

Institute of Policy Studies Seminar on Regulatory Review Bill

A SECOND BILL OF RIGHTS FOR NEW ZEALAND?

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In what follows I have not tried to say everything that can be said. I focus on one aspect of the proposed Regulatory Responsibility Bill (RRB). Here are the points I will make:

- 1. Why the RRB is a second Bill of Rights**
- 2. Why there should only be one Bill of Rights**
- 3. Recommendation I: some of the proposed rights in the RRB should be considered for inclusion in the New Zealand Bill of Rights Act 1990**
- 4. Recommendation II: some of the operational provisions proposed for the RRB could usefully be incorporated in the Bill of Rights.**
- 5. Recommendation III: the remaining “principles” in the RRB should not be justiciable to any degree, not even in statutory interpretation. They should be enacted, if at all, as Parliament’s message to its members.**

Introduction

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

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

¹ I am convenor of the NZLS Law Reform Committee which generally makes submissions on Parliamentary Bills, and which did so on the Regulatory Responsibility Bill in 2008. But I am speaking today in a personal capacity.

The RRB hinges, then, around the concept of “compatibility” with the principles.

What are these “principles”?

They are set out in proposed s 7. They are essentially in two categories, what I will call substantive principles (what the legislation ought to be like in its substance) and procedural (how legislation ought to be made).

Legislation should

- Be consistent with the rule of law. That is immediately specified in greater detail to mean (i) law should be clear, (ii) not adversely retrospective in the way it affects existing rights, (iii) that people should be equal before the law in the sense that it applies uniformly to all, and (iv) that issues of legal right and liability should be resolved by law and not administrative discretion.
- Not diminish a person’s liberty, personal security, freedom of choice or action, or rights to own use or dispose of property.
- Not take or impair property without consent of owner, save when the taking or impairing is in the public interest, and full compensation is provided by the persons who benefit from the taking

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

Then there are other substantive principles. Legislation should:

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

These, too, are essentially rights (that legislation should have this substance). That said, they are not rights of the classic sort that get included in bills of rights (though the last could be, albeit that it is quite expansive and potentially problematic in practice). But they could be invoked by individuals in the context of specific cases.

Then follows a list of procedural principles. These are: that legislation should not be made unless persons to be affected have been consulted to the extent

practicable, and unless there has been a careful evaluation of issue concerned, and the effectiveness of any relevant existing legislation and common law, etc.

These, then, are the principles against which legislation is to be measured for its compatibility.

When does the compatibility assessment take place? When a bill is introduced into the House, the responsible Minister and the CEO of the relevant department are to certify as to one of 3 possible things:

that the proposed legislation is compatible with the stated principles;

that a provision is incompatible, but the incompatibility is reasonable and demonstrably justified in a free and democratic society (a possibility set out in cl 7(2));

that it is incompatible and the incompatibility is *not* justified, and that there are reasons for proceeding with it despite the unjustified incompatibility [surely a very rare possibility].

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

A certificate must be given also before the third reading of the Bill in Parliament. This is designed to ensure that proper attention is given to any amendments that have been made to a Parliamentary bill as it makes its way through the Select Committee process, or by way of SOP.

After legislation is enacted, there are further occasions on which legislation may be measured against the principles for compatibility. Courts are empowered – indeed required – to give an enactment a meaning that is compatible with the principles in preference to any other meaning (cl 11(1)). It follows that any court faced with the argument that meaning A should be preferred over meaning B, because meaning B is incompatible with the principles, will have to actually inquire into whether meaning B truly is incompatible. And this will involve it deciding whether the incompatibility is reasonable and demonstrably justified in a free and democratic society. This is judicial review.

The Bill recognises that this is all in the cause of interpretation of legislation: not a licence to re-write statutes. So it follows that a court may have made the inquiry and satisfied itself that meaning B is indeed incompatible with the principles to an extent that is not justified, yet conclude that meaning B is in fact the meaning to be given because no other meaning is plausibly available.

Any court that does that, going through those reasoning steps, has in fact declared meaning B to be incompatible with the principles, while (of necessity) applying meaning B.

So to this point the RRB follows exactly the methodology of the New Zealand Bill of Rights Act 1990, which similarly requires judges to measure legislation

against the rights and freedoms in that Bill. The Bill of Rights uses the language of consistency rather than compatibility, but it is the same thing. In a Bill of Rights case, a court is required to prefer statutory meanings that are consistent with the Bill of Rights over those that are not. And, of course, in order to do this, it has to decide whether a meaning (the one it is being urged to avoid) is in fact inconsistent. If it decides that it is inconsistent but that it cannot legitimately avoid that meaning because no plausible alternative meaning is available, the outcome is in fact a declaration of the inconsistency of that legislative provision with the Bill of Rights.

This happens not infrequently, most recently in *R v Hansen* [2007].

Incidentally, in the Bill of Rights context, courts have been rather coy about this process and whether they are truly making “declarations of inconsistency”. But in my view and that of most commentators they plainly are, because it is implicit in the operation of the Bill of Rights that it requires legislation to be assessed against the standard of respect for rights.

The RRB goes further than the Bill of Rights and makes it quite explicit that the courts are to make declarations of incompatibility in relation to a legislative provision, if that is their conclusion.

They can do this only after the department responsible for the legislation has had the chance to provide its view on the legislation’s compatibility, and only after the SG has been given notice.

No further consequence attaches to a judicial declaration that legislation is incompatible with the principles and that the incompatibilities cannot be justified in a free and democratic society. That is the same as under the Bill of Rights. It is moral suasion, the courts being able to be enlisted by litigants to express a view about the consistency of legislation. This is the model under the Human Rights Act 1998 (UK) as well, where legislative adherence to the judicial declaration is the norm.

It can immediately be seen that there is a very close connection between the RRB and the existing New Zealand Bill of Rights Act 1990.

Each sets standards for legislation. The standard comprises a set of principles in one case, or rights, in the other, and also recognises that these are not absolute. They can be reasonably limited. But they can also be unreasonably limited. And the line between what is acceptable and unacceptable is marked by the concept of reasonable limits that may be demonstrably justified in a free and democratic society.

1 Why the RRB is a Bill of Rights

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

The idea of bills of rights is to set standards: a baseline below which law and executive action should not fall.

The classic Bill of Rights is imposed upon a legislature by a higher law: like the US one (ratified and adopted by constitutional conventions of “the People”), or the Canadian one, imposed by the UK Parliament upon Canada. Once imposed, they set the terms on which all law is allowed to operate. They are, in a sense, a message from the People to the organs of their Government. Or in the case of Canada, from a superior Legislature to an inferior one.

More recently, beginning in Canada with the 1960 Canadian Bill of Rights, there has emerged the subtly-different phenomenon of legislative bills of rights that are essentially messages from the legislature to the courts. These bills of rights, passed as ordinary statutes, say “here are the rights and freedoms that we in Parliament think are fundamental in our society, and we affirm them in the law”. Then, because just affirming them does not necessarily accomplish anything in itself, these statutory bills of rights give instructions as to what happens when confronted with legislation that does not meet the standard. In the case of the New Zealand Bill of Rights Act 1990 and some of its recent counterparts in other countries,² interpreters are told to interpret legislation consistently with the affirmed rights (recognising of course that legislation will be consistent with them if it limits rights only to the extent that is reasonable in a free and democratic society).

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

Now the RRB commentary claims that by setting out principles of responsible regulation, the Bill is not creating free-standing rights for individuals. The claim is that the RRB is simply saying “here is what legislation should be like: it should not diminish a person’s liberty or personal security or take or impair their property [etc]”. The argument is that this different from saying that “everyone has a right to liberty, security and property”.

But it isn’t different. Let’s consider the most famous Bill of Rights, the US one. The First Amendment is explicitly a set of prohibitions on Congress. It says

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

² In fact the Canadian Bill of Rights was the most radical “statutory bill of rights”, being held to authorise the non-application of even later inconsistent statutes, a fact to which our s 4 of the Bill of Rights is a response (and which has counterparts in s 10 of the UK HRA).

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

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

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

Though the RRB calls them "principles", they are a *standard* for legislation (against which legislation can be declared incompatible or alternative meanings chosen on the basis of the standard not being met). But it hardly matters what they are called. And nothing can be made of the fact that the RRB would say "legislation *should* not ..." where as the US First Amendment says Congress *shall* make no law ...". In the RRB context (of declarations of incompatibility being possible), *should not* means *must not*.

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

The only difference between the US formulation and the RRB formulation is that in the US, a law that does abridge free speech (say) to the point of being ruled inconsistent with the US Constitution is not applied.³

In NZ, in contrast, a law that diminishes liberty, or that takes or impairs property, would be incompatible with the principle but would not for that reason be "dis-applied". Still a court could declare that it does diminish liberty or wrongly takes property and so amounts to incompatibility with the principles. That is, it could do under the RRB for liberty and security etc precisely what it can do under the Bill of Rights for the rights in that document.

³ People often say it is "struck down". But that is a figure of speech. The real point is that laws inconsistent with the constitution are not applied.

That is why, in its key provisions – in its truly novel provisions – the RRB is functionally equivalent to a Bill of Rights.⁴

What flows from this?

2. Having two bills of rights is not a good idea

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

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

Proliferating statutes dealing with law-making values

Recall that a statutory bill of rights is effectively one Parliament saying "here is what we think is really important. Courts from now are on are to resolve interpretation issues by preferring *our* set of values. If they can't resolve them within the rubric of interpretation, but consider the legislation of another parliament (a later or an earlier one) to be inconsistent with what we said, then declare that inconsistency."

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

A Bill of Rights is not exactly like that but it is close. It is saying to future parliaments, and in respect of past ones, prefer interpretive solutions that give effect to our values and standards.

This is generally regarded as acceptable because the values and standards are heavily abstracted and have a transcendent appeal; they are relatively timeless and attract a great deal of support in the community.

⁴ Perhaps this is why the proponents of the Bill do not suggest that there should be a power to make judicial declarations of incompatibility with those process principles. And the idea of reasonable limits on those process principles is incoherent – can it really be said to be reasonable and demonstrably justified in a free and democratic society to not undertake a careful evaluation of the issue concerned.

Statutes that do this need to have a sort of sanctity. Statutes about human rights tend to have this. Ours is drawn from the ICCPR which itself reflects the UDHR, proclaimed in force after a consultation involving most countries of the world. Another example of a statute with sanctity, drawn from another context, is the English statute by which the UK joined the European Economic Community in 1972. Recall that in that statute it was said that henceforth, in cases where UK law was inconsistent with European Union law operating in the UK, then the European law was to prevail. In a famous 1990 case called *Factortame*, and in another famous 2003 case called *Thoburn*, the English courts held that the 1972 statute actually set the rules: EU law overrode English law. That statute really *did* mean that even if a later parliament enacted a law inconsistent with EU law, then courts were bound to give effect to EU law. The 1972 statute (requiring this result) had a sort of sanctity because of the political commitment to Europe which the people had come to accept.

So even ordinary statutes setting standards on fundamental matters like rights, or giving effect to international treaties such as the Treaty of Rome, can have quasi-constitutional effect – controlling or at least influencing the substance of earlier and later law.

Such statutes are sometimes called superstatutes. They are unlikely to be repealed. Even though it is technically possible to override them, e.g. by a later parliament passing a law saying that the law must prevail despite the super statute, this is not often done.⁵

Now, I think it unwise to attempt too many of these statutes.

I fear that if the RRB is enacted as it is, then it would invite further articulations of standards by subsequent parliaments.

There are indeed deep principles in our constitutional system that we have not thought it right, so far, to articulate in law. They are like reasons for action (as opposed to limits on action, which is what bills of rights tend to be). Cass Sunstein has called them constitutive commitments.⁶ Consider this list drawn from President Franklin D Roosevelt’s wartime speech to Congress in which he proposed a “second bill of rights” to include:⁷

⁵ It is significant that our Bill of Rights is essentially sacrosanct, even though it was passed in the very final stages of the 1987 Labour Government with the votes only of the Labour Party.

⁶ *The Second Bill of Rights: FDR’s Unfinished Revolution and Why We Need it More than Ever*, Basic Books, 2004. I take FDR’s speech from p 243 of this book.

⁷ Some of these are not too far from the Bill of Rights that was proposed for New Zealand by the Constitutional Society in 1958: Article 16 provided that no person should be denied a fair and reasonable opportunity to engage in any lawful trade, business profession or employment for which he may be properly qualified. Lest there be an argument that people could get only fair and reasonable returns, another provision said “nothing in this article shall prevent the making of any provision for ensuring to any

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

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

The right of every farmer to raise and sell his products at a return which will give him and his family a decent living;

Now, Roosevelt did not propose these for inclusion in the Constitution as such, but he did see these rights as an imperative for political action, which would of course include appropriate legislation. The truth is that all governments do likewise: politicians and parliaments of various persuasions do their honest best to formulate laws and policies that promote economic prosperity and well-being. Obviously politicians differ amongst themselves as to the best ways of achieving these aims; they may place different emphases, for example, on sustainability and foreign policy, or individual initiative and collective responsibility. But these sorts of basic commitments are foundational to New Zealand society as they are elsewhere. While civil and political rights are often reasons for *restricting* what governments can do (whether by legislation or otherwise), it is the social and economic imperatives that prompt the doing of *something*, rather than nothing.

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

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

Liberty and overlap with the Bill of Rights

person an adequate reward for his special skill or ingenuity.” Then there was the right to “stability in the purchasing value of money in New Zealand”.

A second reason why the RRB would be confusing if enacted is this. “Liberty” in cl 7(1) denotes all the fundamental freedoms in ss 13 to 18 of the Bill of Rights: freedom of expression, freedom of religion, association and assembly. Hence the word liberty is the window through which (much of) the Bill of Rights is incorporated into the RRB, rather like the due process clause of the 14th Amendment of the US Constitution through which (much of) the US Bill of Rights is made applicable to the States. As you will know, the US Bill of Rights was initially aimed at imposing limits on Congress and the federal government, and not the States, and it was only with the Civil War Amendments in 1865 that civil rights obligations were constitutionally imposed upon the states. The 14th Amendment says “no State shall deprive a person of life liberty or property save by due process of law”.

The US Supreme Court has said that the concept of liberty includes “fundamental rights”, of which those set out in the First Amendment are examples, and in this way the First Amendment has been applied to the states.

Something similar would happen with the RRB. Assessing a bill for its consistency with liberty would involve assessing it for its impact on freedom of expression, religion, association and assembly, and so replicate these rights in the Bill of Rights. But because the RRB has more protections built in than the New Zealand Bill of Rights Act 1990 (to which I come below), the rights would be protected more stringently.

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

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

I believe there would be needless confusion if the RRB were enacted, particularly in relation to the certification requirement against the standards of liberty and security.

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

I come, then, to my first recommendation.

I would be in favour of amending the Bill of Rights to include some of the rights in the RRB. First, “security of the person”.

The New Zealand Bill of Rights Act 1990 mentions “security of the person” but only elliptically. It’s in the marginal note to ss 8 through 11, which deal with the rights to life and against medical experimentation and torture. These are all iterations of the general right to security of the person. But they do not quite

capture its full scope. It make sense to add “security” of the person to the Bill of Rights.

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

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

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

I would be prepared to consider also a right to “liberty” in the Bill of Rights. It is in the Canadian Charter and also the Victorian one. At its core it denotes physical liberty, and the well-charted risk is that it may be judicially interpreted to allow for substantive review (that if liberty is to be taken from a person, then there should not simply be fair *procedure*, but substantively fair *laws* that do not invade deep personal rights). And then there is the spectre of the *Lochner* era, when the US Supreme Court held that liberty included “freedom of contract” and invalidated (that is, refrained from applying) some labour and welfare laws.

That spectre might be reason enough for rejecting the RRB, but nonetheless I think it has to be said that for the last 70 years the concept of “liberty” has been cautiously applied in the US, and since 1982 in Canada also. And if it were in the New Zealand Bill of Rights it would reach some aspects of rights that are not dealt with in the Bill of Rights, particularly the ability to make intimate decisions about one’s life and one’s children. Recognising the statutory nature of our Bill of Rights, a right to liberty is worth seriously exploring, but for the Bill of Rights and not an RRB.

4 Recommendation 2

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

These are:

The need for certification of consistency as well as inconsistency. It would be useful if the Bill of Rights required the tabling of advice about every Bill in Parliament, including those where the advice is that the Bill is consistent. While such advice is available on the Justice website, it would be good for it to be publicly available within the Parliamentary process.

The third reading certification of consistency. At present there is no Bill of Rights requirement for inconsistency reports after introduction of a Bill, and so the

effects of Select Committee amendments and SOPs can go unexamined, in a formal sense.

Explicit judicial declaration power. It would be beneficial to make explicit the courts' power to declare enactments inconsistent with the Bill of Rights. They have asserted such a power since the *Moonen* case in 1999, and acted on the basis that such a power exists since at least 1998 in *Quilter*. Courts in the UK and in the Australian states with statutory bills of rights have such power.

5 Recommendation 3

Beyond being a catalogue of possible improvements to the Bill of Rights, I do not see advantages in the RRB as proposed and many disadvantages. I infer from the titles of later speakers' papers that a number of points I might have made are to be covered by them (as well as a great many other and better ones).

Essentially my reasons are that:

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

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

The strictly process principles (about the need to consider alternative to legislation etc) are not apt at all for interpretation principles (and are rightly excluded from the scope of declarations of incompatibility). So why have them at all? Isn't the alternative to build a culture that asks such questions? And if there isn't such a culture, it is certain that the RRB won't have any effect at all because it is essentially a set of boxes to tick. The promoters recognise that and that explains the concern to get judicial opinions on compatibility, but that comes at the cost of bringing judges into matters of politics and economics for which they are not trained (and the diversion of state resources into litigation as already mentioned).

Conclusion

I would not want to conclude without commending the clarity and economy of the Taskforce Report and the draft Bill, and also the industry in its preparation. I accept unreservedly the good intentions of the promoters – to improve the performance of New Zealand and the welfare of our community. I think we need to continue to build a political culture in which the answers are sought to the sorts of problems that the Taskforce accepted to exist with legislation. But I do not think that bringing the judiciary in, as some sort of outside "check", is either useful or productive, and that it is likely to be counter-productive. With that excised, the RRB could be Parliament's message to itself, and to the Executive, as

to how it should behave (and how secondary and tertiary legislation should be made). But with the principles largely replicated in the Cabinet Office Manual and constitutional principle, one wonders if the RRB is necessary once the provisions about judicial involvement is excised.