; *Belcher v The Chief Executive of the Department of Corrections* [2007] NZCA 174 at [16]–[17]; *Miller v The New Zealand Parole Board* [2010] NZCA 600 at [75]; *Boscawen v Attorney-General* (No 2) [2008] 8 HRNZ 520 at [58]; [2009] NZCA 12 at [55]–[56]. It is also the case that the courts have suggested that they will not make a declaration where the rights infringement does not require section 5 to be considered: *McDonnell* at [123(C)]. However, in such cases the reason for not reading the legislation consistently with the protected right will be equally apparent from the judgment.
- 4 *Manawatu v R* [2007] NZSC 13 at [6]. And see also *R v Exley* [2007] NZCA 393 holding that no legitimate question of statutory interpretation arose in that case because the legislation was clear.
- 5 Commission on a Bill of Rights, *A Bill of Rights for the UK?: the choice before us* (Dec. 2012), <<https://www.justice.gov.uk/downloads/about/cbr/uk-bill-rights-vol-1.pdf>> at [69]; [96]. It was said consultees had had no appetite for a strike-down power; my consultation response was evidently not read.
- 6 *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633 at 663.
- 7 *Burden & Burden v UK* (2008) 47 EHRR 38, at [41]; see also Malik v UK App. No.32968/11 28 May 2013.
- 8 It is worth emphasising that this may be the costs not only of the government's lawyers but private parties or other organisations who have an interest in the legislation or who benefit from it.
- 9 It would be preferable if the notwithstanding clause only applied after a court judgment, whereas under the Canadian Charter it can be used pre-emptively. The 'override' is also adopted by the Victorian Charter, s.31.

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The Victorian Charter of Human Rights and Responsibilities

The Victorian Charter of Human Rights and Responsibilities Act 2006 (the Victorian Charter) was enacted 16 years after the New Zealand Bill of Rights Act (NZBORA). Like the NZBORA and the United Kingdom's Human Rights Act 1998 (HRA), the Victorian Charter is an ordinary act of Parliament which seeks to preserve parliamentary sovereignty by limiting the courts' ability to strike down legislation. The Victorian Charter drew heavily upon the experience of New Zealand and the United Kingdom. The Victorian Charter expressly adopts some aspects of the NZBORA and the HRA (such as the interpretative rule), rejects other aspects (such as the ability to obtain damages for breach), but also includes some provisions that are quite different from either the NZBORA or the HRA.

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In considering the options for strengthening the NZBORA, it may be helpful to look to the experience of Victoria in relation to its somewhat more detailed act. However, a comparative analysis must consider the broader legal, constitutional and political framework in which the Victorian Charter operates, as well as the different administrative arrangements within government that are not necessarily apparent from the text.

Constitutional and legal environment

The Victorian Charter operates within a very different constitutional and legal framework to that of the NZBORA. This framework affects the operation of the Victoria Charter in a number of ways.

First, the Victorian Charter is legislation of the state of Victoria, and can therefore generally only apply to Victorian legislation and public officials. It cannot affect the interpretation of Commonwealth laws or the implementation of those laws by Commonwealth bodies.

Second, the Victorian Charter applies differently to the judicial branch

of government. Under the Victorian Charter, courts are expressly excluded from the definition of 'public authority', except when acting 'administratively'. In contrast, section 6 of the HRA expressly includes courts and tribunals in the definition of public authority and provides that it is unlawful for a public authority to act incompatibly with a human right. Section 3 of the NZBORA provides that the act applies to acts done by all three branches of government, as well as persons and bodies exercising public functions, powers and duties. The direct application of the NZBORA and the HRA to courts and tribunals means that courts and tribunals must themselves consider human rights and act compatibly with them, and renders decisions vulnerable to review or appeal where they fail to do so. It also potentially gives rise to a direct obligation on courts to consider and develop the common law in light of the statutory human rights.

Third, from the perspective of a New Zealand-qualified lawyer practicing in Australian public law, one of the most noticeable differences between the two legal cultures is the influence of the principle of separation of powers. In contrast to the position at the Commonwealth level, in the Australian states there is no strict requirement of separation of powers. Nevertheless, the principle operates much more strongly in the state legal system than it does in New Zealand. The principle has already had a marked impact upon the interpretation and operation of key provisions of the Victorian Charter.

It is clear that the boundaries between law-making (a legislative function) and interpreting legislation (a judicial function) was at the heart of the High Court's decision in *Momcilovic v The Queen*¹ to reject the approach adopted by the UK courts to the interpretative rule in the HRA and to adopt a more modest approach to the interpretative rule in section 32 of the Victorian Charter. Further, for three of the seven members of the High Court, the power of a court to make a declaration of inconsistent interpretation with no practical effect for the parties was not a judicial function and

was incompatible with the institutional integrity of the Supreme Court.

It is also likely that the principle is, at least in part, responsible for the courts' reluctance to engage in proportionality review, particularly when it comes to legislation. Currently, Victoria is in the same (or perhaps a worse) position than New Zealand was prior to *R v Hansen*.² The conflicting judgments of the High Court in *Momcilovic* mean that the role of the reasonable limits provision in section 7(2) in an assessment of compatibility under the interpretative rule is unclear.

Finally, any consideration of the Victorian Charter would also be incomplete without acknowledging the political environment within which

general to bring to the attention of Parliament any provision of a bill that appears to be inconsistent with any of the rights and freedoms contained in the NZBORA. Notably, the obligation is on the attorney-general, including in respect of non-government bills, and is only to identify inconsistencies with rights. As a matter of practice, the attorney-general is provided with legal advice on all bills by the Ministry of Justice (in respect of non-justice bills) and by the Crown Law Office (in respect of justice bills). With the exception of advice on bills in respect of which a section 7 report has been tabled, the legal advice is published online.³

In contrast, section 28 of the Victorian Charter places an obligation on the

In contrast, section 28 of the Victorian Charter places an obligation on the member of Parliament who proposes to introduce a bill into a house of Parliament to cause a reasoned statement of compatibility to be prepared in respect of the bill.

it operates. The present coalition government opposed the enactment of the Victorian Charter when it was in opposition. That controversy has continued, particularly in the context of conducting the statutorily mandated reviews of the charter. The Scrutiny of Acts and Regulations Committee completed the first such review in 2011. The majority of the committee favoured the retention of the provisions regarding scrutiny of legislation, and a number of significant amendments were recommended to improve this process. However, a majority also recommended the repeal of division 3 (interpretation of laws) and division 4 (obligations of public authorities).

Parliamentary scrutiny

One of the obvious differences between the provisions of the NZBORA and the Victorian Charter is in the obligations to report on proposed legislation. Section 7 of the NZBORA requires the attorney-

member of Parliament who proposes to introduce a bill into a house of Parliament to cause a reasoned statement of compatibility to be prepared in respect of the bill. The statement of compatibility is laid before the House before the member gives his or her second reading speech. The Scrutiny of Acts and Regulations Committee (a joint investigatory committee of Parliament) is required by section 30 of the Victorian Charter to consider any bill introduced into Parliament and to report to Parliament as to whether the bill is incompatible with human rights.

The requirement to provide a reasoned statement of compatibility in respect of all bills is unique to the two Australian jurisdictions with a statutory human rights instrument, Victoria and the Australian Capital Territory. It has the potential to improve the understanding of all members of Parliament as to the human rights implications of proposed legislation, and to increase parliamentary

debate of the human rights issues. This is more difficult to achieve in jurisdictions such as the UK or Canada, where there is either no obligation at all upon the incumbent government to identify human rights issues, or merely a requirement of certification that the proposed legislation is compatible with human rights.

In practice, the Victorian Charter has not featured prominently in parliamentary debates. However, there is a clear dialogue between the member introducing the bill and the Scrutiny of Acts and Regulations Committee. It is common for the committee to write to the minister introducing a government bill identifying further human rights issues or requesting more information

that culture was to build knowledge throughout government.

Section 28 of the Victorian Charter distributes the responsibility for legislative compatibility with human rights to all members of Parliament, rather than just the attorney-general. This decentralisation is reinforced and developed through the administrative arrangements that operate within government. The preparation and tabling of a statement of compatibility is the culmination of a series of administrative processes that are aimed at early identification of human rights issues and ensuring that proposed legislation is developed in a way that is compatible with rights.

In addition to the obligations to

the Human Rights Unit is consulted on statements of compatibility and human rights certificates, it does not prepare them. Departments are encouraged to prepare statements of compatibility and human rights certificates themselves. This is seen as an important aspect of building a culture of rights in which all public officials develop a knowledge and understanding of human rights, and consideration of human rights occurs at all stages of the decision-making processes of government.

There are noticeable benefits of this decentralised process. Rather than human rights being seen as an area of specialised knowledge, possessed only by a select few within the Department of Justice or the Victorian Government Solicitor's Office, all public servants are encouraged to develop a knowledge of human rights with particular regard to the implications for their policy area. Having legislation that is compatible with human rights is only the first step in ensuring human rights-compatible outcomes. Primary legislation may confer a power that, on its face, permits a wide discretion, some of which may be compatible with rights and some of which may not. Ensuring subordinate legislation and individual decision-making are compatible with human rights requires consideration of human rights implications at all levels of the decision-making process. Building knowledge of human rights within all areas of government is essential. This was recognised by the two-year delay in the full operation of the Victorian Charter, during which time human rights training was implemented government-wide and departments had an opportunity to develop internal policies and procedures to incorporate human rights considerations.

In practice, the extent to which government departments have built in-house capacity to prepare statements of compatibility and deal with human rights issues has been variable. However, those departments that encounter human rights issues on a regular, and often daily, basis have built up significant expertise. Those departments generally prepare statements of compatibility and human rights certificates themselves. Other

Measuring the success of internal government processes is difficult, particularly where it involves the development of legislation, as much of the material is cabinet-in-confidence.

regarding a particular issue, including a more detailed justification for an identified limit upon rights. In other cases the committee may identify issues and bring to the attention of Parliament the question of whether a particular limit upon rights is justified.

Reasoned statements of compatibility may also prove to be an important aspect of the dialogue with the courts. As part of the extrinsic material, identification in the statement of compatibility of whether and the extent to which the bill intends to limit rights may assist in the subsequent interpretation of the legislation. The statement of compatibility may also provide evidence of the reasons or justification for limiting the rights.

Decentralisation and building a culture of rights

In enacting the Victorian Charter, it was made clear that the expectation was that most of the work would occur within government, rather than the courts, and there was a stated intention to build a 'culture of rights'. Key to developing

report in respect of bills under section 28 of the Victorian Charter, a responsible minister is required to provide a human rights certificate in respect of legislative instruments and statutory rules.⁴ The human rights certificate must certify whether rights are limited and, if so, whether the limit is reasonable and justified. The Scrutiny of Acts and Regulations Committee is empowered to report to Parliament if the legislative instrument is incompatible with the human rights in the Victorian Charter.⁵

Section 38 of the Victorian Charter requires that public authorities not only act compatibly with rights, but also give proper consideration to relevant human rights when making decisions. In this context, an understanding of human rights is required of all public servants.

In contrast to the practice in New Zealand, neither the Department of Justice nor the Victorian Government Solicitor's Office are responsible for preparing statements of compatibility. The Victorian Department of Justice has a small Human Rights Unit. However, while

departments are more likely to engage lawyers to assist; but, even then, they tend to have greater engagement in the process than occurs in New Zealand, sometimes preparing a draft themselves.

Measuring the success of internal government processes is difficult, particularly where it involves the development of legislation, as much of the material is cabinet-in-confidence. The fact that the Victorian Charter is being considered and is influencing the development of legislation is evident from the work of the Victorian Law Reform Commission. Often, terms of reference will include an express requirement to consider the rights enshrined in the Victorian Charter. Reports of the commission have included a discussion of the charter. More recently, the commission acknowledged that the Victorian Charter proved to be a 'helpful guide' when designing new guardianship laws.

It is also possible to speculate on the influence of the Victorian Charter by comparing more recent Victorian legislation with that in other Australian jurisdictions. For example, the Serious Sex Offenders (Detention and Supervision) Act 2009 includes a range of safeguards and protections that are missing from similar legislation in other states and which reflect rights in the Victorian Charter.

Decentralisation comes with a number of risks. First, there is the risk of lack of consistency across government. That risk is increased in a jurisdiction such as Victoria, where external legal providers play a greater role in the provision of legal services than in New Zealand and the UK. In Victoria the Human Rights Unit within the Department of Justice plays an important role in ensuring consistency across government. Further, the attorney-general is given a significant role with respect to litigation involving the Victorian Charter. Notice is required to be given to the attorney-general where issues arise under the Victorian Charter in the county or supreme courts, and the attorney-general is given a right of intervention in any court in which issues under the Victorian Charter arise. This procedure has been criticised as

being a deterrent against litigants raising human rights issues, and it may also have contributed to a perception within the legal profession and judiciary that human rights issues are particularly complex. Nevertheless, the procedure has proven to be important to ensuring consistency and a whole-of-government approach to human rights issues, particularly in the early development of jurisprudence under the Victorian Charter.

Second, in a decentralised model such as that in Victoria, the role of the Scrutiny of Acts and Regulations Committee is critical to ensuring a high standard of scrutiny of legislation for human rights compatibility. The committee acts as an independent check on the assessment of

sections 28–30) and to its interpretation (section 32). The Victorian Charter also applies to the making of subordinate instruments, through the requirement to provide human rights certificates under the Subordinate Legislation Act 1994. Subordinate instruments are also subject to the interpretative rule in section 32 of the charter.⁶ However, unlike primary legislation, a subordinate instrument that is incompatible with human rights may result in invalidity, unless the instrument is empowered to be incompatible by the act under which it is made. A careful reading of section 32 of the Victorian Charter reveals an operation upon subordinate instruments similar to that under the NZBORA, according to the

The potential impact of the Victorian Charter on the validity of subordinate instruments does not seem to be well understood in Victoria and, like in New Zealand, the use of the interpretative rule to challenge the validity of subordinate instruments is rare.

the internal legislative and policy officers. In Victoria the committee is sufficiently resourced to have a legal adviser. I can say from my own experience within government that public servants take the committee's scrutiny seriously. They are concerned to ensure that the statement of compatibility properly identifies and analyses the human rights issues and avoids a 'negative' report from the committee. The presence of the committee serves as a powerful disincentive against paying lip service to human rights or preparing inadequately reasoned statements of compatibility.

Express application to all levels of decision-making

The Victorian Charter is considerably more prescriptive than the NZBORA as to its application to the different levels of decision-making. As in New Zealand, the Victorian Charter applies to the enactment of primary legislation (through

New Zealand Court of Appeal decision in *Drew v Attorney-General*.⁷ The potential impact of the Victorian Charter on the validity of subordinate instruments does not seem to be well understood in Victoria and, like in New Zealand, the use of the interpretative rule to challenge the validity of subordinate instruments is rare.

The Victorian Charter expressly applies to acts and decisions of public authorities. Section 38 provides that it shall be unlawful for a public authority to act incompatibly with rights or, in making a decision, to fail to give proper consideration to relevant human rights. While public authority is broadly defined, the most notable exclusion from the definition is courts and tribunals, except when acting 'administratively'.

In contrast, the NZBORA depends upon the general application provision of section 3 to impose obligations on the executive and judicial branches of government. In contrast to the UK, there

have been relatively few cases in which the NZBORA has been used to review decisions made by the executive. We can only speculate as to the reasons for this, but one may be the absence of a clear or express provision as to how the NZBORA applies to decisions of the executive. The focus of much of the New Zealand jurisprudence and commentary appears to have been on the role of Parliament in protecting rights. However, having legislation that is compatible with rights is only the first step in ensuring rights-compatible outcomes. Human rights need to be considered at all levels of the decision-making process.

In Victoria, the obligation in section 38 to give proper consideration to relevant human rights has so far been interpreted in a way that addresses the concerns expressed by the House of Lords.

Exclusion of the courts

As discussed above, the reason courts were excluded from the definition of public authority is because of the constitutional issues that could arise if Victorian courts were bound to develop the common law by reference to the Victorian Charter. It is arguable that, in excluding the courts from the definition of public authority, the framers of the Victorian Charter 'threw the baby out with the bath water'. Not only has it meant that courts are not required to develop the common law; there is no obligation upon them to consider the human rights implications of their decisions, except in so far as this involves interpretation of legislation, or to act compatibly with rights.

There has been a marked reluctance on the part of Victorian courts to deal with human rights arguments. To a large extent this can be explained by the lack of clarity as to the operation of the interpretative rule in section 32 of the charter as a consequence of the multiple and conflicting judgments of the High Court in *Momcilovic*. However, the courts' reluctance to consider human

rights arguments has extended to the Court of Appeal expressing the view that 'ordinarily this court should not be expected to entertain Charter points on an interlocutory criminal appeal'.⁸

There are sound reasons why interlocutory appeals in criminal matters may be inappropriate for raising human rights arguments. Frequently, such appeals raise issues of fair hearing arising from a ruling during the course of a trial, such as the admissibility of evidence. The fairness of a hearing must be assessed in light of the conduct of the trial as a whole. Accordingly, an argument based on the right to a fair hearing in section 24

of the Victorian Charter is usually inapt for an interlocutory appeal. However, the Court of Appeal has also cited as reasons against considering human rights arguments on interlocutory appeals the complexity of human rights arguments and consequential delay in the criminal trial, and, even less convincingly, that the matter is capable of being decided in favour of the accused without resort to the Victorian Charter. Disruption and delay in the criminal trial are undoubtedly factors to be taken into account in determining whether leave should be granted to file an interlocutory appeal. They may also influence whether the court delivers a judgment determining all matters raised by the parties, or only those that are necessary to dispense with the appeal. However, the singling out of human rights arguments as being inappropriate for raising on an interlocutory appeal is problematic, not least because the failure to determine those issues may itself be incompatible with human rights, as the court would be requiring or permitting a trial to proceed in breach of human rights. Had the judiciary been included

in the definition of public authority (with an exception with respect to the common law), as is the case in the UK, it would be more difficult for the courts to avoid considering and determining human rights issues in this way, or more generally.

Proper consideration

The obligation upon public authorities to give 'proper consideration' to relevant human rights in making decisions is unique to Victoria and the Australian Capital Territory. The procedural obligation is consistent with other provisions of the Victorian Charter which seek to embed human rights within administrative law.⁹ This is in distinct contrast to the approach of the UK House of Lords, which has rejected process review under the HRA. As Baroness Hale stated in *Belfast City Council v Miss Behavin' Ltd*:

The role of the court in human rights adjudication is quite different from the role of the court in an ordinary judicial review of administrative action. In human rights adjudication, the court is concerned with whether the human rights of the claimant have in fact been infringed, not with whether the administrative decision-maker properly took them into account.¹⁰

Tom Hickman is critical of the complete rejection of process review under the HRA, particularly given the importance of a procedural obligation to the development of a culture of rights (Hickman, 2010, ch.8). He argues that both commentators and the House of Lords overreached with their concerns that process review would lead to a 'new formalism' and be 'a recipe for judicialisation on an unprecedented scale',¹¹ and that 'a construction ... which requires ordinary citizens in local government to produce such formulaic incantations would make it ridiculous'.¹²

In Victoria, the obligation in section 38 to give proper consideration to relevant human rights has so far been interpreted in a way that addresses the concerns expressed by the House of Lords. In *Castles v Secretary to the*

Department of Justice,¹³ a prisoner sought declaratory relief to enable her to resume the IVF treatment she underwent prior to her incarceration. The judge recognised the potential for section 38 to apply to a wide range of decisions at all levels of government. In light of that, ‘proper consideration of human rights should not be a sophisticated legal exercise’:

Proper consideration need not involve formally identifying the ‘correct’ rights or explaining their content by reference to legal principles or jurisprudence. Rather, proper consideration will involve understanding in general terms which of the rights of the person affected by the decision may be relevant and whether, and if so how, those rights will be interfered with by the decision that is made. As part of the exercise of justification, proper consideration will involve balancing competing private and public interests. There is no formula for such an exercise, and it should not be scrutinised over-zealously by the courts.¹⁴

Her Honour concluded that while ‘proper consideration’ entails that the public authority must do more than simply pay lip service to Victorian Charter rights and the terms of section 7, it does not require a comprehensive or detailed analysis:

While I accept that the requirement in s 38(1) to give proper consideration to a relevant human right requires a decision-maker to do more than merely invoke the Charter like a mantra, it will be sufficient in most circumstances that there is some evidence that shows the decision-maker seriously turned his or her mind to the possible impact of the decision on a person’s human rights and the implications thereof for the affected person, and that the countervailing interests or obligations were identified.¹⁵

In that case, the detailed manner in which the competing interests of Ms

Castles and the broader public interests were weighed up in briefings, together with the secretary’s own statement, was considered sufficient.

In *Patrick’s Case*,¹⁶ Justice Bell agreed with the comments of the court in *Castles* and reinforced the view that the consideration of human rights required by section 38 can be done in a variety of ways to suit the particular circumstances. Referring to UK authority, Bell noted that decision-makers ‘are not expected to approach the application of human rights like a judge “with textbooks on human rights at their elbows”’.¹⁷

In Victoria, another issue has arisen which raises concerns about the implications of the procedural obligation

On the other hand, the ability to review a decision for proper consideration of human rights may avoid the criticism commonly leveled against statutory bills of rights, namely that they involve unwarranted intrusion of the courts into the role of the executive by reviewing decisions on their merits. While I do not subscribe to the view that proportionality review amounts to merits review, it nevertheless involves greater scrutiny of decisions than permitted under *Wednesbury* unreasonableness. There may be occasions when it is more appropriate for a court to quash the decision, or to make a declaration that would have the effect of requiring the public authority to re-make its decision, giving proper

If a procedural obligation were to be added into the NZBORA, consideration should be given to how the obligation might relate to any substantive obligation to act compatibly with rights, and to the remedies that may flow from a breach.

upon public authorities. That is the question of appropriate remedies for breach of the obligation. Australian administrative law retains the concept of jurisdictional error that has largely been abandoned in New Zealand. At the risk of oversimplifying the position, jurisdictional error can render a decision invalid, the remedy for which would normally be to quash the decision. In the area of human rights, even breach of the substantive obligation to act compatibly with human rights will often result in declaratory relief only. Where the procedural obligation is not complied with but the ultimate outcome is compatible with human rights, it seems difficult to justify an approach that invalidates and quashes the decision. The Supreme Court has so far rejected the argument that a breach of section 38 of the Victorian Charter amounts to jurisdictional error, but that decision is on appeal.¹⁸

consideration to human rights, rather than for the court to determine what is the correct and human rights-compatible outcome.

In New Zealand, the question of the availability of process review under the NZBORA has yet to be fully considered by the courts. Arguably, it remains open to the New Zealand courts to permit some degree of process review under the NZBORA, perhaps following the Canadian approach¹⁹ rather than that of the UK.

If a procedural obligation were to be added into the NZBORA, consideration should be given to how the obligation might relate to any substantive obligation to act compatibly with rights, and to the remedies that may flow from a breach.

Substantive rights

The Victorian Charter includes a broader range of rights than the NZBORA. These include rights which go well beyond the

criminal law, including the right to equality (section 8), the right to privacy (section 13), the rights of families and children (section 17) and cultural rights (section 19). The consequence is that the Victorian Charter has not been limited to criminal matters and has not been branded with being a 'drink driver's charter' or anything similar. The fact that the Victorian Charter can only apply to state legislation, as noted above, means that some of the most controversial issues, such as anti-terrorism laws and treatment of asylum seekers, have not been affected by it. Rather, the cases in which the Victorian Charter has received the most judicial attention have included issues such as the treatment of persons with mental illness in the criminal justice system,²⁰ the rights of families and children in public housing,²¹ the rights of persons with disabilities in guardianship matters,²² the rights of persons involuntarily detained under mental health legislation,²³ and the rights of children in the care of the state.²⁴ The

inclusion of such rights ensure that the Victorian Charter is relevant to all Victorians, not just those who come into contact with the criminal justice system.

Conclusion

In many respects the open text of the NZBORA may not need amendment to strengthen its protection of human rights. It is open to government to strengthen administrative and parliamentary procedures, without amendment to the act. It is also open to the New Zealand courts to develop a form of process review and/or review for substantive compliance with rights, and to take a more active role in ensuring compliance with rights.

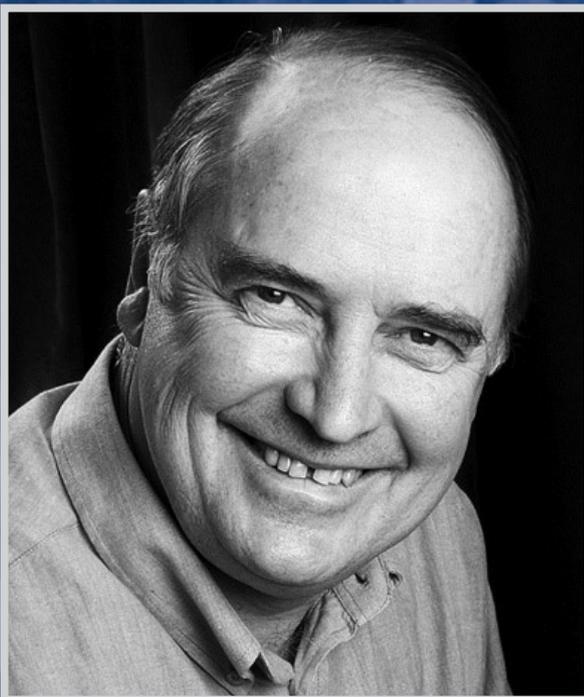
However, without incorporating new rights that are relevant to all New Zealanders, the NZBORA may continue to be seen as a drink-drivers' or criminals' charter. While Victoria's charter may be politically controversial, the fact that its most significant impacts have been in areas such as mental health and child

protection enables it to have much broader support within the community.

- 1 (2011) 245 CLR 1.
- 2 [2007] 3 NZLR 1.
- 3 <http://www.justice.govt.nz/policy/constitutional-law-and-human-rights/human-rights/bill-of-rights>.
- 4 See ss.2A and 12D of the Subordinate Legislation Act 1994.
- 5 See s.25A of the Subordinate Legislation Act 1994.
- 6 The term 'statutory provision' in s.32 is defined in s.3 as including subordinate instruments.
- 7 [2002] 1 NZLR 58.
- 8 *The Queen v Chaouk* [2013] VSCA 99 at [35], citing *Wells v R (No 2)* [2010] VSCA 294.
- 9 In particular, s.39 seems to contemplate that human rights arguments will largely be raised in judicial review proceedings, for which the same remedies will be available for a breach of rights.
- 10 [2007]1 WLR 1420 at [31].
- 11 *R (on the application of Begum) v Headteacher and Governors of Denbigh High School* [2007]1 AC 100 at [31] per Lord Bingham.
- 12 *Belfast City Council v Miss Behavin' Ltd* [2007]1 WLR 1420 at [13] per Lord Hoffmann.
- 13 *Castles v Secretary to the Department of Justice* [2010] VSC 310.
- 14 *Ibid.* at [185].
- 15 *Ibid.* at [186].
- 16 *PJB v Melbourne Health (Patrick's Case)* [2011] VSC 327.
- 17 *Ibid.* at [312].
- 18 *Bare v Small* [2013] VSC 129.
- 19 *Dore v Barreau du Quebec* [2012] 1 SCR 12.
- 20 *Victorian Toll & Anor v Taha and Anor; State of Victoria v Brookes & Anor* [2013] VSCA 37.
- 21 *Director of Housing v Sudi* (2011) 33 VR 559.
- 22 *PJB v Melbourne Health; Patrick's Case* [2011] VSC 327.
- 23 *Kracke v Mental Health Review Board* [2009] VCAT 646; (2009) VAR 1.
- 24 *Re Beth* [2013] VSC 189.

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A Way of Thinking about Vested Interests¹

In 2010–11 three government policy initiatives aroused controversy and accusations of special treatment for ‘vested interests’: a change in workplace relations law to meet the demands of a film company; special treatment for a company in the ultra-fast broadband roll-out; and a gambling-licences-for-convention-centre deal. Were the accusations justified? And what is a ‘vested interest’ and where does it fit in New Zealand’s democracy?

Everyone has interests and expresses and pursues those interests in various ways, individually and with others who are like-minded and directly, or by seeking favourable rules or the backing of those in authority. In a sense all interests are ‘vested’, since they are attached to and, in a sense, ‘clothe’ the person or entity holding or pursuing them. And in an open, democratic society, their pursuit

is logically an unexceptionable, natural human interaction.

But the term ‘vested interests’ has acquired negative overtones of unfair, nefarious or anti-social behaviour: that is, their successful pursuit, and sometimes just their pursuit, is seen as in some way damaging. For that reason, and because this article does not treat the topic as a matter of ethics, it is more useful to talk of ‘special interests’, and to distinguish legitimate and unexceptional pursuit of those interests in an open, democratic way from pursuit of them in such a way that it injures the general public interest.

The inequalities that matter

In a well-functioning modern democracy all citizens are equal members, which does not imply equality of outcomes, but does imply that there is a general public interest in interests not being pursued in such a way as to advantage some and disadvantage others by creating substantial new inequalities, or maintaining or exacerbating pre-existing substantial

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inequalities. (In this article 'citizen' is used generically and includes 'permanent residents'.) Citizens' equal membership extends, since the expansion of social services in the 20th century, to being 'able to enjoy a standard of living much like that of the rest of the community and thus ... able to feel a sense of participation and belonging to the community' (Royal Commission, 1972).

In practice citizens have *inherent inequalities*, some inherited and genetic, some gender-determined, and some acquired in the very early years of life, and they have *attitudinal inequalities* which determine how they prefer to operate in society, including whether they are leaders or followers. These

And citizens form associations such as charities and not-for-profit organisations to protect or advance the individual interests of others less likely to be able to pursue their interests without help, and to promote animal welfare or protection of the physical environment, to seek to enhance a suburban or urban landscape, or to push for policy change they believe will make society or the economy more equitable.

There is nothing inherently injurious to the general public interest, as defined above, in these activities. If the competition is equal, the pursuit of any one interest will not reduce the realisation of any other interest, more than the realisation of that interest is reduced by the realisation of

interest groups seek to gain benefits from the government but do not control decision-makers; corporatism, with interest groups formally incorporated into the system of government, as when wage bargaining was formally regulated by the Arbitration Court, and when in the 1950s and 1960s governments informally arbitrated among interest groups, often behind closed doors; and a 'market liberal' model in which the role of the state is limited and there is more reliance on unregulated choices by individuals and private firms in a free market.

In fact there are few genuinely open markets. In almost all markets both information and power are asymmetrical, usually in favour of larger or more concentrated participants and in practice. That goes for interest group interaction in Mulgan's first model. And governments of different parties favour different interests. This is only partially and crudely self-correcting through elections, protests, organised campaigns, petitions and so on.

Moreover, once a policy or legislation is in place it becomes a new status quo, and the longer it is in place, the more likely it is to become accepted by the public as the norm and then not be repealed or reversed by a subsequent government made up of different parties. Thus, the status quo may become part of the 'culture'.

The corporate model is not in prospect.

National interest versus special interest

A modified version of the 'market liberal' model was applied by the incoming Labour government in 1984. It stopped listening to arguments by individual firms and sectors (or individuals) for their special benefit. The criterion for successful arguments put to the government was that a change would deliver national benefit. This did not mean sector groups or large firms stopped pressing cases that were beneficial to the sector, firm or individual. But it did mean that to gain that benefit, a case had to be presented that the benefit to the sector/firm/individual was also a benefit to the economy as a whole, and the case had to argue for generic, not special action (though it should be added that the

In fact there are few genuinely open markets. In almost all markets both information and power are asymmetrical, usually in favour of larger or more concentrated participants and in practice.

inequalities are unexceptional elements of a normal, diverse human society. But there are also *manufactured inequalities*, created – by action or omission – in the law and by the state's practices, by custom or social structures and traditions, and by economic interaction. Such inequalities deny true justice and inhibit citizens taking a full part in their society and nation. So the focal question in this article is: does the successful pursuit of a special interest manufacture substantial new inequalities or maintain or exacerbate existing manufactured inequalities, and are those inequalities substantial? If so, it is arguably incompatible with true democratic practice and in that sense not in the general public interest.

Citizens join together formally and informally in interest groups to collectively pursue individual interests. Unions, business associations and political parties are examples. Firms are a hybrid: a firm has an individual interest, but is also a collective in the sense that all those engaged or employed in it have an interest in the firm being profitable.

others' interests. Of course, in practice some secure more of their interests than others, and some inequality of outcome is compatible with a just society in a well-functioning democracy. It can also be argued, (loosely) following John Rawls (Rawls, 1972), that if some secure an advantage (gain or benefit) through successfully pursuing their interests, that is compatible with a just society if others are not disadvantaged. There might also be a general acceptance of long-established differences – a 'culture' – which arguably is not necessarily undemocratic.

But large and persistent inequalities of outcomes are not compatible with a just society, because then the citizens are no longer equal members. Thus, the word 'substantial' is important in assessing the impact of the pursuit of special interests.

How to gain advantage

Richard Mulgan (Mulgan, 2004) identified three types of interaction between interest groups and governments: a pluralist model, in which the political system operates like an open market where

criteria themselves as to what constituted national benefit favoured some arguments over others).

Broadly speaking, this national benefit 'rule' still applies, but in recent years some well-connected individuals or firms have persuaded ministers to respond favourably to specific cases they have made which benefit them directly. They have, in effect, finessed Mulgan's interest-group market.

- In September 2010 the Australian Media Entertainment and Arts Alliance union, backed by several international actors' unions, ramped up a bid by New Zealand Actors Equity for minimum conditions for filming the *Hobbit* film series. Sir Peter Jackson, the director, said these claims put at risk Warner Brothers' commitment to the film, and specifically to the film being filmed in New Zealand: Warner Brothers did not want to deal with a unionised workforce. After lawyers representing Warner Brothers met the minister of economic development, Gerry Brownlee, and the prime minister and tourism minister, John Key, the government agreed on 27 October to promote special legislation in Parliament specifying that film workers were contractors and could not demand a collective agreement or take strike action. The legislation passed. The deal also gave Warners up to \$34 million in tax concessions.

The deal did have a large national interest component in work, business opportunities and promotional benefits. It included a commitment that all DVDs of the films would include a tourism promotion video. Nevertheless, it prompted criticism that the law had been changed to meet the demands of an individual company – a response at odds with the post-1984 principle. Professor Paul Roth of Otago University, an academic specialising in employment law, said the deal was a case of New Zealand 'teetering into third world status' (quoted in McLean, 2010, etc). It also clearly disadvantaged the particular employees affected and, if replicated

elsewhere, would disadvantage employees generally.

This was a case of specific concessions to a firm in return for it spending money here.

- In legislation promulgated in late 2010, successful bidders for contracts to build fibre networks for the ultra-fast broadband project were granted a period of eight and a half years during which the Commerce Commission (the regulator of the telecommunications sector) could not inquire into, or order changes to, the terms under which retailers of broadband services could access the fibre. Since Telecom's network arm, Chorus, was expected to, and

- On 13 June 2011, prime minister and tourism minister John Key, economic development minister David Carter and Auckland mayor Len Brown announced a deal with Sky City Entertainment under which Sky City would build a \$350 million, 3,500-seat convention centre in Auckland by 2015, in return for which the government would favourably consider additional gambling licences and/or an extension of its gambling licences beyond their 2021 termination date. Sky City said the regulatory changes were needed to assure it of revenue in return for the risk it was taking. The government said it would get a convention centre,

Powerful interests can also afford to employ lobbyists, either in-house or from a consultancy, though the easy access to senior ministers and officials in New Zealand make this less important than in larger countries.

eventually did, win most of the network building contracts, this was seen by competitors, retailers, consumers and all political parties other than National as potentially giving Chorus near-monopoly rents, and this unusual alliance successfully campaigned through March–May 2011 to have the 'regulatory holiday' removed – though the government did still guarantee that fibre builders would not be out of pocket if the Commerce Commission did order cuts in access terms.

The ultra-fast broadband project is in effect a public-private partnership (PPP) between the government-owned Crown Fibre Holdings and companies building the fibre network. PPPs typically involve a trade-off between the government and the private company to give the contracting company reasonable assurance that it will be able to operate profitably.

much needed for tourism, without having to stump up money itself.

This prompted criticism that gambling licences were for sale to a favoured company. Key said the additional licences would not worsen problem gambling because it would be foreigners who did the gambling, and that the changes would be subject to 'full public submissions' because additional licences needed a change to the Gambling Act, which imposed a moratorium on casinos. A subsequent Audit Office report faulted officials in the Ministry of Economic Development for not following strict tendering rules. (Other critics said the deal added to the risk of more gambling addiction or just more gambling, and more individual and societal cost.)

The message from these examples was that rules can be bent if the deal is attractive enough and if you can get the

ear of the prime minister or other senior ministers.

In each case it could be, and was, argued that there was national economic benefit:

- jobs and associated spending and promotional benefits flowed from the Hobbit deal;
- the country's businesses and consumers will benefit from the broadband roll-out as they did from railways and the telegraph;
- the country gets a convention centre which will bring high-spending international conferences to Auckland, benefiting transport, accommodation and other businesses and potentially generating more

expensive legal actions, which can 'burn off' less-powerful and wealthy opponents.

There are also documented examples in the United States of academics writing research papers for payment for drug companies and companies opposing action on climate change, thereby manipulating public opinion. Debatable examples of such powerful interests are those who make and market alcoholic drinks, and fatty and sugary drinks and food. Some academics say these interests are too influential with politicians and block legislation aimed at reducing the damaging effects of their products on some people. The companies argue that the science is not clear (unlike with smoking), and that in any case to block

government made up of the Labour Party and the Greens.

Some also argue that the pursuit of apparently altruistic interests can result in injury to the general public interest in the sense of manufacturing a substantial new inequality, or maintaining or exacerbating a substantial existing inequality: for example, environmental interest groups campaigning against certain economic activities, where a successful campaign would result in the loss of jobs.

Do some special interests have a back-door route to influence? Government departments and other agencies routinely deal with special interests in the form of 'stakeholders' to ensure that policies and programmes are workable, and take into account those whom policies and programmes most affect. This is unexceptional if any adjustments to policy or programmes are made in line with national interest criteria. But there is a risk of capture.

In the strict version of Mulgan's 'market liberal' model the special interest pursued is theoretical or principled or ideological, and usually argued on the grounds that the resultant policies are in the national interest.

–to which might be added the particular circumstances of a small country, where some projects can be achieved only by joint action by the government and a private firm. But the economic benefit was at the cost of favouring powerful interests – 'concentrated interests' –which could get the ear of politicians. This is injurious to the general public interest (as defined above) in the sense that a rules-based system is an important protection of the individual interests of those who do not have power; that is, 'dispersed interests'. The obvious parallel is New Zealand's often-expressed interest in, and need of, a rules-based international order, since New Zealand is a very small nation-state with negligible military and economic strength.

Powerful interests can also afford to employ lobbyists, either in-house or from a consultancy, though the easy access to senior ministers and officials in New Zealand make this less important than in larger countries. They can also afford

access or artificially raise prices through taxes or price control would penalise those who use the products in moderation for pleasure, and interfere with personal freedoms, an important ingredient of a democracy. Gambling attracts similar contests of views.

To these examples of successful pursuit of special interests might be added the influence in New Zealand of Federated Farmers, which persuaded the government to postpone indefinitely agriculture's inclusion in the greenhouse gas emissions trading scheme, and whose farmer-members are the beneficiaries of a decision to use some of the proceeds of the partial sales of state-owned enterprises to seed investment in water storage dams to provide more water for irrigation (though it can also be argued that this can enable more efficient use of river water, and thus, if there is no additional allocation, limit the take from aquifers).

In all these cases, those special interests would be treated differently by a

The self-reinforcing loop

In the strict version of Mulgan's 'market liberal' model the special interest pursued is theoretical or principled or ideological, and usually argued on the grounds that the resultant policies are in the national interest. Nevertheless, if successful this can result in a privileged class or caste emerging which has a special interest in upholding the theory/principle/ideology. A loop can develop in which those whom a set of policies advantages can ensure that the policies are not overturned or, instead, are reinforced. This is common in autocratic states. In the Soviet Union a privileged oligarchy was able to pass on its privileges to progeny because of its hold on power. The ruling Communist Party in China maintains power despite deep changes in the ideological orthodoxy.

Some argue that a modified version of Mulgan's 'market liberal' model was developed in Anglo-American countries over the past 30 years. A set of theories arguing for 'more market' or a new 'market liberalism', ascribing primacy to market mechanisms over government regulation and action, gained enough adherents to influence and/or command cabinets and legislatures in Britain, the

United States, Canada, Australia and New Zealand, and over time to varying degrees in other countries. The beneficiaries of the policies had the connectedness and wherewithal to lobby successfully to keep the policies in place, despite changes in the party composition of governments. This created a self-reinforcing loop which largely survived even the global financial crisis precipitated by the crash of the lightly-regulated US banking system in 2008.

Market liberalism over time became the orthodoxy, even under centre-left governments, in part through promotion and in part through adaptation and acquiescence. This kept the influence loop in place. A paper by Martin Gilens and Benjamin Page (Gilens and Page, 2014), as reviewed in the market-liberal *Economist* magazine (Economist, 2014), found 'a vicious cycle in which politicians adopt policies that favour the better-off; this gives the wealthy more money with which to lobby politicians, which leads to more favourable legislation and so on. The surge in inequality over the last 30 years could perhaps be attributed, in part, to this process.' The paper found that 'if a proposed policy change had low support among the wealthy (one in five in favour) the policy was adopted about 18% of the time. When four in five wealthy people supported a plan, the prospects for adoption rose to 45%.' Alan Kohler, a conservative commentator at the Australian *Business Spectator*, has written that 'the two great vested interests of the modern world are American bankers and the Chinese Communist Party' (Kohler, 2013). The Gilens paper was interpreted in the media as concluding that the United States is an oligarchy.

In effect, the creation of an oligarchic loop amounts to capture of the policy-making process, and in that process the creation of 'rents': that is, returns from investments or labour in excess of what a market free of policy and other distortions would deliver. This clearly amounts to the manufacture of an inequality which can be substantial.

It might be argued that a milder version of this has applied in New Zealand. Political parties depend on donations for their operational and campaign funding.

Businesses are the biggest donors to the National and Labour parties, and in this election cycle the Greens have been shown to have similarly benefited from a 'green' business donor. All three parties insist they do not make policy adjustments in response to specific donations. The National Party's practice is that all such donations are made to the party organisation and MPs are not notified. Some businesses have a policy of making donations to all significant political parties. But businesses do pick and choose. The National Party's general policy line favouring business coincides with higher donations from business than are made to other parties. Some of the Labour Party's bigger business

well-educated are disproportionately represented in major political parties, and can influence policy – including, for example, interest-free loans for students.

One way in which an oligarchic loop can develop is through the advantage that a relatively small, well-organised, well-connected, well-financed and tightly focused ('concentrated') interest group with much to gain from a policy or set of policies (a special tariff, for example, or lower top marginal or company tax rate) has over 'dispersed' interests – the large numbers of unorganised people who individually have less to lose (or to gain) and for whom the transaction costs of mobilisation are greater.

Are there also examples in New

Excessive pursuit of special interests to the point that they are injurious to the general public interest can lead to damaging political or other reaction which negates the gains won by pressing those interests, and in doing that may lower general welfare.

donors are those who would benefit from Labour's industry policies. Labour also receives significant funding from unions, which reflects both the party's origins in the labour movement and consequent special constitutional rights for unions, and its pro-union labour relations policy. The Conservative Party was formed by a wealthy businessman.

Whether this form of funding of political parties reflects the influence of injurious special interests is a matter for debate. Donor Sky City did benefit from ministerial adjustment of a tender process, but there is no evidence that that was the result of its donation, as distinct from its proposition just happening to fit well with ministers' aims to expand tourism.

It can be argued that the much higher proportion of children of tertiary-educated parents who go on to tertiary education than of the children of less-educated people is a loop. The

Zealand of group special interests winning office to press the case? Some cite the Canterbury Regional Council's impasse over water allocation and control: some councillors wanted more control to combat contamination of waterways and draining of aquifers, which was affecting city water; others, representing farmers, opposed that. In the opinion of one who was involved, farmers became concerned that they would be outvoted after the 2010 elections, and the government replaced the councillors with commissioners. It is beyond the scope of this article, however, to make a detailed analysis of this event.

There does not appear to be any evidence in New Zealand of payment of MPs to represent or speak on behalf of interest groups, and there is no evidence that parties have been 'captured' by an interest group as a result of the presence of a former activist for that group.

The risk to the winners

Excessive pursuit of special interests to the point that they are injurious to the general public interest can lead to damaging political or other reaction which negates the gains won by pressing those interests, and in doing that may lower general welfare. A recent New Zealand example may have been the hard line taken by Federated Farmers against inclusion in the greenhouse gas emissions trading scheme, and against proposals for firm measures to reduce fertiliser run-off pollution of waterways. Fish and Game New Zealand, the pressure group for recreational fishers and hunters, labelled this 'dirty dairying', a phrase which caught on and may have contributed to firming up public opinion against dairy farmers and for stronger measures.

More broadly, the embedding of high income and wealth inequalities by the success of the oligarchic loop may in time provoke a populist response which rolls back the loop's influence and gains. Populism is seldom rational and coherent.

Prevention and reversal

Prevention of the oligarchic loop requires a strong, rules-based system which takes account of the interests of the least and less powerful. Exposure and reversal require strong institutions, a rules-based system,

and rigour in policy-making and political decision-making and in the operations of government departments and agencies to prevent capture and resultant rents.

One institutional dimension is transparency: sunlight is the best disinfectant. This focuses on roles of the media, the parliamentary process and the three parliamentary officers, the auditor-general, the ombudsman and the parliamentary commissioner for the environment, who can speak on behalf of 'dispersed interests'. To these might be added the Office of the Children's Commissioner. Some think, though some doubt, that a register of lobbyists would help. In all cases there are examples of strong sunlight but also some clouds.

Another relevant institution is the Commerce Commission, which has multiple roles, including controlling monopolies and setting pricing parameters for oligopolies, finding and fining cartels, and inquiring into and putting a stop to excessive exploitation of market power to disadvantage consumers and suppliers. Other channels are courts; citizens' campaigns; protests and petitions' citizens-initiated referendums (though none have been acted on so far); a citizens assembly or jury (tried in Canada and Ireland but not yet in New Zealand); collaborative governance, as through the Land and Water Forum, involving 59

interest groups, which produced consensus on the foundations of water policy; working groups involving experts; and electronic channels for consultation and feedback. (Fuller discussion is contained in the note on which this article is based.)

In summary

The cornerstone criterion by which pursuit of a special interest is judged to be injurious to the general public interest is whether it manufactures a substantial inequality or maintains or exacerbates an existing substantial, manufactured inequality. That the level of income and wealth inequality is high in New Zealand and has risen greatly since the 1980s, and so has put full citizenship beyond the reach of large numbers of citizens, suggests that the level of successful pursuit of injurious special interests has also been high, at least in the sense of a loop having developed which generates and protects policies that benefit those who have already benefited. Within that loop there are examples of specific injurious interests. That suggests that there is cause for an informed and comprehensive inquiry and a programme of action, aimed at each citizen having full, equal membership of society, the essence of a democracy.

¹ This article abridges a note posted at <http://igps.victoria.ac.nz/Vested%20Interest%20Paper.pdf>.

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Rodney Scott

A Systems Perspective on the Natural Resources Framework: comment on Hearnshaw et al.

The Natural Resources Framework is a new approach to policy advice developed by the multi-agency natural resource sector in New Zealand. This framework has been implemented with some success, but also some teething problems. The framework is a 'systems' approach to understanding the interaction between the many actors in the natural resource management system, and as such could benefit from insights and lessons from the systems sciences. This article is a rejoinder to Hearnshaw et al. (2014), and presents three suggestions for how the framework could be improved based on literature from the fields of system dynamics and systems thinking.

Introduction

In 2012 the performance of the Ministry for the Environment was independently reviewed, using the Performance Improvement Framework (State Services Commission, 2012). Among a long list of recommendations, the final report recommended that the ministry develop a 'multi-disciplinary analytic framework' for understanding complex trade-offs inherent in the public management of natural resources. In response, the ministry led the development of the Natural Resources Framework (Ministry for the Environment, 2013). The framework consists of six steps: four analytical steps in between two process steps. The six steps are: Identify; Reveal; Establish; Assess; Integrate; Advise (see detailed description

in Hearnshaw et al., 2014).

This article is written from the perspective of a participant in two large projects that used the Natural Resources Framework: one collaborative initiative involving seven agencies in the natural resources sector (Cavana et al., 2014), and a second project conducted within the Ministry for the Environment. In both of these projects, the framework was useful in revealing new insights and helping participants to understand connections, but applying the framework also created several challenges. Many of these challenges were reminiscent of challenges faced, and subsequently overcome, in the fields of system dynamics and systems thinking.

This article is likely to be of interest to two main audiences: to the authors of the framework, in refining their methods and the associated guidance documents for how to use the framework; and to public servants and other practitioners looking to appropriate the framework to fit their needs.

The following discussion consists of five sections. First, the systems sciences are introduced, and an argument is put forward to justify the view that the framework is a systemic approach. Then, three sections describe important lessons from the systems sciences on how to apply systemic approaches: focusing on problems rather than systems; having clarity on desired outcomes; and using the framework to answer questions that start with 'why' rather than 'how'. Finally, a short conclusion describes how these recommendations could be accommodated within the framework and identifies areas for further research.

Why the Natural Resources Framework is a systemic approach

A system consists of a collection of interrelated parts that exhibit behaviour as a product of their interaction (von Bertalanffy, 1952). System dynamics is an approach to understanding the behaviour of systems over time through the use of modelling techniques (Forrester, 1961). The Natural Resources Framework follows very similar steps as those used in system dynamics modelling, as shown in Table 1.

Systems thinking is a management technique consisting of a visual diagramming language for understanding social organisations (Senge, 1990). It was developed as an offshoot of system dynamics, for situations where formal

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Table 1: Process steps in system dynamics modelling and the Natural Resources Framework

System dynamics (Sterman, 2000)	Natural Resources Framework (Hearnshaw et al., 2014)
Identify relevant systemic structures and variables (stocks and flows)	Reveal the important variables in the system
Create a model that represents the dynamic behaviour of the system	Establish the dynamics and behaviours of the system
Simulate and compare multiple policy options	Assess multiple policy options
Recommend actions for improved system performance	Integrate these options into an intervention plan

Table 2: Conceptual stages in systemic and analytic thought

Systemic approach (Ackoff, 1994)	Natural Resources Framework (Hearnshaw et al., 2014)	Analytic approach (Ackoff, 1994)
Of what is the thing I am studying a part?	Describe the containing environment	What are the component parts of the thing that I am studying?
What are the functions and behaviours of the containing system?	Reveal the interrelationships between natural resources and people	What are the functions of the parts?
What is the contribution of the object of study to the behaviours of the containing system?	Analyse the behavioural drivers that people face and the effect on collective behaviour	Can knowledge of the parts be aggregated to an understanding of the whole?

quantitative modelling was not possible or not required (Coyle, 2000). Systems thinking has been contrasted with analytic thought (Ackoff, 1994; see Table 2); the Natural Resources Framework uses a cognitive perspective that is much more closely aligned to a systemic than to an analytic approach.

As the name suggests, policy analysis typically follows an analytic approach in which complicated problems are reduced into simpler parts. At the launch of the Natural Resources Framework, some audience members (both from within the Ministry for the Environment and from the broader natural resources sector) were unsure how the framework differed from traditional policy approaches. Tables 1 and 2 clearly identify the Natural Resources Framework as a systemic approach in contrast to traditional policy analysis, demonstrating the separate and distinct contribution of the framework. The original authors indirectly acknowledge the systemic nature of the Natural Resources Framework by using the words ‘system’, ‘systems’ and ‘systemic’ no fewer than 41 times in its description (Hearnshaw et al., 2014). One of the projects described made use of a tool

from system dynamics (the causal loop diagram) to complete the Reveal phase, demonstrating the parallel process steps (and substitutability) of the different approaches (Cavana et al., 2014).

Systems thinking and system dynamics are both established academic fields with significant research literature. Each has its own professional society (International Society for the System Sciences, and the System Dynamics Society) and its own peer-reviewed journal (*Systems Research and Behavioural Science* and the *System Dynamics Review* respectively). In applying systemic approaches, each field has encountered challenges and set-backs (see, for example, Forrester, 1993; Eskinasi and Fokkema, 2006; Größler, 2007), and overcome these to demonstrate significant positive results (Scott, Cavana and Cameron, 2013, 2014a). Through this experience, each field has documented important lessons about how to apply systemic methods effectively (Martinez-Moyano and Richardson, 2013; Scott, Cavana and Cameron, 2014b). The following sections describe three such lessons, and their relevance and application to improving the effectiveness of the framework.

Use systemic approaches to understand problems, not systems

Perhaps counterintuitively, system dynamics modelling is a process for understanding problems, not for understanding systems (Radzicki, 2010). This is because attempting to model systems typically results in excessively large models that are difficult to understand (Sterman, 2000). The basic mantra ‘problems, not systems’ is part of the most basic instruction of both systems thinking (Senge, 1990) and system dynamics (Saeed, 1998).

The Identify stage of the framework asks its users to clarify scope, but not to define the problem. This stage is described as procedural rather than analytic. In both projects discussed in this article the process quickly jumped to the Reveal stage. Both projects defined their purpose as understanding the natural resource management system (and acknowledged that they may have been stretching the applicability of the framework by using it in this way). During the process there were frequent discussions about whether information was relevant, and the level of detail required. The cross-agency project included detailed descriptions of some elements of the system and only the broadest outline of others, with no clear rationale for the distinction (Cavana et al., 2014). In the Ministry for the Environment project, some participants collected information about social norms, while others were more interested in quantitative data about resource-based industrial activity. The project team was forced to repeat the Reveal stage several times as the focus and level of detail was redefined, resulting in delays of several months. By defining their purpose as understanding a system, they had no criteria for determining materiality or relevance of information within that system.

In contrast, if the projects had been oriented around addressing a problem, then the scope could have been assessed as the variables most relevant to understanding the dynamic behaviour of that problem (Maani and Cavana, 2003).

Lessons from systems sciences suggest that it is not sufficient to define scope in terms of the system being investigated

(Radzicki, 2010). ‘Scope’ typically specifies the outer boundaries, but not the materiality of information within those boundaries (see Ulrich, 2002; Cabrera, 2006). This suggests that the Identify stage should be amended from a focus on scope to one that includes problem definition. This is also likely to require elevation of Identify from a procedural stage to an analytic one.

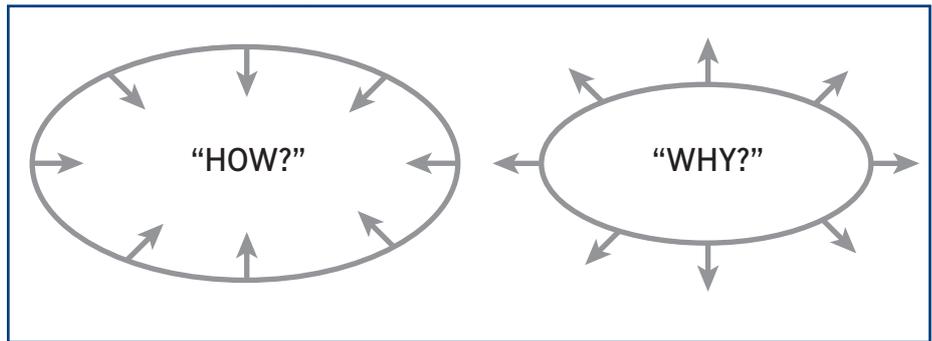
Be very clear on the outcomes sought

A related challenge is the clarity of desired outcomes. When exploring the behaviour of systems, a problem is defined as the gap between the situation we desire and the situation we perceive (Sternman, 2001). A robust problem definition includes description of why the current situation is not optimal: that is, the outcomes sought, and how the current state differs from those aspirations.

The Natural Resources Framework includes a consideration of outcomes and trade-offs in the third and fourth analytic stages (Integrate and Assess). This is used as a basis for determining which policy option is preferable, and is too late to inform and guide the Reveal and Establish phases.

In the Ministry for the Environment project, the lack of clear outcomes hampered information gathering in the Reveal stage. Many project meetings involved lengthy discussions to clarify and then re-litigate the outcomes being investigated. For example, it was unclear if the goals of the natural resource management system were maximising social, economic and environmental outcomes, or whether procedural and distributive elements were also important. This was the subject of considerable debate and caused delay. If procedural and distributive elements were important goals, then the Reveal stage needed to gather information on these elements. The Establish phase would need to understand the incentives and behaviours that had an impact on these elements. If these elements were included and later deemed irrelevant, then the time used to investigate this relationship would have been unproductive. If they had been excluded and later deemed important, then the Reveal and Establish phases

Figure 1: Directions of inquiry



would need to be repeated to incorporate these relationships.

When the Ministry for the Environment had a follow-up Performance Improvement Framework review in 2014, the reviewers applauded the development of the framework, but stated that the ministry needed to work with the broader natural resources sector to specify explicit and measurable environmental outcomes (State Services Commission, 2014). A systemic approach requires the explicit identification of desired outcomes as part of a problem definition, and prior to mapping the system (Andersen, Richardson and Vennix, 1997). The Natural Resources Framework would be strengthened and streamlined by explicitly establishing the desired outcomes before attempting to understand the dynamics and linkages that contribute to those outcomes.

Use systemic approaches to understand

‘why’ questions rather than ‘how’ questions.

‘How’ (mechanism) and ‘why’ (function and history) are complementary categories of inquiry for understanding behaviour (Tinbergen, 1963; Hladký and Havlíček, 2013). Within the field of systems thinking, systemic approaches are thought to be better suited to understanding questions on function and history, i.e. those that begin with ‘why’ (Ackoff, 1993, 1994). Reductionist approaches are better suited to questions of mechanism, those that begin with ‘how’. Answering ‘how’ questions requires knowledge about the thing being studied. Answering ‘why’ questions requires an understanding about the containing whole (Ackoff, 1999; see Figure 1).

‘How’ questions look within the thing studied; ‘Why’ questions look backwards

and outwards to understand the dynamics of the containing system over time.

Both projects discussed in this article explored the question, ‘How does the natural resource management system work?’ This is a question of mechanism. This question could be answered by an analytic/reductionist process that looked within the management system. An analyst could divide the natural resource management regime into its component parts, describe those parts, and then aggregate that knowledge into a description of the whole.

Conversely, a ‘why’ question – e.g. ‘Why do air quality problems persist in some areas?’ – is well suited to a systemic approach. This would require looking more broadly than the air quality management system, and at the social, economic and biophysical context of the problem. It would require understanding the incentives on behaviour of the different parties. The resultant understanding could lead to policy interventions that better supported the desired behaviours.

The Natural Resources Framework may be successful in explaining how things work, but it is not clear why this would be more effective than traditional policy approaches. Literature on systemic approaches suggests that the framework would be most applicable for exploring why certain behaviours or suboptimal outcomes occur.

Conclusion

The Natural Resources Framework is an important development in creating more coherent and resilient natural resource policy. As a new tool, it represents an admirable first attempt at a systemic approach to policy development. As it is applied in practice, there are opportunities

to augment and refine its features. The literature on systemic approaches suggests that refinements should be made to both how and when the framework is used.

First, greater effort must be directed at a clear problem definition with explicit goals. Systems literature suggests that working on systems (rather than problems) will doom the framework from the beginning. The preparatory stage of the framework (Identify) needs clarifying and emphasising to prevent wasted effort in the Reveal and Establish phases. In developing the framework, the Identify phase was apparently the subject of considerable debate, and eventually left open to encourage the framework

to be used for a wide range of purposes (personal communication, James Palmer, August 2014). It may be useful to review this decision in light of early experiences with using the framework.

Second, the Natural Resources Framework is a tool, but not the only tool, for policy development. In its eagerness to apply the new framework, the Ministry for the Environment has applied the framework to two contexts to which it does not appear to be well-suited. The Natural Resources Framework needs to be positioned as augmenting our policy analysis toolkit, with clear guidance provided on when it is and is not the most appropriate tool. The systems literature

suggests that it will be most useful for problems that require an understanding of why certain behaviours are exhibited, not just how they play out.

This article has been prepared on the basis of the author's experience with two projects, and considerable experience in using systemic approaches in other contexts. The conclusions are therefore early impressions of the journey of implementing the framework. Further research is required on subsequent application of the framework, in order that its use may be further refined.

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Holly Walker

The Lobbying Disclosure Bill and the Case for Greater Transparency in New Zealand

The Green Party has championed honest politics in New Zealand for many years. The party has always been committed to open and transparent government, and has taken steps in the past to advance this, including by proactively disclosing our MPs' expenses and by fighting for electoral finance laws to be cleaned up. Greater transparency about lobbying is another step towards this goal of honest politics and more open government.

The public deserves an open and accountable political system. Accessing and influencing MPs should be a level playing field; it should be equally easy for all citizens to engage as active participants in our democracy. Greater transparency

about political lobbying would give New Zealanders peace of mind that ministers and lobbyists aren't trading favours behind closed doors. It would also shed light on this sort of activity when it does occur, and hopefully reduce the political

point scoring that inevitably happens when there are questions left unanswered about who is influencing whom.

The Lobbying Disclosure Bill

Former Green MP Sue Kedgley launched the Lobbying Disclosure Bill in 2011 out of a concern about the growing influence of lobbying in New Zealand. After 12 years in Parliament she believed lobbying was becoming increasingly entrenched in our political system, and she was concerned that it was often happening behind closed doors. While New Zealand hasn't experienced the high-profile scandals involving lobbying that are common in places like the United States and the UK, the reality remains that some people have a better chance of being heard than others – and a lot of the time we don't know who these people are or the extent of their access.

The Lobbying Disclosure Bill was a chance to create best practice in New Zealand while we still can. The bill was closely modelled on the successful Canadian regime, and was developed following an OECD report recommending

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that member countries take action to establish lobbying disclosure regimes. As the Green Party's new open government spokesperson, I inherited the bill from Sue when I entered Parliament in 2011. It was pulled from the ballot in April 2012, and had its first reading in July. It passed the first reading and was sent to the government administration select committee for consideration.

Purpose of the bill

The aim of the bill was to bring a greater measure of transparency and public disclosure to lobbying activity in New Zealand and to enhance trust in the integrity of political decision-making. In seeking to achieve that, the bill would do two things:

1. establish a Register of Lobbyists: anyone paid to undertake lobbying activity would be required to register and file quarterly returns with the auditor-general;
2. empower the auditor-general to develop a code of ethics for lobbyists in consultation with key stakeholders and the public; once finalised, anyone registered as a lobbyist would be required to comply with the code of ethics.

The bill defined a 'lobbyist' as anyone who is paid to influence public decision-making. This meant it would have applied to anyone who is paid to communicate with a public office holder (an MP, minister, or anyone employed in their office) in an attempt to influence that public office holder.

'Lobbying' was defined as communication in an attempt to influence public decision-making in relation to legislation, regulation, government policy, or the awarding of contributions, contracts, grants or funding by or on behalf of the government. It did not include any submission to the House, any communication which is restricted to a request for information, or public communication (e.g. tweets, blog posts, Facebook, letters to the editor, etc.).

Guiding principles

From the start there were four key principles which guided my work on the bill, and which are important in framing

the conversation about this bill. These are also drawn from the Canadian regime.

Lobbying is a legitimate activity

In seeking to introduce a disclosure regime and a code of ethics, the intention was not to denigrate lobbying as illegitimate or to prevent it from happening. MPs need to hear from those with expert knowledge on certain issues to help inform decision-making. Lobbying is a valid part of this information-sharing process. Although the bill required certain communications to be registered and declared, it did not seek to prevent these communications from taking place.

Open and accessible government and Parliament are vital

We are lucky in New Zealand to have a relatively open and accessible Parliament, and approachable MPs. It should be as easy as possible for people to actively engage as citizens in our democracy. In no way was it the intention of this bill to restrict public access to MPs or to have a chilling effect on interactions between the public and their representatives. In fact, a properly functioning lobbying disclosure regime should enhance public engagement and participation in the democratic process.

The public has a right to know who is lobbying MPs on which issues

Nevertheless, part of an open and accessible political system is transparency about who has that access. The public has a right to know who is influencing MPs on which issues. Transparency about lobbying activity would help to level the playing field in terms of influence on decision-making.

A lobbying disclosure regime needs to be practical, workable and fair

Any requirements need to work in the context of the New Zealand political system and be workable in practice. It is largely on this point that the bill got caught up during the select committee's consideration.

Consultation and select committee process

After the bill was first pulled, I engaged widely with stakeholders in an effort to understand how this sort of regime would

fit within their activities and the impact it would have on their work. This included meetings with consultant lobbyists, in-house lobbyists from businesses and NGOs, and representatives from trade unions, charities and other political parties, all advocating for a wide range of issues.

The select committee received 104 submissions, from an equally diverse range of submitters. The overall message was general support for the principles of the bill: to bring transparency to political lobbying in New Zealand. But what also became clear through the consultation process, and again through the submissions to the select committee, was that the bill needed amendment to ensure that it was appropriate to New Zealand's political context. There was a tension that needed to be addressed between a disclosure regime that upheld the principles of openness and transparency and one that was at the same time practical and workable.

Main areas of concern

There were at least four main areas of concern.

Definitions of lobbying activity and who is captured as a lobbyist

The definitions in the bill as it was introduced were deliberately wide because as soon as restrictions are introduced on what lobbying activity is, and therefore who is a lobbyist, you risk not capturing all the activity that should be captured. It also opens up avenues for getting around the disclosure regime. However, with such wide definitions there was also concern that you could unintentionally include many whom it was not intended the bill should capture.

Compliance: the onus of registering and filing returns

Concern was also raised about the compliance requirements of registering and filing the quarterly returns. Smaller organisations, in particular, were concerned about the potential administrative burden.

The size of penalties for non-compliance

The bill created two offences: one for

those who hinder an investigation or mislead the auditor-general, and another for those engaging in lobbying activity when not registered as a lobbyist. Both of these offences came with a maximum fine of \$10,000 for individuals and \$20,000 for companies or organisations. There was concern from many that these penalties were too high, particularly for smaller organisations, individuals, and those representing NGOs, not-for-profit organisations or charities.

The role of the auditor-general

In the bill as introduced the auditor-general was tasked with administering the lobbying disclosure regime and developing the lobbyists' code of conduct. Questions were raised about whether the Office of the Auditor-General was the most appropriate office to undertake this role, particularly because the auditor-general currently has no role in relation to private-sector entities and focuses on the expenditure of public money by the executive.

Revised proposal – options paper

After hearing from submitters, I drew up an alternative proposal that I felt addressed the concerns that were raised. I was able to present a series of recommendations that I hoped would form a lobbying disclosure regime that was more appropriate for our political context. These recommendations, briefly summarised, were:

- narrowing the definition of lobbying activity to only cover pre-arranged oral communication, where the primary purpose of that communication is an attempt to influence a public office holder in respect of legislation, regulation, government policy, or the awarding of grants, funding, contributions or contracts by or on behalf of government;
- narrowing the definition of a lobbyist to someone who undertakes lobbying activity as a part of their regular duties, whether or not they receive payment;
- narrowing the definition of a public officeholder to only include ministers, meaning that lobbying activity is only pre-arranged oral

communication with a minister in an attempt to influence legislation, policy, etc.;

- that the lobbying regime would be administered by a new, independent body, as is the case in Canada;
- shifting the onus of registering and disclosing lobbying activity from the individual lobbyist to the organisation they represent.

Unfortunately the committee decided not to accept these suggested changes, or pursue a register of lobbyists. While it was disappointing that the committee decided that the bill should not pass, however, it was encouraging that committee members were open to pursuing other mechanisms to help boost transparency in this area.

Recommendations from the select committee

In August 2013 the government administration select committee reported back on the Lobbying Disclosure Bill. In the final report it recommended a number of non-legislative options to introduce greater transparency around political lobbying and decision-making. These were:

- that the House:
 - develop guidelines for MPs about handling communications relating to parliamentary business;
 - review the relevant Standing Orders to ensure consistency;
- that the government:
 - require the regulatory impact statements and explanatory notes of parliamentary bills to include details of the non-departmental organisations consulted during the development of related policy and legislation;
 - encourage the proactive release of policy papers to make the policy-making process more transparent.

These recommendations were adopted unanimously by the select committee with cross-party support, so I am hopeful that they will eventually be implemented by Parliament and the government.

Ministerial disclosure regime

In recent months there have been several examples of why we need greater transparency in relation to lobbying,

from Judith Collins' trip to China and the infamous dinner with Oravida, to Maurice Williamson's resignation and the recent revelations about the National Party 'Cabinet Club'. In response to these revelations, and as a follow-up to the Lobbying Disclosure Bill, the Green Party has proposed that New Zealand adopt a ministerial disclosure regime, based on the system in the UK, which requires ministers to publicly release records of their meetings with external organisations, overseas travel, gifts given and received, and hospitality received. The records would be released on a quarterly basis and published online. The regime could be implemented by amending the Cabinet Manual.

I believe this could be a way to meet the strong public appetite for greater transparency and openness about who has access to our politicians in a simpler way than the more extensive lobbying disclosure regime. A ministerial disclosure regime would mean that the public would be able to see, on a regular basis, with whom ministers are meeting, from whom they're receiving hospitality and gifts, and details of their overseas travel. Some of this information is already made public through the Register of Pecuniary Interests, or can be sought via the Official Information Act. However, a ministerial disclosure regime would provide regular, proactive disclosure of this information, bringing a greater measure of transparency to decision-making and improving ministerial accountability.

This proposal has not found favour with the government, but I am hopeful that by keeping the conversation alive we will eventually take steps to introduce greater transparency about political lobbying in New Zealand. I hope my bill has advanced this conversation and increased the prospects for reform.

This article is based on the author's contribution to a roundtable on lobbying hosted by the Institute for Governance and Policy Studies in Wellington on 16 May 2014.

Mark Unsworth

The Lobbying Disclosure Bill

a solution for a problem that doesn't exist?

Three years ago, on 13 June 2011 Green MP Sue Kedgley launched a campaign and released a members' bill to establish a publicly-accessible register of lobbyists. It was claimed to be 'all part of our campaign for more open, transparent, and honest politics' (Green Party, 2011). The Lobbying Disclosure Bill was eventually introduced into Parliament, but failed to win enough support to be passed. It is timely to investigate why an attempt to introduce rules on lobbying, which exist in many Western countries, met with little support here.

What, perhaps, is unique about New Zealand society and the public's interaction with the political world that has led to a

less than enthusiastic interest in the need for regulation of those who lobby? Was the Greens' bill a solution to a problem that didn't exist?

My title doesn't wish to diminish in any way valid concerns I share regarding the need for openness and transparency in political society. I suspect, however, that some of those calling for more openness and transparency actually only require it from sectors they mistrust, such as the business sector, and are not willing to apply the same transparency requirements to themselves.

One of my strongest beliefs about why restrictions on lobbying were not championed in this country is that the

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concept never had any mass appeal here. Apart from to the Green Party and some in academia, this was never a burning issue in New Zealand. Why is that?

My initial belief is that New Zealanders are generally fair and reasonable people, but also independent. They will support legislation and regulations that restrict freedoms in respect of seat-belts in cars, cycle helmets etc. when these seem to make sense to most people. At other times, especially when publicised and ridiculed as with rules on shower heads, the opposition to so-called 'nanny state' restrictions creates a backlash.

The Greens introduced their bill with a fierce attack not on all lobbyists but just on those representing the business sector. 'The ongoing growth of lobbyists' influence has subtly shifted the political landscape in favour of corporate interests', Sue Kedgley thundered (Green Party, 2011). Leaving aside the obvious fact that Kedgley was conveniently forgetting that it was environmental lobbying and consciousness-raising that had allowed her to become an MP, the key point is that the Green Party seems to have been in a tiny minority in holding this view. The public showed no sign of concern. Even the media coverage of the policy launch skipped the public policy issue, instead concentrating on the red herring matter of parliamentary passes, which some lobbyists, myself included, carry.

The Greens and academia still hold that New Zealand must have this legislation, but their strongest argument seems to be that New Zealand needs it because other countries have it. My view, and it's one that those who understand the Kiwi nature well may support, is that New Zealand should decide on what we need ourselves. Do we need laws imposed on us just because other countries have them? I suspect most would support the notion that our laws should reflect New Zealand society and how it operates, not other countries which may be similar to New Zealand on the surface, but in reality are miles apart.

How do our neighbours behave?

It is useful to look at our close allies who operate various forms of controls on lobbying.

Australia

Our closest friend is Australia: very similar to New Zealand in many ways; but, it must be said, history shows a much more lenient attitude towards accusations of corruption in Australia, especially relating to the police. Australian politics is also multi-layered, with their state systems offering wider options for political pressure. Pork-barrelling (spending on local projects primarily for political advantage) is also endemic in Australia, as this article in the Australian notes with a touch of humour:

Bert Kelly – a minister for public works in the Holt and Gorton government and a fierce advocate for sound economic policy – used to say that whenever an election

become more and more American in style, dividing between the Labor and Liberal camps. The top lobbyists not only report from the sidelines, as is the case in New Zealand; they are often senior party office holders who not only fundraise but help lead party factions and play a role in leadership ballots. To my knowledge, no New Zealand consultants operate in this manner. The small number of true lobbying firms operating in New Zealand requires political impartiality, or they wouldn't survive. Some Australian consultant lobbyists also accept success fees for bringing in government contracts, a move which critics believe can encourage corruption. Again, this practice is unknown in New Zealand.

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was imminent, he 'could feel a dam coming on'. Shots on the evening news of the two party leaders, in fleuro vests and hard hats, promising investment in motorways, rail lines, broadband or even stadium lights, has become the standard fare of election campaigns. (Uran, 2013)

While New Zealand politicians are not innocent on the charge of election bribes, our MMP system vastly reduces the need for regional-specific lobbying and/or corruption. We still have 'marginal electorates' in New Zealand, but they don't matter as much as it is the overall party vote which decides elections.

Another significant difference which has an impact on the perception of the relationship between lobbyists and politicians in Australia and New Zealand is the different manner in which consultant lobbyists operate. To begin with, Australian lobbying firms have

United Kingdom

New Zealand's lobbying environment is also chalk and cheese compared to that in the United Kingdom. In the House of Commons backbench MPs can serve as paid corporate lobbyists. Although this news would startle many New Zealanders, it is generally accepted in Britain and Winston Churchill (for Burmah Oil (now BP)) and David Cameron (Carlton Communications) are among a long list of successful politicians who were concurrently corporate lobbyists. The practice of MPs accepting cash to ask questions in the House of Commons has also made headlines in Britain, a practice that again I have never heard of in New Zealand.

United States

New Zealand lobbying or political behaviour is also not comparable in any shape or form to the situation in the United States. Lobbying companies,

often law firms based in Washington, have massive power because they are the fundraisers for the grossly expensive television-based election system. Analyst James Thurber estimates that the actual number of working lobbyists is close to 100,000 and that the industry earns \$US9 billion annually (Attkisson, 2012).

What is unique about New Zealand?

New Zealand is a comparatively corruption-free society. Transparency International judges New Zealand to be the least corrupt country; we have been at the top for eight straight years and never lower than fourth place since 1995. Its definition of corruption encompasses 'undue influence over public policies,

New Zealand's political system is also open by international standards. The public can attend all sittings of Parliament and nearly all of the business of select committees which review legislation and government agency performance and expenditure. The select committee process itself is open and transparent and easy for ordinary citizens to access. All bills, and submissions to select committees, are available online, as are copies of all oral and written parliamentary questions and petitions.

New Zealand also has a powerful tool in its Official Information Act (OIA), although improvements could be made. It requires government agencies and ministers to provide vast amounts of

an MP, knowing that a team of excitable journalists will make a huge fuss if they are found to have spent more than \$25 on a bottle of wine at a restaurant with an overseas guest. This lowest-common-denominator and sometimes prurient media coverage is an unpleasant and quite immature side effect of having a transparent democracy.

Another significant point of difference is that in New Zealand nearly all voting in Parliament is done along party lines. The rules allow for conscience votes to be held as required, and these do occur in debates on moral issues such as the drinking age, abortion and same-sex marriage. Increasingly, however, minor party leaders are limiting the opportunity for real conscience votes and declaring a party line for all to follow. This may reduce opportunities for individual MPs to make a principled stand, but, at the same time, the near monopoly of party voting reduces the impact of lobbying individual MPs and the risk of corruption.

Another vital, but hard to measure, difference in the New Zealand political system is that our MPs are generally accessible. We don't treat them like gods as happens in other countries, and, apart from the prime minister, they nearly always travel without a security presence. Our MPs can be seen out shopping in the weekends, opening bowling clubs, at A & P shows and school fairs, at the movies and in pubs and cafes across the country. Nearly all electorate and some list MPs hold weekly or monthly clinics for constituents. They are all resourced to have a staffed electorate office, and staff in Parliament to take calls and requests. A meeting with a local MP is not generally difficult to arrange.

In Wellington MPs can be seen on Lambton Quay or The Terrace nearly every day; MPs can be seen in the Koru Lounge at airports regularly. You don't have to pay to get access to MPs in New Zealand. A good cause and a polite call, email or letter will often do the trick.

Analysing the Lobbying Disclosure Bill

Pointing out why New Zealand is different from other countries which have lobbying restrictions does not by itself explain why

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institutions, laws and regulations by vested interests at the expense of the public interest'.

Some question such surveys as they record just 'perceptions' of a number of international agencies. However, in 2013 Transparency International New Zealand conducted a National Integrity System assessment. As reported by Liz Brown:

The overall conclusion is that New Zealand's National Integrity System remains fundamentally strong. By international standards there is very little corruption and New Zealand remains legitimately highly rated against a broad range of international indicators of transparency and quality of governance. (Brown, 2014)

New Zealand enjoys the scrutiny of a free and active press. Hints of corruption or even cronyism at any level are pursued vigorously by the media.

official data in a timely manner. The OIA is regularly used by opposition political parties and the media to shine light on the activities of ministers and government officials, and report inconsistencies between the recommendations of officials and actual decisions taken.

New Zealand has strict rules on the declarations of political parties and restrictions on media and other advertising and promotion during election campaigns. MPs must sign pecuniary interest registers annually and these must include political gifts and corporate hospitality. Many sensitive government departments also have tough rules on the acceptance of hospitality, gifts and travel.

The New Zealand regime is so open that anecdotal evidence exists that it actually discourages more professional people from participating in politics. The belief is that business people in particular are unlikely to enjoy a stint as

this particular legislative attempt failed to secure support. There are possibly many reasons, but for me the fault lay in the fact that the Lobbying Disclosure Bill was so thorough and comprehensive. As counterintuitive as this may sound, to be totally effective any regulatory controls on lobbying must be comprehensive, but the result is a nightmare of red tape and the inclusion of potentially thousands of people who do not identify as lobbyists. Sue Kedgley's not-so-secret desire when she launched the bill was really to control business lobbyists, especially those who opposed her environmental thinking. The legislation was drafted, however, in a manner to include every type of lobbyist, from the corporate representative through to iwi, freshwater campaigners, the church and the trade unions.

The reaction to the bill voiced in submissions was widespread and overwhelmingly negative. The usual suspects, big business and lobbying consultancies, spoke out, but were joined by every other sector in society and no punches were pulled. Quick snapshots from the submissions received by the government administration select committee reviewing the bill include:

Amnesty International: it would discourage debate.

Caritas: too broad.

National Council of Women: it would erode the rights of New Zealanders.

New Zealand Law Society: impractical.

Trade unions: reporting requirements are burdensome.

Iwi: restricted freedom of speech.

Forest & Bird: poorly drafted.

New Zealand Society of Authors: would undermine democracy.

The problem, as noted earlier, is that if you want to regulate lobbyists accurately and effectively, then you cannot just choose some lobbyists. You can't target a consultant and leave out a church, university or NGO, all of whom are very

In the end, the final nail in the coffin of the bill was submissions not from lobbyists but from our legislative parliamentary specialists.

effective advocates for their followers or members.

Some, including the Labour Party through an SOP (parliamentary amendment) proposed by Charles Chauvel, suggested narrowing the definition to exclude groups such as trade unions and charities (Chauvel, 2012). This incredibly self-serving suggestion implied that trade unions and others who support Labour don't lobby, or, if they do, shouldn't face transparency requirements. It never had a chance in our Parliament, which to me again epitomises the inherent fairness that is expected in New Zealand society and not always in other countries.

Other submitters suggested only regulating third-party (consultant) lobbyists. To their credit, groups such as Forest & Bird dismissed this idea. 'Lobbying is lobbying, whether on behalf of a third party, or oneself', they noted (Forest & Bird, 2013). In the end, the final nail in the coffin of the bill was submissions not from lobbyists but from our legislative parliamentary specialists. The clerk of the House told the committee that the bill's application to parliamentary proceedings would 'be likely to put pressure on the privileges of the House, diminishing its powers and immunities'. The attorney-general concluded that the bill could 'limit freedom of expression as affirmed by section 14 of the Bill of Rights Act 1990'. He also noted that 'freedom of expression is an essential barrier to state tyranny, and the ability to freely express view and opinions; citizens should not

be silenced but the state' (Government Administration Committee, 2013).

Other options

The death of the bill at the select committee stage didn't halt general debate on transparency issues, and the new Green MP, Holly Walker, who inherited the bill after Sue Kedgley resigned from Parliament has continued her wide and comprehensive consultation on these issues. Walker proposed a range of possible revisions in an options paper, and it is worth considering these in a New Zealand context.

A. *Definition of lobbying activity narrowed: only pre-arranged oral communication*

This would reduce red tape but lobbying when you 'bump into' rather than schedule a meeting with someone is just as effective. It would completely miss socialising at a gentleman's club or trade union function.

B. *Lobbyist narrowed: only those who undertake lobbying as part of regular duties*

Again, this would cut down on red tape but would miss the businesses, charities, NGOs or law firms that lobbied on a one-off case yet may have been incredibly effective.

C. *Who is lobbied narrowed: public office holder narrowed to only ministers*

This ignores the fact that so many of the key decisions-makers are the officials in government agencies, advisers, private secretaries and even select committee chairs.

D. *Administration: moved to a new, independent body*

More sensible, but it could develop a life of its own.

E. *Onus on registering and disclosing: moved from individual to organisation they represent*

Again, sensible, but it isn't full disclosure.

Could some form of regulation be

Figure 1

European Union Breakdown		New Zealand – estimated guess	
Trade Federations	35%	Companies	26%
Commercial Consultants	15%	NGO's	18%
Companies	13%	Business Associations and Unions	20%
NGO's	13%	Iwi	5%
Business & Labour Association	10%	Consultants	18%
Regional representaion	8%	Local Government	7%
International Organisations	5%	Government funded advocacy	5%
Think tanks	1%		

useful? Personally I have no problems with a lobbyist register, although I am not sure what use it would have. Who

lobbies in New Zealand? It is hard to say exactly, as it isn't recorded. Having read an estimate of who lobbies the European

Union in Brussels, I conducted a quick survey among fellow lobbyists and current and former Beehive staff. The results are shown here in figure 1.

To finish on a lighter tone, I would like to note the wording of one line in the proposed Lobbyist Code of Conduct in Australia: 'Lobbyists shall not make misleading, exaggerated or extravagant claims.' While obviously approving of this sentiment, which I follow every day, I make the observation that if MPs in the debating chamber were obliged to sign up to an identical code, Parliament would probably only need to sit for three weeks each year.

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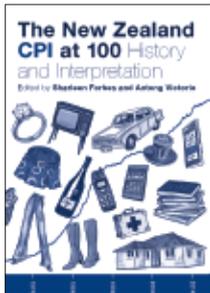
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The New Zealand CPI at 100: History and Interpretation



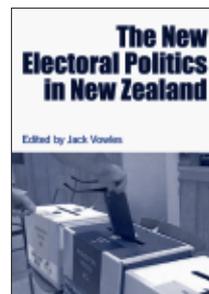
Edited by Sharleen Forbes and Antong Victorio

Very few New Zealanders have lives unaffected by the Consumers Price Index, or CPI. It is used by the New Zealand government to adjust student allowances, welfare benefits and superannuation; by the Reserve Bank to guide monetary policy; by the old Court of Arbitration, and also by employers and employees, to negotiate wages; and by the media to inform the public about the effects of price changes on their standard of living.

Some authors in this book document the New Zealand CPI as a history of conflicting machinations between unions, employers, public officials and lobby groups. Others view it as a mirror of domestic social norms and important international developments that eventually developed into a beacon with considerable public trust. Still others emphasise its technical evolution, from a crude selection of prices necessary for a just wage, to a modern indicator of consumer satisfaction and economic management.

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The New Electoral Politics in New Zealand: The significance of the 2011 Election



Edited by Jack Vowles

Around the world there was unusual interest in New Zealand's electoral politics during the 1990's, because of the country's adoption of the Mixed Member Proportional (MMP) electoral system. Since then international interest has lapsed. Yet at the 2011 election and concurrent referendum, New Zealanders voted to retain the MMP system. Among other inquiries, this book asks the question: why?

Looking back to the 2011 election and before, this book lays out the current state of the play in New Zealand electoral politics. Despite its reservations about MMP, the National Party has done very well under that system, particularly since 2005, with a vote share and polling that brought it well within reach of a single party majority in 2014. For these reasons National appears unwilling to change the MMP system in ways recommended by an independent review conducted by the Electoral Commission. This book explores these questions, as well as others, including voter turnout decline, attitudes to welfare reform, women's representation, changes in Māori politics, and the growing importance of immigration on New Zealand politics and society.

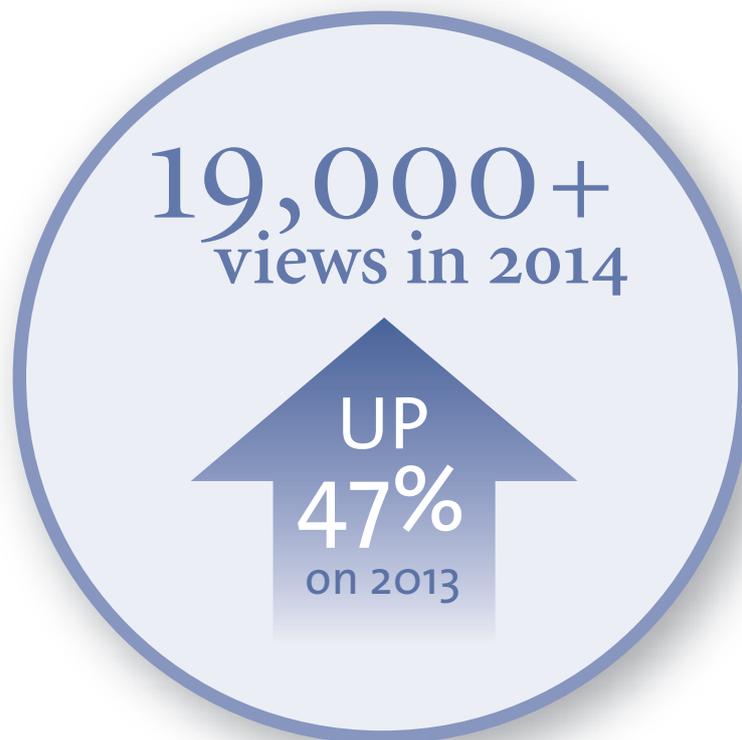
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