

**“Tinkering in the Constitutional Shed”: The  
Regulatory Standards Bill and Legislative Quality in  
New Zealand**

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## Introduction

In a country where statute law is not merely King, but Emperor,<sup>1</sup> legislative quality is crucial. In New Zealand, 105 Acts and 405 regulations are created or amended annually.<sup>2</sup> With over 1900 public Acts in force and thousands of other legislative instruments in existence, poor drafting can have far-reaching consequences.<sup>3</sup> The Regulatory Standards Bill (RSB hereafter) introduced to Parliament on 15 March 2011 attempts to moderate those consequences.

The RSB's purpose is to improve the quality of legislation in New Zealand, with a view to fostering economic growth. Accordingly, it seeks increased transparency in the legislative process and encourages greater accountability for legislators.<sup>4</sup> The RSB has three key components. Firstly, it creates a benchmark for legislation by expounding several principles of 'responsible regulation.' Secondly, it promotes transparency by requiring that all legislative proposals are certified as compatible with the principles. Finally, it promotes accountability by empowering the courts to grant declarations of inconsistency when legislation unjustifiably contravenes the principles.<sup>5</sup>

The RSB is currently undergoing select committee consideration. Submissions closed on 18 August 2011 and an interim report has since been released, focussed on the advice of the Regulations Review Committee (RRC).<sup>6</sup> The Commerce Committee is seeking further guidance related to the RRC's concerns and must report to Parliament before 20 October 2011. At this stage it is impossible to know whether the RSB will proceed. Nevertheless, it warrants consideration. If enacted, the RSB could create significant constitutional and legislative change. Accordingly, this dissertation will examine the most controversial aspects of the RSB and seek to conclude: a) whether it would function as intended; and b) if it should proceed. The scope of this paper is limited to the aspects most likely to generate radical change, focussing chiefly on primary legislation.

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<sup>1</sup> Geoffrey Palmer "Improving the Quality of Legislation: The Legislation Advisory Committee, the Legislation Design Committee and What Lies Beyond" (2007) 15 *Waikato L. Rev.* 12, 12.

<sup>2</sup> Hon. Rodney Hide (5 July 2011) 673 *NZPD* 19751.

<sup>3</sup> George Tanner "How Does the Proposed Regulatory Responsibility Bill Measure Up Against the Principles? Changing the Role of Parliament and the Courts" (2010) 6 *Policy Quarterly* 21, 22.

<sup>4</sup> Regulatory Standards Bill 2011(277-1), explanatory note.

<sup>5</sup> *Ibid.*

<sup>6</sup> 45 submissions were received on the Bill. Regulatory Standards Bill 2011 (277-1) (interim select committee report), 2.

The initiative for the RSB was launched over a decade ago. Chapter One examines the RSB's history and considers the extent to which legislative quality is an issue in New Zealand. Chapter Two examines the provisions of the resultant bill, including a brief survey of the principal mechanisms. The remainder of that chapter focuses on the prohibition on the taking of property. The takings principle has provided a major justification for the RSB and so can serve as a lens to examine both the orthodoxy of the principles and whether the RSB meets its own standards. The question of the RSB's orthodoxy is further addressed in Chapter Three, which examines it in the context of New Zealand's constitutional framework. Finally, in light of that framework, Chapter Four considers whether the RSB would actually affect the legislative process. I conclude that while the drafters sought to preserve New Zealand's constitutional norms, the final RSB still may alter them in practice. The risk of unintended consequences is high and the impact on legislative quality likely to be negligible. Therefore in its current form, the RSB should not be enacted.

## **Chapter One: Background to the Regulatory Standards Bill**

This chapter will provide a short history of the RSB and address why the quality of legislation matters and whether New Zealand has a problem with legislative quality.

### **1.1 The road to the Regulatory Standards Bill**

The RSB has been almost two decades in the making. A regulatory responsibility bill first was mooted in the 1990s by an advisory group commissioned by then-Minister of Commerce, John Luxford. That bill was never introduced.<sup>1</sup> This was followed by a 2001 discussion paper entitled *Constraining Government Regulation*.<sup>2</sup> That paper included a draft Regulatory Responsibility Bill (RRB) which was subsequently introduced to the House as a private member's bill by Hon. Rodney Hide MP on 2 August 2006.<sup>3</sup> It was supported by all parties in the House bar the Greens at its first reading on 27 June 2007.<sup>4</sup>

The RRB advanced to select committee, but the Commerce Committee did not recommend its passage. The Committee concluded that further work was required to assess whether it was an appropriate response to the perceived problem, and recommended that the Government establish an expert taskforce “to develop a legislative or Standing Orders option, or both, to improve regulatory review and decision making processes.”<sup>5</sup> As a result of the ACT Party's confidence and supply agreement with the National Party after the 2008 election, a Regulatory Responsibility Taskforce (the Taskforce) was established in March 2009. Its terms of reference directed it to create a draft bill. The Taskforce was chaired by former Treasury Secretary Graham Scott and included six other members.<sup>6</sup> The Taskforce reported back in September 2009 with a draft bill.<sup>7</sup> From June to August 2010, the Government sought public consultation on the draft, which forms the basis of the current RSB.

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<sup>1</sup> Jesse Wilson “Raising regulatory standards” [2011] NZLJ 99, 99.

<sup>2</sup> Bryce Wilkinson *Constraining Government Regulation* (New Zealand Business Roundtable, Wellington, 2001).

<sup>3</sup> Regulatory Responsibility Bill 2006 (71-1).

<sup>4</sup> The vote was 114 – 6. Regulatory Responsibility Bill – First Reading (27 June 2007) 640 NZPD 10302.

<sup>5</sup> Regulatory Responsibility Bill 2006 (71-1) (select committee report), 2.

<sup>6</sup> The other members of the Taskforce were: Paul Baines, Hon David Caygill, Richard Clarke QC, Jack Hodder SC, Dr. Don Turkington and Dr. Bryce Wilkinson.

<sup>7</sup> The report is available at <[www.treasury.govt.nz](http://www.treasury.govt.nz)>

The Taskforce concluded that current institutional safeguards to ensure legislative and regulatory quality are not sufficient.<sup>8</sup> New Zealand's constitutional arrangements include few formal checks and balances, with neither a written constitution nor a second Parliamentary chamber. Nor is Parliament completely independent of the executive.<sup>9</sup> The parliamentary process does include a number of checks,<sup>10</sup> but bills can change radically during their passage and the mixed member proportional system (MMP) has made it more difficult to correct errors.<sup>11</sup> MMP minority governments may also make greater use of regulations, thereby avoiding the need for legislation.<sup>12</sup> Other limitations include tight timeframes, brief consultation, amendments by Supplementary Order Paper and little independent scrutiny of legislation.<sup>13</sup> Jeremy Waldron has expressed concern at the way New Zealand has “stripped safeguard after safeguard away from its legislative process – leaving it with virtually none of the safeguards that working democracies take for granted.”<sup>14</sup>

Safeguards do remain, but they are not fail-safe. The Legislation Advisory Committee (LAC) was established in 1986 to provide expert assistance in the law-making process.<sup>15</sup> However, it tends to become involved only after bills have been introduced<sup>16</sup> and its guidelines for good legislation are long and elaborate, rendering them difficult for policy makers to internalize.<sup>17</sup> In practice, the LAC's *Guidelines* are often simply ignored.<sup>18</sup> Other committees also scrutinise legislative quality. The Legislation Design Committee (LDC) was set up in 2006 to provide advice on developing legislative proposals, but it meets infrequently and becomes

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<sup>8</sup> The Regulatory Responsibility Taskforce *Report of the Regulatory Responsibility Taskforce* (30 September 2009) accessed at <[www.treasury.govt.nz](http://www.treasury.govt.nz)>, 8.

<sup>9</sup> The Treasury “Regulatory Impact Statement: Regulating for Better Legislation – What is the Potential of a Regulatory Responsibility Act?” (February 2011) <[www.treasury.govt.nz](http://www.treasury.govt.nz)>, 6.

<sup>10</sup> For further information, see David McGee *Parliamentary Practice in New Zealand* (3<sup>rd</sup> ed, Dunmore Publishing Ltd., Wellington, 2005).

<sup>11</sup> George Tanner “How Does the Proposed Regulatory Responsibility Bill Measure Up Against the Principles? Changing the Role of Parliament and the Courts” (2010) 6 *Policy Quarterly* 21, 32.

<sup>12</sup> Geoffrey Palmer and Matthew Palmer *Bridled Power: New Zealand's Constitution and Government* (4<sup>th</sup> ed, Oxford University Press, Melbourne, 2004), 16.

<sup>13</sup> The Treasury, above n 9, 7.

<sup>14</sup> Jeremy Waldron “Parliamentary Recklessness: Why we need to legislate more carefully” (2008) Maxim Institute Annual John Graham Lecture <[www.maxim.org.nz](http://www.maxim.org.nz)>, 18.

<sup>15</sup> For further information, see <[www2.justice.govt.nz/lac/](http://www2.justice.govt.nz/lac/)>

<sup>16</sup> Tanner, above n 11, 29.

<sup>17</sup> Tim Smith “The Regulatory Responsibility Taskforce: A View From Inside the Room” (2010) 6 *Policy Quarterly* 14, 16.

<sup>18</sup> David Caygill “The Case for Better Parliamentary Scrutiny of Legislation” (2010) 6 *Policy Quarterly* 54, 55.

involved only when requested.<sup>19</sup> The Regulations Review Committee (RRC) can investigate complaints about regulations and may recommend that a regulation be disallowed under the Regulations (Disallowance) Act 1989.<sup>20</sup> No motion for disallowance has yet succeeded.<sup>21</sup> Though “designed to be a heavy check on executive power,” the Act has not proven to be so.<sup>22</sup> The courts can also review regulations and declare them invalid where they are outside the ambit of the law-making power laid down in the enabling Act. However, that power has been used cautiously.<sup>23</sup>

Since 1998, some form of regulatory impact analysis (RIA) has also been required, including the preparation of regulatory impact statements.<sup>24</sup> RIA essentially entails a cost-benefit analysis. While such analysis is useful, it may not be appropriate for assessing all legislative proposals. For example, RIA would have availed little in evaluating the Electoral Finance Act 2007 which raised issues around freedom of speech.<sup>25</sup> Moreover, without a strong government commitment to quality regulation, RIA becomes little more than a compliance exercise and government departments do not undertake full analysis.<sup>26</sup>

On the whole, our system has few effective checks and balances, and various reforms have done little to alter that.<sup>27</sup> Concurrently, the use of regulation has been increasing.<sup>28</sup> The current Government is concerned about this issue and in 2009 released an official statement proclaiming that “better regulation and less regulation, is essential.”<sup>29</sup>

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<sup>19</sup> Tanner above n 11, 29.

<sup>20</sup> For further information on the RRC, see Charles Chauvel “Public Law Remedies: The Regulations Review Committee” in NZLS Seminar *Public Law Remedies* (New Zealand Law Society Family Law Section and Property Law Section, Wellington, June 2011) 65.

<sup>21</sup> Ross Carter “Regulations and Other Subordinate Legislative Instruments: Drafting, Publication, Interpretation and Disallowance” (December 2010) New Zealand Centre for Public Law Occasional Paper No. 20. Accessed online at <[www.victoria.ac.nz](http://www.victoria.ac.nz)>, 36

<sup>22</sup> Geoffrey Palmer “A View of the Legal Debate” (2010) 6 *Policy Quarterly* 33, 33.

<sup>23</sup> Geoffrey Palmer “Deficiencies in New Zealand Delegated Legislation” (1999) 30 *VUWLR* 1, 17.

<sup>24</sup> The Treasury, above n 9, 8.

<sup>25</sup> Roger Kerr “A Regulatory Responsibility Act: An Idea Whose Time Has Come?” (27 November 2009) New Zealand Business Roundtable <[www.nzbr.org.nz](http://www.nzbr.org.nz)>

<sup>26</sup> Wilkinson, above n 2, 95-6.

<sup>27</sup> Caygill, above n 13, 56.

<sup>28</sup> Palmer, above n 23.

<sup>29</sup> Bill English and Rodney Hide *Government Statement on Regulation: Better Regulation, Less Regulation* (17 August 2009) accessed at <[www.treasury.govt.nz](http://www.treasury.govt.nz)>

The Taskforce's report reflected a similar belief that there is room to improve New Zealand's institutional safeguards against poor quality legislation. They concluded that:<sup>30</sup>

...first, as matters of both principle and practicality, there can and should be less legislation and better legislation; and second, the existing constitutional and operational framework cannot be expected to deliver those outcomes without significant changes.

The Taskforce found that compliance with current mechanisms is "patchy" and that a "coherent, mandatory, regulatory quality regime" is required.<sup>31</sup> Government actions create economic costs which should be acknowledged and confronted explicitly, openly and transparently.<sup>32</sup> Forcing governments to disclose the analysis underlying legislation should create more informed debate. Legislators would then "bear the political cost of publicly acknowledging who loses and by how much."<sup>33</sup> Currently, there is no incentive to do this, resulting in poor quality legislation.

Other sources confirm that "informed domestic opinion consistently suggests that legislation could be much better than it is."<sup>34</sup> The Commerce Committee's report on the 2006 RRB acknowledged the significant public support for improving the framework and process of making regulations.<sup>35</sup> Supporters included representatives of the business community such as the New Zealand Chambers of Commerce, the Business Roundtable, the Institute of Chartered Accountants and Federated Farmers.<sup>36</sup>

## **1.2 Why does legislative quality matter?**

Legislation is a pervasive feature of modern life. Between 2000 and 2009, over 68,000 pages of legislation came into force in New Zealand.<sup>37</sup> We rely on legislation to achieve numerous social goals to the extent that it has been said that "New Zealanders tend to exhibit an

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<sup>30</sup> The Regulatory Responsibility Taskforce, above n 8, 8.

<sup>31</sup> Ibid, 16.

<sup>32</sup> Ibid.

<sup>33</sup> Ibid, 18.

<sup>34</sup> The Treasury, above n 9, 6.

<sup>35</sup> Regulatory Responsibility Bill 2006 (71-1) (select committee report), 2.

<sup>36</sup> Wilson, above n 1, 100.

<sup>37</sup> Rodney Hide "Regulatory Responsibility Bill" (13 April 2010) ACT New Zealand <[www.act.org.nz](http://www.act.org.nz)>

innocent and misplaced faith in the efficacy of legislation.”<sup>38</sup> Poor quality legislation can have far-reaching consequences as it is the major source of our law and makes significant demands on us.<sup>39</sup>

The effectiveness of legislation is directly connected to its quality. If legislation is inconsistent with legal principles and democratic values, then the rule of law is compromised and society’s faith in the law and legal processes can be undermined.<sup>40</sup> Poor quality legislation can limit freedom, competition, and innovation and where law is wordy and obscure it imposes costs on government and the community.<sup>41</sup> Even legislation which creates neither direct nor indirect costs may be burdensome if it limits opportunities.<sup>42</sup> Legislative quality is thus associated with economic growth. However, linking the quality of legislation with specific outcomes can be challenging because it is difficult to differentiate between drafting issues, poor implementation and simple circumstance. Furthermore, normative policy judgments are usually involved.<sup>43</sup> Creating and maintaining high quality legislation therefore is not a simple task.

New Zealand’s legislative quality is measured by a number of international surveys. New Zealand is top of the Organisation for Economic Co-operation and Development (OECD) for ease of doing business and below the OECD mean in terms of restrictive market regulation.<sup>44</sup> In 2010 and 2011, New Zealand ranked third in the world in the World Bank’s Ease of Doing Business Rankings<sup>45</sup> and fourth in the Index of Economic Freedom.<sup>46</sup> The latter also concluded that New Zealand’s protection for property rights is strong.<sup>47</sup> On the other hand,

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<sup>38</sup> Palmer and Palmer, above n 12, 186.

<sup>39</sup> The Treasury, above n 9, 4.

<sup>40</sup> Tanner, above n 11 21.

<sup>41</sup> Palmer and Palmer, above n 12, 200.

<sup>42</sup> Hide, above n 37.

<sup>43</sup> The Treasury, above n 9, 5.

<sup>44</sup> Ibid, 6.

<sup>45</sup> The International Finance Corporation and World Bank “Ease of Doing Business in New Zealand” (2011) *Doing Business 2011* <[www.doingbusiness.org](http://www.doingbusiness.org)>

<sup>46</sup> The Heritage Foundation and The Wall Street Journal “2011 Index of Economic Freedom” (2011) <[www.heritage.org/index/](http://www.heritage.org/index/)>

<sup>47</sup> Property rights were given a score of 95.0 out of 100 based on the finding that “[p]rivate property is well protected. “The Heritage Foundation and The Wall Street Journal “2011 Index of Economic Freedom” (2011) New Zealand data accessed at <[www.heritage.org/index/country/NewZealand#property-rights](http://www.heritage.org/index/country/NewZealand#property-rights)>

New Zealand's ranking in the OECD Product Market Regulation Indicator has fallen from 4<sup>th</sup> in 1998 to 14<sup>th</sup> in 2008.<sup>48</sup>

Based on these indicators, opponents of the RSB query whether a problem with legislative quality actually exists, let alone one necessitating legislative action.<sup>49</sup> Richard Ekins and Chye-Ching Huang claim that the RSB lacks a firm foundation as this initial assumption has not been proven.<sup>50</sup> They contend that the Taskforce's examples of bad law-making were merely controversial policies,<sup>51</sup> and that the Taskforce's other claims were not fully developed, nor fully substantiated.<sup>52</sup> The Taskforce's assessment seems to be predicated on a belief that judge-made common law is more conducive to economic growth than statutory regulation, which is not necessarily true.<sup>53</sup> Furthermore, economic growth is not the only goal for law-making. To focus on that is too limiting and may lead to poor laws.<sup>54</sup> Broader public policy rationales for regulation can and do exist.

Nonetheless, there is evidence that New Zealand could be producing better quality legislation. Problems exist for two fundamental reasons: the increasing complexity of legislating; and the "incentives, pressures and human biases" that affect actors in the public arena.<sup>55</sup>

### **1.3 How do legislative quality problems arise?**

The complexity of legislation is an enormous hurdle to ensuring its quality. It is often difficult to narrow down the exact nature of an issue, let alone to predict the outcomes of legislative action. Moreover, modern regulation is becoming increasingly technical due to globalisation, technological change and the expansion of government reach into the private

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<sup>48</sup> Rodney Hide "Adoption of the Regulatory Responsibility Bill Drafted by the Regulatory Responsibility Taskforce" (2 February 2011) Memorandum to Cabinet Economic Growth Committee EGI (11) 7, accessed at <[www.treasury.govt.nz](http://www.treasury.govt.nz)> at [3].

<sup>49</sup> For example, Richard Ekins and Chye-Ching Huang "In Search of Better Law-Making: Why the Regulatory Responsibility Bill won't deliver what it promises" (February 2011) Maxim Institute guest paper <[www.maxim.org.nz](http://www.maxim.org.nz)>

<sup>50</sup> Ibid, 5.

<sup>51</sup> Ibid.

<sup>52</sup> Ibid, 6.

<sup>53</sup> Ibid, 7.

<sup>54</sup> Ibid.

<sup>55</sup> The Treasury, above n 9, 9.

sphere.<sup>56</sup> Much of the detail of regulation is not determined by Parliament but by Ministers and public agencies.<sup>57</sup>

The pressures on politicians and officials can also adversely affect quality. Ministers are often influenced by the media and believe they must respond rapidly and decisively to problems.<sup>58</sup> The incentive is to ‘get it done’ rather than to get it done well.<sup>59</sup> Government Ministers also must act within the three-year Parliamentary term, which has been described as “[t]he biggest problem that law making faces in New Zealand.”<sup>60</sup> Public choice theory posits that laws will be inequitable and inefficient where perverse incentives exist. Officials will tender legislative advice designed to maximise their best interests,<sup>61</sup> and decision-makers will downplay the risks of legislation. Furthermore, in a democratic society, there will always be an inherent tension between the will of the majority (expressed through the power of the state) and the rights and freedoms of individuals. Quite aside from the economic costs of legislation and regulation, social costs can and do arise.

#### **1.4 Conclusion**

There is room for improvement in the quality of New Zealand’s law and the law-making process. The question then remains of how best to achieve this end. The RSB is designed to do this through “increasing the transparency of regulation-making and the accountability of regulation makers.”<sup>62</sup> The RSB establishes a baseline below which the standard of legislation should not fall.

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<sup>56</sup> The Treasury, above n 9, 9.

<sup>57</sup> Smith, above n 17, 15.

<sup>58</sup> The Treasury, above n 9, 10.

<sup>59</sup> Kevin Guerin “Encouraging Quality Regulation: Theories and Tools” (New Zealand Treasury Working Paper 03/24, 2003) accessed at <[www.treasury.govt.nz](http://www.treasury.govt.nz)> at 7.

<sup>60</sup> Palmer, above n 22, 34.

<sup>61</sup> Richard Shaw “Consultants and Advisers” in Raymond Miller (ed) *New Zealand Government and Politics* (Oxford University Press, Melbourne, 2006) 257, at 259-60. For more on public choice theory and other theories of regulation in relation to quality, see Guerin, above n 59.

<sup>62</sup> Regulatory Standards Bill 2011 (277-1), Explanatory Note.

## **Chapter Two: The Regulatory Standards Bill and the Principles of Responsible Regulation**

The RSB is comprised of three key components intended to increase transparency and accountability in the creation of legislation. The RSB:

1. provides a benchmark for good regulation through a set of regulatory principles that all regulation should comply with; and
2. provides transparency by requiring those proposing and creating regulation to certify whether the regulation is compatible with the principles; and
3. provides monitoring of the certification process through a new declaratory role for the courts (though the power is declaratory only).<sup>1</sup>

The executive, the legislature and the courts therefore all have roles in vetting legislation. This chapter will explore how the RSB's mechanisms are intended to work, followed by a close examination of the most controversial of the proposed principles: the takings principle.<sup>2</sup> I will consider why the takings principle is important, how it is intended to function, and the problems with the provision as it stands.

### **2.1 The mechanisms of the Regulatory Standards Bill**

#### **2.1.1 The principles of responsible regulation**

The 'principles of responsible regulation' are central to the RSB. They are "designed to accord with and reflect broadly accepted principles of good legislation"<sup>3</sup> and form the benchmark against which to measure legislation. Current legislative quality control mechanisms tend to apply ex post rather than ex ante. In contrast, the RSB is intended to influence policy discussions prior to the legislative process, in addition to empowering the courts to review legislation.<sup>4</sup> According to the preamble, "the principles are distilled from

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<sup>1</sup> The RSB provides the courts with the power to issue a declaration of inconsistency, i.e. a statement by the courts that a provision is unjustifiably inconsistent with the principles. See further 2.1.2.

<sup>2</sup> Regulatory Standards Bill 2011 (277-1), cl 7(1)(c).

<sup>3</sup> The Regulatory Responsibility Taskforce *Report of the Regulatory Responsibility Taskforce* (30 September 2009) accessed at <[www.treasury.govt.nz](http://www.treasury.govt.nz)>, 6.

<sup>4</sup> Jack Hodder "Public Law, Property Rights and Principles for Legislative Quality" in NZLS Continuing Legal Education *Administrative Law: The Public Law Scene in 2011* (New Zealand Law Society Family Law Section and Property Law Section, Wellington, 2011) 27, 31.

sources such as the LAC Guidelines, the common law, and Parliament’s Regulations Review Committee.”<sup>5</sup> The resulting principles fall into six broad categories, as follows.<sup>6</sup>

<b>Rule of law</b>	Legislation should: be clear and accessible; not adversely affect rights and liberties or impose obligations retrospectively; treat people equally before the law; and issues of legal right and liability should be resolved by the application of law, rather than the exercise of administrative discretion.
<b>Liberties</b>	Legislation should not diminish a person's liberty, personal security, freedom of choice or action, or rights to own, use, and dispose of property, except as is necessary to provide for, or protect, any such liberty, freedom, or right of another person.
<b>Taking of property</b>	Legislation should not take or impair, or authorise the taking or impairment of, property without the consent of the owner unless the taking or impairment is necessary in the public interest; and full compensation for the taking or impairment is provided to the owner (compensation to be provided, to the extent practicable, by or on behalf of the persons who obtain the benefit of the taking or impairment).
<b>Taxes and charges</b>	Legislation should not impose, or authorise the imposition of, a tax except by or under an Act; nor impose, or authorise the imposition of, unreasonable charges for goods or services.
<b>Role of the courts</b>	Legislation should preserve the courts' role of authoritatively determining the meaning of legislation. Where legislation authorises a Minister, public entity, or public official to make decisions that may adversely affect any liberty or freedom, it should provide a right of appeal on the merits against those decisions to a court or other independent body; and state appropriate criteria for making those decisions.
<b>Good law-making</b>	Legislation should not be passed unless, to the extent practicable, the persons likely to be affected have been consulted and there has been a careful evaluation of: the issue; the effectiveness of any relevant existing law; whether the public interest requires it; any reasonable other options; who is likely to benefit, and who is likely to suffer a detriment; and any potential adverse consequences. It should produce benefits that outweigh the costs and be the most effective, efficient, and proportionate response to the issue concerned

The principles are not absolute. The RSB is designed to operate within the framework of Parliamentary supremacy so when necessary, the Government can create legislation incompatible with the principles.<sup>7</sup> The critical point is that under the RSB, legislators must

<sup>5</sup> Regulatory Standards Bill 2011 (277-1), preamble.

<sup>6</sup> Ibid, cl 7(1)(a)-(k).

<sup>7</sup> See further 3.1.

confront those incompatibilities and establish whether they can be reasonably justified in a free and democratic society.<sup>8</sup>

The principles would apply to all legislative instruments created after the RSB's entry into force. Consequently, any regulations unjustifiably inconsistent with the principles would be ultra vires based on the principle in *Drew v Attorney-General*.<sup>9</sup> After ten years, the RSB standard would extend to all other legislation. Public entities would be required to review legislation they administer for compatibility with the principles and record the results in their annual report.<sup>10</sup> The RSB also provides for ministerial guidelines to be promulgated to develop understanding of the principles, similar to those on the New Zealand Bill of Rights Act 1990 (NZBORA).<sup>11</sup>

The Taskforce stressed the orthodoxy of the principles and that capability to develop policy in line with the principles should already exist.<sup>12</sup> Despite the Taskforce's assertions, the principles have been described as unorthodox and unconstitutional,<sup>13</sup> and their expression in the RSB is seen to differ from or extend beyond accepted norms.<sup>14</sup> This problem is emphasised in the RRC's submission to the Commerce Committee. The RRC fears that overlaps with principles outside the RSB and differing expressions of the subject matter will create uncertainty.<sup>15</sup> Critics also say that the principles selected are not "obvious truths about what should be done" and require further elucidation.<sup>16</sup> The Taskforce's report did not

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<sup>8</sup> Regulatory Standards Bill 2011 (277-1): cl 7(2). See further 3.2.

<sup>9</sup> [2002] 1 NZLR 58 (CA). In *Drew*, the Court of Appeal established that a power to make regulations must be exercised in accordance with the New Zealand Bill of Rights Act 1990. The resultant regulations will be invalid if they unjustifiably limit a protected right or freedom.

<sup>10</sup> Regulatory Standards Bill 2011 (277-1): cl 16. See further 4.2.

<sup>11</sup> *Ibid*, cl 15. The NZBORA guidelines are published by the Ministry of Justice and are intended to make the Bill of Rights Act more accessible to the public sector. They do not have any legal status, rather, they are a practical resource to assist public sector to integrate human rights considerations into policy and practice. See further Ministry of Justice *Guidelines on the New Zealand Bill of Rights Act 1990: A Guide to the Rights and Freedoms in the Bill of Rights Act for the Public Sector* (2004) Accessed at <[www.justice.govt.nz](http://www.justice.govt.nz)>

<sup>12</sup> Graham Scott "The Regulatory Responsibility Bill: Some Issues in the Debate" (2010) 6 *Policy Quarterly* 58, 62.

<sup>13</sup> Richard Ekins and Chye-Ching Huang "In Search of Better Law-Making: Why the Regulatory Responsibility Bill won't deliver what it promises" (February 2011) Maxim Institute guest paper <[www.maxim.org.nz](http://www.maxim.org.nz)>, 10.

<sup>14</sup> The Treasury "Regulatory Impact Statement: Regulating for Better Legislation – What is the Potential of a Regulatory Responsibility Act?" (February 2011) <[www.treasury.govt.nz](http://www.treasury.govt.nz)>, 17

<sup>15</sup> Regulatory Standards Bill 2011 (277-1) (interim select committee report), Appendix A: Advice received from the Regulations Review Committee.

<sup>16</sup> Ekins and Huang, above n 13, 20.

adequately specify why these principles were selected and others excluded;<sup>17</sup> creating concern that emphasis on unsound principles might distort the reasoning behind legislation.<sup>18</sup>

The Taskforce selected the above principles based on a belief that they would be the most conducive to creating a high-quality regulatory environment, enhancing economic growth. The principles are thus skewed towards efficiency. However, economic benefits are only one factor that should be taken into account when assessing legislation. Critics claim that the RSB would over-emphasise cost-benefit analysis and efficiency considerations in making policy choices.<sup>19</sup> There is also no sound evidence that these principles are the best means to generate growth.<sup>20</sup>

The principles also are ill-defined, as their simplistic drafting obscures their inherent complexities.<sup>21</sup> This creates a risk of oversimplifying and hardening complex and evolving concepts. Their vagueness may undermine the stability and clarity of New Zealand's statute law.<sup>22</sup> Rule of law requires that law be both clear and predictable. It is impossible to know how the courts might interpret the RSB's principles, so the content of the law will be neither clear nor predictable, endangering the rule of law. One further issue is the exclusion of various principles, creating imbalances. For example, the RSB does not include the principles of the Treaty of Waitangi, nor any reference to New Zealand's international obligations.<sup>23</sup> Consequently, the principles chosen do not have a broad base of support.<sup>24</sup> Public sector agencies have expressed concern that the principles are neither widely accepted nor understood.<sup>25</sup>

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<sup>17</sup> Ekins and Huang, above n 13, 10-11.

<sup>18</sup> Richard Ekins "The Regulatory Responsibility Bill and the Constitution" (2010) 6 *Policy Quarterly* 9, 12.

<sup>19</sup> Geoff Bertram "Deregulatory Irresponsibility: Takings, Transfers and Transcendental Institutionalism" (2010) 6 *Policy Quarterly* 48, 49.

<sup>20</sup> Chye-Ching Huang "Regulatory responsibility and the law" [2010] NZLJ 91, 93.

<sup>21</sup> George Tanner "How Does the Proposed Regulatory Responsibility Bill Measure Up Against the Principles? Changing the Role of Parliament and the Courts" (2010) 6 *Policy Quarterly* 21, 32. For example, the rule of law is a contested concept with no single, simple meaning. See for example Richard Ekins (ed) *Modern Challenges to the Rule of Law* (Lexis-Nexis, Wellington, 2011).

<sup>22</sup> Ekins, above n 18, 13.

<sup>23</sup> The Treasury, above n 14, 17.

<sup>24</sup> *Ibid*, 14.

<sup>25</sup> *Ibid*, 30.

### 2.1.2 Certification

The RSB's mechanisms are based on the premise that increased transparency creates better incentives for regulators and empowers the regulated.<sup>26</sup> The RSB is designed to facilitate informed debate and to engender a sense of personal responsibility in law-makers.<sup>27</sup> To that end, all legislation will need to be accompanied by a signed certificate of compliance, certifying the consistency of the measure with the principles. Both the Minister responsible for a bill and the chief executive of the public entity<sup>28</sup> with the responsibility of administering the legislation will be required to undertake certification. That certificate will then need to be presented to Parliament by the Minister before the bill's introduction and before the third reading.<sup>29</sup>

If an incompatibility with the principles exists, the certificate must state whether that departure is "justified to the extent that it is reasonable and can be demonstrably justified in a free and democratic society."<sup>30</sup> If not, it must say why the legislation is proceeding regardless. Therefore under the RSB, Parliament can create legislation contravening the principles, but must acknowledge what they are doing and why. The RSB should therefore encourage increased deliberation in the legislative process.<sup>31</sup> Certification will also act as a "fire alarm" to the business community.<sup>32</sup> This mechanism reflects the Taskforce's desire for "[s]omething stronger ... to require policy-makers to confront regulatory effects on productivity and economic costs earlier rather than later."<sup>33</sup>

### 2.1.3 The role of the courts

The RSB requires the courts to monitor certification and to enforce and incentivise compliance with the principles. Secondary and tertiary legislation will be directly subject to

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<sup>26</sup> Kevin Guerin "Protection Against Government Takings: Compensation for Regulation?" (New Zealand Treasury Working Paper 02/18, 2002) accessed at <www.treasury.govt.nz>, 21.

<sup>27</sup> Tim Smith "The Regulatory Responsibility Taskforce: A View From Inside the Room" (2010) 6 *Policy Quarterly* 14, 15.

<sup>28</sup> Defined in cl 4.

<sup>29</sup> Regulatory Standards Bill 2011 (277-1): cll 9-10.

<sup>30</sup> *Ibid*, cl 7(2).

<sup>31</sup> Rodney Hide "Regulatory Responsibility Bill" (13 April 2010) ACT New Zealand <www.act.org.nz>.

<sup>32</sup> Jane Kelsey "'Regulatory Responsibility': Embedded Neoliberalism and its Contradictions" (2010) 6 *Policy Quarterly* 36, 40.

<sup>33</sup> The Regulatory Responsibility Taskforce, above n 3, 16.

the RSB which could be used to disallow inconsistent measures as per *Drew v Attorney General*.<sup>34</sup> Where primary legislation is found to be inconsistent with the principles, the courts will be able to issue a declaration of incompatibility under a new jurisdiction expressly created by the Bill.<sup>35</sup> However, it will not carry binding legal consequences: a declaration will not affect the validity or enforcement of a parliamentary enactment. Nor can the courts order injunctions or compensation. The final three principles also are excluded from the declaration's scope on the grounds that they are unsuitable for judicial deliberation.

The courts also are given an interpretive direction drawn from the NZBORA. If an enactment can be given a meaning consistent with the principles, then that meaning must be preferred. Neither the declaratory jurisdiction nor the interpretive direction would apply to current legislation until ten years after the RSB's entry into force. In that time, all statute law should be revised to avoid future declarations by creating compatibility with the principles.<sup>36</sup> It would be a massive undertaking: the recent rewrite of the Income Tax Act 2007 alone took fifteen years. All legislation would need to be considered in light of each of the principles, inevitably requiring some policy changes.<sup>37</sup> The takings principle in particular could have far-reaching consequences if applied to existing legislation.

The next section will examine the RSB's most controversial provision: the takings principle. This will include consideration of: the principle's function; how it might operate; and problems with the provision in its current form.

## **2.2 In focus: the 'takings' principle**

### ***Taking of property:***

*[Legislation should] not take or impair, or authorise the taking or impairment of, property without the consent of the owner unless—*

- (i) the taking or impairment is necessary in the public interest; and*
- (ii) full compensation for the taking or impairment is provided to the owner; and*

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<sup>34</sup> *Drew*, above n 9.

<sup>35</sup> Regulatory Standards Bill 2011 (277-1): cl 12(1).

<sup>36</sup> Ekins, above n 18, 13.

<sup>37</sup> See further 4.2.

(iii) *that compensation is provided, to the extent practicable, by or on behalf of the persons who obtain the benefit of the taking or impairment.*<sup>38</sup>

### 2.2.1 Why include a takings principle?

The takings provision in the RSB is intended to promote economic efficiency through stronger protection of property rights. The Taskforce was concerned that “[w]here governmental action cuts across private rights there is inevitably economic cost. That cost should to the largest extent possible be explicitly assessed and confronted by lawmakers.”<sup>39</sup> Legislation is sometimes enacted that takes or impairs property rights without explicit provision for compensation.<sup>40</sup> Each of the Taskforce’s examples of poor legislative quality related to an interference with property rights.<sup>41</sup> While the RSB would not necessarily have changed the outcome in those cases, it would have required that the costs and possible consequences of each action be disclosed before the decision was made. As a result, the takings clause is at the core of the RSB.

To understand the possible ramifications of the takings clause, it is necessary to consider the nature and history of property rights in New Zealand. The nature of property rights is both complex and contested. Legally speaking, “property is not a clod of earth but a bundle of legal entitlements.”<sup>42</sup> Property rights are not static but evolve alongside changes in society and technology.<sup>43</sup> There is no singular, simple definition for either property or the rights associated with it.<sup>44</sup>

The concept of property denotes a system of rules, governing access to and control of material resources.<sup>45</sup> Jeremy Waldron lists three kinds of property rights: common property,

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<sup>38</sup> Regulatory Standards Bill 2011 (277-1): cl 7(1)(c).

<sup>39</sup> The Regulatory Responsibility Taskforce, above n 3, 14.

<sup>40</sup> Ibid, 46.

<sup>41</sup> The 2000 cancellation of the West Coast Accord; the Foreshore and Seabed Act 2004; the forcible unbundling of Telecom’s local loop and the rejection of the Canadian Pension Plan Investment Board’s proposal to purchase shares in Auckland Airport. Ibid, 17-18.

<sup>42</sup> William A. Fischel *Regulatory Takings: Law, Economics and Politics* (Harvard University Press, Cambridge MA, 1995), 2.

<sup>43</sup> Lewis Evans, Neil Quigley and Kevin Counsell “Protection of Private Property Rights and Just Compensation: An Economic Analysis of the Most Fundamental Human Right Not Provided in New Zealand” (2009) New Zealand Institute for the Study of Competition and Regulation Inc <www.iscr.org.nz>, 5.

<sup>44</sup> Ibid, 4.

<sup>45</sup> Jeremy Waldron *The Right to Private Property* (Clarendon Press, Oxford, 1988), 31.

collective (or state) property and private property.<sup>46</sup> Private property therefore is but one way to order a property system. In a private property arrangement, rules of property “are organised around the idea that contested resources are to be regarded as separate objects, each assigned to the decisional authority of some particular individual.”<sup>47</sup> To comprehend property rights in a constitutional context, it is necessary to understand why private property is regarded as important.<sup>48</sup>

Liberal theory emphasises the constitutional importance of private property rights.<sup>49</sup> Private property rights have traditionally been understood to do at least three things. Firstly, they create a boundary between individual rights and government power.<sup>50</sup> Ownership of property allows individuals to be self-sufficient and self-reliant, necessarily restricting the control the state exercises over an individual. Private property therefore enhances the rule of law and the rights of citizens.<sup>51</sup> Secondly, property rights also facilitate economic activity as they form the basis of market exchanges permitting the maximisation of individual preference. Strong protection for property rights is therefore associated with economic growth. Finally, property rights promote “industry, social advancement and individual human worth.”<sup>52</sup> That is, property rights are understood to instil positive values in individuals.

Protections for liberty and property can be traced back to the Magna Carta in the 13th century and have remained a touchstone of English law.<sup>53</sup> In the 18<sup>th</sup> century Sir William Blackstone described the three primary rights of the English as “the right of personal security, the right of personal liberty and the right of private property.”<sup>54</sup> Part of the mythology of private property rights is that they are perceived in a more individualistic and absolute way than other rights.

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<sup>46</sup> Jeremy Waldron “Property Law” in Dennis Patterson (ed) *A Companion to Philosophy of Law and Legal Theory* (2<sup>nd</sup> ed, Blackwell Publishing, Chichester, 2010) 11, 11.

<sup>47</sup> Ibid, 12.

<sup>48</sup> Ibid, 16.

<sup>49</sup> Tom Allen *The Right to Property in Commonwealth Constitutions* (Cambridge University Press, Cambridge, 2000), 161.

<sup>50</sup> Jennifer Nedelsky “American Constitutionalism and the Paradox of Private Property” in Jon Elster and Rune Slagstad (eds) *Constitutionalism and Democracy* (Cambridge University Press, Cambridge, 1988) 241, 241.

<sup>51</sup> Allen, above n 49, 143.

<sup>52</sup> Philip A. Joseph “Property Rights and Environmental Regulation” (2001) Ninth Annual Conference of the Resource Management Law Association for New Zealand, Wellington, 4-7 October 2001, 4.

<sup>53</sup> Legislation Advisory Committee *Guidelines on the Process and Content of Legislation* (2001) accessed at <[www.justice.govt.nz](http://www.justice.govt.nz)>, 45

<sup>54</sup> Volume I of *Commentaries on the Laws of England*, 125. Quoted in Hodder, above n 4, 38.

In reality however, property cannot be defined in private terms alone,<sup>55</sup> and its meanings are defined by the state.<sup>56</sup> The right has never been absolute as it carries implicit tensions between the individual and the collective.<sup>57</sup> Therefore it is orthodox that private property rights must be subject to limits deemed necessary for the wider public interest, including takings for community infrastructure, planning and resource controls, or limitations on intellectual property rights.<sup>58</sup>

So, it is generally conceded that states must have the power to take, tax and regulate property without the consent of the individual owners - subject to restraints.<sup>59</sup> Increased regulation has undermined the liberal view of property.<sup>60</sup> Consequently, the question is not whether the right can be limited, but what principles should guide those limitations.<sup>61</sup> In most jurisdictions, Parliament may legislate for the compulsory acquisition of property only where it is in the public interest and when compensation will be paid.<sup>62</sup> Decisions about what constitutes the public interest are difficult ones, involving substantive social and political judgments, which is why they generally rest with a democratically elected legislature. The RSB is designed to make such decision-making transparent.

The RSB is a response to disquiet about waning protections for private property rights and a sense that they are too often subjugated by the state.<sup>63</sup> It attempts to address the “cognitive dissonance between property’s mythology and property’s protection.”<sup>64</sup> Categorising a right as constitutional strengthens its normative force and its protection from abrogation.<sup>65</sup> The

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<sup>55</sup> Laura S. Underkuffler “Property as Constitutional Myth: Utilities and Dangers” 92 *Cornell Law Review* 1239, 1247.

<sup>56</sup> Nedelsky, above n 50, 264.

<sup>57</sup> *Ibid*, 292.

<sup>58</sup> Justice Joe Williams “Property or Interests, Private or Public” in NZLS Continuing Legal Education *Administrative Law: The Public Law Scene in 2011* (New Zealand Law Society Family Law Section and Property Law Section, Wellington, 2011) 49, 50.

<sup>59</sup> Allen, above n 49, 1.

<sup>60</sup> Extensive regulation is consistent with a more communitarian view of property. See for example Kevin Gray “Equitable Property” (1994) 47 *Current Legal Problems* 157.

<sup>61</sup> Suri Ratnapala “Environmentalism Versus Constitutionalism: A Contest Without Winners” (2006) International Centre for Economic Research, Working Paper No. 38/2006 <[www.icer.it](http://www.icer.it)>, 43.

<sup>62</sup> Allen, above n 49, 4.

<sup>63</sup> Jack Hodder “Capitalism, Revolutions and our Rule of Law” (F.W. Guest Memorial Lecture, University of Otago, 10 August 2011).

<sup>64</sup> Underkuffler, above n 55, 1250.

<sup>65</sup> Joseph, above n 52, 7.

RSB therefore seeks to better protect private property rights on the basis that New Zealand's constitutional inheritance "warrants recognition rather than neglect."<sup>66</sup>

### 2.2.2 The scope of the takings principle in the Regulatory Standards Bill

This section will consider the scope of the RSB's takings principle, including its extent and how it might function. The RSB could significantly constrain the government's power to alter private property rights as the takings principle extends far beyond existing protections for private property rights in New Zealand.

By international standards, New Zealand lacks strong safeguards. Excluding some aspects of the work of the Waitangi Tribunal, little opportunity exists to legally challenge a government claim that the public interest justifies a taking of property rights.<sup>67</sup> There is no:<sup>68</sup>

...standard process for assessing or challenging a government action that affects property rights to determine whether the action is essential in the public interest, and if so whether compensation should apply.

Property rights also were not included in the NZBORA and subsequent attempts to amend it via private members' bills in 1998 and 2005 have been unsuccessful.<sup>69</sup> Nonetheless, New Zealand's legal heritage reflects the belief discussed above that "the protection of property is ... one of the fundamental values of a liberal society."<sup>70</sup>

The power to expropriate property must be conferred by statute. However, Parliament is sovereign and can "enact laws expropriating property without compensation. In doing so, it can step right through existing laws and rights, obliterating remedies which otherwise would exist."<sup>71</sup> The courts may examine whether 'manner and form' provisions were complied with

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<sup>66</sup> Hodder, above n 4, 44.

<sup>67</sup> Lewis Evans and Neil Quigley "Compensation for Takings of Private Property Rights and the Rule of Law" in Richard Ekins (ed) *Modern Challenges to the Rule of Law* (Lexis-Nexis, Wellington, 2011) 233, 234.

<sup>68</sup> Guerin, above n 26, 16.

<sup>69</sup> Mai Chen "Strengthening the Protection of Private Property: The Regulatory Responsibility Taskforce 2009 and Revised Bill Should Appear After the Real Estate Agents Act 2008" (11 December 2009) Chen Palmer <[www.chenpalmer.co.nz](http://www.chenpalmer.co.nz)>. The concern at this time was that certain terms were not well-defined, including 'property'.

<sup>70</sup> Legislation Advisory Committee, above n 53, 54.

<sup>71</sup> *Westco Lagan Ltd v Attorney-General* [2001] 1 NZLR 40, per McGechan J at [95].

in the enactment of a statute requiring expropriation without compensation but cannot grant relief against an Act merely because its content allowed that expropriation.<sup>72</sup> Protection against compulsory acquisition of property is therefore only available through the common law.

All common law jurisdictions recognise a principle that private property should not be taken without full compensation and only for public purposes.<sup>73</sup> It is expressed through administrative law doctrines and in techniques of statutory interpretation.<sup>74</sup> The principle operates through this interpretive presumption:<sup>75</sup> if legislation purports to authorise a taking of property without compensation, it must state so clearly.<sup>76</sup> Where the statutory language is unclear, the courts will presume that the legislature did not intend to authorise an uncompensated taking and interpret accordingly. Compensation will be expected in the absence of explicit statutory language to the contrary.<sup>77</sup> However, the common law interpretive presumption falls short of full constitutional protection for private property rights.

The RSB would alter the situation significantly as the takings principle could increase both the strength and the scope of private property rights. It addresses not only takings of property but also ‘impairment’ of property rights. By incorporating the concept of impairment, the RSB invites the possibility of compensation for regulatory takings, a concept hitherto unrecognised in New Zealand law.<sup>78</sup> The common law does not require compensation when property rights are merely restricted.<sup>79</sup>

When government compulsorily acquires full ownership of a property right, it is normally defined as a physical taking. In contrast, regulatory (or partial) takings occur when

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<sup>72</sup> *Westco Lagan*, above n 71, at [91].

<sup>73</sup> *Cooper v Attorney-General* [1996] 2 NZLR 480 (HC).

<sup>74</sup> Michael Taggart “Expropriation, Public Purpose and the Constitution” in Christopher Forsyth and Ivan Hare (eds) *The Golden Metwand and the Crooked Cord: Essays on Public Law in Honour of Sir William Wade QC* (Clarendon Press, Oxford, 1998) 91, 112.

<sup>75</sup> See further 3.3.

<sup>76</sup> Legislation Advisory Committee, above n 53, 55.

<sup>77</sup> *Attorney-General v De Keyser’s Royal Hotel Ltd* [1920] A.C. 508, 542 per Lord Atkinson. See also *Belfast Corporation v O D Cars Ltd* [1960] A.C. 490.

<sup>78</sup> Ekins and Huang, above n 13, 13. See also 2.2.3.

<sup>79</sup> *Belfast Corporation*, above n 70.

government limits the nature of a property right through legislative action.<sup>80</sup> The takings clause in the RSB encompasses both forms of taking. The Taskforce stated that:<sup>81</sup>

...the inclusion of “impairment” is intended to encompass regulatory actions which, while not amounting to a physical taking of property, severely impair an owner’s enjoyment of his or her bundle of property rights. Where the degree of impairment is sufficiently serious it will amount to a taking.

Traditionally, physical takings are permitted under the principle of eminent domain: the right of government to expropriate property for public works. They are characterised by compulsion.<sup>82</sup> In New Zealand, the Public Works Act 1981 (PWA) provides the Crown (and certain agencies with power devolved from the Crown) with the statutory authority to expropriate land. They may only do so in accordance with that Act, and compensation to full market value is generally required.<sup>83</sup> Other statutes also create powers of compulsory acquisition, but exercised within the PWA regime.<sup>84</sup> The PWA only applies to land.

Regulatory takings are quite another matter. Under the broadest possible interpretation, “every form of regulation of the use of land, labour or capital could be interpreted as a taking through altering vested rights.”<sup>85</sup> Regulatory takings do not involve any transfer of ownership. Instead, the bundle of rights associated with ownership of a property interest is limited in some way. If each right that a person has over something is itself property, then any state action restricting or extinguishing any of those rights can be viewed as a taking of property.<sup>86</sup> Environmental legislation for example may create a taking if “it destroys or impairs a landowner’s reasonable rights of use, or significantly undermines the exchange value of the land.”<sup>87</sup> The Resource Management Act 1991 (RMA) therefore specifically precludes compensation for land injuriously affected by its controls.<sup>88</sup> In *Falkner v Gisborne*

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<sup>80</sup> Guerin, above n 26, 2.

<sup>81</sup> The Regulatory Responsibility Taskforce, above n 3, 47.

<sup>82</sup> Philip A. Joseph *Constitutional and Administrative Law in Zealand* (3<sup>rd</sup> ed, Thomson Brookers, Wellington, 2007), 667.

<sup>83</sup> Public Works Act 1981, s 60.

<sup>84</sup> Joseph, above n 80, 670.

<sup>85</sup> Guerin, above n 26, 17.

<sup>86</sup> Allen, above n 49, 121.

<sup>87</sup> Joseph, above n 52, 8.

<sup>88</sup> Section 85: Compensation not payable in respect of controls on land - (1) An interest in land shall be deemed not to be taken or injuriously affected by reason of any provision in a plan unless otherwise provided for in this Act.

*District Council* it was held that the principles of the RMA take priority over private property rights and no right to compensation could be implied.<sup>89</sup> In the context of the RMA, the public interest in sustainable environmental management has a greater value than private property rights.

New Zealand's government generally compensates for the taking of property (in whole or in part) but not for reducing its utility.<sup>90</sup> In contrast, the RSB would require payment of compensation for both the acquisition of physical property *and* regulatory constraints on the uses of property.<sup>91</sup> This is because without a requirement to compensate, regulation is costless to the regulator. The true costs of a policy are concealed, reducing political costs.<sup>92</sup> That encourages increased use of regulation, generating inefficiencies.<sup>93</sup> Investment may also be discouraged.<sup>94</sup> Compensation is therefore economically efficient. Underlying the RSB's takings clause is the idea that a government "that need not compensate owners has less reason to 'get it right' than a government that must."<sup>95</sup>

However, not every situation that appears to be a taking will be compensable. In United States jurisprudence, for example, the state need not compensate when using its 'police power' to eliminate a nuisance.<sup>96</sup> Under the common law, no person has the right to cause nuisance to others.<sup>97</sup> Regulation therefore is not considered a taking if the state acts to mediate between conflicting private property rights or to eradicate a nuisance.<sup>98</sup>

Implementation of the RSB would require consideration of when compensation should be granted, and to what extent. Substantial literature on the economic analysis of the right to property has been produced in the North American context,<sup>99</sup> but has not emerged in the

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<sup>89</sup> [1995] NZRMA 462 (HC). The plaintiffs had argued that council policy would effectively result in a 'seizure' of property, relying on section 21 of the New Zealand Bill of Rights Act. Justice Barker found that compensation explicitly denied by the RMA, and that the scheme deliberately prioritised sustainability over private property rights.

<sup>90</sup> Guerin, above n 26, 14.

<sup>91</sup> Evans, Quigley and Counsell, above n 43, 8.

<sup>92</sup> Guerin, above n 26, 5.

<sup>93</sup> Joseph, above n 52, 14.

<sup>94</sup> Kathleen Ryan "Should the RMA Include a Takings Regime?" (1998) 2 NZ J. Env'tl. L. 63, 65.

<sup>95</sup> Ratnapala, above n 61, 39.

<sup>96</sup> *Mugler v Kansas* 123 US 623 (1887).

<sup>97</sup> Ratnapala, above n 61, 29-30.

<sup>98</sup> Guerin, above n 26, 9.

<sup>99</sup> See for example Frank Michelmann "Property, Utility and Fairness: Comments on the Ethical Foundations of 'Just Compensation' Law" (1967) 80 *Harvard Law Review* 1165; Lawrence Blume and Daniel L. Rubinfeld

Commonwealth.<sup>100</sup> As a result, the assumption that efficiency is the best means to measure compensation would itself create uncertainties. It is by no means evident which efficiency standard should be applied in determining the RSB's operational framework.<sup>101</sup> Furthermore, efficiency may not be the most appropriate touchstone around which to consider the boundaries of private property rights and the limits of compensation.

Economic analysis is not always persuasive, and to:<sup>102</sup>

...move from the conclusion that just compensation promotes efficiency ... to the recognition that it ought to be paid ... is to impose the culture of economics on the culture of society at large.

Essentially, the welfare state incorporates uncompensated takings and transfers of property between citizens. The effect of such a broad test in the RSB could be to exclude, on principle, any legislation with redistributive consequences. Moreover, social justice as a concept is not easily quantifiable. Debate continues on how to measure gains and losses between groups and there is no simple answer.<sup>103</sup>

Finally, to understand the extent of the RSB's takings clause, Richard Epstein's work requires attention. Epstein's approach was instrumental in shaping the RSB.<sup>104</sup> Epstein advocates strong private property rights and limited government. He submits that analysis of private law has necessary consequences for public law, founded on a Lockean understanding that government has no better standing than the citizens it represents. Accordingly, the question of whether property has been taken is a simple one. Epstein asks: "*would the government action be treated as a taking of private property if it had been performed by some*

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"Compensation for Takings: An Economic Analysis" (1984) 72 *California Law Review* 569; Thomas W. Merrill "The Economics of Public Use" (1986) 72 *Cornell Law Review* 61.

<sup>100</sup> Allen, above n 49, 84.

<sup>101</sup> See Guerin, above n 26, 6-7.

<sup>102</sup> Fischel, above n 42, 217.

<sup>103</sup> Bertram, above n 19, 50.

<sup>104</sup> Epstein receives special thanks in the foreword to the Taskforce's report and Bryce Wilkinson's 2001 discussion paper drew heavily on his work.

*private party?*<sup>105</sup> So, if any incident of ownership is removed, then government will prima facie come within the scope of a constitutional guarantee of property rights.<sup>106</sup>

Epstein's work does not reflect the state of the law as it stands either in America or New Zealand and is far from undisputed.<sup>107</sup> His theory restricts the compulsory power of the state and requires compensation for many actions not currently compensated. Redistributive programs would be limited.<sup>108</sup> Private law is also not a constant standard as it evolves in response to new situations and new preferences.<sup>109</sup> Nonetheless, given its influence on the RSB, Epstein's work is useful as it elucidates the possible magnitude of the takings principle.

The RSB's takings clause is intended to better protect for property rights in New Zealand. As it stands, the clause would achieve this. However, functionally it also would represent a significant shift in the operation of the law of property rights in New Zealand.

### 2.2.3 Problems with the takings principle

As discussed above, there is a gulf between current New Zealand law and how the RSB's takings principle might function. The principle therefore gives rise to a number of legal issues, creating real uncertainties in New Zealand's law.<sup>110</sup> These are primarily centred on the terms left undefined in the RSB, including: 'impairment', 'taking', 'public interest', 'property' and 'full compensation.'

The RSB's protection against impairment is problematic. New Zealand's Supreme Court declined to introduce a doctrine of regulatory takings as recently as 2007 in *Waitakere City Council v Estate Homes Ltd*.<sup>111</sup> The Court reiterated that New Zealand has no general statutory protection for property rights bar the common law presumption of interpretation.<sup>112</sup> That presumption will be invoked only when there is "a forced acquisition of a landowner's

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<sup>105</sup> Emphasis in original. Richard Epstein *Takings: Private Property and the Power of Eminent Domain* (Harvard University Press, Cambridge MA, 1985), 36.

<sup>106</sup> *Ibid*, 57.

<sup>107</sup> Allen, above n 49, 172-3.

<sup>108</sup> Fischel, above n 42, 173.

<sup>109</sup> *Ibid*, 178-9.

<sup>110</sup> Ekins and Huang, above n 13, 12.

<sup>111</sup> *Waitakere City Council v Estate Homes Ltd* [2007] 2 NZLR 149 (SC).

<sup>112</sup> *Ibid*, at [45] per McGrath J.

rights under a power belonging to the state which allows the landowner no choice.”<sup>113</sup> Where permission to develop land has been refused, the courts have understood it as regulation rather than a taking.<sup>114</sup> Accordingly, New Zealand’s judiciary will break new ground in applying the RSB and will have to choose between creating definitions and/or applying overseas takings jurisprudence.<sup>115</sup> The latter is especially challenging, given that property rights are often closely related to their constitutional setting.

Furthermore, takings jurisprudence is far from settled overseas. Nations with constitutionally enshrined protections for private property include the United States and Australia.<sup>116</sup> In each case, there must be some minimum level of interference before a claim for compensation can be made.<sup>117</sup> The critical issue is determining at what point regulation becomes a taking. In other words: how far is too far? This question has vexed the courts in the United States,<sup>118</sup> where takings law tends to be described as “muddled”<sup>119</sup> or “a bewildering mess”.<sup>120</sup> United States takings law is much debated and highly complex as it involves both federal and state constitutional law.<sup>121</sup> The Fifth Amendment to the United States Constitution guarantees that “nor shall private property be taken for public use without just compensation.”<sup>122</sup> Although intended to protect physical property from seizure, the question of compensation for takings by regulation arose in 1922 in *Pennsylvania Coal Co. v Mahon*.<sup>123</sup> In a landmark judgment, Justice Holmes stated that “while property may be regulated to a certain extent, if regulation goes too far it will be recognised as a taking.”<sup>124</sup>

Active judicial consideration on this question did not really begin until the 1980s<sup>125</sup> and the area remains extremely uncertain. No definitive answers exist as to what comprises a regulatory taking, what might limit a regulatory taking, and what differentiates compensable

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<sup>113</sup> *Waitakere City Council*, above n 111, at [51] per McGrath J.

<sup>114</sup> *Ibid*, at [47] per McGrath J.

<sup>115</sup> Ekins and Huang, above n 13, 12.

<sup>116</sup> The Regulatory Responsibility Taskforce, above n 3, 45.

<sup>117</sup> Allen, above n 49, 162.

<sup>118</sup> Joseph, above n 52, 12.

<sup>119</sup> Ekins and Huang, above n 13, 12.

<sup>120</sup> Quoted in Ryan, above n 94, 66.

<sup>121</sup> Tanner, above n 21, 27.

<sup>122</sup> *Constitution of the United States of America*, Amendment V: No person shall...be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation. Accessed online at <[www.law.cornell.edu](http://www.law.cornell.edu)>.

<sup>123</sup> 260 US 393 (1922) (SC).

<sup>124</sup> *Ibid*, 416.

<sup>125</sup> Ryan, above n 94, 66.

and non-compensable regulatory takings.<sup>126</sup> What is clear is that it includes takings of the rights to use and enjoy property, not just the right to possession.<sup>127</sup> Requirements as to the level of impairment vacillate between a destruction of all economic value and a lesser threshold, and/or a lack of proportionality.<sup>128</sup> Justice Scalia in 1992 recognised that:<sup>129</sup>

...[i]n 70-odd years of succeeding “regulatory takings” jurisprudence, [the Supreme Court has] generally eschewed any “set formula” for determining how far is too far, preferring to “engag[e] in ... essentially ad hoc, factual inquiries.”

Given that other jurisdictions have struggled to create precise tests, it seems likely that New Zealand’s courts would struggle with this issue. Not all strict impairments on property rights will, or necessarily should, amount to a taking.

Also undefined in the RSB is ‘public interest’. Generally, it is understood in law as “utilitarian or otherwise derived aggregated social concerns that provide reasons for coercive legal action.”<sup>130</sup> A wide definition would preserve the legislature’s power to make difficult decisions, but public interest is an inherently flexible concept. For example, the power of eminent domain could also be used for commercial developments perceived to be in the public interest.<sup>131</sup> On the other hand, it can be argued that to overemphasise property rights is to unreasonably constrain a modern government from acting in the public interest. The point of the RSB is that where a public interest is asserted, its value must be quantified against the loss to private property rights.<sup>132</sup> It is highly unlikely that the courts would declare any legislation incompatible with the RSB for violation of the public interest. Judicial deference has been strongest in Commonwealth jurisdictions in relation to legislative policy decisions.<sup>133</sup> Nonetheless, it is impossible to know how the courts would interpret the RSB.

‘Property’ is also open to interpretation, meaning the principle may extend beyond land. The Taskforce intended it to apply to all types of real and personal property, including intangible

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<sup>126</sup> Ryan, above n 94, 67.

<sup>127</sup> Ibid, 68.

<sup>128</sup> Ibid, 69.

<sup>129</sup> *Lucas v South Carolina Coastal Council* 505 US 1003 (1992), 1015 (USSC)

<sup>130</sup> Underkuffler, above n 55, 66.

<sup>131</sup> See *Kelo v. City of New London*, 545 U.S. 469 (2005) (United States SC). Guerin, above n 26, 3.

<sup>132</sup> Evans and Quigley, above n 60, 259-60.

<sup>133</sup> Allen, above n 49, 202.

property. Both real property and chattels are types of “property” for the purposes of the RSB.<sup>134</sup> In other Commonwealth jurisdictions, property has also been interpreted to encompass a wide variety of interests.<sup>135</sup> Interpretation of a property right depends on the purpose of that right. If the purpose is “the enhancement or protection of individual welfare and human dignity” then the right should be interpreted accordingly.<sup>136</sup> Consequently, interpretation of the RSB will be shaped by judicial understanding of the clause’s rationale.

Property rights depend on perceptions and are vulnerable to uncertainties.<sup>137</sup> The RSB is designed to counter this by creating certainty and security, thereby encouraging investment. The Taskforce anticipated gains in economic growth would result largely from reducing uncertainty about future amendments to legislation.<sup>138</sup> There are examples in New Zealand’s legislative history of government-created property rights, where later modifications could constitute a compensable taking.<sup>139</sup> One example of this is fisheries, where tradable rights to quota have been created.<sup>140</sup> Interpretation of property under the RSB therefore is likely to be strongly influenced by economic concerns.

The Bill’s requirement for ‘full compensation’ also reflects economic concerns and is undefined. Evans and Quigley claim that “application of eminent domain without compensation is an on-going characteristic of contemporary New Zealand.”<sup>141</sup> The RSB would alter this by making it very expensive for government to limit property rights.<sup>142</sup> It creates a presumption against any legislative activity altering the possible uses of property. Arguments for this kind of limitation of government power generally focus on constitutionality and efficiency, as lack of a compensation regime may lead to “unfair and inefficient limitations on private uses of land.”<sup>143</sup>

The RSB’s requirement of full compensation for the taking or impairment of property is adopted from the existing compensation provisions of the PWA. The Taskforce perceived

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<sup>134</sup> The Regulatory Responsibility Taskforce, above n 3, 45.

<sup>135</sup> Allen, above n 49, 122.

<sup>136</sup> Ibid, 9.

<sup>137</sup> Guerin, above n 26, 23.

<sup>138</sup> The Regulatory Responsibility Taskforce, above n 3, 19.

<sup>139</sup> Guerin, above n 26, 18.

<sup>140</sup> Fisheries Act 1996.

<sup>141</sup> Evans, Quigley and Counsell, above n 43, 40.

<sup>142</sup> Ekins and Huang, above n 13, 13.

<sup>143</sup> Ryan, above n 94, 65.

that provision as well understood, and so preferred it to equivalent provisions in the Australian and United States constitutions.<sup>144</sup> However, the requirement to compensate in the RSB goes much further than that in the PWA. The parameters are also ill-defined. It is likely that the RSB's clause would be limited by nuisance through the application of the 'demonstrably justified' test in clause 7(2), but this is not immediately evident. Nor is it at all clear how that test would be applied in this context. Evans and Quigley have previously asserted that if a takings law was introduced in New Zealand, the legislature would seize the opportunity to provide the courts with detailed guidance as to their intentions.<sup>145</sup> The RSB soundly contradicts this.

The lack of guidance is especially evident when considering the threshold for compensation for impairment. As discussed, the question remains unsettled overseas. The RSB does not specify a threshold level for diminution in value leading to compensation. Nor does it specify where to seek guidance on the issue. The RSB's clause therefore fails to provide any meaningful assistance to legislators, let alone to the judiciary. If the threshold were set low, issues of affordability could arise. At its extreme, the RSB could constrain the size of government in New Zealand.<sup>146</sup> Consequently, it could have a strong disciplinary effect – but only if government acceded to a low threshold. As no bar is provided, the legislature will be forced to set their own, to which the courts would most likely defer. Furthermore, even if a taking of property was found to have failed to meet the standards required by the RSB, the property owner would still have no legal right to prevent the taking or to receive compensation.<sup>147</sup>

Whether the threshold would differ when the liability to compensate is not borne by government is another complex question. Requiring the beneficiaries of a taking to bear the cost can create better incentives in terms of both equity and efficiency.<sup>148</sup> However, where the beneficiaries are outside government, they may be very difficult to identify. The requirement that a beneficiary pay compensation is not only novel but could be extremely challenging to

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<sup>144</sup> The Regulatory Responsibility Taskforce, above n 3, 47.

<sup>145</sup> Evans and Quigley, above n 67, 258.

<sup>146</sup> Guerin, above n 26, 15.

<sup>147</sup> Jesse Wilson "Raising regulatory standards" [2011] NZLJ 99, 101.

<sup>148</sup> Guerin, above n 26, 8.

implement in practice.<sup>149</sup> This aspect of the clause is extremely imprecise and would constitute a challenge to the rule of law.

### 2.3 Conclusion

The RSB is intended to provide a framework for discussion about legislative issues. It is not intended to curb the choices available to government, but to ensure those choices are made transparently and explicitly. In reality, the RSB's framework is charged with uncertainties, particularly in relation to the prohibition on interference with private property rights. Academic comment suggests that:<sup>150</sup>

...[t]o alter government behaviour effectively without demoralizing government regulation, takings compensation legislation should provide relatively clear, bright-line tests for what types of government actions are and are not compensable.

The RSB in no way provides this. The takings clause is ill-defined and introduces radical new concepts to New Zealand's law. The potential scope is incredibly uncertain, rendering the Bill unsatisfactory according to its own principles. The law would be neither clear nor accessible, contrary to the rule of law. The confusion that marks American takings law serves as a reminder of the complexities in this area of the law and the possible risks posed by the RSB.

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<sup>149</sup> Ekins and Huang, above n 13, 13.

<sup>150</sup> E. Donald Elliott "How Takings Legislation Could *Improve* Environmental Legislation" [1997] 38 Wm. & Mary L. Rev. 1177, 1195.

## **Chapter Three: The Regulatory Standards Bill and the Constitution**

Four norms characterise New Zealand's constitution: representative democracy; Parliamentary sovereignty; rule of law and judicial independence; and the constitution as an unwritten and evolving way of acting.<sup>1</sup> This chapter will address whether the RSB conforms to New Zealand's current constitutional arrangements, as critics claim that it is "hostile to our democratic constitutional order."<sup>2</sup>

New Zealand has an unwritten liberal democratic constitution contained in a "collection of different legal instruments and customary understandings".<sup>3</sup> The RSB would operate on all three branches of government. It is therefore necessary to consider the RSB's possible impact on the relationship between the constituent elements of government and to reflect on the continuing debate on the nature and extent of judicial power.<sup>4</sup> The RSB has potential implications for Parliamentary sovereignty; the role and interpretive function of the courts; and for the New Zealand Bill of Rights Act 1990 (NZBORA) regime.

### **3.1 Parliamentary sovereignty in the 21st century**

In twenty-first century New Zealand, Dicey's classic statement on Parliamentary sovereignty holds true:<sup>5</sup>

That Parliament thus defined has, under the English constitution, the right to make or unmake any law whatever; and, further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament.

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<sup>1</sup> Matthew Palmer "New Zealand Constitutional Culture" (2007) 22 NZULR 565, 580.

<sup>2</sup> Richard Ekins "The Regulatory Responsibility Bill and the Constitution" (2010) 6 *Policy Quarterly* 9, 13.

<sup>3</sup> Palmer, above n 1, 589.

<sup>4</sup> Geoffrey Palmer "The New Zealand Constitution and the Power of the Courts" (2006) 15 *Transnat'l L. & Contemp. Probs.* 551, 553.

<sup>5</sup> Albert Venn Dicey *Lectures Introductory to the Study of the Constitution* (Macmillan, London, 1885) 36.

Parliamentary sovereignty is the fundamental rule of recognition in New Zealand's legal system<sup>6</sup> and was recently reinforced in the Supreme Court Act 2003.<sup>7</sup> Parliament may legislate without any constraints, and the courts must interpret and enforce all legislation.

However, in recent years, some commentators have speculated that Parliamentary sovereignty may not be absolute. It is now generally accepted that future Parliaments will be bound by 'manner and form' provisions in current enactments.<sup>8</sup> It has also been submitted that in very extreme circumstances, the courts might refuse to uphold legislation that, although otherwise valid, undermines certain fundamental individual rights. For example, Cooke J suggested in *Taylor v New Zealand Poultry Board* that "[s]ome common law rights presumably lie so deep that even Parliament could not override them."<sup>9</sup> Modern constitutional scholarship remains divided over the nature of the Parliamentary supremacy in an age of increased emphasis on individual human rights.<sup>10</sup>

The RSB would provide 'weak form' judicial review, much like the NZBORA. The NZBORA was originally intended to empower the courts to strike down legislation, but there was no evidence that New Zealanders had lost faith in Parliament.<sup>11</sup> The NZBORA was therefore fashioned to operate within the existing framework, as is the RSB. Parliamentary bills of rights of this kind are intended to promote 'dialogue' between the branches of government, within the confines of established constitutional norms.<sup>12</sup> Parliament retains the sole right to legislate, but also shoulders the responsibility of protecting individual rights.

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<sup>6</sup> Richard Ekins "The Authority of Parliament: A Reply to Professor Joseph" (2005) 16 KCLJ 51, 56.

<sup>7</sup> Section 3(2): "Nothing in the Act affects New Zealand's continuing commitment to the rule of law and the sovereignty of Parliament."

<sup>8</sup> Geoffrey Palmer and Matthew Palmer *Bridled Power: New Zealand's Constitution and Government* (4<sup>th</sup> ed, Oxford University Press, Melbourne, 2004), 156. One example is in the Electoral Act 1993. Section 268 imposes a restriction on the amendment or appeal of certain provisions of that Act.

<sup>9</sup> *Taylor v New Zealand Poultry Board* [1984] 1 NZLR 394 (CA) per Cooke J, 398.

<sup>10</sup> See for example Sian Elias "Sovereignty in the 21<sup>st</sup> Century: Another spin in the Merry-go-round" (2003) 14 PLR 148; E W Thomas "The Relationship of Parliament and the Courts" (2000) 31 VUWLR 5; Philip Joseph "Parliament, the Courts, and the CollaNZBORative Enterprise" (2004) 15 KCLJ 321; Dr. Michael Cullen "Parliamentary Sovereignty and the Courts" [2004] NZLJ 243; Jeffrey Goldsworthy "Is Parliament Sovereign? Recent Challenges to the Doctrine of Parliamentary Supremacy" (2003) 3 NZJPIL 7.

<sup>11</sup> Andrew Geddis and Bridget Fenton "'Which is to be Master?' – Rights-Friendly Statutory Interpretation in New Zealand and the United Kingdom" (2008) 25 *Arizona Jnl of Int'l & Comparative L* 733, 762.

<sup>12</sup> See for example: Peter W. Hogg and Allison A. Bushell "The *Charter* Dialogue between Courts and Legislatures (Or perhaps the *Charter of Rights* isn't such a bad things after all)" (2007) 35 *Osgoode Hall LJ* 75.

Parliament has simply surrendered some of its moral power by permitting the courts to criticise it.<sup>13</sup>

The RSB would function within the bounds of Parliamentary sovereignty. It expressly states that the principles do not have the force of law and that the courts may not hold any provision of legislation to be impliedly repealed or revoked, or to be in any way invalid or ineffective; or decline to apply any provision.<sup>14</sup> The courts may declare legislation incompatible with the principles,<sup>15</sup> but that power is subject to strict limits and Government representatives should first be heard.<sup>16</sup> The declaratory power is a remedy to inform only and Parliament's autonomy is therefore unambiguously preserved.<sup>17</sup>

Nevertheless, the RSB may constitute a challenge to Parliamentary sovereignty. Ekins and Huang claim that the declaratory power undermines sovereignty, as Parliament may be pressured into changing laws, based on United Kingdom precedent.<sup>18</sup> In the United Kingdom, the Human Rights Act 1998 allows the courts to declare legislation incompatible with the rights in the European Convention on Human Rights.<sup>19</sup> Where declarations have been issued, the United Kingdom Parliament has "invariably" repealed or amended provisions to reflect court decisions.<sup>20</sup> As at September 2011, 27 declarations have been made, 19 of which became final.<sup>21</sup> The Taskforce explicitly compared the RSB's declaratory power to that in the United Kingdom. Accordingly, although the RSB de jure preserves Parliamentary sovereignty, law-making power may be transferred de facto to the courts, with Parliament

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<sup>13</sup> Petra Butler "Human Rights and Parliamentary Sovereignty in New Zealand" (2004) 35 VUWLR 341, 365-6. See also below.

<sup>14</sup> Regulatory Standards Bill 2011 (277-1), cl 14.

<sup>15</sup> Ibid, clause 12(1): "A court may, in any proceedings, declare that a provision of any legislation is incompatible with 1 or more of the principles specified in section 7(1)(a) to (h)."

<sup>16</sup> Jesse Wilson "Raising regulatory standards" [2011] NZLJ 99, 102.

<sup>17</sup> Philip A. Joseph *Constitutional and Administrative Law in New Zealand* (3<sup>rd</sup> ed, Thomson Brookers, Wellington, 2007), 9.

<sup>18</sup> Richard Ekins and Chye-Ching Huang "In Search of Better Law-Making: Why the Regulatory Responsibility Bill won't deliver what it promises" (February 2011) Maxim Institute guest paper <[www.maxim.org.nz](http://www.maxim.org.nz)>, 16.

<sup>19</sup> Human Rights Act 1998 (UK), s 4(2): If the court is satisfied that the provision is incompatible with a Convention right, it may make a declaration of that incompatibility.

<sup>20</sup> Sara Jackson "Designing Human Rights Legislation: Dialogue, the Commonwealth Model and the Roles of Parliaments and Courts" (2007) 13 Auckland U. L. Rev. 89, 106.

<sup>21</sup> United Kingdom Ministry of Justice *Responding to Human Rights Judgments: Report to the Joint Committee on Human Rights on the Government's response to human rights judgments 2010-11* (September 2011) accessed at <[www.justice.govt.uk](http://www.justice.govt.uk)>, 5.

obliged to adhere to judicial views.<sup>22</sup> However, the constitutional context in the United Kingdom is different, as the European Court of Human Rights acts as a de facto court of final appeal.<sup>23</sup>

In contrast, experience with the NZBORA suggests that New Zealand's Parliament is unlikely to defer uncritically to the courts.<sup>24</sup> Parliament has endorsed declaratory judgments by endowing the courts with that power under the Human Rights Act 1993.<sup>25</sup> This can be regarded as Parliamentary recognition that a declaratory power need not be inconsistent with its sovereignty.<sup>26</sup> A recent Australian case challenged the validity of a similar provision in Victoria's Charter of Human Rights.<sup>27</sup> By a majority of 4-3, the Australian High Court held that the Charter's declaratory power is valid.<sup>28</sup> That decision suggests that the RSB's power would also be considered valid.

Parliamentary sovereignty is deeply entrenched in New Zealand's constitutional culture and the RSB does not alter that in theory. However, in practice, the RSB could actually affect the balance of institutional power. This will be further discussed in the final chapter. Questions about possible consequences of the RSB are also inextricably linked with questions about the role of the courts under the RSB and about the rule of law.

### **3.2 The role of the courts in New Zealand**

The traditional role of the courts is to expound and apply the common law, and to interpret and apply legislation.<sup>29</sup> If the RSB is enacted, the courts will be required to interpret the principles and consider compatibility in a wide range of legislative contexts. It is claimed that the RSB would require a "significant further step beyond the traditional limits of the courts'

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<sup>22</sup> Tim Smith "The Regulatory Responsibility Taskforce: A View from Inside the Room" (2010) 6 *Policy Quarterly* 14, 18.

<sup>23</sup> Geddis and Fenton, above n 11, 769.

<sup>24</sup> Smith, above n 22, 18. On the practical effects of the NZBORA and how this might be mirrored by the RSB, see 4.1.

<sup>25</sup> Section 92J(2). See also 4.2.

<sup>26</sup> Wilson, above n 16, 102.

<sup>27</sup> Victorian Charter of Human Rights and Responsibilities Act 2006, s 36: Declaration of inconsistent interpretation.

<sup>28</sup> *Momcilovic v The Queen & Ors* [2011] HCA 34.

<sup>29</sup> John Smillie "Who Wants Juristocracy?" (2006) 11 *Otago L. Rev.*, 183, 191.

constitutional role in New Zealand.”<sup>30</sup> Essentially, judges would be required to evaluate the merits of policy proposals. If a legislative provision limits one of the principles, judges will have to determine whether it is a reasonable limitation to the extent that it “can be demonstrably justified in a free and democratic society.”<sup>31</sup> Such a determination will inherently involve an evaluation of policy decisions. The RSB therefore may expand the sphere of the courts, undermining the separation of the powers.

Such an expansion would raise issues of democratic accountability. New Zealand has a strong constitutional commitment to representative democracy.<sup>32</sup> The RSB’s mechanisms may see disputes about the reasonableness of legislation transferred into legal argument, rather than in the democratic domain. Ekins and Huang argue that obeisance to legal advice and judgments is “likely to weaken the quality of legislation and illegitimately weaken our democratic culture”.<sup>33</sup> The RSB risks policy-makers deferring uncritically to judicial assessment of the merits of legislation.<sup>34</sup> Such substantive and moral judgments are better left to elected politicians as it is undemocratic to “permit a small group of non-elected, mostly male, former lawyers to substitute their views on highly contestable moral and social issues for those of the democratically elected Parliament.”<sup>35</sup>

The courts are also an inappropriate forum for making policy decisions. New Zealand’s system is adversarial, requiring judges to adjudicate rather than to investigate. Access to information therefore may be limited, preventing judges from making a fully informed decision.<sup>36</sup> Neither judges nor lawyers have experience or expertise in evaluating policy proposals of the kind that inform decisions to legislate.<sup>37</sup> Policy choices are Parliament’s province as it has both the constitutional mandate and the necessary resources. The courts are aware of their institutional shortcomings and customarily avoid intrusions into the legislative arena.<sup>38</sup> Principles of ‘justiciability’ traditionally guide the courts in determining what lies

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<sup>30</sup> The Treasury “Regulatory Impact Statement: Regulating for Better Legislation – What is the Potential of a Regulatory Responsibility Act?” (February 2011) <[www.treasury.govt.nz](http://www.treasury.govt.nz)>, 17.

<sup>31</sup> Regulatory Standards Bill 2011 (277-1), cl 7(2).

<sup>32</sup> Palmer, above n 1, 580.

<sup>33</sup> Ekins and Huang, above n 18, 15.

<sup>34</sup> Ibid.

<sup>35</sup> Smillie, above n 29, 183.

<sup>36</sup> Ekins and Huang, above n 18, 17.

<sup>37</sup> Geoffrey Palmer “A View of the Legal Debate” (2010) 6 *Policy Quarterly* 33, 39.

<sup>38</sup> Smith, above n 22, 20.

within their institutional competency.<sup>39</sup> Declining to hear matters of high policy safeguards the reputation of the courts.<sup>40</sup> Public respect for the courts as neutral arbiters of disputes could wane if they begin to participate in contingent and controversial political decisions.<sup>41</sup> Critics argue that the RSB would empower the courts to consider matters previously excluded by justiciability principles.<sup>42</sup> A new concept of justiciability could consequently flow into contexts other than RSB review, thereby encouraging judicial activism.<sup>43</sup>

This critique may be minimised by the body of NZBORA case law.<sup>44</sup> While the application of the justified limitations test to the RSB would be novel, there is a coherent case law on the equivalent NZBORA provision and a methodology has been established.<sup>45</sup> That jurisprudence reduces the uncertainty around the application of the RSB. The argument that the RSB would licence the courts to review the reasonableness of all legislation<sup>46</sup> therefore may be somewhat over-stated. Under the NZBORA, section 5 is not applied unless Parliament's intended meaning is apparently inconsistent with a protected right or freedom.<sup>47</sup> Clause 7(2) of the RSB therefore will not arise in all cases.

Nevertheless, risks remain. While a methodology for applying section 5 of the NZBORA exists, its application by different judges can lead to conflicting results. In *Brooker v Police* for example, members of the Supreme Court came to conflicting conclusions based on the weight each accorded to the right to freedom of expression in balancing competing rights.<sup>48</sup> Thomas J noted that in such cases "to a large extent the outcome depends on the subjective perception of the individual judge."<sup>49</sup>

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<sup>39</sup> Chye-Ching Huang "Regulatory Responsibility and the law" [2010] NZLJ 91, 91.

<sup>40</sup> Ibid.

<sup>41</sup> Ekins and Huang, above n 18, 17.

<sup>42</sup> Huang, above n 39, 91.

<sup>43</sup> Ibid, 92.

<sup>44</sup> NZBORA s 5 contains the same justified limitation provision: "the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

<sup>45</sup> Ibid.

<sup>46</sup> Ekins and Huang, above n 18, 15.

<sup>47</sup> *R v Hansen* [2007] 3 NZLR 1 (SC) per Tipping J at [92].

<sup>48</sup> *Brooker v Police* [2007] 3 NZLR 91 (SC).

<sup>49</sup> Ibid at [154] per Thomas J.

The Taskforce claimed that courts would defer to the judgment of policy-makers in analysis, and even in controversial cases, seldom disagree with Parliament.<sup>50</sup> Ekins maintains that this is speculation and that judges might view the RSB as a signal that Parliament now considers them competent to decide policy matters.<sup>51</sup> While indeed speculative, the RSB's explicit constraints, combined with the courts' traditional conservatism, make it very unlikely to open the floodgates. If the courts were capricious, that tendency would have manifested already under existing principle-based legislation.<sup>52</sup> NZBORA jurisprudence also indicates that the courts are likely to focus on issues of process rather than substance. Where RSB certification is thorough and clearly explains the reasoning behind any incompatibility, the courts will be unlikely to disagree.

For some the RSB represents a shift in the constitutional relationship between Parliament and the courts: a "juridification" of law-making.<sup>53</sup> Nonetheless, courts sometimes already act as constitutional advisors to Parliament; especially after the rise of 'parliamentary bills of rights' over the last couple of decades.<sup>54</sup> Parliament is also advised by external specialists on other legislative matters. Under the Treaty of Waitangi Act 1975,<sup>55</sup> Parliament can ask the Waitangi Tribunal to examine any enacted or proposed legislation for compatibility with Treaty principles.<sup>56</sup> The questions posed by the RSB may therefore not be outside the competency of the courts.<sup>57</sup> However, clause 7(2) of the RSB is not the only problematic clause.

### **3.3 Interpreting the Regulatory Standards Bill**

Statutory interpretation is "an important, albeit incidental source of constitutional law."<sup>58</sup> An interpretation should sit within the constraints of statutory purpose, per section 5 of the

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<sup>50</sup> The Regulatory Responsibility Taskforce *Report of the Regulatory Responsibility Taskforce* (30 September 2009) accessed at <www.treasury.govt.nz>, 54.

<sup>51</sup> Ekins and Huang, above n 18, 16.

<sup>52</sup> Bryce Wilkinson and Graham Scott "Regulatory responsibility: a response" [2010] NZLJ 47, 48. For example under the NZBORA or the Human Rights Act 1993.

<sup>53</sup> Ekins and Huang, above n 18, 17.

<sup>54</sup> Smith, above n 22, 19.

<sup>55</sup> Sections 6(1)(a) and 8.

<sup>56</sup> Butler, above n 13, 352.

<sup>57</sup> Smith, above n 22, 18.

<sup>58</sup> Joseph, above n 17, 28.

Interpretation Act 1999.<sup>59</sup> Clause 11 of the RSB provides that wherever an enactment can be given a meaning that is compatible with the principles of responsible regulation, that meaning must be preferred to any other meaning. It is based on section 6 of the NZBORA. In NZBORA case law, section 6 is activated only once Parliament's intended meaning breaches protected rights in a way that cannot be demonstrably justified.<sup>60</sup> The courts have applied it to exclude strained or tenuous interpretations, as in *R v Hansen*.<sup>61</sup> Despite this, its application under the RSB poses uncertainties.

The RSB's interpretive direction reflects the common law 'principle of legality' employed by courts to protect fundamental human rights.<sup>62</sup> In *R v Secretary of State for the Home Department, ex parte Simms*, Lord Hoffman explained that:<sup>63</sup>

The principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words ... In the absence of express language or even necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual.

Judges thus interpret statutes so that rights will be superseded only where Parliament has expressed an intention to do so clearly and unambiguously. New Zealand case law treats the principle of legality as statutorily incorporated by the NZBORA.<sup>64</sup> These approaches to interpretation will shape how the RSB is understood.

Critics argue that the RSB's interpretive direction is unconstitutional and "may license dubious interpretation."<sup>65</sup> While the *Hansen* decision suggests that the courts will strive to avoid novel interpretations of statutory language, Ekins and Huang point out that lower courts

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<sup>59</sup> Claudia Geiringer "The Principle of Legality and the Bill of Rights Act: A Critical Examination of *R v Hansen*" (2008) 6 NZJPIL 59, 88.

<sup>60</sup> *R v Hansen* [2007] 3 NZLR 1 (SC) per Tipping J at [92].

<sup>61</sup> *Ibid.*

<sup>62</sup> On these fundamental rights, see JF Burrows and RI Carter *Statute Law in New Zealand* (4<sup>th</sup> ed, LexisNexis, Wellington, 2009), chapter 11.

<sup>63</sup> [2000] 2 A.C. 115, at [131]. Cited in New Zealand for example in *R v Pora* [2001] 2 NZLR 37.

<sup>64</sup> Geiringer, above n 59, 73. (Section 6 of the NZBORA and cl 11 of the RSB).

<sup>65</sup> Ekins and Huang, above n 18, 18.

still have used section 6 radically.<sup>66</sup> Moreover, a similar interpretive direction in the United Kingdom's Human Rights Act has been used to significantly alter the meanings of legislation.<sup>67</sup> However, the *Hansen* judgment is recent and unlikely to be overturned quickly. The Supreme Court explicitly rejected the United Kingdom approach, and indicated that New Zealand's courts should be reluctant to assign meanings to legislation which cannot be readily sustained. However, if that is the case, then clause 7(2) of the RSB will serve no real purpose and should not be included.

On the other hand, the RSB's interpretive direction would not apply to legislation made prior to its passage until ten years after enactment.<sup>68</sup> Future courts might adopt novel statutory meanings, departing from the original legislative intent. That would effectively amount to a contingent amendment of all statutes with courts seeking to provide RSB-consistent meanings.<sup>69</sup> To retrospectively amend legislation like this would be contrary to the rule of law, one of the very principles that the RSB seeks to promote.<sup>70</sup> New Zealand's existing statute law could become uncertain and unstable.<sup>71</sup>

The RSB's interpretive direction could also destabilise regulations. Delegated legislation may be invalid if repugnant to the Act under which it was made or if repugnant in relation to Acts of general application.<sup>72</sup> Judges might read down empowering statutes or adopt artificial interpretations to create consistency with the RSB.<sup>73</sup> This occurred under the NZBORA in *Drew v Attorney-General*.<sup>74</sup> Under the RSB, regulations could be found invalid at any time, undermining the rule of law by modifying the law's predictability.<sup>75</sup> This would also undermine the RSB's objective of creating a more stable legislative environment.

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<sup>66</sup> Ekins and Huang, above n 18, 18. They cite *In the matter of application by A M M and K J O (Adoption)* HC Wellington CIV-2010-485-328, 24 June 2010 as an example of the courts effectively amending a law to fit the NZNZBORA, diverging from Parliamentary intention. See also *Hopkinson v Police* [2004] 3 NZLR 704 (HC).

<sup>67</sup> Human Rights Act 1998, s 3(1): "So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights." (UK) See Richard Ekins "Rights, Interpretation and the Rule of Law" in Richard Ekins (ed) *Modern Challenges to the Rule of Law* (LexisNexis NZ Ltd., Wellington, 2011) 165.

<sup>68</sup> Regulatory Standards Bill 2011 (277-1), cl 11(3).

<sup>69</sup> Ekins and Huang, above n 18, 18.

<sup>70</sup> Regulatory Standards Bill 2011 (277-1), cl 7(1)(a).

<sup>71</sup> George Tanner "How Does the Proposed Regulatory Responsibility Bill Measure Up Against the Principles? Changing the Role of Parliament and the Courts" (2010) 6 *Policy Quarterly* 21, 24.

<sup>72</sup> Joseph, above n 17, 1036.

<sup>73</sup> Ekins and Huang, above n 18, 18.

<sup>74</sup> [2002] 1 NZLR 58 (CA).

<sup>75</sup> Ekins and Huang, above n 18, 18.

The High Court of Australia recently held that this interpretive approach is constitutionally valid in *Momcilovic v The Queen & Ors.*<sup>76</sup> While not binding, that decision combined with NZBORA jurisprudence suggests that the RSB’s interpretive direction is not unorthodox. NZBORA jurisprudence will play an important role in determining how courts understand and interpret the RSB, raising the final question: how will the RSB relate to the NZBORA?

### **3.4 Interplay with the New Zealand Bill of Rights Act: A ‘second Bill of Rights’ Act?**

The RSB explicitly states that nothing in the principles section is intended to limit the NZBORA.<sup>77</sup> Nevertheless, it would sit awkwardly alongside the NZBORA regime. Some of the RSB’s principles (like those on liberty and property) have “the flavour of rights” and consequently seem better suited to the NZBORA.<sup>78</sup> Paul Rishworth points out that while expressed as what laws should not do, the principles are “functionally equivalent” to rights.<sup>79</sup>

The Taskforce’s claim that the RSB does not create legal rights is ultimately unsustainable. The RSB’s premise is that if legislators fail to adhere to the principles, they will be acting erroneously.<sup>80</sup> Fundamentally, the NZBORA approach is the same. The principles are also a standard for legislation: that they are framed as principles, rather than rights, is irrelevant. A principle that legislation should not diminish individual liberty is essentially the same as a principle that one’s liberty should not be diminished by legislation. The liberty principle in fact owes its centrality to the importance of that concept as a right.<sup>81</sup>

Given that the RSB is functionally identical to the NZBORA, Rishworth argues that it will be needlessly confusing to have foundational rights spread out in different statutes, operating in different ways. If the RSB’s rights are important enough to protect, then their place is in the NZBORA.<sup>82</sup> This is underscored by the overlap between the RSB’s liberty principle and the

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<sup>76</sup> *Momcilovic*, above n 28. The plaintiff questioned the validity of s 32(1) of the Victorian Charter of Human Rights and Responsibilities: “So far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights.”

<sup>77</sup> Regulatory Standards Bill 2011 (277-1): cl 7(3).

<sup>78</sup> The Treasury, above n 30, 17.

<sup>79</sup> Paul Rishworth “A Second Bill of Rights Act for New Zealand?” (2010) 6 *Policy Quarterly* 3, 3.

<sup>80</sup> Ekins and Huang, above n 18, 10.

<sup>81</sup> Rishworth, above n 79, 5. ‘Liberties’ principle: cl 7(1)(b).

<sup>82</sup> *Ibid*, 6.

rights in sections 13 to 18 of the NZBORA. A bill of rights should pronounce fundamental values and standards that are held above others and have a “transcendent appeal.”<sup>83</sup> Having multiple statutes of this kind dilutes their impact and tempts future pronouncements. For Rishworth, all fundamental rights ought to be in the NZBORA, which could be amended to include rights to property and liberty.<sup>84</sup> Privileging the RSB’s principles might also alter judicial understanding of New Zealand’s constitution.<sup>85</sup>

Moreover, the RSB goes further than the NZBORA, as it explicitly empowers the courts to give declarations of incompatibility. New Zealand’s courts have claimed to have this power in relation to NZBORA rights since *Moonen v Film and Literature Board of Review*,<sup>86</sup> but it was not granted in the statute. Nor has it ever been exercised. It seems odd that the RSB would have more rigorous protections than the NZBORA, given that the latter’s purpose is “to affirm, protect, and promote human rights and fundamental freedoms in New Zealand.”<sup>87</sup>

### 3.5 Conclusion

The RSB’s drafting preserves the underlying norms of New Zealand’s constitutional order. Despite this, it sits awkwardly in that framework, and may have unintended consequences. While New Zealand’s courts historically have tended to be deferential, the RSB could in practice generate increased judicial activism and an expansion of their role. Indeed, for the RSB to have any real impact, Parliament will have to take note of what the courts say. This may erode Parliamentary sovereignty and have serious constitutional consequences. The likely efficacy of the RSB is addressed in the next chapter.

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<sup>83</sup> Rishworth, above n 79, 6.

<sup>84</sup> *Ibid*, 7-8.

<sup>85</sup> Huang, above n 39, 92.

<sup>86</sup> [2002] 2 NZLR 754 (CA)

<sup>87</sup> NZBORA 1990.

## **Chapter Four: Can the Regulators Be Regulated? Possible Outcomes of the Regulatory Standards Bill**

The RSB's purpose is to improve the quality of legislation in New Zealand. However, it remains to be seen whether the RSB would actually have this effect. Judging the quality of legislation is difficult to do, let alone speculating about possible improvements that might result from the enactment of the RSB. It is impossible to know what the substantive outcomes for legislative quality might be. It is possible, however, to consider the likely effectiveness of the RSB's institutional mechanisms given New Zealand's constitutional and political environment.

Accordingly, this chapter will examine how the RSB's mechanisms might function, including possible outcomes from certification and declarations of inconsistency. Comparisons can be drawn between the RSB's mechanisms and other attempts to influence the legislative process. Most of the RSB's mechanisms have close parallels in other initiatives, providing practical experience on which we can draw to assess its anticipated impact.<sup>1</sup> These include: the New Zealand Bill of Rights Act 1990 (NZBORA); the Human Rights Act 1993 (HRA) and its 2001 amendment; and the passage of other legislation such as the Fiscal Responsibility Act 1994 (FRA).

### **4.1 The role of the New Zealand Bill of Rights Act in the legislative process**

Of all New Zealand's existing legislation, the NZBORA is the most analogous to the RSB. The NZBORA provides legislative recognition of rights and freedoms deemed fundamental to New Zealanders. It therefore sets a standard below which legislation should not fall. Implementation of the NZBORA created a regime under which government action must be assessed in relation to the protected rights. This parallels the RSB, which also contains provisions based on those in the NZBORA. Consequently, the NZBORA's history and jurisprudence provide a comparative basis for analysing the RSB's efficacy.

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<sup>1</sup> Tim Smith "The Regulatory Responsibility Taskforce: A View From Inside the Room" (2010) 6 *Policy Quarterly* 14, 20.

Like the RSB, the NZBORA was expected to restrain legislators and the constraints imposed are more political than legal.<sup>2</sup> The NZBORA was to incentivise legislators and public officials to more carefully scrutinise legislative proposals for rights inconsistencies, thereby avoiding public backlash over any infringements.<sup>3</sup> The NZBORA, like the RSB, contains both ex ante and ex post measures. The most significant of the former is section 7 of the NZBORA, which seeks to ensure that Parliament does not inadvertently legislate inconsistently with any of the protected rights.

Section 7 of the NZBORA stipulates that the Attorney-General is required to notify Parliament when any provision of a bill appears inconsistent with the NZBORA. Accordingly, the Cabinet Manual requires that legislative proposals are developed by reference to the NZBORA.<sup>4</sup> The Ministry of Justice vets all bills (bar their own), and advises the Attorney-General on whether any rights issues exist. The Attorney-General must then report to the House on any bill that limits any right in a manner that cannot be demonstrably justified in a free and democratic society.<sup>5</sup> Parliament and the public are thus informed of the issue, but Parliament can choose to disregard the report and enact the legislation. For regulations, the relevant Cabinet Paper should include a statement about any NZBORA inconsistencies.<sup>6</sup> These checks are intended to promote transparency, and so allow political and moral pressure to be exerted on government, thereby discouraging the passage of any rights-limiting bill. The RSB also will use such moral suasion. The goal of certification is to ensure law-makers seriously consider the compatibility of proposals with the RSB. The RSB's interpretive direction is also designed to ensure that legislative language is carefully selected and considered.<sup>7</sup>

However, the NZBORA is perceived by some as ineffective in preventing the passage of rights-limiting legislation. It is impossible to measure the effect the NZBORA process actually has in policy development, but it is likely that it does affect the shape of legislative

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<sup>2</sup> Claudia Geiringer "The Dead Hand of the Bill of Rights? Is the New Zealand Bill of Rights Act 1990 a Substantive Legal Constraint on Parliament's Power to Legislate?" (2007) 11 Otago L. Rev. 389, 390.

<sup>3</sup> Andrew Geddis "The Comparative Irrelevance of the NZNZBORA to Legislative Practice" (2009) 23 NZULR 465, 468.

<sup>4</sup> Cabinet Office *Cabinet Manual 2008* at [7.60]

<sup>5</sup> Section 5.

<sup>6</sup> Cabinet Guide "Legislation" accessed at <<http://cabguide.cabinetoffice.govt.nz/>>

<sup>7</sup> Smith, above n 1, 17.

proposals, and that officials will seek to address any issues prior to introduction.<sup>8</sup> Nonetheless, since 1990, some fifty-seven section 7 reports have been tabled in the House: twenty-seven on Government bills.<sup>9</sup> This indicates an apparent willingness to put forward rights-inconsistent legislation. The number also does not reflect the fact that the Attorney-General may not report all possible inconsistencies,<sup>10</sup> or that government may bypass the process by making substantial changes to bills after introduction.<sup>11</sup> The Electoral Finance Act 2007 is one highly-publicised example of legislation where no section 7 notice was issued, despite the fact that the Act had serious consequences for the right to freedom of expression.<sup>12</sup> The courts have declined to intervene in this process and will not review the Attorney-General's exercise of the section 7 power.<sup>13</sup> Overall, section 7 reports have had a negligible impact.<sup>14</sup> Various governments have proven willing, on multiple occasions, to introduce and pass legislation unaffected by the NZBORA.<sup>15</sup> While the NZBORA purports to apply to Parliament through section 3(a), it has not actually operated as a substantive constraint on the content of legislation.<sup>16</sup>

Essentially, Ministers have “clinically weighed the merits of infringing legislation against the political costs of defending it.”<sup>17</sup> The NZBORA is composed of generally accepted, internationally recognised human rights. Dispute tends to centre on whether the reasons provided for limits on those rights meet the section 5 test. In contrast, the RSB's principles are highly contested. It therefore seems likely that the RSB's certification provisions will not have a preventive effect. The Treasury believes the impact of certification will be muted and that government officials will have little incentive to avoid incompatibilities. Some principles (such as the liberties principle) are likely to be breached frequently, thereby lessening the impact of certification. Other principles, like that on the rule of law, are technical and breach

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<sup>8</sup> Geddis, above n 3, 472.

<sup>9</sup> Ministry of Justice “Section 7 reports” (2011) accessed at <[www.courts.govt.nz](http://www.courts.govt.nz)>

<sup>10</sup> Geddis, above n 3, 474.

<sup>11</sup> The Treasury “Regulatory Impact Statement: Regulating for Better Legislation – What is the Potential of a Regulatory Responsibility Act?” (February 2011) <[www.treasury.govt.nz](http://www.treasury.govt.nz)>, 8.

<sup>12</sup> See Geddis, above n 3, 483-6.

<sup>13</sup> *Boscawen v Attorney-General* [2009] 2 NZLR 229 (CA).

<sup>14</sup> Geddis, above n 3, 477.

<sup>15</sup> *Ibid*, 468.

<sup>16</sup> See Geiringer, above n 2.

<sup>17</sup> Philip A. Joseph *Constitutional and Administrative Law in New Zealand* (3<sup>rd</sup> ed, Thomson Brookers, Wellington, 2007), 1174.

is less likely to attract public attention.<sup>18</sup> Furthermore, the volume of certificates produced will also dilute their impact, given that about 1,600 will be required annually.<sup>19</sup>

The NZBORA was also designed to have an ex post influence on legislation. The judiciary have a narrow ability to ameliorate the effects of inconsistent legislation through the interpretive direction in section 6. However, this power is limited, as discussed in the previous chapter. Furthermore, while the courts have deemed themselves able to issue declarations of inconsistency with the NZBORA, they are yet to do so.<sup>20</sup> Even where a provision has been found to unjustifiably limit a NZBORA right, the consequences have been minimal. In *R v Hansen* the Supreme Court found that the reverse onus in the Misuse of Drugs Act unjustifiably limited the right to be presumed innocent.<sup>21</sup> Despite this, the court felt unable to provide a rights-consistent meaning as it was not plausible in light of the statutory language.<sup>22</sup> No action was taken to rectify the inconsistency. Instead, only months after the *Hansen* decision, Parliament passed the Misuse of Drugs (Classification of BZP) Amendment Act 2008, incorporating the same maligned test.<sup>23</sup>

Given that legislative practice is largely unaffected by the NZBORA,<sup>24</sup> the RSB is unlikely to have a greater effect. The RSB does have some key differences. Certification must also be undertaken by chief executives, implying that a wider degree of acceptance of the effects of proposed legislation must be obtained. Furthermore, bills must be certified not only on introduction but also before the third reading.<sup>25</sup> This latter stage is a useful development given how much bills change through the Parliamentary process.<sup>26</sup> Requiring a second certificate would necessitate reconsideration of the consequences of a bill. However, it seems improbable that notice of inconsistency with the RSB's principles would prevent the passage of legislation once that proposal had already been through select committee and the

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<sup>18</sup> The Treasury, above n 11, 14.

<sup>19</sup> *Ibid*, 15.

<sup>20</sup> See *Moonen v Film and Literature Board of Review* [2002] 2 NZLR 754 (CA).

<sup>21</sup> *R v Hansen* [2007] 3 NZLR 1.

<sup>22</sup> Geddis, above n 3, 481.

<sup>23</sup> *Ibid*, 486.

<sup>24</sup> *Ibid*, 483.

<sup>25</sup> Regulatory Standards Bill 2011(277-1): cll 8-10.

<sup>26</sup> The 2011 Review of Standing Orders has recommended that Standing Orders be amended to require Bill of Rights reporting on all substantive Supplementary Order Papers. Report of the Standing Orders Committee *Review of Standing Orders* (September 2011) accessed online at <[www.parliament.nz](http://www.parliament.nz)>, 37.

committee of the whole House. This, combined with the history of the NZBORA, suggests that the RSB will not create any meaningful change.

#### **4.2 The Human Rights Amendment Act 2001: creating consistency and declarations of incompatibility**

While the NZBORA is the most obvious precedent for the RSB, the HRA 1993 is another example of rights-based legislation in New Zealand. Its object is to promote a cultural shift within government.<sup>27</sup> The HRA, like the RSB, empowers the courts to issue declarations of inconsistency where legislation does not meet the required standard. Furthermore, prior to the Human Rights Amendment Act 2001, a massive, cross-government project was launched to ensure that all legislation was compliant with its terms: similar to that required by the RSB.

The HRA consolidated New Zealand's anti-discrimination legislation and increased the prohibited grounds of discrimination to thirteen. Given the range of rights covered, the public sector was temporarily excluded from compliance.<sup>28</sup> Section 151 of the HRA exempted the public sector until 31 December 1999, pending completion of an audit of all legislation, policies and practices for consistency with the Act.<sup>29</sup> The Human Rights Commission was given the task of commenting on the consistency of legislation with human rights standards in a project known as Consistency 2000.<sup>30</sup>

The Consistency 2000 project was not completed. The Commission ran out of time and money to complete the review and the final report covered "only a modest proportion of the total Acts and regulations in the New Zealand statute book."<sup>31</sup> A project review team in 2000 concluded that the exercise was poorly conceived and created confusion. The Commission had found widespread non-compliance with the Act's provisions throughout the public sector as the HRA could not accommodate the balancing required for public policy. The standards for the private sector were creating discriminatory results, even where the outcome was justified. As a result, the 2001 Act amended the HRA to include a new Part 1A which applied

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<sup>27</sup> Joseph, above n 17, 270.

<sup>28</sup> Sylvia Bell "The Human Rights Act 1993" in NZLS Seminar *Public Law Remedies* (New Zealand Law Society Family Law Section and Property Law Section, Wellington, June 2011) 39, 39.

<sup>29</sup> Joseph, above n 17, 270.

<sup>30</sup> Petra Butler "Human Rights and Parliamentary Sovereignty in New Zealand" (2004) 35 VUWLR 341, 352.

<sup>31</sup> Human Rights Commission *Human Rights Commission Report: Consistency 2000* (December 1998) accessed at <[www.justice.govt.nz](http://www.justice.govt.nz)>

the standard from section 5 of the NZBORA to the public sector.<sup>32</sup> Another Ministry of Justice report stated that the experience demonstrated that “an audit that is too difficult to operate ultimately results in a rush to obtain exemptions rather than to improve policies.”<sup>33</sup> Their conclusion was that a legislative approach of this kind cannot replace empirical research, monitoring the effects of legislative changes and good policy analysis.<sup>34</sup>

That conclusion has obvious implications for the RSB. The Taskforce’s intent was that in the ten year period stipulated, Ministers and public entities will undertake a comprehensive review of all legislation and either repeal, revoke or amend any inconsistent legislation.<sup>35</sup> While the RSB also mandates continuing monitoring for compatibility with departmental reviews to be included in the annual reports of public entities,<sup>36</sup> the former obligation is likely to have a greater immediate impact. The project would be similar to Consistency 2000, but of larger scope, given the need to audit for multiple principles. The Taskforce conceded that the RSB would bring forward public sector costs.<sup>37</sup> The sheer size of the effort required to update New Zealand’s body of law suggests that the cost could be enormous. Every Act, Regulation or Instrument would not only need to be assessed for clarity, but also evaluated for consistency with all of the principles. Many fundamental statutes have been so extensively amended that they have lost their coherence and so rewriting them to make them accessible would be extremely challenging. Such an undertaking would not be a proportionate response to the problem the RSB is intended to address.<sup>38</sup>

The 2001 amendment empowered the courts to grant declarations of inconsistency when an enactment breaches section 19 of the NZBORA (and therefore Part 1A of the HRA).<sup>39</sup> This remedy negotiates a middle path between Parliamentary sovereignty and higher law jurisprudence.<sup>40</sup> When a declaration under section 92J of the HRA is issued, it will not affect the validity of the enactment in question, but the responsible Minister must report the

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<sup>32</sup> Joseph, above n 17, 281.

<sup>33</sup> Ministry of Justice *Re-evaluation of the Human Rights Protections in New Zealand* (October 2000) accessed at <[www.justice.govt.nz](http://www.justice.govt.nz)>, at [78].

<sup>34</sup> *Ibid*, at [80].

<sup>35</sup> The Regulatory Responsibility Taskforce *Report of the Regulatory Responsibility Taskforce* (30 September 2009) accessed at <[www.treasury.govt.nz](http://www.treasury.govt.nz)>, 12.

<sup>36</sup> Regulatory Standards Bill 2011(277-1): cl 16.

<sup>37</sup> The Regulatory Responsibility Taskforce, above n 35, 19.

<sup>38</sup> George Tanner “How Does the Proposed Regulatory Responsibility Bill Measure Up Against the Principles? Changing the Role of Parliament and the Courts” (2010) 6 *Policy Quarterly* 21, 30.

<sup>39</sup> NZBORA s 19: freedom from discrimination and HRA: s 92J.

<sup>40</sup> Joseph, above n 17, 8-9.

government's response to the House within 120 days.<sup>41</sup> In 2008, the first declaration was issued by the Human Rights Review Tribunal (HRRT) in *Howard v Attorney-General*.<sup>42</sup> The HRRT declared that section 85 and clause 52 of the Injury Prevention Rehabilitation and Compensation Act 2001 were discriminatory on the ground of age.<sup>43</sup> The Government response was not tabled in the House until July 2010, when the Minister for ACC reported that the discriminatory provision had since been amended.<sup>44</sup> In that instance, the amending legislation was actually introduced in November 2007, prior to the declaration.<sup>45</sup> The declaratory power under the HRA has not been otherwise exercised and so it provides little guidance on possible outcomes under the RSB.

The RSB includes a declaratory power to give it political "teeth".<sup>46</sup> It is the sole remedy provided and the RSB expressly precludes other options to avoid another decision like that in *Baigent's Case*.<sup>47</sup> However, the prospect of a declaration under the RSB is unlikely to incentivise compliance and so will have little effect on legislative behaviour. It would be at least two years before the first declaration could be awarded, and one may never be issued. If declarations are frequently sought at first and awarded for minor incompatibilities, then there will be little pressure on legislators to alter their approach. In contrast, if declarations are rare, they may attract more publicity, but will not significantly affect incentives because of the probability of censure will be low.<sup>48</sup>

The Taskforce expected that a declaration would require Government and Parliament - as "a matter of comity and practical political reality" - to consider and, if appropriate, respond to the incompatibility.<sup>49</sup> They also concluded that the courts would not entertain claims where the issue was moot, such as where legislation had been certified to be incompatible.<sup>50</sup> Furthermore, in an action where a declaration is sought, public entities must be given an opportunity to provide the court and the applicant a statement as to whether the impugned

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<sup>41</sup> Bell, above n 28, 46.

<sup>42</sup> *Howard v Attorney-General* [2008] NZHRRT 10.

<sup>43</sup> *Ibid* at [90]. The Act has subsequently been renamed the Accident Compensation Act 2001.

<sup>44</sup> Minister for ACC "Report of the Minister for ACC on a declaration by the Human Rights Review Tribunal under section 92J of the Human Rights Act 1993" (7 July 2010) accessed at <[www.parliament.nz](http://www.parliament.nz)>

<sup>45</sup> Injury Prevention, Rehabilitation, and Compensation Amendment Bill (No 2) 2007 (170-3).

<sup>46</sup> Smith, above n 1, 18.

<sup>47</sup> *Simpson v Attorney-General (Baigent's case)* [1994] 3 NZLR 667 (CA). Cited in the Regulatory Responsibility Taskforce, above n 35, 63.

<sup>48</sup> The Treasury, above n 11, 15.

<sup>49</sup> The Regulatory Responsibility Taskforce, above n 35, 61.

<sup>50</sup> *Ibid*.

legislation breaches the principles. The Taskforce claimed that where a breach is acknowledged, a court will be unlikely to entertain the claim for the declaration.<sup>51</sup> Declarations therefore will operate only as a backstop remedies, highlighting where Government has refused to acknowledge that the principles have been breached.

Finally, the HRA is also illustrative in the context of regulations. Regulations are not rendered invalid by a declaration of inconsistency under the HRA.<sup>52</sup> However, they may be vulnerable on independent grounds and where Parliament has not expressly authorised an inconsistency; the courts may read down an empowering provision to preserve the prohibition against unlawful discrimination.<sup>53</sup> The principle is the same as that applied in *Drew v Attorney-General*.<sup>54</sup> In *Director of Human Rights Proceedings v New Zealand Thoroughbred Racing Inc.*, the Court of Appeal invalidated a rule of the galloping conference made under the Racing Act 1971 on the ground that the rule discriminated against a trainer on the basis of her marital status.<sup>55</sup> The rules in question were created prior to the HRA but the court said that did not make them immune to the effects of a later statute, “particularly where Parliament intended that the legislation have a special status, like the Human Rights Act.”<sup>56</sup> The RSB is intended to have a special status and may therefore have a greater impact in the context of adjudging the legality of regulations than on the creation of legislation.

### **4.3 Transparency and the Fiscal Responsibility Act 1994**

The RSB is also based on the FRA and the Reserve Bank of New Zealand Act 1989 (RBA). The FRA has been particularly influential, though it has since been incorporated into the Public Finance Act 1989.<sup>57</sup> The RSB is imbued with the same notions of transparency and accountability and also mandates “open reporting against pre-set principles.”<sup>58</sup> The impact of the FRA is therefore relevant in assessing the possible outcomes of the RSB.

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<sup>51</sup> The Regulatory Responsibility Taskforce, above n 35, 62-3.

<sup>52</sup> Section 92K.

<sup>53</sup> Joseph, above n 17, 284.

<sup>54</sup> [2002] 1 NZLR 58 (CA).

<sup>55</sup> *Director of Human Rights Proceedings v New Zealand Thoroughbred Racing Inc* [2002] 3 NZLR 333 (CA).

<sup>56</sup> *Ibid*, at [22], per Blanchard J.

<sup>57</sup> See Part 2: Fiscal Responsibility, substituted on 25 January 2005 by the Public Finance Amendment Act 2004.

<sup>58</sup> David Caygill “The Case for Better Parliamentary Scrutiny of Legislation” (2010) 6 *Policy Quarterly* 54, 54.

The FRA was motivated by concerns about the lack of fiscal information publically available during election campaigns.<sup>59</sup> It introduced a comprehensive regime of reporting requirements for the government's fiscal and economic policy; linking the information systems for budgeting with those for reporting on the government's finances.<sup>60</sup> The FRA was comprised of two key elements: a set of principles of fiscal responsibility; and a requirement for transparent assessment of the government's fiscal policies against those principles.<sup>61</sup> Government must publish a Budget Policy Statement before the Budget and a Fiscal Strategy Report at the time of the Budget, showing the consistency of the government's fiscal policy with the five principles of responsible fiscal management.<sup>62</sup> However, few of the FRA's obligations were substantive. Instead, it relied on publicity and reporting. Government is compelled to disclose proposed fiscal and economic policies and any possible consequences of those. Any departure from the principles of responsible fiscal management must be justified and temporary.<sup>63</sup> As a result, the financial implications of government decisions continue to be highly visible.<sup>64</sup>

The FRA provided a counter-weight to incentives operating on politicians, by permitting informed debate on fiscal strategy.<sup>65</sup> It is claimed to have "created a cultural shift in the way that money is spent in New Zealand and the whole mind-set around public expenditure,"<sup>66</sup> and its approach has since been duplicated overseas.<sup>67</sup> Successive governments have published statements on their fiscal intentions. The FRA is said to have successfully generated compliance with the principles, ensured that incoming governments have not been met with any surprises and permitted closer monitoring of government fiscal performance.<sup>68</sup> However, the initial public interest in fiscal statements has faded as it has become apparent

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<sup>59</sup> Graham Scott "New Zealand's Fiscal Responsibility Act" (1995) 2 *Agenda* 3, 4.

<sup>60</sup> *Ibid*, 12.

<sup>61</sup> Bryce Wilkinson *Constraining Government Regulation* (New Zealand Business Roundtable, Wellington, 2001), 84.

<sup>62</sup> Now in s 26G of the Public Finance Act 1989. See further: the Treasury "A Guide to the Public Finance Act" (2005) accessed online at <[www.treasury.govt.nz](http://www.treasury.govt.nz)>.

<sup>63</sup> Geoffrey Palmer and Matthew Palmer *Bridled Power: New Zealand's Constitution and Government* (4<sup>th</sup> ed, Oxford University Press, Melbourne, 2004), 120.

<sup>64</sup> Scott, above n 59, 6.

<sup>65</sup> *Ibid*, 10.

<sup>66</sup> Rodney Hide "Adoption of the Regulatory Responsibility Bill Drafted by the Regulatory Responsibility Taskforce" (2 February 2011) Memorandum to Cabinet Economic Growth Committee EGI (11) 7, accessed at <[www.treasury.govt.nz](http://www.treasury.govt.nz)>, 5.

<sup>67</sup> Richard Hemming and Michael Kell "Promoting Fiscal Responsibility: Transparency, Rules, and Independent Fiscal Authorities" (2001) Banca D'Italia Third Workshop on Fiscal Rules, Perugia, February 1-3, 2001. Accessed online at <[www.bancaditalia.it](http://www.bancaditalia.it)>, 436.

<sup>68</sup> Wilkinson, above n 61, 84.

that submissions to the finance and expenditure select committee have negligible effects on government policy. The FRA's goals (including fiscal surplus and low net debt) also were unlikely to attract strong opposition from interest groups, in contrast to the RSB.<sup>69</sup>

The RSB has been constructed by analogy to the FRA, but the RSB's principles are more contentious. There has also been a significant shift in the political climate since the FRA's passage. It was passed on the basis of a cross-party consensus which no longer exists. The RSB does not have broad support and if enacted, there is no guarantee that it would survive a change in government.<sup>70</sup> Furthermore, the RSB might create an environment in which policy-makers seek to evade its requirements. Geoff Bertram points out that the FRA was designed to compel the Minister of Finance to provide full accounts to Parliament. Instead it has created a policy environment in which contentious transactions are taken off the Crown balance sheet, with fiscal policy increasingly reliant on state-owned enterprise profits and assets. As these are separate entities, Ministers can claim to have little control over their behaviour and thus shirk accountability of the kind the FRA was fashioned to facilitate.<sup>71</sup> The RSB could equally encourage misleading behaviour.

The RSB is intended to implement a framework for transparency and accountability, thereby creating informed debate. It is predicated on an assumption that transparency will result in higher quality legislation with lower compliance costs and fewer unintended consequences.<sup>72</sup> In this sense, the mechanisms are well constructed to make information available. The certification regime is intended to provide clear, accessible information on the rationale for legislation, early in the process.<sup>73</sup> However, there is no guarantee that this would be sufficient to spark increased debate and even less that increased debate could ensure better quality legislation.

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<sup>69</sup> Wilkinson, above n 61, 85.

<sup>70</sup> Jane Kelsey "Regulatory Responsibility': Embedded Neoliberalism and its Contradictions" (2010) 6 *Policy Quarterly* 36, 39.

<sup>71</sup> Geoff Bertram "Deregulatory Irresponsibility: Takings, Transfers and Transcendental Institutionalism" (2010) 6 *Policy Quarterly* 48, 52.

<sup>72</sup> Hide, above n 66, 5.

<sup>73</sup> Smith, above n 1, 17.

#### **4.4 The crux of the issue: can the Regulatory Standards Bill actually constrain Parliament?**

As discussed in the previous chapter, the RSB has been drafted to fit New Zealand's constitutional framework. The RSB's provisions therefore explicitly preserve Parliamentary sovereignty and the courts cannot decline to apply legislation. However, this raises the question of whether the RSB can actually have any meaningful consequences.

For the RSB to be effective, it must essentially shift the balance of institutional power. The Taskforce concluded that the principles would not be adhered to without "meaningful consequences in the event of non-compliance."<sup>74</sup> If a legislative proposal is certified as containing an unjustifiably inconsistent provision, then there must be real pressure on Parliament to rectify that inconsistency. If not, the RSB will only operate as a compliance exercise. The same applies to the power of the courts to give declarations of inconsistency. If a court declares legislation inconsistent and Parliament takes no action, then the RSB will only be window-dressing. The Taskforce looked to the United Kingdom's Human Rights Act 1998 for guidance as declarations of inconsistency from the United Kingdom courts often have elicited change.<sup>75</sup> If this eventuated in New Zealand, the RSB would shift the constitutional balance between legislature, executive and judiciary, de facto curtailing the Parliament's sovereignty. If Parliament does act based on declarations, the price is the possible introduction of judges into the policy arena.<sup>76</sup>

It is therefore paradoxical that advocates of the RSB claim it will not affect New Zealand's constitution. If that were so, then there would be no cause to enact it. The point of providing the courts with a declaratory power is that Parliament *should* be obliged to consider altering legislation with inconsistencies. If Parliament follows the United Kingdom example and changes legislation in every instance where a declaration is issued, then the boundaries of Parliamentary sovereignty may accordingly recede. To have practical consequences in New Zealand's legal system, the RSB will require judicial review of a stronger form than currently exists.

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<sup>74</sup> The Regulatory Responsibility Taskforce, above n 35, 61.

<sup>75</sup> See 3.1.

<sup>76</sup> Paul Rishworth "A Second Bill of Rights Act for New Zealand?" (2010) 6 *Policy Quarterly* 3, 8. See also Chapter Three.

Tim Smith, a Taskforce member, acknowledges this contradiction but does not convincingly explain why it does not undercut the rationale for the RSB. Smith notes that the declarative power must have some political or moral force or there is no reason to include it. However, he also states that a de facto transfer of legislative power to the judiciary is undesirable. Smith believes it unlikely based on NZBORA history, as “politicians have not been substantially cowed by the threat of judicial remonstrance in enacting legislation that is inconsistent with the rights.”<sup>77</sup> This is inherently contradictory – if the threat of judicial reprimand is indeed ineffective, then the RSB will not modify legislative behaviour and so not achieve its purpose. If the RSB is to play an active role in New Zealand’s institutional culture, then such a transfer is necessary. It need not be extreme, and indeed is unlikely to be, but Parliament must at least take genuine notice of judicial pronouncements.

A constitutional shift is therefore a necessary corollary. There is a case for some measure of judicial activism in New Zealand, given that other checks and balances on government have been eroded over time, leaving a Parliament where “legislative due process is ... sacrificed to efficiency, to executive impatience, and to political expediency.”<sup>78</sup> The RSB could be viewed through the lens of the parliamentary bill of rights model. On that understanding, the constitutional balance between branches of government is maintained and dialogue established. However, the consequences and constitutional foundation of that model are also disputed, and it cannot resolve the paradoxical nature of the RSB.

#### 4.5 Conclusion

Constitutional change in New Zealand has historically been an ad hoc and “pragmatic evolution.”<sup>79</sup> The constitution has evolved in response to the realities of difficult situations.<sup>80</sup> For example, the NZBORA was conceived as an aversive response to the perceived authoritarian nature of the Muldoon government in the 1980s, rather than from desire for constitutional change for its own sake.<sup>81</sup> The expectation is that politicians will “fix problems

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<sup>77</sup> Smith, above n 1, 18.

<sup>78</sup> Jeremy Waldron “Compared to what? Judicial activism and New Zealand’s Parliament” [2005] NZLJ 441, 443.

<sup>79</sup> Joseph, above n 17, 139.

<sup>80</sup> Matthew Palmer “New Zealand Constitutional Culture” (2007) 22 NZULR 565, 574.

<sup>81</sup> David Erdos “Aversive Constitutionalism in the Westminster World: The Genesis of the New Zealand Bill of Rights Act (1990)” (2007) 5 *Int. J. Constitutional L.* 343, 344-5.

as they appear and ... fashion world-leading innovations with number eight wire after tinkering in the constitutional shed.”<sup>82</sup> That attitude may mean that the RSB cannot be effective, as the problem of poor legislation is not widely accepted.

The RSB’s mechanisms are intended to create behavioural change across government. However, this is difficult to achieve and it is impossible to predict whether the RSB could in fact create better quality legislation. Without a culture of quality, the RSB will simply represent another set of boxes to tick.<sup>83</sup> Far from cutting red tape, the RSB seems likely to create a tangle of it.<sup>84</sup> Economic theory suggests that the creation of regulatory provisions may trigger a counter-productive behavioural response in individuals as they seek either to evade or subvert the regulation for their own interests.<sup>85</sup> This may prove to be the case with the RSB. Other legislative measures such as the NZBORA and the HRA have not created a dramatic cultural shift, nor altered the parameters of Parliamentary sovereignty. Accordingly, it seems unlikely that the RSB would have any greater impact on the legislative process.

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<sup>82</sup> Palmer, above n 80, 576.

<sup>83</sup> Rishworth, above n 76, 8.

<sup>84</sup> Bertram, above n 71, 48.

<sup>85</sup> Ibid, 52.

## Conclusion

The Regulatory Standards Bill 2011 is intended to usher in a new era of transparency and accountability, improving both New Zealand's legislative and economic environments. Legislation provides the framework in which we live and do business in New Zealand so its quality is a perennial issue. New Zealand has few effective quality-control mechanisms and a largely unconstrained Parliament. Accordingly, the RSB proposal is not without merit.

However, as it stands, the RSB incorporates too many uncertainties and poses too many risks. Its consequences could diverge drastically from the Taskforce's predictions. The RSB's principles are controversial and are of uncertain scope and dubious orthodoxy. This is exemplified by the takings principle. The RSB would not meet its own standards as the principles are vague, unclear and likely to destabilise New Zealand's law. In turn, this would undercut the rule of law.

It is impossible to know how the judiciary will interpret the principles, which compounds those uncertainties. The RSB was drafted to be constitutionally orthodox, but it nonetheless raises questions about the nature of the relationship between Parliament and the courts. It would require the courts to make judgments about the reasonableness of policy choices, stretching their institutional capacity both conceptually and practically. If the RSB's mechanisms function as proposed, Parliamentary sovereignty may be diminished. Indeed, for it to be effective, the RSB *must* cause a constitutional shift.

The RSB therefore could to undermine not only the stability of legislation but also the balance of institutional power between the branches of government. It would challenge many of New Zealand's constitutional norms, not least the importance of the political process for making choices on contested social and economic issues. The RSB is therefore conceptually problematic. It also raises practical problems, as it would be extremely costly and complex to implement.

However, the RSB is unlikely to have a significant practical impact. The NZBORA was expected to have a dramatic effect on legislative practice in New Zealand but that did not eventuate and successive governments have proven willing to override its rights and freedoms. In order to create real, cross-government change, a cultural shift is required. In

short, the RSB does not provide the “coherent, mandatory regulatory quality regime” the Taskforce wanted.<sup>1</sup>

Accordingly, the RSB should not be enacted. Too many problems exist. Its implementation would require a mammoth project to alter the statute book with unknown consequences for New Zealand’s law. To undertake a task of that magnitude when the RSB may prove ineffectual would be imprudent. As it stands, the RSB is likely to have a negligible influence on legislative quality and could have other unintended consequences. Whether revision could eliminate these risks is also questionable.

At present, the RSB’s passage is far from guaranteed. As at 14 October 2011, the House has only twelve more sitting days prior to the general election. The Commerce Committee’s report is due on 20 October 2011, so the RSB may be considered before Parliament dissolves. However, given the range of issues, the Commerce Committee is not likely to recommend that the RSB proceed. Further tinkering is therefore necessary to construct an effective solution to the problem of legislative quality.

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<sup>1</sup> The Regulatory Responsibility Taskforce *Report of the Regulatory Responsibility Taskforce* (30 September 2009) accessed at <[www.treasury.govt.nz](http://www.treasury.govt.nz)>, 16.

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## **Appendix**

### **Regulatory Standards Bill 2011 (277-1)**

Government Bill

#### **Explanatory note General policy statement**

The purpose of the Regulatory Standards Bill is to improve the quality of regulation (meaning Acts of Parliament, statutory regulations, and tertiary legislation) in New Zealand. The Bill has its origins in a private member's Bill, then known as the Regulatory Responsibility Bill, that Parliament's Commerce Committee examined in 2008. The Committee recommended that the member's Bill not be passed, but that the Government establish a high-level expert taskforce to consider options for improving regulatory review and decision-making processes, including legislative and Standing Orders options.

Following the recommendation of the Commerce Committee, the Government established the Regulatory Responsibility Taskforce in March 2009. The current Regulatory Standards Bill is the result of the work of that Taskforce.

The Regulatory Standards Bill aims to improve the quality of regulation in New Zealand by increasing the transparency of regulation-making and the accountability of regulation makers. In essence, the Bill has 3 key components. It—

- provides a benchmark for good regulation through a set of regulatory principles that all regulation should comply with; and
- provides transparency by requiring those proposing and creating regulation to certify whether the regulation is compatible with the principles; and
- provides monitoring of the certification process through a new declaratory role for the courts.

The Bill's principles apply to Acts of Parliament, regulations, and tertiary legislation (excluding regulation made by local government). The principles are distilled from sources such as the Legislative Advisory Committee (LAC) Guidelines, the common law, and Parliament's Regulations Review Committee.

The principles cover 7 key areas, including the rule of law, protection of individual liberties, protection of property rights, the imposition of taxes and charges, the role of the courts, review of administrative decisions, and good law-making processes. Any incompatibility with the principles is justified to the extent that it is reasonable and can be demonstrably justified in a free and democratic society.

The Bill provides transparency by requiring those proposing and creating regulation to certify whether the regulation is compatible with the principles, and the justification for any incompatibility. Depending on the kind of regulation, the Bill will require Ministers, chief executives, or both chief executives and Ministers, to certify compliance with the principles.

This certification process ensures transparency about whether regulation is consistent with legal principle.

The Bill provides monitoring of the certification process, and accordingly incentives for accurate certification, by allowing the courts to provide declarations of incompatibility where they believe that the principles have been breached. This power is declaratory only; the courts will not have the power to strike down legislation, to issue injunctions against Parliament or the Crown, or to award damages to those adversely affected by regulation that is incompatible with the principles.

Initially, the courts will be able to make declarations only in relation to regulation made after the commencement of the Bill. After 10 years, the declaratory power extends to all regulation.

In addition to the key benchmarking, transparency, and monitoring components, the Regulatory Standards Bill directs the courts to prefer legislative interpretations that are consistent with the Bill's principles. This direction applies initially only to new regulation, but after 10 years to the existing stock of regulation as well. The Bill also requires every public entity to use its best endeavours to review all regulation that it administers regularly for compatibility with the principles. The steps entities have undertaken to review their regulation and the outcomes from this process are required to be included in the entities' annual reports.

### **Regulatory impact statement**

The Treasury produced a regulatory impact statement on 2 February 2011 to help inform the main policy decisions taken by the Government relating to the contents of this Bill.

A copy of this regulatory impact statement can be found at –

- <http://www.treasury.govt.nz/publications/informationreleases/ris>

### **Clause by clause analysis**

The drafting of this Bill reflects the wording of the draft Bill contained in the Report of the Regulatory Responsibility Taskforce of September 2009. Part 4 of that report contains the Taskforce's commentary on that draft Bill (<http://www.treasury.govt.nz/economy/regulation/rrb>).

*Clause 1* is the Title clause.

*Clause 2* is the commencement clause. The Bill comes into force 6 months after the date on which it receives the Royal assent.

*Clause 3* sets out the purpose of the Bill.

*Clauses 4 and 5* relate to interpretation. The legislation to which the Bill applies is defined broadly to include primary, secondary, and tertiary legislation, but does not include instruments made by local government.

*Clause 6* provides that the Act binds the Crown.

*Clause 7* sets out the principles of responsible regulation. In summary, the principles are that legislation should—

- be consistent with certain specified aspects of the rule of law:

- not diminish a person’s liberty, personal security, freedom of choice or action, or rights to own, use, and dispose of property, except as is necessary to provide for, or protect, any such liberty, freedom, or right of another person:
- not take or impair property without the consent of the owner unless certain criteria are satisfied (including payment of full compensation):
- not impose a tax except by or under an Act:
- not impose a charge for goods or services unless the amount of the charge is reasonable (in relation to both the likely benefits of the goods or services to the payer and the costs of efficiently providing the goods or services):
- preserve the courts’ role of authoritatively determining the meaning of legislation:
- provide a right of appeal on the merits against certain decisions affecting any liberty, freedom, or right referred to above, and should state appropriate criteria for making those decisions:
- not be made unless, to the extent practicable, the persons likely to be affected by the legislation have been consulted:
- not be made unless there has been a careful evaluation of certain matters (for example, the issues concerned, the effectiveness of the existing law, the options, the benefits, and any reasonably foreseeable adverse consequences):
- produce benefits that outweigh the costs of the legislation:
- be the most effective, efficient, and proportionate response to the issue concerned that is available.

*Subclause (2)* provides that an incompatibility is justified to the extent that it is reasonable and can be demonstrably justified in a free and democratic society. This is similar to the qualification that exists in section 5 of the New Zealand Bill of Rights Act 1990.

*Subclause (3)* confirms that the clause does not limit the New Zealand Bill of Rights Act 1990.

*Clauses 8 and 9* provide that the following persons must each sign, at each of the following times, a written certificate as to compatibility of new legislation with the principles of responsible regulation:

<i>Type of legislation</i>	<i>Persons who must each sign certificate</i>	<i>Times at which certificate must be given</i>
Government Bill	The Minister responsible for the Bill.  The chief executive of the public entity that will be responsible for administering the Bill when it has been enacted.	Before the Bill is introduced to the House of Representatives.  Before its third reading.
Any Bill other than a Government Bill	The member of Parliament responsible for the Bill	Before the Bill is introduced to the House of Representatives.
Any other legislation	The Minister responsible for the legislation (if a Minister	Before its third reading. Before the legislation is made

is responsible).

The chief executive of the public entity that will be responsible for administering the legislation when it has been made.

A certificate given by a chief executive is not required to state whether any incompatibility with the principles is justified if a Minister has also given a certificate.

*Clause 10* requires the certificate in respect of a Bill to be presented to the House of Representatives.

*Clause 11* provides that wherever an enactment can be given a meaning that is compatible with the principles (after taking account of the qualification in *clause 7(2)* relating to what is reasonable and can be demonstrably justified in a free and democratic society), that meaning is to be preferred to any other meaning. This clause will apply to legislation made before the date on which the Bill comes into force only after the tenth anniversary of that date.

*Clause 12* provides that certain courts may declare legislation incompatible with the principles. This applies to legislation made before the date on which the Bill comes into force only after the tenth anniversary of that date.

*Clause 13* provides that a court declaration has only a declaratory effect, and does not give rise to any substantive rights.

*Clause 14* provides that the principles do not have the force of law.

*Clause 15* gives the relevant Minister power to issue certain guidelines.

*Clause 16* requires every public entity to regularly review all legislation that it administers for compatibility with the principles.

*Clause 17* requires public entities to publish certain information on the Internet.

Hon Rodney Hide

# **Regulatory Standards Bill**

Government Bill

277—1

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## **The Parliament of New Zealand enacts as follows:**

### **1 Title**

This Act is the Regulatory Standards Act 2011.

### **2 Commencement**

This Act comes into force 6 months after the date on which it receives the Royal assent.

## **Part 1 Preliminary provisions**

### **3 Purpose**

The purpose of this Act is to improve the quality of Acts of Parliament and other kinds of legislation by—

- (a) specifying principles of responsible regulation that are to apply to new legislation and, over time, to all legislation; and
- (b) requiring those proposing new legislation to state whether the legislation is compatible with those principles and, if not, the reasons for the incompatibility; and
- (c) granting courts the power to declare legislation to be incompatible with those principles.

### **4 Interpretation**

In this Act, unless the context otherwise requires,—

*legislation* has the meaning set out in section 5

*legislative instrument* means a regulation, rule, Order in Council, bylaw, proclamation, notice, warrant, determination, authorisation, or other document that—

- (a) determines the law or alters the content of the law, rather than applying the law in a particular case; and
- (b) directly or indirectly affects a privilege or interest, imposes an obligation, creates a right, or varies or removes an obligation or right

*principles* means the principles of responsible regulation stated in section 7(1)

*public entity* means—

- (a) a Department within the meaning of section 2 of the State Sector Act 1988; and
- (b) an entity or office named in Schedule 1 of the Crown Entities Act 2004; and
- (c) the Reserve Bank of New Zealand; and
- (d) any person or body that is established by or under an Act (other than the Local Government Act 2002) if that person or body, or an officer or employee of that person or body, has functions that include the making of legislative instruments

*public official* means an officer or employee of a public entity.

### **5 Meaning of legislation**

In this Act, unless the context otherwise requires, *legislation* means any of the following that has the force of law in New Zealand:

- (a) an Act of the Parliament of New Zealand or of the General Assembly;
- (b) a legislative instrument that is a regulation, or that is required to be treated as a regulation, for the purposes of the Acts and Regulations Publication Act 1989 or the Regulations (Disallowance) Act 1989:

- (c) any other legislative instrument made under an enactment by the Governor-General in Council, a Minister of the Crown, a public official, or a public entity.

## **6 Act binds the Crown**

This Act binds the Crown.

## **Part 2**

### **Principles of responsible regulation and their effect**

#### *Principles of responsible regulation*

## **7 Principles**

- (1) The principles of responsible regulation are that, except as provided in subsection (2), legislation should—

#### *Rule of law*

- (a) be consistent with the following aspects of the rule of law:
  - (i) the law should be clear and accessible:
  - (ii) the law should not adversely affect rights and liberties, or impose obligations, retrospectively:
  - (iii) every person is equal before the law:
  - (iv) issues of legal right and liability should be resolved by the application of law, rather than the exercise of administrative discretion:

#### *Liberties*

- (b) not diminish a person's liberty, personal security, freedom of choice or action, or rights to own, use, and dispose of property, except as is necessary to provide for, or protect, any such liberty, freedom, or right of another person:

#### *Taking of property*

- (c) not take or impair, or authorise the taking or impairment of, property without the consent of the owner unless—
  - (i) the taking or impairment is necessary in the public interest; and
  - (ii) full compensation for the taking or impairment is provided to the owner; and
  - (iii) that compensation is provided, to the extent practicable, by or on behalf of the persons who obtain the benefit of the taking or impairment:

#### *Taxes and charges*

- (d) not impose, or authorise the imposition of, a tax except by or under an Act:
- (e) not impose, or authorise the imposition of, a charge for goods or services (including the exercise of a function or power) unless the amount of the charge is reasonable in relation to both—
  - (i) the benefits that payers are likely to obtain from the goods or services; and
  - (ii) the costs of efficiently providing the goods or services:

#### *Role of courts*

- (f) preserve the courts' role of authoritatively determining the meaning of legislation:
- (g) if the legislation authorises a Minister, public entity, or public official to make decisions that may adversely affect any liberty, freedom, or right of a kind referred to in paragraph (b),—

- (i) provide a right of appeal on the merits against those decisions to a court or other independent body; and
- (ii) state appropriate criteria for making those decisions:

*Good law-making*

- (h) not be made unless, to the extent practicable, the persons likely to be affected by the legislation have been consulted:
  - (i) not be made (or, in the case of an Act, not be introduced to the House of Representatives) unless there has been a careful evaluation of—
    - (i) the issue concerned; and
    - (ii) the effectiveness of any relevant existing legislation and common law; and
    - (iii) whether the public interest requires that the issue be addressed; and
    - (iv) any options (including non-legislative options) that are reasonably available for addressing the issue; and
    - (v) who is likely to benefit, and who is likely to suffer a detriment, from the legislation; and
    - (vi) all potential adverse consequences of the legislation (including any potential legal liability of the Crown or any other person) that are reasonably foreseeable:
  - (j) produce benefits that outweigh the costs of the legislation to the public or persons:
  - (k) be the most effective, efficient, and proportionate response to the issue concerned that is available.
- (2) Any incompatibility with the principles is justified to the extent that it is reasonable and can be demonstrably justified in a free and democratic society.
  - (3) Nothing in this section limits the New Zealand Bill of Rights Act 1990.

*Certification*

**8 Certificate as to compatibility of legislation with principles**

- (1) The Minister responsible for a Government Bill, and the chief executive of the public entity that will be responsible for administering the resulting Act immediately after it has been enacted, must each sign a written certificate containing the information specified in section 9—
  - (a) before the Bill is introduced to the House of Representatives; and
  - (b) before the commencement of the Bill's third reading in the House of Representatives.
- (2) The member of Parliament who is in charge of a Bill (other than a Government Bill) must sign a written certificate containing the information specified in section 9—
  - (a) before the Bill is introduced to the House of Representatives; and
  - (b) before the commencement of the Bill's third reading in the House of Representatives.
- (3) The Minister responsible for legislation of a kind referred to in section 5(b) or (c) (if a Minister is responsible), and the chief executive of the public entity that will be responsible for administering that legislation immediately after it is made, must each sign a written certificate containing the information specified in section 9 before that legislation is made.
- (4) Despite any other enactment, a Minister may not delegate his or her duties under this section to anyone other than a member of the Executive Council, and a chief executive may not delegate his or her duties under this section to anyone other than a person who is acting as chief executive in his or her place.

## **9 Content of certificate**

- (1) A certificate signed by a person for the purpose of section 8 must state, in the person's opinion,—
  - (a) whether the legislation is compatible with each of the principles; and
  - (b) if not, the respects in which it is incompatible; and
  - (c) if paragraph (b) applies,—
    - (i) whether the incompatibility is justified under section 7(2); and
    - (ii) if so, the reasons for that justification and, if not, the reasons why the legislation is proceeding despite the lack of justification.
- (2) Subsection (1)(c) does not apply to a certificate given by a chief executive of a public entity if a Minister has also given a certificate under section 8.

## **10 Certificate must be presented to House of Representatives**

A certificate in respect of a Bill for the purposes of section 8 must be presented to the House of Representatives as soon as practicable after the certificate is signed.

### *Application of principles*

## **11 Interpretation compatible with principles to be preferred**

- (1) Wherever an enactment can be given a meaning that is compatible with the principles (after taking account of section 7(2)), that meaning is to be preferred to any other meaning.
- (2) The court may, on application or its own motion, grant leave for the Solicitor-General to be joined as a party to proceedings in which subsection (1) may be applied.
- (3) Subsection (1) applies to an enactment made before the date on which this Act comes into force only after the tenth anniversary of that date.

Compare: 1990 No 109 s 6

## **12 Court may declare legislation incompatible with principles**

- (1) A court may, in any proceedings, declare that a provision of any legislation is incompatible with 1 or more of the principles specified in section 7(1)(a) to (h) (unless the incompatibility is justified under section 7(2)).
- (2) However, a court may not make a declaration unless, before the declaration is made,—
  - (a) the public entity responsible for administering the legislation concerned (if any) has been given the opportunity to provide to both the person seeking the declaration and the court a statement as to whether the legislation is incompatible with the principles; and
  - (b) the Solicitor-General has been given notice of, and the opportunity to be joined as a party to, the proceedings.
- (3) In this section and section 13,—

*court* means the High Court, the Court of Appeal, or the Supreme Court  
*proceedings* means—

  - (a) proceedings that relate only to an application for a declaration under subsection (1) or the Declaratory Judgments Act 1908; or
  - (b) judicial review proceedings.
- (4) Subsection (1) applies to legislation made before the date on which this Act comes into force only after the tenth anniversary of that date.

Compare: Human Rights Act 1998 ss 4, 5 (UK)

### **13 Effect of court declaration**

- (1) A declaration under section 12—
  - (a) does not affect the validity, continuing operation, or enforcement of the provision in respect of which it is given; and
  - (b) is not binding on the parties to the proceedings in which it is made.
- (2) A court may award costs against or in favour of any party to proceedings under section 12, but may not make an order for an injunction or compensation or anything else in conjunction with or in respect of—
  - (a) a declaration under section 12; or
  - (b) a certificate given, or a failure to give a certificate, under section 8.

### **14 Legal effect of principles**

- (1) The principles do not have the force of law (except as provided in sections 11 to 13).
- (2) No court may, in relation to any legislation (whether made before or after the commencement of this Act),—
  - (a) hold any provision of the legislation to be impliedly repealed or revoked, or to be in any way invalid or ineffective; or
  - (b) decline to apply any provision of the legislation—by reason only that the provision is incompatible with any of the principles or that any provision of this Act has not been complied with.

Compare: 1990 No 109 s 4

## **Part 3 Miscellaneous provisions**

### **15 Guidelines**

- (1) The Minister who is responsible for the administration of this Act may, by notice in the *Gazette*, issue guidelines as to any or all of the following:
  - (a) examples of the application of the principles;
  - (b) the information that should be included in explanatory notes for legislation as to the compatibility of the legislation with the principles;
  - (c) the steps that public entities should take in order to comply with section 16(1);
  - (d) the steps that persons and public entities should take in order to comply with section 17.
- (2) The guidelines do not have the force of law.
- (3) The Minister must ensure that the guidelines are published, at all reasonable times, on an Internet site maintained by or on behalf of the Department that is responsible for the administration of this Act.

### **16 Review of legislation for compatibility with principles**

- (1) Every public entity must use its best endeavours to regularly review all legislation that it administers for compatibility with the principles.
- (2) Every public entity must include in each of its annual reports under the Public Finance Act 1989, the Crown Entities Act 2004, or any other Act a statement of—
  - (a) what steps it has taken to comply with subsection (1) during the year to which the report relates; and
  - (b) the outcomes of any reviews under that subsection that it has completed during that year.

**17 Publication of information on Internet**

- (1) Every public entity that is responsible for administering any legislation must publish a list of that legislation on the Internet.
- (2) Every public entity that publishes, or provides to a court, information about the compatibility of legislation with the principles (whether for the purpose of section 12, or in accordance with guidelines under section 15, or otherwise) must ensure that the information is published on the Internet throughout the period during which the legislation is in force.
- (3) However,—
  - (a) information that is provided to a court is required to be published on the Internet under subsection (2) only after the relevant court proceedings have been finally completed; and
  - (b) subsection (2) does not require a public entity to publish information on the Internet if there would, under the Official Information Act 1982, be good reason for withholding the information if a request for that information to be made available were made under that Act.
- (4) Every person who signs a certificate under section 8 must ensure that a copy of the certificate is published on the Internet throughout the period during which the legislation is in force.
- (5) Material required by this section to be published on the Internet by a public entity must be published on an Internet site maintained by or on behalf of the public entity so that it is available at all reasonable times.