

DRAFT

INSTITUTE OF POLICY STUDIES

**SYMPOSIUM ON THE 2009 REPORT OF THE REGULATORY
RESPONSIBILITY TASKFORCE AND THE PROPOSED REGULATORY
RESPONSIBILITY BILL**

**HOW DOES THE PROPOSED BILL MEASURE UP AGAINST THE
PRINCIPLES? CHANGING THE ROLE OF PARLIAMENT AND THE
COURTS**

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Introduction

1 It is critical to any principled analysis of the Regulatory Responsibility Bill to understand the relationship that now exists between legislation and judge-made law. For that reason, something needs to be said about the seismic changes in that relationship that have occurred particularly over the later half of the twentieth century and into the new millennium. It is also important to appreciate how the legislature and the courts perceive their own roles. The Bill is, at its heart, an interpretative measure that would require the courts to interpret all legislation in a particular way by adopting constructions that so far as possible ensure consistency with a legislated set of principles. An important question is whether this properly reflects the relationship between the legislature and the courts and is compatible with current approaches to the interpretation of legislation mandated by Parliament and understood and accepted by the courts themselves. These issues are discussed later in the paper.

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Common law and statute

- 2 There are two sources of law in New Zealand as with most of the so-called common law countries, judge-made law and legislation. Legislation is by far the dominant of them although it was not always so. In earlier times in England the statute was an interloper and the task of the judges was to confine its operation by employing strict rules of construction. If one looks at the New Zealand statute book today, and I use that term to include the whole body of legislation including statutes and delegated legislation, it will be seen that there are few areas that it does not touch.
- 3 Much of our business and commercial law is statute based: for example the law relating to companies, capital markets and their operation, takeovers, personal property securities, financial reporting, receiverships, trade practices, consumer protection, foreign investment, and intellectual property. The law of contract is now a mix of statute and judge-made law, the so-called “contract statutes” having reformed and codified large areas of what was once common law.² Our criminal law is entirely statute based. The law of evidence, formerly a combination of statute and judge-made law, is now completely codified.³ The statute has made inroads into tort law through the Injury Prevention, Compensation, and Rehabilitation Act 2001, the Contributory Negligence Act 1947, the Law Reform Acts of 1936 and 1944, and the Defamation Act 1992. The system for transferring and dealing with estates and interests in land has been statute based since 1885. The New Zealand economy is dominated by the primary sector so it is not surprising that we have a good deal of legislation relating to it.⁴ Significant statutes affect education, health, social welfare, courts, immigration, the labour market, occupational regulation, central and local government, the electoral system, and transport. Implementation of Treaty of Waitangi settlements relies on complex statute law.

² Frustrated Contracts Act 1944, Illegal Contracts Act 1970, Contractual Mistakes Act 1977, Contractual Remedies Act 1979, Contracts (Privity) Act 1982

³ Evidence Act 2006

⁴ Animal Products Act 1999, Wines Act 2003, Forests Act 1949

- 4 There are over 1900 public Acts in force and thousands of other legislative instruments including statutory regulations made under the authority of Acts of Parliament. Each year the New Zealand Parliament enacts over 100 Acts and the executive makes over 400 regulations. While much of this is amending legislation, new cognate statutes are constantly appearing.
- 5 Not surprisingly, the focus of the work of the courts has changed. Instead of making law, the principal job of the courts is to interpret and apply legislation. While the courts make law and do so every day, for the most part this involves ascertaining the meaning of legislation. The resulting product has been perceptively described by an experienced New Zealand Judge “interstitial legislation”. Even administrative law, one of the great growth areas of the so-called common law, is really no more than statutory interpretation.
- 6 In an address given to the New York Bar Association in 1947 and entitled *Some Reflections on the Reading of Statutes*, Associate Justice Felix Frankfurter said that the number of cases in the United States Supreme Court not resting on statutes had reduced almost to zero, that the courts had ceased to be the primary law-makers in the sense that they legislated common law, and that almost every case coming before the Court had a statute at its heart or close to it.⁵ In an article critical of the House of Lords decision in *Pepper v Hart*⁶ Lord Steyn noted that the flood of legislation to give effect to the welfare state and the European dimension meant that the preponderance of legislation over the common law was increasing year by year.⁷ Still more recently, in an address delivered at Peterhouse College, Cambridge in 2002, Justice Michael Kirby said that the construction of statutes had become the single most important aspect of legal and judicial work.⁸ In a footnote to his paper Justice Kirby refers to a statement by Lord Hailsham in his 1983

⁵ Ray D Hewson (ed) *Landmarks of Law: Highlights of Legal Opinion* 1st ed, New York, Harper 1950, p 210; (1947) *Columbia Law Review*, p 527

⁶ [1993] AC 593

⁷ John Steyn “*Pepper v Hart: A Re-examination*” (2001) *Oxford Journal of Legal Studies*, p 59

⁸ Hon Michael Kirby “Towards a Grant Theory of Interpretation: The Case of Statutes and Contracts. Address given to Clarity and Statute Law Society conference, Cambridge University, 13 July 2002

Hamlyn lecture that 90% of the cases heard in the English Court of Appeal involved questions of statutory interpretation.⁹

- 7 New Zealand commentators have been more forthright. It has been asserted that in the New Zealand legal system, statute law is not merely King, it is Emperor.¹⁰ The time has surely come to stop calling New Zealand and other comparable jurisdictions common law countries. They may have been once; they are not now. Lawyers in particular have been slow to recognise the transcendent role of legislation in our legal system, a reflection possibly on the emphasis placed in legal education on case law.

The importance of having good law

- 8 No one would deny the necessity for legislation to be of a high standard and subject to constant and thorough scrutiny. As is often the case, the answer is better expressed by someone else. The House of Lords Committee on the Constitution said this in its 14th Report:

The scrutiny of legislation is fundamental to the work of Parliament. Parliament has to assent to bills if they are to become the law of the land. Acts of Parliament impinge upon citizens in all dimensions of their daily life. They prescribe what citizens are required to do and what they are prohibited from doing. They stipulate penalties, which may be severe, for failure to comply. They can have a significant impact not only on behaviour but also on popular attitudes. Subjecting those measures to rigorous scrutiny is an essential responsibility of both Houses of Parliament if bad law is to be avoided and the technical quality of all legislation improved. Parliament has a vital role in assuring itself that a bill is, in principle, desirable and that its provisions are fit for purpose. If Parliament gets it wrong, the impact on citizens can on occasion be disastrous; and history has shown examples of legislation that has proved clearly unfit for purpose.

⁹ Lord Hailsham of St Marylebone “Hamlyn Revisited: The British Legal System Today” Series 35, 1983

¹⁰ Rt Hon Sir Geoffrey Palmer “Improving the Quality of Legislation – The Legislation Advisory Committee and the Legislation Design Committee and What Lies Beyond?”. Waikato Law Review Vol 15, 2007, p 12

- 9 Legislation originates from the policies of elected governments. They decide what they want to do. It is true that they may be persuaded by their advisers to legislate in certain areas (sometimes disparagingly described as bureaucratic legislation), but for the most part governments call the shots. Public sector advisers and lawyers play a very large and very important part in turning policy into legislation. The knowledge and skills required to design and develop legislation are acquired through doing and they are not easily or quickly acquired. High standards must be achieved. There can be no mistakes. Legislation cannot be half right or about right. It has to be perfect or as close to perfection as it is possible to get. If it is not consistent with legal principle and the values held by a modern parliamentary democracy or it is unclear, the rule of law comes under threat and the faith of society as a whole in its own laws and the law-making processes is weakened.
- 10 There is no formal training available for those who work in the legislative field. It was only when the Legislation Advisory Committee Guidelines on the Process and Content of Legislation appeared in 1987 that New Zealand acquired for the first time a publication that contained material that could be used in the preparation of legislation and criteria against which proposed legislation could be assessed. It was and still is designed to assist policy and legal advisers and governments in the design, development, and drafting of legislation. To a large extent it encapsulates a lot of esoteric and institutional knowledge and practice.
- 11 Professor Burrows and Ross Carter's excellent work *Statute Law in New Zealand*¹¹ appears to be the only New Zealand textbook dealing with legislation as a discrete subject and it stops short of attempting to lay down standards for good legislation. Legislation as a subject is not and never has been taught in all our law schools. Although a popular elective, it remains an optional subject at Victoria University. Harvard Law School, having pioneered the casebook method of teaching law, abandoned it in 2006. First year law students at that university now begin their legal studies with a compulsory

¹¹ JF Burrows and RI Carter *Statute Law in New Zealand* 4th ed LexisNexis 2009

course on statutes and statutory interpretation.¹² The texts on statutory interpretation have a limited focus and are not concerned with legislative quality. The texts on law drafting are few and they too have a specific focus. The position is the same in many other jurisdictions. It is surprising that matters of such importance receive so little attention from governments and the academic world. There is a large gap in training and resources available to assist in producing good quality law.

- 12 The work of the Taskforce is a serious initiative and its proposals for improving legislative quality are timely and relevant. They deserve careful and principled consideration. This paper attempts an analysis of how the proposed Bill measures up to the principles it would require all legislation to comply with. The purpose of the analysis is to try to ascertain whether a legislative solution of the kind proposed is the best way forward and what its impact might be on the constitutional relationship between the legislative and judicial branches of government: how might its enactment affect the balance between legislative and judicial function. The paper does not address each and every principle. Instead, it focuses on some of the main ones. I conclude that despite the limited assistance available to governments and their advisers to produce legislation of the highest quality, the Bill is not the answer.

Does the Bill measure up to its principles?

- 13 The principles are grouped under six categories, rule of law, liberties, taking of property, taxes and charges, role of courts, and good law-making.

Rule of law

- 14 The first category concerns key elements of the rule of law. The first of these is that the law should be clear and accessible. The Bill itself is well drafted and the following comments mean no criticism of the Parliamentary Counsel. One of the great benefits of legislation that has been drafted in plain language is that it is easier to understand it and see what effect it will have. As with the

¹² Hon Justice Michael Kirby AC CMG, *ALJ@80: Past, Present, & Future*. Paper delivered to a conference to celebrate the 80th anniversary of the Australian Law Journal, Sydney, 16 March 2007

statement of other principles, the language used to describe the rule of law principles is open-textured. The Bill's title is not ideal. The Taskforce recognises this. The Bill itself is about legislation and the standards it must meet. The title, however, speaks of regulatory responsibility. An ordinary person coming to the Bill for the first time is unlikely to understand from the title alone what the Bill is about? It might be thought the Bill deals with the behaviour of regulators; how for example an office holder like the Privacy Commissioner or the Commerce Commission goes about its business.

15 The Bill uses the word regulatory as a grammatical form of regulation. Economists commonly use regulation and regulatory when they talk about law and law-making. It is in this sense that the term regulatory is used: an illustration of the principle that economists and lawyers are two professions divided by a common language. The title of the Bill is counter-intuitive. Apart from the title and the reference to the principles of responsible regulation, regulation is not used in the Bill itself. Instead, the conventional term legislation is used. The Taskforce recommends several alternative titles: "Legislative Responsibility Act", "Legislative Principles Act", and "Legislative Quality Act". "Legislation Standards Act" is another. That is what the Bill is about and stands more chance of getting the first time reader onto the right wavelength. Legislative titles are important: they should not be misleading or obscure. The American practice of using the name or names of the promoters in the title is singularly unhelpful. Political titles are even worse. The title should be a succinct, general, and accurate description. The title of this Bill does not measure up and the recommendations of the Taskforce to adopt a better one should be supported.

16 Even then, a reader might be led to think that the Bill contains a definitive statement of the requirements for good legislation. It is, however, not comprehensive and does not expressly mandate consistency with a number of important statutes including the Official Information Act 1982, Human Rights Act 1993, and the Privacy Act 1993 nor with the Treaty of Waitangi and New Zealand's obligations under international law all of which import important values into our legislation. It says nothing about the design of sanctions to

enforce legislative obligations or what matters Parliament must legislate upon and what matters may be delegated. Although the Bill is careful to state that the principles do not limit the New Zealand Bill of Rights Act 1990, there may be considerable overlap with that Act. The principle in clause 7(1)(b) of the Bill that legislation should not diminish freedom of choice or action might be thought to include some of the specific freedoms protected under the Bill of Rights. There is no judicial power to issue declarations of inconsistency under the Bill of Rights while the Bill expressly gives the courts power to make a declaration of incompatibility. I come back to this point later in the paper.

17 No one would disagree that legislation should be clear and accessible. But what exactly do those terms mean? Are they synonymous? Clear to whom- a specialist in the field, a highly intelligent person, someone of average intelligence? Is “clear” directed at the drafting alone or the policy or at both? Legislation has multiple audiences: law-makers, users, scholars, judges, and administrators. It can be difficult to lay down hard and fast rules in this regard. Much depends on the subject-matter. Tax legislation, for example, assumes a degree of knowledge of, among other things, accounting and company law principles. James Christie succeeded Sir John Salmond as Law Draftsman and in his early years worked closely with the Attorney-General, Sir Francis Bell. Bell’s advice to Christie proffered obviously in an age free from the constraints of political correctness was: “Make it clear, Christie. Make it clear so that the Judges can understand it. Make it so clear that even the Judge’s wife can understand”.¹³

18 What does a drafter have to do to know that what has been drafted is clear? There is always a tension between principle and detail. How much detail is necessary? Too much and the measure risks becoming cluttered: too little and it risks becoming uncertain. It is a difficult matter of balance. Words have shades of meaning. Clarity is not just about words: structure and organisation of material are important components of clarity. The clarity of a piece of legislation may be affected by the complexity of the policy it seeks to

¹³ *Portrait of a Profession* 185

implement: if that complexity can be reduced the legislation can often become clearer.

19 Professor Burrows has been kind enough to say that most modern New Zealand Acts are light years ahead of their predecessors in terms of elegance and comprehensibility.¹⁴ I have, however, listened to criticism from commercial lawyers in particular that the plain language style of our recent business legislation has resulted in uncertainty and increased transaction costs. Not everyone likes modern drafting innovations like examples, purpose and overview clauses, flow-charts, diagrams, and other graphical aids. The say it is unnecessary clutter, adds nothing to an otherwise well-drafted provision, gives readers a false sense of knowing more than they actually do, and that it dumbs down the statute. These people say that an Act having these features is not clear.

20 It might be possible for the courts to develop some jurisprudence on what clear means, but I suggest it is a broad and elusive concept to pin down and I am not sure if judges are best placed to do it. The word “clear” by itself does not take one very far and a law that leaves wide scope for judicial development is not a good law. If Parliament only ever enacted law the meaning of which was clear and unambiguous, there would be no more cases coming before the courts on the interpretation of statutes. Somehow, I can’t see that happening. Finally, it is difficult to conceive of a situation where a departure from the requirement for legislation to be clear could, under the Bill, ever be reasonable and demonstrably justified. The possibility of engaging the justified limitation qualification in this context seems odd. It would also be highly improbable that the Minister and the chief executive would ever certify under clause 8 of the Bill that their Bill was not clear.

21 This paper is about legislation, not judge-made law. It might, however, be mentioned in passing that judge-made law is not always a model of clarity and accessibility. Decisions of appellate courts that deliver multiple judgements

¹⁴ JF Burrows and RI Carter *Statute Law in New Zealand* 4th ed LexisNexis 2004 p 118

can make it extremely difficult even for a lawyer to work out what has been decided and why. Judges can all arrive at the same result but for different reasons. While judges do not always speak with a single voice, the legislature always does. Despite the fact that modern day judgments make sensible use of headings and paragraphs and judges attend courses on judgment writing, many judgments are too long and often discursive, a feature that is in part the result of the judicial process of analogous reasoning in which a conclusion is reached by drawing on the same or similar cases. There is no guarantee that a decision of a court on whether an Act is clear would itself be clear on the issue.

- 22 The term “accessible” is not free from ambiguity either and can have more than one meaning. The commentary recognises this. It says the word is intended to have three meanings: availability in the sense that the law should be available in the physical sense (where can I get my hands on it?): navigable in the sense that users can locate the law in the existing body of legislation without unnecessary difficulty (where can I find what I’m looking for?): clarity in the sense that the law is understandable to the user (when I’ve found it, will I understand it?).¹⁵ If the word is to have these meanings, perhaps the Bill could say so. Except where a provision is ambiguous, it should not be necessary to look at extrinsic material to find out what it means.
- 23 The obligation to make legislation physically available goes to the fundamental principle of parliamentary democracy under the rule of law that in order to know their rights and obligations under the law citizens must be able to get hold of it. The Acts and Regulations Publication Act 1989 requires the Chief Parliamentary Counsel to make copies of Acts and regulations available for purchase at a reasonable price. There is a similar obligation with reprints which are compilations of Acts and regulations with their amendments incorporated. Acts and regulations both as enacted or made and in up to date form are available free via the internet from a database owned and maintained

¹⁵ The Commentary adopts the three dimensional meaning given to the term accessible by Professor Burrows and Ross Carter in their book *Statute Law in New Zealand*. There is a helpful discussion in the Report of the Law Commission *Presentation of New Zealand Statute Law* NZLC Report 104 Chapter 1 pp13-22

by the Crown.¹⁶ There is no statutory requirement for internet availability. Would legislation be accessible under the Bill if it were available only in electronic form requiring users to download it? That is the position in the Canadian province of New Brunswick which no longer publishes hard copies of statutes or regulations. Does the obligation to make legislation accessible require State subsidisation? These are just a few of the questions that arise when one considers the content of the obligation. The fact that physical access to legislation is the subject of a separate Act suggests the matter is rather more complex than merely stating that it has to be accessible.

24 The law on the same topic is often scattered across several statutes. The last time a comprehensive subject-matter index of legislation was published was in 1933. The textual method of amending legislation results in the enactment each year of a great many amending Acts. It is unsafe for a reader to read just the principal Act. These amending Acts have to be looked at to see how they affect the principal Act. Sometimes an Act that is not described as an amending Act makes amendments to other Acts; the fact that it does so will not be apparent on its face. Reprints help with the problem of navigation, but they don't overcome it. Not all Acts and regulations are reprinted. Reprints themselves can be out of date soon after publication. The New Zealand Legislation website provides the only up to date versions of Acts and regulations, but it requires a person to have or have access to a computer with internet access.

25 Would the legal obligation in the Bill to make legislation accessible require the State to publish a comprehensive subject-matter index and keep it up to date? Would it require the State to operate a continuous reprinting facility so that reprints of all legislation could be accessed rather than, as under the current arrangements, just the statutes and regulations for which there is the greatest demand? The word "accessible" takes on new meaning when its full implications are considered.

¹⁶ New Zealand Legislation website: <http://www.legislation.govt.nz>

- 26 The second rule of law component is the principle that the law should not operate retrospectively. The requirement in clause 11 of the Bill to prefer an interpretation of legislation that is compatible with the principles and the power for a court to issue a declaration of incompatibility will not apply to existing legislation for 10 years. Parliament and the executive would have 10 years to get their act together. An Act or regulation that is not made compliant within that period will be subject to the interpretative direction and to a declaration of incompatibility. At first sight, that may seem a reasonable amount of time for the statute book to be brought up to scratch and I shall come back to the practicalities of this later in the paper. Despite the 10 year grace period, however, there seems to me to be an element of retrospectivity involved. There is no retrospectivity if existing legislation is made compliant but, if it is not, the Bill will certainly have retrospective effect and it is not a sufficient answer to say there is no retrospectivity involved because you have been given 10 years to get your legislative house in order. For the reasons outlined later in this paper, I suggest pulling that off is impossible.
- 27 It is worth mentioning in relation to the retrospectivity principle that while Parliament routinely changes the law prospectively, the courts seldom if ever do. The issue of prospective overruling arose in the House of Lords in 2005 in *Re Spectrum Plus*¹⁷. Spectrum Plus gave a debenture to a bank to secure its indebtedness under an overdraft facility. The security was stated to be a specific charge over book debts and a floating charge over its undertaking and its property assets and rights. The charge was expressed in the same terms as a charge that had been held 25 years earlier in a case called *Seibe Gorman & Co Ltd v Barclays Bank Ltd* to create a fixed charge. The House of Lords overruled *Seibe Gorman* deciding that the charge was floating not fixed and thus ranked behind preferential creditors, but it declined to do so prospectively. On the face of it, this meant that every charge taken by a bank over a company's book debts on the basis that it was fixed was in fact floating and did not provide the same degree of security as the lender had understood. Both Lord Nicholls and Lord Hope expressed the view that the courts have

¹⁷ [2005] 4 All ER 209

power to overrule prospectively but that it would be only in exceptional circumstances that the power should be exercised. In Lord Nicoll's words "Never say never" which, roughly translated means "hardly ever". Lord Scott said it could never be done in a case involving the interpretation of a statute and Lord Steyn agreed.

- 28 The same issue arose in *Chamberlains v Lai*¹⁸, a decision of the New Zealand Supreme Court in which the rule that barristers are immune from liability in tort was overruled, but not prospectively. Tipping J indicates several factors that may lead a court to overrule an earlier decision prospectively but suggests it would only be in rare circumstances. The Judge does, however, recognise the difference in practice between the legislature and the courts in this regard. The legislature does it all the time, the courts seldom if ever. It seems curious to ask the courts to pass judgment on this aspect of the rule of law.
- 29 The third rule of law component is the principle that everyone is equal before the law. The commentary explains this as an entitlement to equality of treatment in the administration of the law as opposed to substantive equality. It refers to the decision of the Supreme Court of Canada in *Andrews v Law Society of British Columbia* that the terms equality under the law and equality before the law are different concepts. In his seminal work *Constitutional Law of Canada* Peter Hogg says the language of section 15 of the Canadian Charter that every individual is "equal before and under the law" was deliberately designed to abrogate a suggestion by a judge in *Lavelle*¹⁹ that review on equality grounds under the Canadian Bill of Rights did not extend to the substance of the law but only to the way it was administered.²⁰ In rights based legislation subtle distinctions abound. It will not be immediately obvious to all that the distinction between substantive and administrative equality is intended by the Bill and it may require an authoritative decision from a court to determine the scope of the principle. The point could be made clear by stating these limits explicitly.

¹⁸ [2006] NZSC 70

¹⁹ [1976] S.C.R. 1349

²⁰ Hogg *Constitutional Law in Canada* 3rd ed Carswell 1992 p 1159

- 30 The fourth rule of law component is the principle that issues of legal right and liability should be resolved by the application of law, rather than the exercise of administrative discretion. A vast number of statutes authorise decision making by Ministers, officials, and public bodies. Some set out detailed decision making parameters while others are less specific or are silent. Administrative decisions made under an Act that does not specify criteria can never be exercised on arbitrary or subjective grounds. Decisions must be made in good faith, for a proper purpose, and in accordance with the objectives of the Act. It is a basic rule of administrative law that a decision-maker cannot take into account irrelevant considerations and may have regard only to relevant considerations.
- 31 The principle in the Bill seems unduly open ended and uncertain requiring every statute that confers administrative decision making powers to specify criteria. How comprehensive must they be? Even though the commentary appears to accept that, despite detailed prescription of rules and standards about the exercise of an administrative power some discretion might be required, the principle itself would seem to preclude this. Discretion is necessary in decision making to ensure decisions are made fairly and to avoid the harsh consequences that can result from strict adherence to prescribed criteria. Many administrative decisions involve a balancing of different factors with more weight given to some than to others. Administrative decision making is not an exact science involving in every case the formulaic application of pre-determined criteria to a given set of facts.
- 32 The Immigration Act 2009 contains numerous provisions for granting different classes of visas. To take one example, residence class visas are required to be made by the Minister or an immigration officer in accordance with residence instructions (see section 72)). However, the Minister can in his or her absolute discretion grant a residence class visa as an exception to those instructions. Conditions may be imposed when a visa is granted whether or not they are part of the immigration instructions applying at the time and additional conditions can be imposed after grant whether or not they are

specified in the immigration instructions (see section 50). It is an accepted legal principle that it is the right of a sovereign state to determine its immigration policy from time to time as it sees fit. It may be as arbitrary as it likes. Immigration instructions are statements of government policy and are a legitimate reflection of this principle (see section 22(8)). The matters that may be provided for in immigration instructions are very broad (see section 22)). Would a decision by the Minister to issue instructions under these powers involve the exercise of administrative discretion and thus infringe the principle in the Bill?

33 Sections 16 and 17 of the Overseas Investment Act 2006 set out criteria that must be considered by the relevant Minister or Ministers in deciding whether to grant consent to an overseas investment in sensitive land. Section 17(1)(c) states that in assessing whether the investment will or is likely to benefit New Zealand, they must consider various factors. The factors are stated in broad terms, for example, whether the investment will result in added market competition, greater efficiency or productivity, or enhanced domestic services. They may also determine what weight to give these factors. Is this unacceptable administrative discretion under the Bill?

34 I doubt if the purpose of the principle is to attempt to legislate the body of administrative law in a single line of text, but if it is then I believe it fails. In my view, it is not good law-making for legislation to be put at risk of challenge merely because it confers on an office holder or entity power to make decisions on a basis that involves the exercise of discretion. The principle, like others, is expressed at too a high level of abstraction to be workable.

Liberties

35 The second category of principle concerns liberty. Legislation should not diminish a person's liberty, personal security, freedom of choice or action, or rights to own, use, and dispose of property, except as is necessary to provide for, or protect, any such liberty, freedom, or right of another person. There is,

however, a subtle difference in the language of the principle in the Bill and the way it is commonly expressed.

36 The passages in *Bennion on Statutory Interpretation*²¹ relied on in the Commentary do not, as I read them, support a general freedom of choice principle. *Bennion* is an attempt to set out in the form of a code comprising 464 sections in 30 parts arranged in 7 divisions and running to nearly 1500 pages a series of rules, principles, presumptions, and cannons for interpreting legislation. Division Four is headed Interpretive Principles Derived from Legal Policy. It asserts that the rules and principles of construction are derived from legal policy. Section 263 defines the nature of legal policy. Bennion's starting point is that the content of public policy and therefore legal policy is what a court thinks and says. A court may be guided by an Act of Parliament as indicating Parliament's view of public policy and that ultimately Parliament's view must prevail.

37 The principle underpins Bennion's code and is the basis for the rules, principles, presumptions, and cannons that form part of it. They need to be seen in this light and particularly in relation to the Bill. It is, however, a fundamentally flawed view of the functions of the legislative and judicial branches. The idea that the content of public policy and legal policy is what a court says it is cannot be regarded as tenable in a modern parliamentary democracy. It is little more than an attempt to preserve the once held view that the judges' role in law-making is paramount and that a law made by an elected legislature or by the executive in the exercise of a delegated law-making power is only a law because the courts recognise it as such. It is completely at odds with the modern day view that Parliament makes the law and the judges interpret and apply it. For this reason, it is dangerous to place reliance on much of what Bennion says.

²¹ 5th ed at 784 and 846

- 38 Section 263 and its definition of the nature of legal policy is followed by various categories of legal policy one of which is the prohibition of restraints which is explained as “legal policy worked out by the judiciary [that] has tended to frown on restraints placed on freedom by private persons”. Passages from four judgments are quoted in support. The first is a decision by Jekyell MR in *Stanley v Leigh*²² regarding the undesirable impact on trade from estates in land remaining inalienable which led eventually to the development of the rule against perpetuities. The second refers to a passage from the judgment of Lord McNaughten in *Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co*²³ to the effect that interferences with individual liberty of action in trade and restraints on trade are, if there is nothing more, contrary to public policy. The third is a passage from the judgment of James V-C in *Leather Cloth Co v Lorstont*²⁴ that public policy requires every man to be at liberty to work for himself and not to be at liberty by contract to deprive himself or the State of his labour. The fourth is a passage from a judgment of Lord Denning MR in *Nagle v Fielden*²⁵ to the effect that the law will not permit a person to be unjustly excluded from carrying on a trade or profession and that a rule that does so arbitrarily, capriciously, or unreasonably is a bad law. Three of these cases are very old and are relics of an era when judges saw themselves as the bastions against the predations of unprincipled and unwelcome statutes. They no longer reflect reality.
- 39 None of these cases support a general freedom of choice principle. I would venture to suggest that there is not a single decision of an English or New Zealand court that does.
- 40 Section 278 of Bennion’s code is also relied on in the Commentary as supporting a freedom of choice principle. Section 278 asserts that property or other economic interests should not be taken away, impaired or endangered by state power except under clear authority. This does not support a general freedom of choice principle nor a principle that a limitation on the right to

²² (1732) 2 P Wms 686

²³ [1984] AC 535, 565

²⁴ (1869) LR 9 Eq 345, 353

²⁵ [1966] 2 QB 633, 644

own, use, or dispose of property is justified only to provide for or protect the right or freedom of someone else.

- 41 The Commentary also relies on Burrows and Carter *Statute Law in New Zealand*²⁶ to support the principle against imposing limits on the right to own, use, or dispose of property. What the authors say, however, is subtly different. What they actually say is that whereas once the courts were most protective of property rights, this has understandably diminished in the area of planning and land use but that even today courts will not adopt a construction that takes away property rights more than the Act and its proper purpose require. In other words, it is a matter of construction of the statute.
- 42 The Commentary is much closer to the mark when it refers to the principle of law that Parliament does not intend to override fundamental rights unless it does so expressly or by necessary implication and cites text-writers including Bennion and Burrows and Carter and Blanchard J for the New Zealand Supreme Court in the recent decision in *Cropp v Judicial Committee*²⁷. This is more in line with the modern day understanding and more usual formulation of the principle. Legislative intent to do any of these things must be “clearly spelt out” to adopt Blanchard J’s words. In *Secretary of State for the Home Department ex parte Simms*²⁸. Lord Hoffmann said that what is meant by the principle of legality is that the legislature must squarely confront what it is doing and accept the political cost: fundamental rights cannot be abrogated by general or ambiguous words. The principles stated in the Bill are overstatements that alter the thrust of the legality principle that the clearest language is required by Parliament to abrogate fundamental rights and freedoms. Nor is it about limitations necessary only to protect others; it is about the need to use the clearest language to derogate. The point in its simplest terms is that the liberty principle as expressed in the Bill is not recognised by English law: what is recognised is that in the interpretation of

²⁶ 4th ed LexisNexis 2009 322-323

²⁷ [2008 3 NZLR 774, 786

²⁸ [2002] 2 AC 115, 131

legislation clear words are needed to interfere with fundamental rights. They are different things.

- 43 On the proposed formulation, would the provisions of the Misuse of Drugs Act 1975 that make mere possession or use of controlled drugs an offence be incompatible with the principle? Would the Family Protection Act 1955 that, in effect, limits the right of a person to dispose of property to whoever he or she wishes be consistent with the principle? Would the imposition of gift duty under the Estate and Gift Duties Act 1968 that effectively limits the amount of property that can be gifted by requiring a proportion to be handed to the state be safe from challenge? Under the Wine Act 2003, a person can only make wine for commercial purposes if they have a registered wine standards management plan and carry out all their winemaking operations in accordance with the plan. The Act lays down requirements for the content of the plans. There is no freedom of choice or action in how the winemaker goes about his or her or its business and the penalties for non compliance are not insignificant. Primary and secondary processors must have registered risk management programmes under the Animal Products Act 1999.
- 44 The Bill of Rights protects the rights to freedom of religion and belief, freedom of expression, and freedom of assembly, association, and movement. But are they not just specific aspects of a broader principle of liberty and freedom of choice or action as the Commentary suggests in which case the Bill goes way beyond what the law currently recognises. The Canadian Charter of Rights and Freedoms stops short of recognising a cognate right to freedom of choice and action.
- 45 There is danger in attempting to package up in a single statutory statement a whole raft of common law presumptions and rules which the courts use in different contexts all the time. Great care and precision is required in stating a principle of this kind. Overstatement or misstatement may have serious consequences. It is true that fundamental rights cannot be abrogated unless Parliament uses clear and unmistakable language. By the same token those fundamental rights should be stated in plain and unmistakable language and

their content made clear to legislators so that Parliament knows exactly what the rights are that it might be infringing. The Bill fails to do this.

Taking of property

- 46 The third category of principle is that legislation should not take or impair or authorise the taking or impairment of property without the consent of the owner unless it is in the public interest and full compensation is paid by the person who benefits. The Commentary refers to protections in other countries against the taking of property, notably the United States and Australia.
- 47 The case law on the meaning of taking in the United States is voluminous. Originally, the concept of taking was thought to apply only to physical appropriation, but since its adoption in 1791 it has undergone enormous development. By 1905, for example, it was used to invalidate legislation of the State of New York limiting to 60 the hours that could be worked in a bakery on the basis that the state's power did not authorise the shifting of resources from employers to employees simply because the legislature disagreed with the existing distribution of wealth although it could do so for health and safety considerations.²⁹ The effect of the decision initially was to place boundaries around labour laws and prevent organised labour from obtaining redistributive legislation.³⁰ Taking may arise from physical damage to property that impairs its use. It may occur to intangible property where the owner had a reasonable investment-backed expectation that the property would not be used by the state and the expectation is impaired.

²⁹ *Lochner v New York* 198 US (1905)

³⁰ Mark Tushnet *The Constitution of the United States: A Contextual Analysis* Hart Publishing 2009 26-27

48 Nowark and Rotunda say this of the development of the law on takings by the United States Supreme Court:

Rather than develop a single framework to define a taking, the Supreme Court, much to the consternation of commentators, has retained to some extent both the theories of Holmes and Harlan. In its decisions on property use regulations and the extent of permissible government impairment of the value of private property interests the Court has issued rulings which follow no clear theoretical guidelines. The Supreme Court's decisions on "taking" issues may properly be viewed as a "crazy quilt pattern" of rulings.³¹

49 There have been numerous decisions on the circumstances in which zoning regulation and landmark zoning can amount to taking, the circumstances in which physical occupation and limitations on an owner's right to exclude access or occupation by others can be a taking, whether utility rate regulation can be a taking, what kind of emergency action will amount to taking (could the state of Virginia destroy ornamental red cedar trees that risked infecting neighbouring apple trees: answer yes)³², and the circumstances in which impairment of use of property may constitute taking. There is also a vast amount of constitutional law writing on the subject.

50 Following the Supreme Court's decision in *Kelo v New London*, which upheld eminent domain for economic development purposes as a public use under a Connecticut statute, a number of the States have passed their own legislation relating to the exercise of the takings power. The legislation restricts the use of eminent domain for economic development purposes, enhancing tax revenue or transferring private property to another private entity, defining what constitutes public use, and establishing criteria for designating blighted areas subject to eminent domain. Some of these general prohibitory laws contain exceptions as for example in Nevada in the case of use by a private entity to benefit a public purpose, lease to an entity that occupies land as an incidental part of a public facility, abandonment, and where the purpose is to abate a threat to public health and safety.

³¹ Nowark and Rotunda *Constitutional Law* 4th ed West Publishing Co 1991 430

³² *Miller v Schoene* 276 U.S. 272

- 51 The legal landscape in the United States with respect to takings is highly complex and involves consideration of a unique and often overlapping mix of federal and state constitutional law. It could hardly be described as clear. We should be extremely wary of importing a body of law from another jurisdiction without knowing precisely what it is or where it might lead.
- 52 Section 51 (xxxix) of the Australian Constitution was adapted with significant modification from the Fifth Amendment to the United States Constitution. The latter is stated as a limitation on power while the former is expressed as a grant of power: the Commonwealth may make laws with respect to the acquisition of property on just terms from any State or person for any purpose for which it has power to make laws. Unsurprisingly, there is also extensive case law and academic commentary on s 51(xxxix) reflecting decades of experience. It has been held to render invalid a Commonwealth statute preventing a landowner from carrying out mining operations within 1000 metres of the surface of the Kakadu National Park although the statute did not totally prevent mining.³³ It has been held to invalidate a Commonwealth statute that required actions for damages for personal injuries by seafarers to be commenced within 6 months after the commencement of another statute which, in bringing in a statutory compensation scheme, removed the right to bring common law actions for damages for personal injury.³⁴ One need only read the masterly summary of the applicable principles in the judgement of Kirby J to realise that the issues are complex and that there are no clear answers
- 53 It would be unwise to enact a law which prohibits in the most general language the taking or impairment of property leaving it up to the courts to define its parameters by reference to the law in some other jurisdiction or to embark on a jurisprudential development mission of its own. Many of the American states have tried to concretise the generality of taking in their own constitutions and through amendments. If New Zealand is to go down the path of providing a constitutional type protection for property rights, then we should at

³³ *Newcrest Mining (WA) Limited v The Commonwealth* (1997) 190 CLR 513

³⁴ *Smith v ANL Ltd* 204 CLR 493

the very least codify its essential components so that state, citizen, and the courts know what is at stake..

Taxes and charges

54 The fourth principle is that taxation must be imposed or authorised by Act of Parliament and that charges for goods and services must be reasonable in relation to the benefits that may be obtained from the goods or services provided and the costs of providing them. There is little to say about this except to observe that as regards tax, the principle is already enshrined in section 22 of the Constitution Act 1986 and as regards charging of goods and services, the principles are well established and hardly need legislative endorsement. Indeed, stating the principle in these brief and general terms obscures the fact that there is a considerable science involved in determining what is reasonable and whether a charge bears a proper relation to the goods or services provided.

Role of courts

55 The fifth principle under the category “the role of the courts” has two elements. The first is that legislation must preserve the role of the courts in authoritatively determining the meaning of legislation. The second is that legislation should provide for a merits appeal against decisions made by Ministers, public entities, and officials to a court or independent tribunal and should state criteria. The first is a well established principle: Parliament makes the law and the courts say what it means. It does though raise a few interesting questions. How would binding rulings under the Tax Administration Act 1994 be affected? The regime doubtless exists to provide certainty in business arrangements from a tax perspective and in that regard it reflects the principle that the law should be predictable and certain. It enables taxpayers to proceed with confidence in the knowledge that their arrangements are not at risk of challenge by the revenue. It takes the tax risk out of commercial decision making. If the Commissioner of Inland Revenue makes a private ruling or a product ruling and it is applied in relation to an arrangement in the way stated in the ruling, the Commissioner must apply the taxation law to the person and the arrangement in accordance with the ruling. The position is similar as

regards status rulings: if a person applies a taxation law in accordance with a status ruling, the Commissioner must also apply the law in accordance with the ruling. Do binding rulings constitute determinations of the meaning of tax legislation or do they operate merely as an estoppel?

56 The second element draws on material covered in detail in the Legislation Advisory Committee Guidelines. The Guidelines are not intended to be absolutes in this regard. They identify several relevant considerations that should be considered in addressing issues about appeal structures. Firstly, there is no common law right of appeal and natural justice does not require an appeal from every decision. Second, a general availability of appeals is at odds with finality of decision making. Third, the value of an appeal has to be balanced against factors such as cost, delay, and the significance of the subject-matter. Fourth, a right of appeal may not be justified where the primary decision-maker is a body of high quality and expertise: in such cases a limited appeal may be appropriate confined to questions of law. Fifth, the higher the policy or political content of a decision, the less justiciable it becomes and the less appropriate it is to provide for a merits appeal. The importance of these considerations is obscured by the unqualified language in which the principle is expressed: there is rather more to the issue than the principle implies.

57 Proponents of the Bill might say that it is not the purpose of the Bill to preclude sensible exceptions and that objections to the generality of the principles are met, as they are with the Bill of Rights, by the justified limitation qualification. The problem with that response, however, is that it treats the enterprise of law-making as an exercise involving a series of rebuttable presumptions quite unsuited to the resolution of complex policy and resource allocation issues.

58 Vast numbers of statutes and regulations confer power on Ministers, public entities, and officials to make decisions: many do not provide for merits appeals. There is no merits appeal against a decision to issue a search warrant. The proposed Search and Surveillance Powers Bill provides for search

warrants to be issued by issuing officers, but there will be no right of appeal. Search warrants are issued every day. The process would collapse if there was a right of appeal on the merits to a court or tribunal. Statutes that confer exemption powers on Ministers and public entities do not provide for merits appeals. There is no merits appeal against a decision of the Reserve Bank to refuse an application for bank registration or to cancel registration once granted. Neither the Overseas Investment Act 2006 nor the regulations provide for merits appeals. Lots of appeals are subject to a leave filter: how would they stand in relation to the Bill?

Good law-making

- 59 The final category of principles relates to good law-making. The Bill expressly precludes a court making a declaration of incompatibility in relation to these principles except as regards the duty to consult (see clause 12) on the basis that the issues are not suitable for judicial consideration because of the institutional limits of the adversarial process. While that may be so as far as declarations of incompatibility go, the fact is that the principles themselves are not entirely non-justiciable under the Bill. Clause 11 requires a court to prefer an interpretation of an enactment that is compatible with the principles over any other meaning and the principles of good law making are no exception. They will still be engaged by the courts in their interpretation function and receive the same judicial consideration the Bill appears to regard as inappropriate.
- 60 The first principle requires consultation with persons likely to be affected by the proposed legislation. It might be thought overly broad. Statutory obligations to consult are commonly limited to requiring consultation with persons or organisations or representatives of persons or organisations rather than with everyone. How does the principle relate to the obligation of the Crown as a Treaty partner to consult with Maori?
- 61 The second principle requires careful consideration of a variety of matters including the effectiveness of existing legislation and the common law, whether the public interest requires legislation at all, other options (including

non-legislative ones), who will benefit and who will suffer, and possible adverse consequences.

62 Some of the principles of responsible regulation which the Bill states are themselves little more than restatements of existing legislation and the common law. The Interpretation Act provides that legislation does not have retrospective effect, the Bill of Rights Act protects freedoms which the Bill also seeks to protect, the Constitution Act provides that taxes cannot be imposed or authorised except by statute, and the common law has long recognised the role of the courts in making authoritative interpretations of legislation. In this regard, the Bill appears to trip over itself and it is no excuse to say that the principles are expressed differently. They deal fundamentally with the same issues.

63 Does the public interest require that the issue be addressed? I confess to considerable unease whenever I come across the words “public interest” in legislation. It is a concept of uncertain scope. I have seldom if ever employed the term in legislation I have drafted because it has always seemed an easy way out of saying what one means and merely subcontracting the problem to someone else. Is the state of the New Zealand statute book such that a law is required to say that it must be clear and accessible? Are there sufficient examples of legislation having seriously adverse retrospective effect to justify another statutory enactment of the principle against retrospectivity? Indeed, are there any? Are there examples of arbitrary or subjective decision making that require a law that issues of legal right and liability be resolved by application of the law and not administrative discretion? Are the protections under the New Zealand Bill of Rights so inadequate that further legislation is required to protect liberty or aspects of it? The Commentary does not make a compelling case that the state of New Zealand’s law and its law-making institutions is so deficient that legislative intervention is essential.

64 The Bill requires careful evaluation of other options that are reasonably available. The Commentary suggests that unless the guiding principles in the Bill including the LAC Guidelines are backed by meaningful consequences,

they are unlikely to achieve significant adherence. The Commentary does not, however, consider alternatives to legislation. Assuming there is less than adequate adherence to the standards of good legislation, it does not follow that a statute is the only way forward. There are several possible alternatives that should be seriously evaluated.

65 The LAC does a good job with limited resources. It relies heavily on the time of its busy members and the contributions they are able to make alongside their other commitments. The members are senior practising and government lawyers, sitting and retired judges, and economists. Apart from producing and updating the Guidelines and limited educative support for them, the LAC's involvement tends to occur after the event, that is, after Bills are introduced rather than in the design and development stages. As a result, its impact on the finished product is necessarily limited. Ministers and departments can be reluctant to change a Bill after its introduction unless the reasons are compelling. The LAC can make submissions to select committees, write to a Minister, or take up concerns directly with departmental officials. Sometimes it is successful, sometimes not. At the end of the long and often difficult process of producing a Bill and getting it into the House, the LAC's involvement is not always welcome. It comes too late. The certification that Ministers and senior officials have to give that in preparing Bills the LAC Guidelines have been taken into account can all too frequently be just a tick in a box on a form.

66 The Legislation Design Committee was set up in 2006 to provide advice in developing legislative proposals. The idea is that departments can engage with the LDC early on in the process and seek its input into the best ways to implement a particular policy. The LDC is concerned with things like design issues, instrument choice, and the coherence of the statute book. The members are the President of the Law Commission (chair), the Solicitor-General, Secretary to the Treasury, Chief Executive of the Department of Prime Minister and Cabinet, Secretary for Justice, and the Chief Parliamentary Counsel, or their nominees. It has three advisers, Dr Warren Young, Emeritus Professor Burrows QC, and me. Like the LAC, it relies heavily on the

individual contributions of members and the advisers. The LDC can be quite effective and some of its engagements have resulted in resolution of difficult issues and better legislation. It is a place to which policy advisers and lawyers can come and ask questions such as “can we do this?”; “this is new territory for us, how should we go about it?”; “are we on the right track?” The LDC meets infrequently and usually only when there is a request for assistance. The idea is that it will look at only a selection of measures. There is also a degree of confusion about the overlapping roles of both the LDC and the LDC.

67 Combining the LAC and LDC into a single body (a Legislation Standards Committee?) with pre and post legislative scrutiny functions and adequate resources to carry them out could provide a highly effective institutional mechanism for ensuring proper legislative standards are met. It could have a certifying function, which would arguably be preferable to the certifying role envisaged by the Bill where the promoters of a proposed Bill are in effect required to say that they have done a good job. It could also be required to report to Parliament through a Minister on compliance with legislative standards. The Taskforce has recommended establishing a permanent group responsible for reviewing existing and proposed legislation against the principles of responsible regulation and guidelines that would be issued by a Minister. What I am suggesting here is not dissimilar.

68 Another option is to mandate the adoption of an equivalent to the Generic Tax Policy Process which has been used since 1994 in developing tax policy. The process was formalised to ensure effective tax policy development through early consideration of key policy elements such as revenue implications, compliance and administrative costs, and economic and social objectives. It brings external consultation into policy development and helps understanding of the rationale that underlies it. It also brings transparency into the process. A key feature is that draft legislation can be included in discussion documents. Exposure drafts of other legislation are sometimes released by governments: consultation may be general or targeted. There should be more use made of the practice.

- 69 A further possibility is a properly resourced Ministerial office with responsibility for the promotion of good legislation. Similar institutional arrangements exist in New South Wales which has a Minister for Regulatory Reform and a Better Regulations Office in the Department of the Premier and Cabinet. Such mechanisms or variants of them could usefully be examined before recourse to legislation as the panacea.
- 70 Another of the good law-making principles is that legislation must be the most effective, efficient, and proportionate response. With the greatest respect to the work of the Taskforce, I consider the proposal fails in the area of problem definition. It is not clear from the Commentary that the problems with New Zealand legislation are such that legislation of this kind is required to fix them. Apart from a few instances the Taskforce cites as examples of bad law-making, there is nothing to indicate where the problems lie or what they are. A careful and comprehensive analysis of the state of the statute book should be required to establish that the enactment of the Bill with all that it entails is necessary.
- 71 The Bill would require all public entities to use their best endeavours to review the legislation they administer for compatibility and report both the steps taken and the outcomes. As already noted, there is a 10-year grace period to get all existing legislation into shape before the courts can pronounce it incompatible. There are over 1900 Acts in force and several thousand regulations. The Bill is not confined to statutes and regulations. It applies also to legislative instruments, that is, rules, orders in council, bylaws, proclamations, notices, warrants, determinations, authorisations, and other documents that determine the law or alter the content of the law and that directly or indirectly affect privileges or interests, impose obligations, create rights, or vary or remove obligations or rights. I doubt if anyone has come up with a number for instruments of this kind, but a conservative guess would put it in the thousands.

- 72 Reviewing such a body of legislation for compatibility would be a massive undertaking. Take the Income Tax Act 2007 as an example. The Act is the result of a process to rewrite the Income Tax Act 1976 in plain language. The job was done in two stages. The first stage began in the early 1990s with the enactment of the Income Tax Act 1994 which reorganised the 1976 Act as a pre-cursor to a full rewrite. The rewrite began around 1995 and involved another two stage process. The first was the enactment of the Income Tax Act 2004 which was limited to rewriting several key parts. The second was passage in 2007 of the completely rewritten Income Tax Act. The object was to produce a tax statute in clear and accessible language without changing tax policy. A few policy changes were necessary and they are identified, but in essence the rewrite was just that, a rewrite not a reform. If account is taken of the 1994 Act, the process has taken over 15 years to complete. The job was done by a dedicated team of Inland Revenue Department policy advisers and law drafters working with private sector lawyers under an expert panel providing direction and oversight. It involved extensive consultation with private sector accounting and legal tax specialists. A rewrite panel considers issues thrown up by the rewrite and recommends changes to the Act.
- 73 Imagine a similar process for all legislation. Not only would it have to be decided whether a particular Act, regulation, or instrument needed rewriting to make it clear (which was the real objective of the tax rewrite), it would be necessary to evaluate it against all the other principles. A great deal of legislation enacted or made each year consists entirely of amendments. Many of our principal statutes and regulations have been constantly amended to the point where they bear little resemblance to the original: they have completely lost their coherence. They are drafted in mix of different styles reflecting their age. Even their numbering can be a source of amusement: sections 707ZZZZB-707ZZZZG of the Local Government Act 1974 for example. Many of these Acts and regulations are referred to everyday by lawyers and non-lawyers alike. They would not pass the test of clarity and accessibility. Rewriting them just to make them clear and accessible would be a massive job. It would also be impossible to avoid making policy changes. There are not the resources to do it. Parliament would have to re-enact it all and might want

to reconsider and debate the original policy. Would this be a proportionate response?

74 The principle of limited liability is a central feature of legislation about companies. The principle is that the liability of the shareholders in the liquidation of a company is limited to the amount unpaid on their shares. A company and its shareholders are separate legal persons and a shareholder is not liable for the debts of the company except to the limit of their unpaid capital. This principle has been around for a long time. It is seen as serving an important economic and social objective in providing for the aggregation of capital for business purposes. What it means, however, is that shareholders can effectively protect themselves from liability to creditors and in tort for the acts and omissions of the business venture they have formed both. Does this not diminish the freedom of action that would otherwise be available to another person to seek redress for a wrong committed by the shareholders were they to carry on business in unincorporated form, for example, as partners or in an unincorporated joint venture?

75 It would seem heretical in this day and age to question the operation of company limited liability. It has, however, been argued recently that-

- limited liability shifts the costs of risk-taking in a manner that is morally indefensible and violates the fundamental principle of equality before the law (a key principle the Bill seeks to protect)
- limited liability was originally conceived as desirable to provide perpetual succession: the original UK Joint Stock Companies Act 1844 did not permit any limitation of the liability of members and expressly preserved full personal liability of members for a company's debts
- it was never clear that limited liability was necessary to promote industrial development
- economists are divided about the merits of the concept. Some claim it promotes economic development, others say unlimited liability may be more efficient, while others say the choice of regime is neutral

- limited liability provides undesirable incentives for shareholders and managers to take risks with other people's money. Adam Smith opposed the idea of limited liability for this reason.
- it is highly questionable whether the vehicle is necessary to raise capital by public subscription since few companies raise capital by public share offers. In 1989 the Law Commission estimated it was less than 1% of companies. UK evidence indicates the predominant consideration for small companies is risk avoidance.³⁵

76 While a reassessment of corporate liability would be seen as seriously threatening the foundations of business, it seems to me that the Bill requires it.

77 The insider trading laws prohibit the use that may be made of information that is price sensitive. Insider trading is a criminal offence under provisions in the Securities Markets Act 1988 as it is in some overseas jurisdictions. The legislation effectively restricts the use a person may make of information that may have been acquired through ownership of a controlling interest in a company or through board representation. If the information is property, does the legislation diminish the person's right to use it? Is the requirement to make a takeover offer under the Takeover Code for additional shares in a company once a threshold has been reached a restriction on the ownership of property? Is the obligation to disclose under the Securities Markets Act an interest in a listed company a restriction on the ownership of shares that constitute or give rise to the interest?

78 It would be impossible to rewrite and re-enact all legislation just to make it clear and accessible let alone rewrite and re-enact it to make it compliant with the principles.

³⁵ Professor John Smillie *Tort, Contract and the Limited Liability Company-Another Look at Trevor Ivory Ltd v Anderson* in Law, Liberty, Legislation: Essays in Honour of John Burrows QC ed Jeremy Finn and Stephen Todd LexisNexis 2008 133

Some related observations

Changing the approach to interpreting legislation

79 It is time to return to the theme with which this paper begins. If enacted, the Bill would in my view alter significantly the approach of the courts to the interpretation of legislation. That approach is set out in precise terms by section 5(1) of the Interpretation Act 1999. The section requires the court to ascertain the meaning of legislation from its text in the light of its purpose. Text is constrained by purpose and purpose is constrained by text. The courts are required to look at the text without being limited to it thus avoiding overly literal constructions. At the same time they must look at the purpose of an enactment but not so as to get carried away by taking account of factors of marginal or no relevance, speculating, or substituting their own views. The provision achieves a nice balance.

80 It is, however, no more than a statutory statement of what had become by the time it was enacted a well established legal principle. The early New Zealand interpretation ordinances and statutes required our courts to interpret legislation purposively but the courts did not always do so. Instead, they applied rules, principles, presumptions, and cannons. They did so because this was how the English courts worked and considerable deference was then shown to them. In the late 1950s and early 1960s a former Law Draftsman, Denzil Ward, argued persuasively that the courts were not giving proper effect to the purpose of legislation as they were required to. Whether this provoked a sea change in approach or not, at least from the 1960s onwards the courts of this country have moved away from a rigid rule based approach to a purposive approach. They still refer to rules, principles, presumptions and to the occasional cannon, but they are regarded more as indicative than determinative in the way they once were.

81 The Bill would force a return to rules, principles, presumptions, and cannons, in short, to the kind of approach advocated by Bennion. It would be an approach at odds with the principle that underlies section 5 and which drives the work of the judiciary of the modern era. That approach recognises the principle that the Bill itself protects, namely, that the role of the court is to

determine the meaning of legislation. It might be said that there would be no inconsistency between the Interpretation Act and the Bill because construing all legislation in a manner consistent with the principles in the Bill would be doing no more than giving effect to the text and purpose of another statute that applied across the legislative board and that being a statute later in time it must have been intended by Parliament to affect the application of the earlier Interpretation Act. The only way to reconcile the two statutes would be to say that the meaning of a statute is to be ascertained from its text, in the light of its context, and in accordance with the principles of the Regulatory Responsibility Act. That seems to mean a dramatic shift away from the purposive approach to interpretation.

- 82 I am unaware of any other country that has enacted legislation of this kind in which an adjudicative role is given to the courts. With the Bill of Rights Act came a large and reputable body of Canadian case law available to guide lawmakers and the courts. Both the Commerce Act and Fair Trading Act deliberately employed open-textured language in the knowledge that an equally large and reputable body of Australian case law was available and there was the added dimension of harmonisation to support the legislative approach.

Increased litigation

- 83 The Bill enlarges the scope for challenging legislation in the courts making an increase in the amount of litigation inevitable. Cases that challenge a statute or other legislative instrument on the grounds of incompatibility may be expensive to run adding to the cost of litigation for both citizen and the state.

A new role for the courts

- 84 The courts are reluctant to intrude into matters falling within the area of legislative competence. In *Arthur J S Hall v Simons*³⁶, Lord Hoffmann spoke of the sensitivity needed on the part of judges in entering into areas of law which are properly matters for democratic decision and referred to his own

³⁶ [2000] 3 All ER 673, 704

judgment in the earlier case of *Southwark London BC v Mills*³⁷ in which he said that in a field such as housing law, which is very much a matter for the allocation of resources in accordance with democratically determined priorities, the development of the common law should not get out of step with legislative policy. If enacted, the Bill is likely to require the courts to make decisions on matters that involve policy choices and to bring them much closer to areas of political and legislative competence. It is no accident that the Bill or Rights Act confers no power to make declarations of inconsistency. That would have been incompatible with a proper appreciation of the role courts play in modern society.

- 85 Apart from decisions in which the Bill of Rights Act is engaged and in which there is a degree of evaluation, the traditional role of the courts is dispute resolution. Courts administer justice by making decisions that resolve disputes between parties in accordance with the law: it is not their function to pass judgment about the integrity and quality of legislation. The Bill would give the courts an evaluative role and take it into areas where in modern parliamentary democracies it has been reluctant to venture and for which it lacks resources and institutional competence.

Political and other realities

- 86 There are other problems with a legislative solution of the kind proposed in the Bill. It takes no account of political, governmental, and parliamentary realities. The three-year parliamentary term is not conducive to good law-making. It creates perverse incentives in which compromising standards is a price of democracy. Governments have agendas and promises to deliver on. Timing can be critical. The demands placed on departments and Parliamentary Counsel to produce legislation are all too often unrealistic and unreasonable. Political deadlines and lack of time are a constant enemy of good law-making. Pressure on scarce parliamentary time is another factor. Bills undergo extensive change during the parliamentary process to a far greater degree than in many other legislatures. The problems of continuous redesign are well

³⁷ [1999] 4 ER 449, 454

understood by those who draft the law and by some of their advisers but not, one suspects, by many others. MMP has made correction of legislative error more difficult than it used to be. These are all features of New Zealand's parliamentary system of government that conspire against the enactment of perfect laws. Fundamental change to the system might result in better laws. What is certain is that this Bill will not.

Conclusions

- 87 The Regulatory Responsibility Bill falls short of complying with many of its own principles. The Bill uses open-textured language. It attempts to define good law-making by reference to a set of simple principles: in doing so it obscures the complexities inherent in them and creates the same lack of clarity and uncertainty that it seeks to prevent. The Bill suffers from an acute lack of problem definition and does not properly identify and assess workable alternatives to legislation. Without enormous additional resources, it would be impossible to make all existing legislation compliant with the principles in the Bill within 10 years: the time frame is unrealistic and unachievable. The Bill is a wholly disproportionate and inappropriate response to the issue it seeks to redress.
- 88 The Bill overlaps with existing legislation restating provisions of current statutes in subtly different ways and in doing so it risks creating uncertainty and confusion. It is inevitable that the Bill would alter the way legislation is interpreted forcing a return to a methodology long ago abandoned by the courts in favour of an approach that explicitly recognises the paramount role of the legislature in a modern parliamentary democracy. There is a failure to recognise the impact that the short parliamentary term and other features of the political and parliamentary system have on law-making.
- 89 The Bill also risks bringing the courts into areas of law-making that are not within their province and for which they lack institutional competence requiring them to adjudicate on choices made by democratically elected governments on complex social and economic issues and the allocation of resources. It will redefine the relationship between the legislative, executive,

and judicial branches of government and risks damaging the comity between them that is critical to a stable society.

Wellington

16 February 2010