

Tim Smith "The Regulatory Responsibility Taskforce: A view from inside the Room" (DRAFT)

Introduction

- 1 My presence at such a distinguished panel requires some explanation, which I trust justifies elevating the usual disclaimers from the first footnote to the text. Together with another of my Chapman Tripp colleagues, Colin Fife, I provided support to the Taskforce, and assisted in the preparation of the Taskforce's Report. Graham Scott, the chair of the Regulatory Responsibility Taskforce proposed to the organisers of this symposium that I participate in today's discussion.
- 2 In this capacity, I obviously do not speak for the Taskforce, which has itself disbanded.¹ The report of the Taskforce must speak for itself, without elaboration. Rather, I offer my perspective, as a person who was 'in the room' with the Taskforce during its deliberations, on what I take as the major legal themes emerging from the Taskforce's report, and the proposed Bill.
- 3 Assessing the Taskforce's report, and the proposed Bill, I suggest, requires us to answer three primary questions:
 - 3.1 is there an issue with the current state of New Zealand's legislative and regulatory system – the process of legislation - and the results of that system – the substance of legislation - that requires a solution? The Taskforce's terms of reference did not require it to address this issue, but it is a question that inevitably arises from the initiative.²
 - 3.2 if there is an issue, does the guidance of selected principles, both procedural and substantive, with which legislation and the legislative process should comply, provide at least a partial answer to that issue?
 - 3.3 are the mechanisms proposed by the Taskforce to incentivise early, thorough and transparent consideration of those principles likely to be effective, and consistent with New Zealand's public law arrangements.
- 4 To answer those questions, a range of expertise and experience must be brought to bear — by lawyers, economists, and those with in-depth experience of the legislative process.

¹ The standard qualification that the views expressed in this paper are those of the author alone therefore apply with particular force to the Taskforce.

² In this paper, I use the term "legislation" in the sense it is used in the Report and Bill to cover all primary, secondary and tertiary legislation promulgated by public agencies – essentially all statutory agencies of central government.

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- 5 In that context, it is appropriate to recall the diversity of professional experience captured by the Taskforce's membership. That membership included those with extensive experience in business, law and economics.
- 6 Most importantly, the Taskforce also included those whose primary experience has been in the public sector, both as legislators, and as senior advisors to legislators. It also bears mentioning that two members of the Taskforce have experience on the Legislation Advisory Committee (*LAC*), one as a former chair whose tenure coincided with the last major revision to the LAC Guidelines.
- 7 The Taskforce thus included experience that covered the entire life-cycle of legislation: from policy development, drafting legislation, advocating for (and against) legislation, implementing legislation, to litigating questions arising from legislation, and advocating for its reform. That range of experiences was critical in developing the proposals in the Bill.
- 8 With that emphasis on experience in mind, I turn briefly to the first two questions raised by the Taskforce's report; is there a problem, and are legislated principles the solution?

Is there an issue?

- 9 The starting point for the Taskforce, a majority of submitters to the Commerce Committee considering the original Bill, from a wide range of backgrounds, agreed that:
 - 9.1 there were real and important problems with the quality of legislation produced by the current law-making processes;
 - 9.2 that current non-legislative initiatives were not capable of producing the change in quality desired; and accordingly
 - 9.3 a legislative solution was required.
- 10 That view was shared by the Taskforce. It concluded that:³

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

³ Taskforce Report, para 1.3.

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- 11 I leave it to others to debate that assessment. I would, however, note that at least one eminent New Zealander has previously suggested that, as least as far as delegated legislation is concerned, there is an issue worth addressing. Sir Geoffrey Palmer, in his review of the use of delegated legislation in New Zealand in 1999, concluded that regulatory interventions in the form of secondary and tertiary legislation:⁴

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

- 12 A brief comparison of Sir Geoffrey's description of matters in 1999 with the present day suggests that similar comments could be made about delegated legislation today. In 1995, 461 regulations were formally published in the New Zealand Statutory Regulations – apparently a record then.⁵ The record still stands, but it is routinely threatened: in 2008, 456 regulations were published. Moreover, the book of delegated legislation is getting noticeably thicker. While the 1999 statutory regulations were housed in three volumes, seven volumes were necessary in 2009.

- 13 The scope of regulation has also expanded. The rejection of light handed regulation since Sir Geoffrey wrote has led to increasingly complex industry specific economic regulation. Much of the detail of that regulation is not determined by Parliament, but by Ministers and regulatory agencies. The effect of the recent amendments to Part 4 of the Commerce Act 1986 reinforce this approach.

A statement of principles as the solution?

- 14 Consistent with the views of a majority of submitters to the Commerce Select Committee, the Taskforce's Terms of Reference established it to "carry forward the Commerce Committee's work on the [the RR Bill]", to "determine what, if any, amendments to the Bill would best achieve its objectives" and to produce a report that, inter alia, "recommends a draft Bill".
- 15 The proposed Bill has, at its core, an elevation of principles covering both substantive and procedural matters which have previously either been tacitly assumed to guide the legislative process, or expressly guided the process through

⁴ G Palmer "Deficiencies in New Zealand Delegated Legislation" (1999) 30 VUWLR 1, 36.

⁵ G Palmer "Deficiencies in New Zealand Delegated Legislation, above, 2.

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the LAC Guidelines or the Regulations Review Committee, to legislative status. Those principles are then reinforced by various mechanisms designed to incentivise early, thorough and transparent consideration of policy proposals and draft legislation against those principles.

- 16 The matters addressed by the principles were well said in the forward to the 2001 revision to the Advisory Committee Guidelines by the Hon Margaret Wilson, when she said

We must -

- ask whether legislation is needed to give effect to the policy which the Government is planning to implement;
- follow proper procedures in preparing the legislation, in particular by consulting appropriately outside Government and within it;
- ensure that the legislation complies with established principles, unless there is good reason for departing from them.

- 17 The inclusion or exclusion of particular principles within the proposed Bill, and the precise formulation of those principles, is itself a substantial topic. It should be no surprise that, in the commentary to the Bill in the Taskforce's report, the commentary on clause 7 is the same length as that for the rest of the Bill combined. Here, I make only two general comments, before turning to the primary novelty in the Bill – the mechanisms incentivise consideration of the principles.

- 18 The first comment is that there is merit in the statement of the principles being, to the extent possible, short, expressed in plain English, and self-contained. If the object is for the principles to guide policy development, and not merely act as a checkbox at the end of the process, though it is unrealistic to expect policy makers, who are expected to have their primary field of expertise in some other area, to internalise an overly elaborate statement. This is an area in which LAC Guidelines can be validly criticise. The 2001 edition of the Guidelines are 480 pages in length.⁶ The Checklist at the beginning of the Guidelines comprise 6 pages of text (in a small font size), and contains 92 separate questions to be addressed.

⁶ http://www2.justice.govt.nz/lac/pubs/2001/legislative_guide_2000/combined-guidelines-2007v2.pdf

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- 19 Further, some of those questions are not self-explanatory. For example, question 3.1 of the Guidelines' Checklist requires the legislator to ask:
- Does the legislation comply with fundamental common law principles?
- 20 To obtain insight into what are to be regulated as "fundamental", the policy analyst must turn to Chapter 3. There are 16 separate principles listed across 2½ pages.
- 21 In comparison, clause 7 of the Bill takes two and a half pages of legislative text. Not all concepts are capable of simple expression, of course, but, as a short form text for policy makers to commit to head (if not to heart), it is largely self-contained, and relatively digestible.
- 22 The second comment is that it is important, in assessing the impact of the Bill, to be accurate in stating what the principles will and will not achieve. The principles are not absolutes. They are, first, able to be justifiably departed from under clause 7(2), to the extent that it is reasonable and can be demonstrably be justified in a free and democratic society. Second, even thus limited, the principles are only matters that legislation "*should*" comply with: not legislation "*must*" comply with. To accurately assess the utility of the principles, those limitations must be recognised.

Are the mechanisms appropriate?

- 23 The Taskforce Bill though does more than provide a statement of Principles. It also includes three legislative mechanisms to incentivise early, thorough and transparent consideration of the principles in the policy development and legislative process: certification, interpretation, and declarations of incompatibility. Each requires justification. However, before addressing those mechanisms, it is worthwhile emphasising what the Bill does *not* do –
- 23.1 it does not set up the principles as supreme law, either in respect of Acts, or delegated legislation;
- 23.2 it does not set up a process which can result in any injunctive or monetary relief for non-compliance by legislators or their advisors;
- 23.3 it does not set up a judicially enforceable process for evidence gathering in the legislative process, or otherwise increase the intensity of judicial

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review of even delegated legislation (effectively the United States' position under the Administrative Procedure Act 1946);⁷

23.4 it does not set up new specialist bodies to review legislation, and complaints concerning legislation.

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

25 I turn to the mechanisms actually contained in the Bill.

- **certification**

26 The first and primary mechanism by which the Bill seeks to incentivise consideration of the principles is through certification. The Bill requires both those who propose legislation (the Minister responsible for a Government Bill, or the member in case of a members bill) and those who would administer it to certify –

- (a) whether the legislation is compatible with each of the principles
- (b) if not, in what respects and whether the incompatibility is justified (with reasons); and
- (c) if the incompatibility is not justified, the reasons for proceeding in the absence of justification.⁸

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

28 The certification process is intended to assist in the quantity and quality of informed debate concerning proposed legislation. In this *informational* purpose, the certification requirements serve a function similar to the requirement that the

⁷ 60 State SAT327.

⁸ RR Bill, cls 8, 9.

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Attorney General report inconsistencies the NZBORA and proposed bills to the House.⁹

- 29 However, in requiring those who propose legislation (and their principal advisors) to execute certificates, the certification provisions serve a broader, and potentially more significant function, by placing a political and/or moral responsibility for confirming compatibility (or not) with the principles on those who are responsible for the policy making process itself.
- 30 When one is asked to sign a document, one is more inclined to read it carefully, and make certain of its truth. That sense of personal *responsibility* engendered by certification, is intended to both incentivise law-makers to take seriously the question of the compatibility of their proposals with the principles, and incentivise their advisors – who will be asked the inevitable question, "can I sign this?" – to be in a position to answer that question, by taking early account of the principles in their policy development process.
- 31 It is interesting to observe that state of Victoria, in passing their Charter of Human Rights and Responsibilities Act 2006, has taken a similar approach. The Victorian Charter is, like our NZBORA, not supreme law,^{10, 11} Under the Charter, a reasoned Statement of Compatibility is obligatory from the person introducing the bill.¹² Justice Kirby has at a recent conference indicated that the view of the Chief Parliamentary Counsel for Victoria is in her experience the certification process that has been the greatest benefit of the Charter.¹³ Similarly, certification can be regarded as the primary mechanism contained in the Bill to encourage early thorough and transparent reason of legislation.

- ***interpretation***

- 32 The second mechanism proposed by the [Bill] is the requirement, that, for all new legislation, wherever an enactment can be given a meaning that is compatible with the principles (after taking into account clause 7(2)), that meaning is to be preferred.¹⁴ The language of clause 11 is expressly taken from section 6 of the

⁹ NZBORA, s7.

¹⁰ Charter of Human Rights and Responsibilities Act 2006 (Vic), s29.

¹¹ Charter of Human Rights and Responsibilities Act 2006 (Vic), s36.

¹² Charter of Human Rights and Responsibilities Act 2006 (Vic), s28. See G Williams *The Victorian Charter of Human Rights and Responsibilities: Origins and Scope* (2006) 30 MULR 880.

¹³ Remarks of Justice Kirby to the American Bar Association, International Law Section Australasian Conference, delivered on 9 February 2010 in Sydney, Australia.

¹⁴ RR Bill, cl 11(1).

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NZBORA, to enable the significant body of precedent developed under that section to be available to the Courts in approaching clause 11.

- 33 The primary significance of this clause 11, I suggest, is to create a "preference eliciting rule", as that term is used by American commentators in discussing common law cannons of construction.¹⁵ The classic example of a preference-eliciting rule is the rule that ambiguity in criminal statutes should be construed against the defendant. It is difficult to contemplate a legislative preference for this result. However, the effect of the default rule is that legislators, faced with the predictable default rule can, and are incentivised to, carefully calibrate their choice of legislative language to define the scope of conduct desired to be criminalised.
- 34 Under clause [] a similar analysis is possible for legislation that is incompatible with, for example, the principle concerning liberties,¹⁶ or taking of property.¹⁷ Indeed, such a preference eliciting default rule in relation to legislative takings already exists at common law,¹⁸ which is why legislation with that effect routinely includes a "no compensation" clause.
- 35 The interpretative default rule of clause 11 incentivises careful consideration, and selection of, legislative language to codify a determination that an incompatibility with the principles is justified under clause 7(2). As the opportunity to undertake that consideration applies only to legislation passed after the enactment of the Bill, and so the Bill expressly limits clause 11 directive to legislation passed after Bill comes into force; in the case of pre-existing legislation, the Bill provides for a 10 year window for review.¹⁹
- 36 Such a default rule might be objectionable if there was a substantial risk that the judiciary, in seeking a principles-consistent interpretation, would calibrate the default rule such that legislative preference could not overcome the default position. The risk of such judicial over-reaching is, however, in my view limited, for three reasons.

¹⁵ E Elhaage "Preference-eliciting statutory default rules" (2002) 102 Columbia L Rev 2162. See also E Elhaage *Statutory Default Rules: How to Interpret Unclear Legislation* (2008).

¹⁶ RR Bill, clause 7(1)(b).

¹⁷ RR Bill, clause 7(1)(c).

¹⁸ *Manitoba Fisheries Ltd v The Queen* [1979] 1 SCR 101.

¹⁹ RR Bill, clause 11(3).

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- 37 First, a clear difference in approach has emerged between the courts of the United Kingdom and New Zealand Courts. The New Zealand approach to s6 of NZBORA, confirmed recently by the Supreme Court in *R v Hansen*, is that the Courts will not consider giving legislation a meaning other than that produced by ordinary legislative techniques unless that normal meaning constitutes an unjustified incompatibility with the principles and an alternative meaning is available.²⁰
- 38 Second, even if that approach to s6 of NZBORA is subsequently revisited, the approach in *R v Hansen*, and the consequential divergence from the United Kingdom courts, is noted and endorsed in relation to clause 11 of the Bill by the Taskforce's Report. That reference can be expected to assist in entrenching that approach in respect of the Bill.²¹
- 39 Third, and perhaps most importantly, in contrast the position usually faced by the courts in interpreting legislation under s6 of NZBORA, a Court faced with a claim that legislation should be given a particular meaning by virtue of clause 11 Bill will have the assistance of the pre-enactment certifications. That will both clarify legislative purpose, and provide a basis for the Court to defer to legislative judgment on any determination of whether an incompatibility is justified.
- **declaration of incompatibility**
- 40 The third mechanism proposed in the Bill is the creation of special jurisdiction for the High Court to grant a declaration of incompatibility²²
- 41 Clause 12 of the Bill provides that a "Court may, in any proceedings", defined as limited proceedings for a Declaratory Judgment or judicial review, "declare that a provision of any legislation is incompatible with 1 or more of the principles specified in clauses 7(1)(a) to (h), unless the incompatibility is justified under section 7(2)".
- 42 As with the other mechanisms proposed, two related questions arise in relation to the proposed jurisdiction: is it necessary, and is it appropriate?

²⁰ *R v Hansen* [2007] 3 NZLR 1 at [60] – [61] per Blanchard J; [92] per Tipping J; [191] per McGrath J; [266] per Anderson J (SC).

²¹ See *Ports of Auckland v Southpac Trucks Limited* [2009] NZSC 112, at [26]: "in order to comprehend the scheme and intended operation of the Carriage of Goods Act it is necessary to have full regard to the intentions of the Law Reform Committee on whose work the Act is based."

²² RR Bill, cl 12(1).

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43 On the first question, the view of the Taskforce, and in particular, the advice of the members of the Taskforce with significant experience as senior advisors to Ministers and elsewhere within Government, was that the certification process alone would likely be insufficient to incentivise serious consideration being given to the principles in the legislative process. The Taskforce concluded that:

The experience of the Taskforce strongly suggests that guiding principles (including, but not limited to, the LAC Guidelines), when not reinforced with meaningful consequences in the event of non-compliance, are unlikely to achieve significant adherence.²³

44 Here, the Taskforce concluded that the availability of a judicial remedy, even if in a declaratory, non-binding form, would provide the necessary political "teeth" to incentivise Ministers and their advisors to carefully consider compliance of legislative proposals with the principles, and whether any inconsistencies are justified.

45 Whether that assessment is correct must be for others, particularly those with experience in Government at the highest levels, to judge. I note only that the experience of the members of the Taskforce was reinforced by its consultation within the public service.

46 So I turn to the second question, whether the grant of a jurisdiction to grant declarations of incompatibility is appropriate, and in particular, whether it is compatible with New Zealand's public law arrangements.

47 It is necessary to say something briefly about the doctrine of "parliamentary sovereignty". The relative merits of that doctrine as a way of understanding New Zealand's constitutional arrangements is, of course, controversial.²⁴ Happily, it is not necessary to enter into that debate in considering the Taskforce's recommendations. To the extent that the doctrine has a meaning, it must be that Parliament has unfettered ability to make and unmake laws.²⁵ That ability is expressly preserved by the Bill.

48 Given that the Bill preserves *formal* Parliamentary sovereignty, there seem to me to be two possible *functional* objections to the jurisdiction:

²³ RRTF Report, para 4.121.

²⁴ See, for an example of the literature, J Goldsworthy "Is Parliament Sovereign? Recent Challenges to the Doctrine of Parliamentary Sovereignty" (2005) 3 NZJPIIL 7.

²⁵ See S Elias "Something Old, Something New: Constitutional Sittrings and the Supreme Court" (2004) 2 NZJPIIL 121, 134.

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- 48.1 first, that notwithstanding preservation of de jure Parliamentary sovereignty, the de facto position is that there will be a transfer of law-making power to the Courts, because legislators will have a tendency to unquestioningly adopt the Court's advice.
- 48.2 second, that the questions required to be answered in the jurisdiction are inappropriate for judicial determination (either because answering the question is harmful to the judicial role or the judiciary has nothing useful to say given its institutional limitations);
- 49 The first point may be shortly dealt with. The possibility of a declaration of incompatibility must have some political or moral force for law-makers, otherwise there is no point in its inclusion in the Bill. At the same time, a de facto transfer of the ultimate legislative power from the law-makers to the judiciary on the issues dealt *with by* the Bill is not desirable. On this issue, balance is required. In fact, however, the New Zealand experience with the NZBORA suggests that this is unlikely. Dr Andrew Geddis' recent, study of the effect of the NZBORA on the legislative process persuasively argues that New Zealand politicians have not been substantially cowed by the threat of judicial remonstrance in enacting legislation that is inconsistent with the rights stated in NZBORA.²⁶ Dr Petra Butler has reached a similar conclusion in her earlier analysis.
- 50 As to the second objection, the concept of the Courts having an institutional role as non-binding "advisors" to the legislature on constitutional issues is not a new one.²⁷ In Westminster democracies, that role has been played by Courts in the context of "Parliamentary Bills of rights" for at least 20 years.
- 51 Of course, there remains the question whether any advice received from the Court is likely to be useful. The institutional disadvantages faced by Courts in considering issues of social policy are well known: the adversarial system is ill-equipped for consideration of broad polyfactorial policy questions; Courts lack necessarily expertise, and the means of readily obtaining it; They also suffer a democratic deficit (at least in comparison with Parliament). However, to assess the significance of those institutional disadvantages, it is necessary to consider the questions that will be asked of the judiciary under the Bill. In fact, I suggest none of the questions actually to be asked of the Court raise significant

²⁶ A Geddis "The Comparative Irrelevance of the NZBORA to Legislative Practice" (2009) 23 NZULR 464.

²⁷ J Varuhas "Courts in the Service of Democracy: Why Courts Should have a Constitutional (But Not Supreme) Role in Westminster Legal System" [2009] NZ L Rev 482.

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institutional disadvantages that cannot be overcome through the application of well established doctrines.

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

52.1 there has not been a careful evaluation of the necessity for a legislative response to an issue;

52.2 the legislation does not produce benefits that outweigh the costs of the legislation; and

52.3 the legislation is not the most effective, efficient, and proportionate response to the issue concerned.

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

54 The third question for the Courts will be, if there is an incompatibility, whether that incompatibility is "reasonable, and justified in a free and democratic society" under clause 7(2). This would seemingly threaten to move the Court into territory beyond its core institutional competencies. However, in addressing the same question in considering Parliamentary Bills of Rights, the Courts have developed a jurisprudence of "deference" to legislative judgment that recognises

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and seeks to mitigate those difficulties. As Tipping J has explained in *R v Hansen*, under the equivalent provision in the NZBORA:²⁸

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

55 At least two matters suggest that the New Zealand Courts are likely to give appropriate deference to legislative judgments on whether incompatibilities with the Bill's principles are justified:

55.1 first, the Court's are likely to be more insistent on process (including consideration of justification in terms of the *Oakes* test), than on substance. The extent to which the law-making body has rendered a "considered opinion" on the issue is likely to determine in part the level of deference given.²⁹ If a certification, or any additional statement provided to the Court under clause 12(2)(a) provides through reasoning for the legislative judgment, that is more likely to attract deference. The Court's approach can therefore be expected to incentivise transparent consideration and thorough weighing of the issues.

55.2 second, many of the principles are likely to be regarded by the Courts as falling towards the opposite end of Tipping J's spectrum to that occupied by fundamental human rights. The principles concerned with economic values, such as compensation for takings, are in practice routinely limited: as distinct from rights not to be tortured, tried unfairly, or even free speech.³⁰ Further, in the field of economic regulation, the Court's currently show marked deference to regulators.³¹

56 An example from the United Kingdom illustrates the likely approach. In the *Countryside Alliance* case,³² the House of Lords was called on to consider a

²⁸ *R v Hansen* [2007] NZSC 7; [2007] 3 NZLR 1 at [116] per Tipping J

²⁹ *R v Hansen*, above, at [118]. See, for example, *R v Governing Body of JFS* [2009] UKSC 15, where JFS' policy was held to be unjustified indirect discrimination by Lord Mance in part because of the "absence of any actual consideration or weighing of 'the need [to pursue the school's aim] against the seriousness of the detriment to the disadvantaged group'" (at [100]).

³⁰ *R v Hansen*, above at [65] per Blanchard J.

³¹ *Unison Networks Ltd v Commerce Commission* [2008] 1 NZLR 42 at [54] (SC). See also *Lab Tests Auckland Ltd v Auckland District Health Board* [2009] 1 NZLR 776, at [366] (CA).

³² [2008] 2 All ER 95 (HL).

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challenge to the United Kingdom's ban on fox hunting under Article 1 of the First Protocol to the European Convention on Human Rights. That provision establishes a right to "peaceful enjoyment of possessions". The pro-hunting advocates claimed, successfully, that this right to peaceful enjoyment of possessions was engaged by the ban, as land could not be used for hunting, and owners of businesses associated with hunting had lost goodwill.

- 57 Nonetheless, the House of Lords unanimously held that the ban was justified and proportional. The moral objection to inhumane treatment of animals was an appropriate policy objective, and given that the interference in property was slight, the ban was a proportionate response to that objective. The speeches of their Lordships emphasise that in reaching this conclusion, significant deference was due to the recently expressed democratic will of the legislature. Lord Bingham stated that:³³

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

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

Conclusions

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

59.1 first, that that Bill proposed by the Taskforce has a heritage in previous law reform in both New Zealand and in other jurisdictions. While the

³³ *R (on the application of the Countryside Alliance) v Attorney General*, above, at [45].

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ultimate proposal is a novel one, most if not all of the mechanisms that comprise that proposal are not. That provides us with, in most cases, practical experience on which to draw in assessing the likely impact of the proposed Bill;

59.2 second, but related to that first point, in assessing the impact of the Taskforce's recommendations, practical expectations based, to the extent possible, on experience, are more relevant than theoretical predictions based on Madisonian insights as to the self-aggrandising nature of public actors.³⁴ Here, the characteristics of New Zealand's political and legal culture – what Dr Matthew Palmer has referred to as "New Zealand's constitutional culture"³⁵ – must be taken into account, particularly when reference is had to the experience of other jurisdictions;

59.3 third, that while it is perhaps natural that a primary focus should rest on the Bill's impact on Parliamentary processes, that should be resisted – the Bill's proposals are equally aimed at delegated legislation, and the appropriateness and effectiveness of the Bill's proposals should be assessed in relation to all legislative acts to which the Bill applies.

60 Finally, it is important to recall the rationale for the Taskforce's creation. That is that a majority of submitters to the Commerce Select Committee held the view that there was an issue of quality with New Zealand's body of legislation, and with its policy making process, and that a legislative process which placed greater incentives on law-makers and their advisors to deliver quality policy and legislation was desirable. If that remains true, then the Taskforce's proposals are worthy of serious consideration.

Tim Smith

³⁴ Federalist No 47, No 48 (1787)

³⁵ M Palmer "New Zealand's Constitutional Culture" (2007) 22 NZULR 565.