PART 4 - COMMENTARY ON THE TASKFORCE'S DRAFT REGULATORY RESPONSIBILITY BILL

Clause 1 Title

> **1 Title**
> This Act is the Regulatory Responsibility Act 2009.

4.1 This clause provides that the title of the Act that will result from the Bill is the Regulatory Responsibility Act. In this, the Bill retains the title of the Bill introduced by the Hon Rodney Hide and referred to the Commerce Committee in 2007 (*the Option 3 Bill*). The Taskforce is aware that the use of the word "regulatory" may cause some confusion in that it is understood differently by economists and lawyers. The former regard it as covering all forms of legislation, including primary (Acts of Parliament), secondary (instruments made by the Executive Council or Ministers), and tertiary (instruments made by public entities, officials, and other bodies), whereas the latter generally regard it as covering only instruments called regulations made by the Executive Council. Because the Bill is a legal document, the Taskforce has used the term legislation, rather than regulation, to cover all primary, secondary, and tertiary legislation (see the commentary in clauses 4 and 5, below).

4.2 The Taskforce recommends that the Government consider whether the Bill would be more appropriately named the "Legislative Responsibility Act" or the "Legislative Principles Act" or the "Legislative Quality Act". If the word regulatory is removed from the title of the Bill, the references in the Bill to "principles of responsible regulation" should be amended to reflect the new title.

Clause 2 Commencement

> **2 Commencement**
> This Act comes into force on [to come].

4.3 This clause will state the date on which the Act resulting from the Bill will come into force. As the Bill provides for a new regime for the consideration and certification of new legislative proposals, the Taskforce recommends that an appropriate fixed period be given between the date on which the Bill receives the Royal assent and the date on which it comes into force, in order for appropriate procedures to be put in place.

4.4 The Taskforce considers that a six month period between the Royal assent and the Bill's entry into force would be appropriate. That period would also allow proposed legislation that has either been introduced as a Bill or, where the proposed legislation is not a Bill, issued for consultation, at the time when the Bill receives the Royal assent, to either be enacted or made prior to the RR Bill coming into force, or assessed against the principles of responsible regulation.

PART 1: PRELIMINARY PROVISIONS

Clause 3 Purpose

> **3 Purpose**
> The purpose of this Act is to improve the quality of Acts of Parliament and other kinds of legislation by—
> (a) specifying principles of responsible regulation that are to apply to new legislation and, over time, to all legislation; and
> (b) requiring those proposing new legislation to state whether the legislation is compatible with those principles and, if not, the reasons for the incompatibility; and
> (c) granting courts the power to declare legislation to be incompatible with those principles.

4.5 Clause 3 states the purpose of the Bill as being to improve the quality of Acts and other kinds of legislation by specifying principles of responsible regulation that will apply to new legislation, and over time to all legislation, requiring those proposing new legislation to state whether the legislation is compatible with those principles, and, if not, the reasons for the incompatibility, and granting the Courts the power to declare legislation to be incompatible with those principles.

Clause 4 Interpretation

> **4 Interpretation**
> In this Act, unless the context otherwise requires,—
> **legislation** has the meaning set out in section 5
> **legislative instrument** means a regulation, rule, order in council, bylaw, proclamation, notice, warrant, determination, authorisation, or other document that—
> (a) determines the law or alters the content of the law, rather than applying the law in a particular case; and
> (b) directly or indirectly affects a privilege or interest, imposes an obligation, creates a right, or varies or removes an obligation or right
> **principles** means the principles of responsible regulation stated in section 7(1)
> **public entity** means—
> (a) a Department within the meaning of section 2 of the State Sector Act 1988; and
> (b) an entity or office named in Schedule 1 of the Crown Entities Act 2004; and
> (c) the Reserve Bank of New Zealand; and
> (d) any person or body that is established by or under an Act (other than the Local Government Act 2002) if that person or body, or an officer or employee of that person or body, has functions that include the making of legislative instruments
> **public official** means an officer or employee of a public entity.

4.6 Clause 4 of the Bill contains definitions of important terms that are used in the Act.

4.7 The definitions include terms that determine which actions by Parliament and public entities are to be assessed against the principles of responsible regulation. The term **legislation**, to which the principles of responsible regulation apply, is separately defined in clause 5 of the Act, but the definition of that term relies on the term **legislative instrument**, which is defined in clause 4. For reasons that are explained in the commentary on clause 5, the definition of legislative instrument is given a wide definition that is adapted from the Australian Legislative Instruments Act 2003. The definition of legislative instrument looks to the substance of the instrument, rather than the form, and to whether the instrument is of a legislative (or law-making) character, rather than of an administrative character.

4.8 The clause also defines the terms **public entity** and **public official**, which under the Bill will have the responsibility, along with the responsible Minister where applicable, for certifying that proposed legislation which they will administer is compatible with the principles of responsible regulation, or that any incompatibility is justified (clause 9). Public entities will also have responsibilities to review legislation which they administer for compliance with the principles of responsible regulation (clause 16), and publish the results of those reviews and certificates made under clause 8 of the Act on the Internet (clause 17).

4.9 A public official is defined as an officer or employee of a public entity. Public entities are defined broadly to include Departments within the meaning of section 2 of the State Sector Act 1988, Crown Entities (including Crown agents, autonomous Crown entities and independent Crown entities), the Reserve Bank of New Zealand and any other statutory bodies (other than those under the Local Government Act 2002) whose functions include the making of legislative instruments.

4.10 The combined effect of the definition of legislation and public entity is to exclude local government entities established under the Local Government Act 2002 that exercise law-making functions from the provisions of the Bill. While those entities may create legislative instruments, as defined in clause 4, legislation only includes legislative instruments made by the Governor-General in Council, a Minister, a public official or a public entity, the definition of which excludes local government.

Clause 5 Meaning of legislation

5 Meaning of legislation

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

(a) an Act of the Parliament of New Zealand or of the General Assembly:

(b) a legislative instrument that is a regulation, or that is required to be treated as a regulation, for the purposes of the Acts and Regulations Publication Act 1989 or the Regulations (Disallowance) Act 1989:

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

4.11 Clause 5 defines the important term **legislation**, which is what the principles of regulatory responsibility apply to. Legislation is defined broadly to include:

(a) primary legislation, that is Acts of the Parliament of New Zealand;

(b) secondary legislation, that is legislative instruments that are regulations, or that are required to be treated as regulations, for the purposes of the Regulations (Disallowance) Act 1989 or the Acts and Regulations Publication Act 1989;

(c) other legislation, that is legislative instruments made under an enactment by the Governor-General in Council, a Minister of the Crown, or a public entity.

4.12 In so defining legislation, the Bill deliberately contains a broader definition of legislation than the definition of "regulation" in the Regulations (Disallowance) Act 1989 and the Acts and Regulations Publication Act 1989 (the *1989 Acts*). As has been noted by the Regulations Review Committee,[13] the definition of "regulation" in those Acts, which focuses on the form of the instrument by which the regulation is made, has proven problematic in practice, and led to apparently arbitrary distinctions between forms of instrument by which laws are made.

4.13 The 1989 Acts define "regulations" as including:

(a) Regulations, rules, or bylaws made under an Act by the Governor-General in Council or by a Minister of the Crown:

(b) An Order in Council, Proclamation, notice, Warrant, or instrument, made under an enactment that varies or extends the scope or provisions of an enactment:

(c) An Order in Council that brings into force, repeals, or suspends an enactment:

(d) Regulations, rules, or an instrument made under an Imperial Act or the Royal prerogative and having the force of law in New Zealand:

(e) An instrument that is a regulation or that is required to be treated as a regulation for the purposes of the Regulations Act 1936 or Acts and Regulations Publication Act 1989 or this Act:

(f) An instrument that revokes regulations, rules, bylaws, an Order in Council, a Proclamation, a notice, a Warrant, or an instrument, referred to in paragraphs (a) to (e).

4.14 A statute may also provide that certain instruments made under it are regulations for the purposes of either or both of the 1989 Acts. These instruments are termed *deemed regulations*.

[13] Regulations Review Committee *Inquiry into the principles determining whether delegated legislation is given the status of regulations* (June 2004).

4.15 Instruments that are not regulations, or deemed regulations, fall outside the purview of the 1989 Acts. They include a plethora of instruments such as bylaws, standards, guidelines, notices, and directions. These instruments may be authorised by a statute (a "delegated" or "sub-delegated" rule-making power) or they may arise through executive administration, such as departmental guidelines and policy manuals. Some are promulgated by the Governor-General, others by the executive council, some require ministerial approval, and others must simply be "published" by the rule-maker. Some (such as departmental manuals) may have no legal foundation at all.

4.16 Not all tertiary legislation is truly *legislative in character*. Some instruments in this category are administrative only in the sense that they simply apply existing law to the individual circumstances of a particular person. Appointment to statutory positions falls within this category. Instruments that are called the same name may be of either legislative or administrative character. For example, a "notice" by a Minister creating a class of exempted persons under s 20 of the Overseas Investment Act 2005 is legislative in character, whereas a civil aviation infringement "notice" is an administrative decision.[14]

4.17 To avoid these difficulties, the Bill introduces a new concept, that of a **legislative instrument**. Any document issued under an enactment (no matter what it is called) that both determines the law or alters the content of the law, rather than applying the law in a particular case, *and* directly or indirectly affects a privilege or interest, imposes an obligation, creates a right, or varies or removes an obligation or right, is a legislative instrument, and therefore legislation, to which the principles of responsible regulation will apply.

4.18 The definition of legislative instrument focuses on the substantive character of an instrument, rather than its form, and seeks to distinguish between instruments that are legislative in character, in the sense that they make new law, and those that are purely administrative in character, in the sense that they involve the application of established criteria to particular circumstances.

4.19 This definition of a **legislative instrument** is taken from the Australian Legislative Instruments Act 2003. That Act establishes a Federal Register of Legislative Instruments to act as a comprehensive repository of Commonwealth legislative instruments. Instruments which are not in the Register are not enforceable. The Taskforce considers that adopting this definition will provide the Court and decision-makers who are required to interpret the concept with the benefit of the Australian Courts' consideration of the issue, as well as harmonising the treatment of such instruments with New Zealand's partner in Closer Economic Relations.

4.20 The Taskforce is reinforced in its view by the recommendations of the Regulations Review Committee in its review of the definitional sections of the 1989 Acts, which also recommended that the Australian Legislative Instruments Act 2003 definition be adopted. This definition would also reinforce the guideline in the current Cabinet Office Circular, which recommends that where the power to make instruments of a legislative

[14] Issued under the Civil Aviation (Offences) Regulations 2006.

character is included in legislation, those instruments be specified as deemed regulations under the 1989 Acts.[15]

4.21 To give an example of how the definition of legislation will operate in practice, it is useful to consider the case of the imposition of regulation of the provision of goods and services subject to limited competition under Part 4 of the Commerce Act 1986, as amended by the Commerce Amendment Act 2008. The Act permits the regulation of goods and services, on the recommendation of the Minister, by Order in Council made by the Governor-General (section 52N). The order is deemed to be a regulation for the purposes of the 1989 Acts. That order must:

(a) identify the good or services to which it relates; and

(b) state which type or types of regulation (of the three types specified in the Act) to which the goods or services are subject.

The effect of the order is that suppliers of the regulated goods and services must comply with the statutory requirements of that type of regulation, and every determination of the Commerce Commission under section 52P. Determinations set out the requirements that apply to each regulated supplier and the input methodologies that apply. Input methodologies are to be published in advance by the Commission by notice in the *Gazette* (section 52W).

4.22 Part 4 of the Commerce Act 1989 is "legislation" as an Act of Parliament under clause 5(a) of the Bill. The Order in Council imposing regulation is also "legislation", as an instrument required to be treated as a regulation for the purposes of the 1989 Acts (clause 5(b)). The Commission's determination of input methodologies under section 52W is a legislative instrument made under an enactment, and therefore legislation under clause 5(c). The input methodologies determine the law for a general class, and affect the right and obligations of regulated entities. Conversely, a determination of the Commerce Commission under section 52P is not a legislative instrument to the extent that it only applies the law in the particular case of an individual supplier.

Clause 6 Act binds the Crown

> **6 Act binds the Crown**
> This Act binds the Crown.

4.23 Clause 6 provides that the Act binds the Crown, thereby overturning the presumption in section 27 of the Interpretation Act 1999. Given that law-makers include the Governor-General in Council, Departments, and other Crown agencies, it is necessary for the effective operation of the Act resulting from the Bill for the Crown to be required to apply the principles of responsible regulation when exercising the power to make legislation.

[15] *Guidelines for legislative instruments that are not regulations* (14 March 2008, CO(08)4).

PART 2: PRINCIPLES OF RESPONSIBLE REGULATION AND THEIR EFFECT

Clause 7 Principles

> **7 Principles**
> (1) The principles of responsible regulation are that, except as provided in subsection (2), legislation should—

4.24 Clause 7 is the central provision of the Bill, and sets out the principles of responsible regulation. It is those principles against which proposed legislation is to be assessed for compatibility, and certified by those proposing its enactment, and against which the Courts may review legislation and if appropriate issue declarations of incompatibility.

4.25 The principles of responsible regulation are expressed as principles, rather than rights, to reflect that the principles describe guidelines for good legislation, rather than individual rights that have as their bases respect for human dignity and freedom. In this regard the principles exist separately from the civil and political rights or human rights traditions, which inform the NZBORA. Instead, the principles which are included in the Bill draw on both the LAC Guidelines, the Regulations Review Committee's principles, and the principles set out in the Option 3 Bill, as well as other sources, but seek to provide a simplified and streamlined set of criteria that accord with and reflect broadly accepted principles of good legislation.

4.26 Importantly, and consistent with the mechanisms proposed by the Bill to assess and report compliance, the principles are guidelines or sign posts for good legislation. Thus, the Bill specifically provides that legislation *should* comply with the principles, rather than that that legislation *must* do so. Departure, justified or unjustified, from the principles is expressly contemplated by that formulation. The purpose of stating the principles is not to diminish Parliamentary supremacy in law making, but to enhance the transparency of the legislative process by providing criteria against which legislators, advisors, interested parties and the broader public may assess the quality of legislative proposals.

4.27 The principles of responsible regulation are not intended to be an exhaustive statement of the matters to be taken into account to produce good legislation, but rather focus primarily on the effect of legislation on existing interests and liberties and good law-making process. The fact that other important matters are not included in the principles is not intended to diminish their importance, but is simply a recognition of the limited purposes of the Act. In particular, nothing in the Act is intended to diminish the NZBORA (see clause 7(3)).

Clause 7(1) – principles of responsible regulation

Rule of law

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

4.28 Clause 7(1)(a) states the principle that legislation should be consistent with four specified aspects of the rule of law: the law should be clear and accessible; the law should not adversely affect rights and liberties, or impose obligations, retrospectively; every person is equal before the law; and issues of legal rights and liability should be resolved by the application of law, rather than the exercise of discretion.

4.29 Although of fundamental importance to our constitutional order, the concept of the rule of law is not free from ambiguity, and has been the source of competing definitions by eminent scholars throughout New Zealand and, earlier, English, legal history.[16] Given that the Act is intended to be a practical document, capable of giving meaningful guidance to those exercising legislative power and their advisors, the Taskforce considers it appropriate to identify and specify the particular aspects of the rule of law with which legislation (as opposed to administrative action) should comply.

4.30 The listing of specific aspects of the rule of law is not meant to provide an exhaustive and definitive definition of the rule of law, nor prevent law-makers and the Courts from taking into account other aspects of the rule of law that are not expressly specified in clause 7(1)(a) (including, where appropriate, by interpreting legislation in a manner that is consistent with other aspects of the rule of law). However, the mechanisms in the Act to give efect to the principles, including certification and declarations of incompatibility, will only apply in respect of the specified principles.

4.31 Notwithstanding that the aspects of the rule of law that form part of the principles of responsible regulation are specified, the section retains a reference to the rule of law as the organising concept from which the particular aspects are drawn. This will provide law-makers and the Courts with guidance as to the origins of the specified principles set out in the paragraph, and assist in their interpretation.

(A) Law should be clear and accessible

4.32 The first specified aspect of the rule of law is that the law should be clear and accessible (clause 7(1)(a)(i)). This well-established principle, sometimes described as that of access to legislation, has been described as a necessary

[16] See P A Joseph *Constitutional and Administrative Law in New Zealand* (3 ed, 2007) 148 – 150.

corollary of the working hypothesis on which the rule of law rests: that everyone is presumed to know the law.[17] It is only if the law is clear and accessible, such that everyone can, if they choose, know the law, that the working hypothesis of the rule of law may be justified.

4.33 Professor Burrows in his standard text, *Statute Law in New Zealand*, expounds that the principle of access to legislation has three meanings: availability, meaning that the law is made available to users; navigability, meaning that the relevant law is able to be discovered in the body of legislation without unnecessary difficulty; and clarity, meaning that once the relevant law is found, it should be understandable to the user.[18] The text of clause 7(1)(a)(i) is intended to capture all three meanings.

(B) Law should not act retrospectively

4.34 The second specified aspect of the rule of law is that the law should not adversely affect rights and liberties, or impose obligations, retrospectively (clause 7(1)(a)(ii)). Again, a necessary corollary of the rule of law is that individuals should have a choice about how to order their affairs in the knowledge of the rules that will be applied. Retrospective legislation, that is legislation that applies to alter the legal character and consequence of conduct and transactions undertaken prior to the legislation entering into force, is inconsistent with this. The basis of the principle "is no more than simple fairness, which ought to be the basis of every legal rule."[19]

4.35 The principle against retrospectivity is a long standing principle of English and New Zealand law. It is traditionally given effect to by the Courts in interpreting legislation.[20] That interpretive presumption has been codified in New Zealand by sections 4 and 7 of the Interpretation Act 1999, which provide that, unless the enactment provides or its context requires otherwise, "an enactment does not have retrospective effect". As has been made clear by the Courts, that provision does not prevent the legislature choosing to legislate retrospectively if that is made clear in the legislation, but instead codifies the common law presumption.[21]

4.36 The inclusion of the principle against retrospectivity in the principles of responsible regulation will enhance the recognition already given to the principle by the Interpretation Act. Law-makers will be required to address themselves to the compatibility of proposed legislation, and certify its compatibility or the reasons for any incompatibility. This process is likely to assist the Courts in undertaking the task of interpreting legislation consistently with the principle, as expressed in the Interpretation Act and the principles of

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17 See J F Burrows and R I Carter *Statute Law in New Zealand* (4 ed, 2009) 141, citing *Blackpool Corporation v Locker* [1948] 1 KB 349, 361 (EWCA) per Scott LJ.

18 J F Burrows and R I Carter, supra, at 141.

19 *L'Office Cherifien des Phosphates v Yamashita-Shinnihon Steamship Co Ltd* [1994] 1 AC 486, 525 (HL) per Lord Mustill.

20 See *Bennion on Statutory Interpretation* (5 ed, 2008) 315 ff; J F Burrows and R I Carter, supra, at 590 – 591.

21 See *R v Pora* [2001] 2 NZLR 37 (CA); *Foodstuffs (Auckland) Ltd v Commerce Commission* [2002] 1 NZLR 353 (CA). See generally the commentary in J F Burrows and R I Carter, supra, at 590.

responsible regulation. If legislation cannot be interpreted consistently with the principle, then a declaration of incompatibility may be given by the Courts.

4.37 For this reason, the formulation of the principle against retrospectivity in the principles of responsible regulation is drafted more narrowly than the formulation in the Interpretation Act. The language is taken from section 4(3)(g) of the Legislative Standards Act 1992 (Qld). This language recognises that not all legislation that acts retrospectively is objectionable; legislation that removes burdens, or confers benefits, is not incompatible with the principle. Accordingly, the proposed clause focuses solely on retrospective legislation that adversely affects persons.

(C) Equality before the law

4.38 The third specified aspect of the rule of law is that every person is equal before the law (clause 7(1)(a)(iii)). This aspect of the rule of law was recognised by Dicey in his classic formulation of the three aspects of the rule of law:[22]

> It means again, equality before the law, or the equal subjection of all classes to the ordinary law of the land administered by the ordinary law courts; the "rule of law" in this sense excludes the idea of any exemption of officials or others from the duty of obedience to the law which governs other citizens or from the jurisdiction of the ordinary tribunals …

4.39 The principle of equality in the administration of the law, as discussed by Dicey as an aspect of the rule of law, can be distinguished from other senses of equality, as incorporated into section 15(1) of the Canadian Charter of Rights and Freedoms,[23] and the Fourteenth Amendment of the Constitution of the United States. Those instruments have been interpreted by the Courts to provide for substantive protections against the *making of laws* which treat people unequally (or, where there are relevant differences, fail to recognise that in legislation), and effective prohibitions against discrimination based on the grounds of race, religion and gender (amongst other matters). Conversely, legislation that distinguishes between different categories of persons is not inconsistent with equality in the administration of law, in the sense used by Dicey, although it may be inconsistent with rights to be treated equally under the law.

4.40 These different senses of the term equality were discussed and distinguished by the Supreme Court of Canada in *Andrews v Law Society of British Columbia*.[24] In that case, the Supreme Court held that the language of "equality under the law" should be interpreted to refer to the substantive right to equality in the formulation of law. It distinguished this from the language of "equality before the law", found in section 1(b) of the Canadian Bill of Rights

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[22] A V Dicey *An Introduction to the Study of the Law of the Constitution* (1885) (10 ed, 1965) 202 – 203.

[23] The Charter is contained in Part 1 of the Constitution Act 1982 and was preceded by the 1960 Bill of Rights.

[24] [1989] 1 SCR 143.

1960, which had previously been interpreted by the Supreme Court to refer to equality in the administration of law, in the strict Diceyan sense.[25]

4.41 In New Zealand, the question of whether a broader right to equality under the law should be enacted was considered in the context of the enactment of the NZBORA. A general right to equality under the law was not recommended by the authors of the White Paper.[26] Instead, claims that legislation confers benefits or imposes obligations unequally may only be raised under s 19 of the NZBORA where that inequality relates to certain specified grounds of discrimination. In this, New Zealand has reached a similar position by legislation to that which the Courts in Canada and the United States have reached in interpreting the general language of their constitutional instruments.

4.42 It would be inappropriate for the Bill to depart from the choice made in relation to the NZBORA in this regard. However, the Taskforce considers that there is merit in the Bill incorporating as a specified aspect of the rule of law, the principle of "equality before the law", that is, equality of administration of the law. That principle is not incorporated directly into the NZBORA, but is well accepted as a fundamental principle of New Zealand law.[27] It is also recognised as such by the current LAC Guidelines.[28]

4.43 Although the Bill is concerned exclusively with the formulation of legislation, or law-making, rather than the administration of laws, the Taskforce considers that this principle is appropriately included in the principles of responsible regulation. Legislation will often provide for structures and mechanisms to administer the enacted legislation. It is therefore appropriate and necessary that when law-makers and their advisors are formulating proposals for those structures and mechanisms, that these are not inconsistent with fundamental principles relating to the administration of legislation. In the principles of responsible regulation, clauses 7(1)(a)(iv), 7(1)(f) and 7(1)(g) are similarly at least partially directed to the formulation of provisions concerned with the administration of legislation.

(D) Issues of legal right and liability should be resolved by application of law

4.44 The fourth aspect of the rule of law specified is that "issues of legal right and liability should be resolved by the application of law, rather than the exercise of administrative discretion".

4.45 This aspect of the rule of law concerns the avoidance of conferring the power to make arbitrary decisions on those administering legislation. As Sir William Wade explained in his discussion of the rule of law in his classic text on

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[25] *Attorney General of Canada v Lavell* [1974] SCR 1349.

[26] White Paper, paras 10.81 – 10.82

[27] *Reckitt & Coleman (NZ) Ltd v Taxation Board of Review* [1966] NZLR 1032 (CA); *Murphy v Rodney District Council* [2004] 3 NZLR 421 (HC).

[28] LAC Guidelines, p 52.

administrative law, it is not enough to require that everything that is done by the executive be done according to law:[29]

> the rule of law demands something more, since otherwise it would be satisfied by giving the government unrestricted discretionary powers … . The secondary meaning of the rule of law, therefore, is that government should be conducted within a framework of recognised rules and principles which restrict discretionary power. Coke spoke in picturesque language of 'the golden and straight metwand' of law, as opposed to the 'uncertain and crooked cord of discretion'.[30]

4.46 The difference between law and administrative discretion is, to an extent, a question of degree.[31] Even a detailed prescription of rules and standards may require some administrative discretion to be exercised at the margins. Nonetheless, the principle is well recognised by the Courts. It is also consistent with the LAC Guidelines, which require detailed consideration to be given to the design of new public powers.[32]

4.47 Thus, for example, in the most extreme examples of disregard of the principle, where legislation has been enacted that purports to give the executive the power to determine issues of legal right and liability on a purely subjective basis, the Courts have held that such powers must be exercised consistently with the purpose of the power and on an objectively reasonable basis.[33] Such provisions in legislation are now recognised as inconsistent with fundamental principle, and therefore are increasingly rare in New Zealand.

4.48 Notwithstanding this, the Taskforce considers that the principle is usefully and appropriately included in the principles of responsible regulation. The inclusion of the principle will inform those formulating legislation that the 'crooked cord' of administrative discretion over issues of legal right and liability is to be minimised, and constrained where possible by reference to express legislative rules and standards (in accordance with clause 7(1)(g)(ii)). Conversely, the conferring on the executive of an administrative discretion will require to be justified.

Liberties

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

4.49 Clause 7(1)(b) states the principle that legislation should not diminish a person's liberty, personal security, freedom of choice or action, or rights to own, use and dispose of property. Such liberties, freedoms and rights may be

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29 H W R Wade and C F Forsyth *Administrative Law* (9 ed, 2004) 20

30 Coke 4 *Institutes* 41.

31 Wade, supra, 21.

32 LAC Guidelines, chapter 8.

33 *Reade v Smith* [1959] NZLR 996 (SC).

diminished to the extent necessary to provide for, or protect, any such liberties, freedoms or rights of another person.

4.50 The law proceeds from a general presumption that everyone is free to live as he or she wishes.[34] The New Zealand and English constitutional tradition has therefore sometimes been said to be based on freedoms, not on rights. In accordance with the doctrine of Parliamentary supremacy, these freedoms, as well as existing liberties and rights, may be taken away by legislation. However, the Courts have traditionally applied a presumption that Parliament does not take away existing liberties, freedoms and rights unless it does so expressly or by necessary implication.[35]

4.51 The liberties, freedoms and rights stated in clause 7(1)(b) are those which the Courts have traditionally recognised as giving rise to an interpretive presumption on the basis of underlying legal policy, and are drawn from the standard works in this regard of Francis Bennion, and, in New Zealand, John Burrows QC and Ross Carter. The liberties, freedoms and rights that are protected are:

(a) liberty of the subject and personal security;[36]

(b) freedom of choice or action;[37]

(c) rights to own, use or dispose of property.[38] (The terms on which property may be taken, or interfered with, if necessary to provide for or protect any right or freedom of another person, are separately dealt with in clause 7(1)(c).)

4.52 The principle deliberately avoids the use of the common law as a baseline for existing liberties, freedoms and rights. Use of the common law as a baseline is unrealistic: the law of modern New Zealand is that formed primarily by the existing body of law and legal principles. Accordingly, the proper baseline to be used to assess whether a particular piece of legislation diminishes from existing liberty, personal security, freedom of choice of action or rights to property is the surrounding body of law and legal principles. It is only legislation which seeks to place additional restrictions on personal liberties, freedoms or rights that may be incompatible with the principle.

4.53 The principle also recognises that those liberties, freedoms and rights may be diminished by legislation to provide for or protect such liberties, freedoms or rights of others where necessary. It is not required that the particular liberties, freedoms or rights being protected are the same as the particular liberties,

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[34] Bennion *Bennion on Statutory Interpretation* (5ed, 2008) 782; See also *Clarke v Takamore* (29 July 2009, High Court Christchurch, CIV-2007-409-1971) at [86] per Fogarty J.

[35] Bennion, supra, at 782, 822 (cited with approval by *Cropp v Judicial Committee* [2008] 3 NZLR 774 at [26] (NZSC)). See also *Taikato v R* (1996) 186 CLR 454 at 460 per Brennan CJ; J F Burrows and R I Carter, supra, at 320; *Craies on Legislation* (8 ed, 2004) para 12.1.3.

[36] J F Burrows and R I Carter, supra, at 320 – 322; Bennion, supra, at 836.

[37] Bennion, supra, at 784, 846.

[38] J F Burrows and R I Carter, supra, at 322 – 323, citing *Fuller v Macleod* [1981] 1 NZLR 390, 398 (CA) per Richardson J; Bennion, supra, 828 – 829, 846 – 851.

freedoms or rights that are being diminished, but the liberties, freedoms or rights to be protected must fall within the category of liberties, freedoms and rights which legislation should not otherwise diminish. For example, legislation creating a power to isolate persons with infectious diseases,[39] by limiting their movement, diminishes a person's liberty and freedom of choice or action, but it may be necessary to protect the personal security of other persons. Where liberties, freedom or rights are diminished for other purposes, that is an incompatibility with the principle that must be justified under clause 7(2).

4.54 The principle in clause 7(1)(b) is intended to complement, and not derogate from, the rights enumerated in sections 8 to 11, and 16 to 18 of the NZBORA, which provide for individual rights in respect of specific aspects of the broader principle of liberty of the subject and freedom of choice or action. Those rights form a basis for assessing all state action, whether legislative, executive or judicial.[40] Conversely, the principles of responsible regulation apply only to those exercising the power to make legislation.

Taking of property

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

4.55 Clause 7(1)(c) concerns the taking of property. It states the general rule that legislation should not take or impair property unless the taking or impairment is necessary in the public interest, full compensation is provided to the owner, and to the extent practicable that compensation is paid by the person or persons obtaining the benefit of the taking.

4.56 By "property" the Taskforce refers to all types of real and personal property, including intangible property. In legal terms, both real property and chattels are types of "property" for the purposes of the Bill. The concept of a legislative "taking or impairment" is described in more detail below.

4.57 Because New Zealand does not have a written constitution, there is no statutory protection against government takings of property other than land or any obligation to pay compensation. Many other nations have constitutionally enshrined a protection against taking of property, for example the United States[41] and Australia.[42] An equivalent protection is contained in the European

[39] See, for example, the Health Act 1956, s 70.

[40] NZBORA, s 3.

[41] The "takings clause" is the last line in the fifth amendment to the Constitution of the United States. It states "nor shall private property be taken for public use, without just compensation."

[42] Commonwealth of Australia Constitution Act, s 51(xxxi): property may only be acquired "on just terms".

Convention on Human Rights.[43] Inclusion of a right to property in the New Zealand Bill of Rights Act 1990 was, however, considered and rejected.[44]

4.58 There is in New Zealand, as in other common law jurisdictions, a presumption that if the government takes private property then compensation will be paid. That presumption is a strong one and affects how judges interpret legislation; it may, however, be overridden by Parliament if sufficiently clear words are used to effect a taking of property. Judges will look sceptically at legislation which takes property, but ultimately Parliament is sovereign and its words must be given effect to. Other protections against the taking of property presently in force in New Zealand statute law include Magna Carta (still in force in New Zealand) and the Public Works Act 1981. These enactments only cover interests in land and not other types of property.[45]

4.59 The common law is organised around a respect for individual dignity and individual possession of property. It is a fundamental rule of the common law that any taking of property in the public interest should be accompanied by payment of full compensation to the owner.[46] It is this principle (that taking must be followed by just compensation) which was enacted in the constitutions of the United States and Australia. And it is this concept which has the force of a non-binding interpretive "presumption" in New Zealand.

4.60 The common law presumption is sufficiently broad so as to protect real property and other types of property such as contractual rights. The Supreme Court of Canada has held that depriving a business of goodwill – and thus rendering its assets virtually useless – constitutes a taking of property which invokes the presumption of compensation.[47]

4.61 The LAC Guidelines contain a reference to the common law presumption and the authors of the Guidelines note that it applies in New Zealand. The Guidelines suggest that if property is being taken a drafter should consider whether or not compensation should be paid.

4.62 The Taskforce considers that a protection against takings akin to the common law presumption should be enshrined in the principles. Despite the directory wording in the LAC Guidelines, in the Taskforce's experience legislation is sometimes enacted which takes or impairs property rights without providing explicitly for compensation. Litigation can ensue.[48] Clause 7(c)(i) sets a threshold for the taking of any property, namely that the taking is in the public interest. This is intended to ensure that legislators do not use governmental

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[43] The European Convention on Human Rights (1950), Protocol 1: Enforcement of certain Rights and Freedoms not included in Section I of the Convention, art 1.

[44] As explained by Sir Geoffrey Palmer in his article *Westco Lagan v A-G: Reflections upon the judgment and rights to property* [2001] NZLJ 163.

[45] In various cases it has been asserted that the protection of property afforded by Magna Carta 1297 is sufficiently broad to encompass types of property other than land, such as fisheries rights or forestry rights. The New Zealand Courts have consistently rejected this contention: see, eg, *Westco Lagan v A-G* [2001] 1 NZLR 40 (HC) and *Mihos v A-G* [2008] NZAR 177 (HC).

[46] The point is elegantly stated by Blackstone in *Commentaries* (1765), vol 1, 134-135.

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

[48] For example, *Cooper v A-G* [1996] 3 NZLR 480 (HC) and *Mihos v A-G* [2008] NZAR 177 (HC).

power to take property for private benefit.[49] Clause 7(c)(ii) states the common law rule that if property is taken, full compensation be provided to the owner. Clause 7(c)(iii) contains a presumption that compensation is provided, to the extent practicable, by or on behalf of the persons who obtain the benefit of the taking or impairment. This is to ensure a hard look is taken at any legislation which takes property from one person (or a small group of persons) to benefit another group of individuals.

4.63 The Taskforce has used the words "taking or impairment" in clause 7. The inclusion of "impairment" is intended to encompass regulatory actions which, while not amounting to a physical taking of property, severely impair an owner's enjoyment of his or her bundle of property rights. Where the degree of impairment is sufficiently serious it will amount to a taking: for example, the Freshwater Fish Farming Regulations 1983, Amendment No 3 which prohibited the sale or removal of live marron from a fish farm unless put in possession of a Crown employee. There was only one licensed fish farm. The regulations were not a physical taking of marron but in effect destroyed their value by precluding trade in those crustaceans.[50] Such regulatory action should in principle be compensated as if it were a taking. There is a body of Australian case law on the meaning of "impairment" in this context.[51]

4.64 The requirement that "full compensation" be given for the taking or impairment of property is adopted from the compensation provisions of the Public Works Act 1981. That provision is well understood in New Zealand, and is to be preferred to the equivalent provisions found in the Australian and United States constitutions. The Taskforce recommends as a future project a detailed examination into the appropriateness of extending the provisions of the Public Works Act 1981 to provide compensation for takings and impairments of both real and personal property. Such an extension of the Public Works Act might well mirror the provisions contained in clause 7.

Taxes and charges

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

4.65 Clauses 7(1)(d) and (e) state principles in relation to taxes and charges levied by legislation.

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[49] For example, in the United States case of *Kelo v City of New London* 545 US 469 (2005), private property was taken by the government for use in a inner-city development to be owned by a private corporation.

[50] See the complaint to the Regulations Review Committee by Koru Aquaculture Ltd (1993) AJHR I.16K at p 3.

[51] *British Medical Association v The Commonwealth* [1949] HCA 44, and that decision was commented on by Gaudron and Gummow JJ in *Smith v ANL Ltd* [2000] HCA 58 at [23].

4.66 Clauses 7(1)(d) restates the rule found in section 22 of the Constitution Act 1986, which provides for Parliamentary control of public finance: "[i]t shall not be lawful for the Crown, except by or under an Act of Parliament... to levy a tax." That provision is itself based on the ancient common law rule that a tax may only be imposed with the express authority of Parliament.[52]

4.67 While the effect of section 22 of the Constitution Act 1986 is to render invalid any tax that is not imposed by or under an Act, which goes further than clause 7(1)(d), the Taskforce considers that the inclusion of an equivalent provision in the principles of responsible regulation serves a significant purpose. It will require policy-makers to focus on whether the charge being imposed is at a level at which it may constitute a tax. A similar obligation to consider taxes is presently contained in the LAC Guidelines.

4.68 Whether a payment constitutes a tax within the meaning of the Constitution Act 1986 can be a vexed issue. "Tax" is not defined in that Act. Because taxes may only be imposed by statute, government entities are not permitted to impose taxes by subordinate legislation (such as local council bylaws). The Courts are often required to adjudicate on whether a payment or other charge is a "tax" in legal terms – a charge which is at a level higher than required to reimburse for services provided or costs incurred will be deemed to be a tax, and thus invalid, unless expressly authorised by Parliament.

4.69 The touchstone for a tax is that it is a compulsory exaction for the support of government, exacted under state authority for public purposes.[53] The level of a tax is not related to the cost of a particular sphere of activity. In *Carter Holt Harvey Ltd v North Shore City Council* Asher J summarised the point:[54]

> There can be no doubt the councils' concession that the levies in question were taxes was correct. The waste levy is a tax, as it involves the compulsory exaction from licensees of moneys not related to services received or costs incurred. It is intended to fund general waste management strategies not connected to the specific activities of the licensees.

4.70 A distinction may be drawn between taxes (compulsory exactions which accrue to the Crown account, and from there may be appropriated as Parliament sees fit and need not be spent on a particular activity) and charges (which are related to specific services provided or costs incurred, and are generally intended to remunerate a public entity for the cost of providing those services or regulating a particular activity). The former require express statutory authority, the latter do not.

4.71 Clause 7(1)(e) provides for principles in relation to costs imposed by legislation that are not taxes, but rather are charges. Clause 7(1)(e)(ii) states the common law rule that charges and other service fees may only be imposed at such amount as will reasonably recoup the expenses incurred in the regulation

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[52] The Bill of Rights 1688, cl 4 prohibits the levying of money for the use of the Crown "by pretence of prerogative" in other manner than was granted by Parliament.

[53] *Haliburton v Broadcasting Commission* CA14/99 15 July 1999.

[54] [2006] 2 NZLR 787 (HC).

of the particular activity.[55] The point is well summarised by the Office of the Controller and Auditor-General in its good practice guide to charging fees for public sector goods and services:

> Setting a fee that recovers more than the costs of providing the goods or services could be viewed as a tax. Unless expressly authorised by statute, this would breach the constitutional principle that Parliament's explicit approval is needed to impose a tax. Accordingly, any authority given to a public entity to charge a fee is implicitly capped at the level of cost recovery.

4.72 Clause 7(1)(e)(i) extends the existing common law rule, and provides that charges must be reasonable in relation to the benefit that the payer is likely to obtain from the goods or services. The Taskforce considers that this extension is justified to ensure that, where costs are imposed on the public by public entities in relation to services which are not the subject of voluntary exchange (in the sense that the public is obliged to use the services of the public entity), the cost of that service is reasonably related to the benefit obtained.

Role of Courts

> (f) preserve the courts' role of authoritatively determining the meaning of legislation:
> (g) if the legislation authorises a Minister, a public entity, or a public official to make decisions that may adversely affect any liberty, freedom, or right of a kind referred to in paragraph (b),—
> (i) provide a right of appeal on the merits against those decisions to a court or other independent body; and
> (ii) state appropriate criteria for making those decisions:

4.73 Clauses 7(1)(f) and (g) concern the role of Courts.

4.74 Clause 7(1)(f) states the principle that construction of legislation – that is, the interpretation of legislation to authoritatively determine its meaning – is for the Courts, and not for the executive. The New Zealand Courts have not adopted the *Chevron* principle from the administrative law of the United States of America,[56] whereby deference is to be given to the interpretation of legislation by the agency responsible for administering it. Rather, our constitutional tradition is of legislative meaning being determined authoritatively by the independent judiciary.[57] Clause 7(1)(f) recognises this traditional principle, and restates the equivalent proposition from the LAC Guidelines.

4.75 This principle does not mean that the Government or anyone else is not entitled to form a view as to the proper interpretation of legislation. However, the principle requires that recourse be available to the Courts to make the authoritative determination of the meaning of legislation, which will then bind the Government and everyone else.

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[55] For example, *Mount Cook National Park Board v Mount Cook Motels Limited* [1972] NZLR 481 (CA), citing *Re a Bylaw of the Auckland City Council* [1924] NZLR 907.

[56] *Chevron USA v Natural Resources Defense Council Inc.* 467 US 837 (1984).

[57] *L v M* [1979] 2 NZLR 519 (CA).

4.76 Clause 7(1)(g)(i) provides that if legislation authorises a Minister, public entity or public official to make decisions that may adversely affect any liberty, freedom or right referred to in clause 7(1)(b), the legislation should provide a right of appeal on the merits against those decisions to a Court or independent body.

4.77 This clause extends the existing law relating to the form of relief that a person whose liberties, freedoms or rights have been adversely affected by a decision may seek. Under existing law, all decisions by those exercising public power may be judicially reviewed by the High Court, either under the Judicature Amendment Act 1972 or under the common law writs. That right to judicial review of a determination by any tribunal or other public authority affecting rights, obligations, or interests protected or recognised by law is also provided for in section 27 of NZBORA. However, judicial review does not provide a review on the merits. Rather, the Court's consideration will be limited to whether the decision under review was made in accordance with the law, fairly, and not unreasonably.

4.78 The Taskforce considers that, where legislation empowers the Government to make decisions that adversely affect liberties, freedoms or rights, a review of that decision on the merits by an independent body is an important check against the erroneous (as opposed to merely improper) exercise of power. This principle is currently recognised as one of the bases on which the Regulations Review Committee may draw delegated legislation to the attention of the House.[58] The principle recognises that appeals or judicial review on errors of law are likely to be of limited utility where the decision to be made is factually complex, or the legislative rules or standards to be applied are broadly drafted. It is not, however, necessary that the appellate body be a Court, and this may be inappropriate where particular expertise is necessary. In some cases, the creation of specialist appellate bodies, such as those under the Immigration Act 1987, may be appropriate. Equally, the principle does not specify the form of the appeal (e.g., whether it is by way of rehearing, or *de novo*), or the burden to be overcome by the appellant.

4.79 Clause 7(1)(g)(ii) provides that where legislation authorises a Minister, public entity or public official to make decisions that may adversely affect liberties, freedoms or rights referred to in clause 7(1)(b), it should state appropriate criteria for making those decisions. This is consistent with clause 7(1)(a)(iv).

[58] Standing Orders, SO310(2)(d).

Good law-making

> (h) not be made unless, to the extent practicable, the persons likely to be affected by the legislation have been consulted:
> (i) not be made (or, in the case of an Act, not be introduced to the House of Representatives) unless there has been a careful evaluation of—
> (i) the issue concerned; and
> (ii) the effectiveness of any relevant existing legislation and common law; and
> (iii) whether the public interest requires that the issue be addressed; and
> (iv) any options (including non-legislative options) that are reasonably available for addressing the issue; and
> (v) who is likely to benefit, and who is likely to suffer a detriment, from the legislation; and
> (vi) all potential adverse consequences of the legislation (including any potential legal liability of the Crown or any other person) that are reasonably foreseeable:
> (j) produce benefits that outweigh the costs of the legislation to the public or persons:
> (k) be the most effective, efficient, and proportionate response to the issue concerned that is available.

4.80 Clauses 7(1)(h) to (k) state principles relating to the law making process. Taken together, they provide that those formulating and proposing legislation should, in the words of the foreword to the LAC Guidelines:[59]

> (a) ask whether legislation is needed to give effect to the policy which the Government is planning to implement;
>
> (b) follow proper procedures in preparing the legislation, in particular by consulting appropriately outside Government and within it.

4.81 Clause 7(1)(h) states the principle that legislation should not be made unless, to the extent practicable, the persons likely to be affected by it have been consulted. The concept of "consultation" is well understood in the area of judicial review, and has been explored by the Courts in a number of cases. The leading judgment remains that of the Court of Appeal in *Wellington International Airport v Air New Zealand*.[60] "Consultation" does not require that there be agreement; rather what is required is the statement of a proposal not yet finally decided upon, listening to what others have to say, considering their responses and then deciding what will be done.

4.82 Clause 7(1)(i) provides that legislation should not be made unless there has been a careful evaluation of the need for legislation of the type proposed. This clause, like clause 7(1)(h), is concerned with the policy-makers' process and formulation of legislation, rather than the substantive outcomes. The clause provides for the simple principle that those formulating legislation consider, before proposing legislation, the necessity for legislation to achieve the public

[59] LAC Guidelines, foreword by the Hon Margaret Wilson, p 7 – 8.

[60] [1993] 1 NZLR 671, 675 – 676 (CA) per McKay J.

policy objective, as against the existing body of law, the options available to address that objective, the potential adverse consequences of the legislation, and the identity of those likely to benefit and/or suffer detriments from the legislation. The clause gives legislative backing to standard requirements of analysis currently found in the LAC Guidelines,[61] and the Regulatory Impact Analysis (*RIA*) requirements prescribed by the Guide to Cabinet and Cabinet Committee Processes.[62]

4.83 Clauses 7(1)(j) and (k) provide principles relating to the substantive outcomes of the policy-makers process that should be conducted in accordance with clauses 7(1)(h) and (i). Clause 7(1)(j) provides that legislation should produce benefits that outweigh the costs of the legislation to the public or persons, and clause 7(1)(k) provides that legislation should be the most effective, efficient and proportionate response to the issue concerned that is available.

4.84 The Taskforce considers that, taken together, these clauses provide a sound approach to the formulation of legislation, consistent with existing requirements contained in the LAC Guidelines and the requirements for Regulatory Impact Analysis prescribed by Cabinet. Those formulating legislation should consider the necessity of legislation, evaluate any options that are reasonably available, and select that option that maximises the net public benefit while constituting the most effective, efficient, and proportionate response to the issue concerned.

Clause 7(2) – justified incompatibility

> (2) Any incompatibility with the principles is justified to the extent that it is reasonable and can be demonstrably justified in a free and democratic society.

4.85 The principles of responsible regulation set out in subclause 7(1) are principles to inform and guide legislative action, not absolutes. Clause 7 recognises that responsible legislators may consider that departure from the principles is required in certain circumstances. Those circumstances may vary widely, and are not capable of being anticipated in any prescriptive detail in the Bill. The purpose of clause 7(2) is therefore to provide a framework to guide legislators' and the Courts' consideration of when an incompatibility with the principles of responsible regulation is justified.

4.86 The language of clause 7(2) is taken from section 5 of NZBORA. Section 5 provides that the rights enumerated in Part 2 of NZBORA may be subject only to such "reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". This language was itself taken from s1 of the Canadian Charter of Rights and Freedoms (the *Charter*).[63]

4.87 Adoption of section 5 of the NZBORA has two principal advantages which commend it to the Taskforce.

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[61] LAC Guidelines, p21ff.

[62] CabGuide *Summary of the regulatory impact analysis requirements*. Available at: http://cabguide.cabinetoffice.govt.nz/procedures/regulatory-impact-analysis.

[63] *A Bill of Rights for New Zealand: A White Paper* (1985).

4.88 The first is that the analysis required by section 5 of legislators and, on review, of the Courts is well established and understood in New Zealand based on the over 15 years experience of government departments, agencies, and the New Zealand Courts in applying the NZBORA.

4.89 The analysis to be applied in considering whether a limit can be justified under s 5 was recently confirmed by the Supreme Court in *R v Hansen*.[64] In *Hansen*, a majority of judges endorsed the approach formulated by the Canadian Supreme Court in relation to section 1 of the Charter.[65] This approach can be expressed in various forms, but in essence calls for a two step inquiry, as follows:[66]

> *Step 1*: Does the limiting measure serve a purpose sufficiently important to justify curtailment of the right or freedom?
>
> *Step 2*: Proportionality test:
>
> (i) is the limiting measure rationally connected with its purpose?
>
> (ii) does the limiting measure impair the right or freedom no more than is reasonably necessary for sufficient achievement of its purpose?
>
> (iii) is the limit in due proportion to the importance of the objective?

4.90 The Taskforce considers that this framework, although developed in the context of rights jurisprudence under the Canadian Charter and the NZBORA, is equally appropriate to considering whether departure from the principles of responsible regulation is justified in a particular case.

4.91 The second advantage of the section 5 formulation is that the approach called for is flexible; the rigour of the justification required for a departure from the principles will depend both on the importance to be attributed to the principle, the extent of the departure, and the importance of the public policy being pursued by the legislation which is said to justify the departure. Thus, in the context of the NZBORA, rights against torture and unfair trial have been said to be absolute protections, whereas the right to freedom of expression is in practice routinely limited.[67]

4.92 The section 5 analysis also allows the Courts, on review of legislation, to give appropriate deference to the judgment of the democratically enacted legislature, either in enacting legislation or in delegating legislative power to another entity. The Taskforce expects that, as under section 5 of NZBORA, the

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[64] [2007] 3 NZLR 1 (NZSC).

[65] *R v Oakes* [1986] 1 SCR 103; see also *R v Chaulk* [1990] 3 SCR 1303, 1335 – 1336. See *R v Hansen*, supra, at [64] – [65] per Blanchard J; [103] – [104] per Tipping J; [203] – [205] per McGrath J; see also [272] per Anderson J.

[66] Summary taken from the judgment of Tipping J in *R v Hansen*, supra, at [104].

[67] *R v Hansen*, supra, at [65] per Blanchard J.

Courts will generally give some deference, or "margin of appreciation", to the judgment of the democratically elected legislature as to whether a limitation is justified in a democratic society.[68] In this, the Courts undertake a review function rather than a *de novo* inquiry into the justification of the measure. The degree of respect will vary according to the subject-matter and the circumstances. Factors include: how recently the legislature has acted on the issue; the depth of the legislatures' consideration of the issue; and the suitability of the issue to judicial scrutiny (e.g. moral perceptions).[69]

4.93 The only difference between clause 7(2) and the language of section 5 of the NZBORA is that clause 7(2) omits the requirement that limits must be "prescribed by law". This requirement has been interpreted by the Courts to state a minimum level of legal clarity: that is, an infringement of a right may be sought to be justified on the basis of law that is so vague that the infringement cannot be said to be "prescribed by law".[70] This requirement has no ready application to legislative, as opposed to administrative, actions, and therefore has been omitted from the Bill, to avoid conceptual confusion.

Clause 7(3) – relationship with the New Zealand Bill of Rights Act 1990

(3) Nothing in this section limits the New Zealand Bill of Rights Act 1990.

4.94 Clause 7(3) records that nothing in the Bill is intended to limit the NZBORA. This includes, by implication, the provisions of the Human Rights Act 1993 which are incorporated by reference into section 19 of the NZBORA.

[68] *R v Hansen*, supra, at [105] – [119] per Tipping J.

[69] *R v Hansen*, supra, at [119] per Tipping J. *R (Countryside Alliance) v Attorney-General* [2008] 2 All ER 95, at [45] (HL) per Lord Bingham.

[70] See A and P Butler *The New Zealand Bill of Rights Act: a commentary* (2005) 149 – 153.

Clause 8 Certificate as to compatibility of legislation with principles

> **8 Certificate as to compatibility of legislation with principles**
>
> (1) The Minister responsible for a Government Bill, and the chief executive of the public entity that will be responsible for administering the resulting Act immediately after it has been enacted, must each sign a written certificate containing the information specified in section 9—
>
> (a) before the Bill is introduced to the House of Representatives; and
>
> (b) before the commencement of the Bill's third reading in the House of Representatives.
>
> (2) The member of Parliament that is in charge of a Bill (other than a Government Bill) must sign a written certificate containing the information specified in section 9—
>
> (a) before the Bill is introduced to the House of Representatives; and
>
> (b) before the commencement of the Bill's third reading in the House of Representatives.
>
> (3) The Minister responsible for legislation of a kind referred to in section 5(b) or (c) (if a Minister is responsible), and the chief executive of the public entity that will be responsible for administering that legislation immediately after it is made, must each sign a written certificate containing the information specified in section 9 before that legislation is made.
>
> (4) Despite any other enactment, a Minister may not delegate his or her duties under this section to anyone other than a member of the Executive Council, and a chief executive may not delegate his or her duties under this section to anyone other than a person who is acting as chief executive in his or her place.

4.95 Clauses 8 to 10 provide for certification of the compatibility of proposed legislation with the principles of responsible regulation by those primarily responsible for proposing or creating legislation.

4.96 The purpose of the certification regime is to enhance transparency in the legislative process, and by so doing, require those exercising legislative powers to review legislation against the principles of responsible regulation. However, the Bill does not intend to create a statutory power that is reviewable by the Courts. This is consistent with the position in relation to review of the Attorney-General's certification of bills as inconsistent with the NZBORA.[71] Consideration by the Courts of the compatibility of enacted legislation with the principles of responsible regulation is to be conducted solely under the express jurisdiction to interpret legislation under clause 11, or to issue a declaration of incompatibility under clause 12. A failure to issue a certificate in advance of legislation entering into force will not entitle a party to an injunction or compensation (clause 13(2)(b)), or render the legislation invalid or ineffective, or enable the Courts to decline to apply any provision of the legislation (clause 14(2)).

4.97 Clause 8 provides for who must certify legislation, and when. Certification is provided by signing a written certificate containing the information set out in clause 9. Certificates are not addressed to any entity, and in this respect are similar to various certificates to be made by directors of companies under the

[71] *Boscawen v Attorney-General* [2009] 2 NZLR 229 (CA).

Companies Act 1993. However, certificates must be published on the Internet (clause 17(3)), and, where the proposed legislation is a Bill, presented to the House of Representatives as soon as practicable after the certificate is signed (clause 10).

4.98 Where the legislation is a Government Bill, both the Minister responsible and the chief executive of the public entity that will be responsible for administering the Bill when it is enacted must certify the Bill both before it is introduced into the House of Representatives, and before the commencement of the Bill's third reading in the House of Representatives. This will ensure that amendments to Bills, whether introduced at the Select Committee stage or by Supplementary Order Paper, will be subject to the certification process by those who are promoting the legislation.

4.99 The Taskforce also respectfully recommends that Parliament's Standing Orders be amended to require the Select Committee to which the Bill has been referred to assess the Bill, and any amendments made to the Bill by the Select Committee, against the principles of responsible regulation. The Taskforce envisages that the Select Committee process will form an important part of ensuring compliance with the principles of responsible regulation, and that submitters will in time routinely address the compliance of Bills with the principles, as is currently the case for the NZBORA. Further potential amendments to the Standing Orders are addressed in Part 5 of this report.

4.100 Where the legislation is a Bill other than a Government bill, the member of Parliament who is in charge of the Bill must certify it. Again, certification must occur both before it is introduced into the House of Representatives, and before the commencement of the Bill's third reading in the House of Representatives.

4.101 Where the legislation is not a Bill, both the Minister responsible (if any) for the legislation and the chief executive of the public entity that will be responsible for administering the legislation immediately after it is made must certify the legislation before it is made.

4.102 The Taskforce considers the requirement that, where appropriate, both a responsible Minister and a responsible chief executive certify to the compatibility of legislation is appropriate to ensure that accountability and transparency is brought to the conduct of both political and non-political actors in the process of formulating legislation.

4.103 Clause 8(4) expressly limits the ability of Ministers and chief executives of public entities to delegate the responsibility of certifying proposed legislation. The purpose of this provision is to avoid the operation of sections 28 and 41 of the State Sector Act 1988, which permits Ministers to delegate their functions and powers under any Act to chief executives, and chief executives to delegate their functions within the entity. This restriction is appropriate to recognise the significance of the certification process, and to ensure that it is accorded a proper level of importance within the executive branch.

4.104 Under clause 8(4), chief executives will only be able to delegate their duties under clause 8 of the RR Bill to a person who is acting as chief executive in his or her place. This will not, however, prevent the common practice of reports

being signed on behalf of the chief executive (as this is not a delegation). This practice leaves the chief executive responsible for the quality of the certification, and thus is consistent with the purpose of the clause. In the case of Ministers, and consistent with section 7 of the Constitution Act 1986, another Minister will be able to sign a certificate on the responsible Minister's behalf.

Clause 9 Content of certificate

> **9 Content of certificate**
>
> (1) A certificate signed by a person for the purpose of section 8 must state, in the person's opinion,—
>
> (a) whether the legislation is compatible with each of the principles; and
>
> (b) if not, the respects in which it is incompatible; and
>
> (c) if paragraph (b) applies,—
>
> (i) whether the incompatibility is justified under section 7(2); and
>
> (ii) if so, the reasons for that justification and, if not, the reasons why the legislation is proceeding despite the lack of justification.
>
> (2) Subsection (1)(c) does not apply to a certificate given by a chief executive of a public entity if a Minister has also given a certificate under section 8.

4.105 Clause 9 sets out the content required of certificates signed under clause 8. A certificate must state, in the person's opinion:

(a) whether the legislation is compatible with the principles of responsible regulation set out in clause 7(1);

(b) if not, the respects in which the legislation is not compatible.

If the legislation is not compatible in the opinion of the person certifying, then that person must also state whether in that person's opinion the incompatibility is justified in a free and democratic society under clause 7(2), and if so the reasons for that justification, and if not, the reasons why the legislation is proceeding nonetheless.

4.106 Where legislation is to be certified by both a Minister and a chief executive of a public entity, clause 9(2) provides that the chief executive of the public entity will not be required to certify, in the case of legislation that is incompatible with the Bill's principles, that the legislation is demonstrably justified in a free and democratic society. The Taskforce considers that, in this case, the certification by the chief executive is best limited to the proposal's technical compliance with the principles set out in clause 7(1), while the judgment as to whether any incompatibility is justified under clause 7(2) is best made by the responsible Minister, as the elected official with direct responsibilities to Parliament.

4.107 Where a Minister does not certify the proposed legislation, the Bill requires the chief executive of the public entity responsible for the legislation to certify as to any justification for an incompatibility with the principles. The Taskforce expects that these occasions will be rare, as generally the power to make legislation will be interpreted not to delegate the power to make legislation inconsistent with the principles of responsible regulation.

Clause 10 Certificate must be presented to the House of Representatives

> **10 Certificate must be presented to House of Representatives**
> A certificate in respect of a Bill for the purposes of section 8 must be presented to the House of Representatives as soon as practicable after the certificate is signed.

4.108 Clause 10 provides that where a certificate is given in respect of a Bill, it must be presented to the House of Representatives as soon as practicable after the certificate is signed. This will enable the certificate to be available for the debate on the first and third readings of the Bill.

Clause 11 Interpretation compatible with principles to be preferred

> **11 Interpretation compatible with principles to be preferred**
> (1) Wherever an enactment can be given a meaning that is compatible with the principles (after taking account of section 7(2)), that meaning is to be preferred to any other meaning.
> (2) The Court may, on application or its own motion, grant leave for the Solicitor-General to be joined as a party to proceedings in which subsection (1) may be applied.
> (3) Subsection (1) applies to an enactment made before the date on which this Act comes into force only after the 10th anniversary of that date.
> Compare: 1990 No 109 s 6

4.109 Clause 11 requires the Courts, when interpreting legislation, to prefer meanings that are compatible with the principles of responsible regulation, where legislation can be given such a meaning.

4.110 The language of clause 11 is adopted from section 6 of the NZBORA. That provision is to be preferred to other interpretation directions in similar legislation in comparable jurisdictions, such as section 8 of the Human Rights Act 1998 (UK), on the basis that it is more familiar to New Zealand legislators, their advisors, and the Courts, and less likely to result in unduly strained interpretations being given to legislation.

4.111 The direction to the Courts to prefer meanings of legislation that are compatible with the principles is subject to two important limits.

4.112 First, the direction to Courts to interpret legislation consistently with the principles recognises that those principles may be subject to justified limitations. Under section 6 of NZBORA, the Supreme Court has held that statutes are to be interpreted, if possible, consistently with the rights as limited by section 5 of the NZBORA, rather than consistently with the unlimited expression of the rights in Part 2 of the Act.[72] The Taskforce expects that the Courts will take a similar approach to clause 11 of the Act. Accordingly if, using ordinary interpretive techniques, including by reference to the legislative

[72] *R v Hansen*, supra, at [60] – [61] per Blanchard J; [92] per Tipping J; [191] per McGrath J; [266] per Anderson J.

purpose,[73] the Courts can give meaning to legislation, the Courts will not consider an alternative meaning of the legislation (even if this meaning would provide greater compatibility with the principles), unless the normal meaning constitutes an incompatibility with the principles that is not justified by clause 7(2).

4.113 Second, the direction will initially apply only to legislation made after the date on which the Bill enters into force. This will ensure that, when a Court is considering whether a meaning of legislation is available that is compatible with the principles, it will be considering legislative text which has already been considered in terms of compatibility with those principles by those responsible for proposing the legislation. The Taskforce considers that this is likely to substantially reduce the prospect of interpretations being given to legislation that are contrary to the understanding of the Minister and public entities proposing the legislation.

4.114 As with the Court's jurisdiction to issue declarations of incompatibility, the direction contained in clause 11 will apply to legislation made before the date the Bill enters into force only after the 10th anniversary of that date. That period is intended to provide legislators and their advisors with an appropriate transition period in which to conduct a review of the body of legislation for which they are responsible, and make any appropriate modifications they consider necessary to enhance the compatibility of that body of legislation with the principles of responsible regulation.

4.115 In addition, clause 11 provides that, in a proceeding in which the interpretative presumption in clause 11(1) may be applied, the Court may either on application or of its own motion, grant leave for the Solicitor-General to be joined as a party to the proceedings. The Taskforce considers that this is an appropriate procedural safeguard to ensure that, if appropriate, the interests of the Government can be represented in any proceeding in which the principles of responsible regulation may be deployed to interpret legislation.

[73] Interpretation Act 1999, s 5: the meaning of an enactment must be ascertained from its text and in light of its purpose.

Clause 12 Court may declare that legislation infringes principles

12 Court may declare that legislation incompatible with principles

(1) A court may, in any proceedings, declare that a provision of any legislation is incompatible with 1 or more of the principles specified in section 7(1)(a) to (h) (unless the incompatibility is justified under section 7(2)).

(2) However, a court may not make a declaration unless, before the declaration is made,—

(a) the public entity responsible for administering the legislation concerned (if any) has been given the opportunity to provide to both the person seeking the declaration and the court a statement as to whether the legislation is incompatible with the principles; and

(b) the Solicitor-General has been given notice of, and the opportunity to be joined as a party to, the proceedings.

(3) In this section and section 13,—

court means the High Court, the Court of Appeal, or the Supreme Court

proceedings means—

(a) proceedings that relate only to an application for a declaration under subsection (1) or the Declaratory Judgments Act 1908; or

(b) judicial review proceedings.

(4) Subsection (1) applies to legislation made before the date on which this Act comes into force only after the 10th anniversary of that date.

Compare: UK Human Rights Act 1998 ss 4, 5.

4.116 Clauses 12 to 13 introduce a new power for the New Zealand Courts, to grant a declaration that particular legislation is incompatible with the principles of responsible regulation. Clause 12 creates the jurisdiction to grant a declaration, and clause 13 specifies the limited effect of the declaration. The Court's power is declaratory only: the Courts will not have the power to either strike down legislation (whether primary, secondary or tertiary), to issue injunctions against Parliament or the Crown, or to award damages to those adversely affected by legislation that is incompatible with the principles.

4.117 Although the jurisdiction to grant a declaration of incompatibility with the principles of responsible regulation will be new, the power to grant declarations of incompatibility is not a novel innovation, either in comparable jurisdictions or in New Zealand. Section 92J of the Human Rights Act 1993, as amended by the Human Rights Amendment Act 2001, has given, from 1 February 2002, the Human Rights Tribunal, and on appeal the High Court, the power to declare that legislation is incompatible with the right to be free from discrimination under s19 of the NZBORA. Similarly, although the Courts have to date declined to expressly give a declaration of incompatibility with other provisions of the NZBORA, it is likely that an equivalent jurisdiction to grant declarations of incompatibility exists in respect of those rights.

4.118 The language of clause 12 is taken from section 3(2) of the Human Rights Act 1998 (UK) (the *HRA*). That Act permits the English Courts to issue declarations that legislation is incompatible with the provisions of the HRA. That jurisdiction has been used in a number of significant cases, including consideration of anti-

terrorism provisions.[74] However, the effect of a declaration under the Bill will be different from a declaration under the HRA. Section 10 of the HRA provides a Minister of the Crown with the power to amend legislation that has been declared to be incompatible with the HRA if there are compelling reasons to proceed under that section. The Bill does not contain an equivalent provision. Instead, the Taskforce expects that the Government and the House of Representatives will, as a matter of comity and practical political reality, consider and if appropriate respond to any declaration of incompatibility made by the Courts.

4.119 The Courts' power to make a declaration of incompatibility would be discretionary, and would be in addition to, and not a replacement for, the Courts' current judicial review jurisdiction. The Taskforce expects that, in exercising the discretion to grant a declaration, the Courts will consider similar factors to those currently considered in the judicial review jurisdiction, recognising however that the jurisdiction is to an appreciable degree by its nature advisory. Equally, however, the Taskforce considers that a Court is unlikely to entertain a claim for a declaration of incompatibility where the issue is truly moot, for example because the legislation has been certified as incompatible with the principles of responsible regulation, or that incompatibility has previously been conceded by the relevant agency.

4.120 The Taskforce has carefully considered the appropriateness of entrusting this additional role to the Courts. The granting of a declaration of incompatibility will require the Courts, at least to an extent, to consider the merits of policy choices made by legislators. This is an area which traditionally the Courts have expressed reluctance to enter, given the familiar institutional advantages enjoyed by policy-makers in the legislative and executive branches over those in the Courts.

4.121 Nonetheless, the Taskforce has concluded that providing the Courts with the limited role envisaged under clause 12 is justified and necessary as a mechanism to encourage and ensure compliance on the part of decision-makers with the principles of responsible regulation. 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. The Taskforce expects that the possibility of a declaration of incompatibility by the Courts, although of no direct legal consequence, provides significant political and institutional incentives on policy-makers and their advisors to carefully consider proposals against the principles, and craft better policies and legislation, in the first instance.

4.122 The utility of the declaration of incompatibility mechanism is therefore not limited to, or indeed even mostly derived from, the Court's actual grant of such declarations. Rather, the importance of the declaration is its effect on policy-makers, at the beginning of the process, to ensure that the additional "navigational lights" provided by the Bill are understood by policy-makers to signify rocks with real political and institutional, if not legal, consequences. In the event that those "navigational lights" are demonstrably given careful

[74] *A v Secretary of State for the Home Department* [2005] 3 All ER 169 (HL).

consideration by policy-makers, the Taskforce considers that the Courts are likely to give substantial deference to the judgment of the policy-makers.

4.123 The jurisdiction to issue declarations of incompatibility under the Bill will be subject to a number of important limits, designed to preserve the status of the remedy, and limit the institutional issues faced by the Courts in exercising the jurisdiction.

4.124 First, the Court will have power to declare a provision of any legislation inconsistent only with the principles specified in clauses 7(1)(a) to (h), and in doing so must take into account clause 7(2). Accordingly, the Courts will not be required to consider whether the legislation has been enacted after a careful evaluation of the matters specified in clause 7(1)(i), or whether the legislation produces benefits that outweigh the costs of the legislation under clause 7(1)(j), or is the most effective, efficient and proportionate response to the issue that is available under clause 7(1)(k). The Taskforce considers that those issues are particularly unsuitable for judicial consideration, given the institutional limits of the adversarial process.

4.125 The requirement, contained in clause 12(2)(a), that the Courts take into account clause 7(2) is also important. The effect of this provision is that the Courts will not issue a declaration of incompatibility where the incompatibility with a principle is reasonable and can be justified in a free and democratic society. This is consistent with the approach of the English Courts under the HRA, and with relevant observations of the New Zealand judiciary in relation to a declaration of incompatibility with rights specified in the NZBORA.[75]

4.126 Second, the jurisdiction to grant a declaration of incompatibility will be limited to the High Court, the Court of Appeal and the Supreme Court. This is provided for by the definition of **court** in clause 12(3). That means that a District Court, or any other tribunal, will not be able to make the declaration.

4.127 Third, the declaration will also only be able to be sought, or granted, in particular **proceedings**, which are defined by clause 12(3) to mean special proceedings in which an application for the declaration is the sole remedy, judicial review proceedings, or proceedings under the Declaratory Judgments Act 1908. The Taskforce considers that, to maintain the institutional significance of the declaration of incompatibility, it is important that the declaration not become a remedy that is appended to statements of claim as a matter of routine.

4.128 Fourth, under clause 12(2)(a) a Court may not make a declaration unless the public entity responsible for administering the legislation concerned has been given the opportunity to provide to both the person seeking the declaration and the Court a statement of whether the legislation infringes the principles. The Taskforce considers that this provision is likely to provide a significant limit to the Court's role. If the public entity responsible states that the legislation infringes the principles, or, alternatively, the legislation has been certified as incompatible with the principles, the Taskforce considers it unlikely that a Court

[75] *Quilter v Attorney-General* [1998] 1 NZLR 523, 554 (CA); *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9, 17 (CA); *R v Hansen*, supra, at [267] per Anderson J. See generally Rishworth et al *The New Zealand Bill of Rights* (2003) 833 – 834.

would entertain the claim for a declaration of incompatibility. In those circumstances, it is expected that a claim for a declaration will likely be able to be struck out by the Solicitor-General.

4.129 Fifth, and related to that last point, under clause 12(2)(b), the Solicitor-General must be given notice of, and the opportunity to be joined as a party to the proceedings. This will ensure that the Government's position on the legislation is made available to the Court, if the Government so wishes.

4.130 Sixth, and finally, under clause 12(4), the jurisdiction to grant declarations of incompatibility will initially apply only to legislation made after the date on which the Bill comes into force. Declarations in respect of legislation made prior to the Bill coming into force will only be able to be made after the 10th anniversary of that date. As with clause 11(3), that period is intended to provide legislators and their advisors with an appropriate transition period in which to conduct a review of the body of legislation for which they are responsible, and make any appropriate modifications they consider necessary to enhance the compatibility of that body of legislation with the principles of responsible regulation.

Clause 13 Effect of declaration

> **13 Effect of court declaration**
> (1) A declaration under section 12—
> (a) does not affect the validity, continuing operation, or enforcement of the provision in respect of which it is given; and
> (b) is not binding on the parties to the proceedings in which it is made.
> (2) A court may award costs against or in favour of any party to proceedings under section 12, but may not make an order for an injunction or compensation or anything else in conjunction with or in respect of—
> (a) a declaration under section 12; or
> (b) a certificate given, or a failure to give a certificate, under section 8.

4.131 Clause 13(1) confirms that a declaration of incompatibility does not affect the validity or continuing operation or the enforcement of the legislation in respect of which it is given. It also provides that a declaration is not binding on the parties to the proceedings in which it is made. This enables responsible Ministers who are, by virtue of the Solicitor-General's participation in the proceedings, a party to them to maintain a different view as to the compatibility of the legislation with the principles of responsible regulation, although the Taskforce expects that Ministers will inevitably accord the findings of the Court weight.

4.132 Clause 13(2) permits the Court to award costs in relation to any proceeding for a declaration, but confirms that a declaration of incompatibility is to be the sole remedy able to be granted by the Courts by specifically excluding any power to make orders other than a declaration of incompatibility under clause 12, such as an injunction, or compensation, or any other order. The purpose of this clause is to avoid the possibility of a similar decision as *Attorney-General v Simpson (Baigent's Case)*, in which the Court of Appeal held that the Courts

had the power to award damages for breaches of NZBORA, notwithstanding the silence of the Act on the point.[76]

Clause 14 Legal effect of principles

> **14 Legal effect of principles**
> (1) The principles do not have the force of law (except as provided in sections 11 to 13).
> (2) No court may, in relation to any legislation (whether made before or after the commencement of this Act),—
> (a) hold any provision of the legislation to be impliedly repealed or revoked, or to be in any way invalid or ineffective; or
> (b) decline to apply any provision of the legislation—
> by reason only that the provision is incompatible with any of the principles or that any provision of this Act has not been complied with.
> Compare: 1990 No 109 s 4

4.133 Clause 14(1) confirms that except as provided in clauses 11 to 13, which relate to the Courts' powers to interpret legislation and issue declarations of incompatibility, the principles do not have the force of law. The clause therefore reaffirms that nothing in the Act is intended to undermine Parliamentary supremacy.

4.134 Clause 14(2) provides that no Court may, in relation to any legislation, hold any provision of legislation to be invalid or repealed, or refuse to apply legislation, simply by virtue of the fact that it is incompatible with the principles of responsible regulation. This is equivalent to section 4 of the NZBORA.

PART 3: MISCELLANEOUS PROVISIONS

Clause 15 Guidelines

> **15 Guidelines**
> (1) The Minister who is responsible for the administration of this Act may, by notice in the *Gazette*, issue guidelines as to any or all of the following:
> (a) examples of the application of the principles:
> (b) the information that should be included in explanatory notes for legislation as to the compatibility of the legislation with the principles:
> (c) the steps that public entities should take in order to comply with section 16(1):
> (d) the steps that persons and public entities should take in order to comply with section 17.
> (2) The guidelines do not have the force of law.
> (3) The Minister must ensure that the guidelines are published, at all reasonable times, on an Internet site maintained by or on behalf of the Department that is responsible for the administration of this Act.

[76] [1994] 3 NZLR 667 (CA). See New Zealand Law Commission *Crown Liability and Judicial Immunity: A Response to Baigent's Case and Harvey v Derrick* (NZLC R 37, 1997).

4.135 Clause 15(1) provides for the Minister responsible for administering the Bill to issue guidelines, to be published in the *Gazette*, concerning the application of the principles, the information to be included in explanatory notes to legislation, and the steps that public entities and other persons should take in order to comply with their obligations to review the body of legislation under clause 16, and to publish information on the Internet under clause 17. In addition to publication in the *Gazette*, the guidelines are to be published on an Internet site maintained by or on behalf of the Department responsible for the administration of the Act.

4.136 Clause 15(2) provides the guidelines issued do not have the force of law. The guidelines are advisory only: the Act remains the sole and definitive statement of the obligations of public entities under the Act, and the principles of responsible regulation remain the sole touchstone against which legislation is required to be assessed. Nonetheless, the Taskforce considers that informal inter-agency co-ordination on quality of regulation issues, including compliance with the proposed principles of regulatory responsibility, is appropriate and necessary to ensure consistent advances in regulatory quality are made in the public sector. The ability of the responsible Minister to issue advisory Guidelines is designed to accommodate and facilitate this.

4.137 The RR Bill allows the Prime Minister to designate, from time to time, the Minister responsible for the administration of the Act. However, the Taskforce recommends that this oversight role be given initially to the Minister of Finance, as the Government Minister with the greatest oversight of economic and fiscal management.

4.138 The Taskforce considers that this role would complement and reinforce the existing role of Treasury (and the Regulatory Impact Analysis Team) within the public sector as the primary agency with responsibility for quality issues in legislation across the public sector.

Clause 16 Review of legislation for compatibility with principles

> **16 Review of legislation for compatibility with principles**
> (1) Every public entity must use its best endeavours to regularly review all legislation that it administers for compatibility with the principles.
> (2) Every public entity must include in each of its annual reports under the Public Finance Act 1989, the Crown Entities Act 2004, or any other Act a statement of—
> (a) what steps it has taken to comply with subsection (1) during the year to which the report relates; and
> (b) the outcomes of any reviews under that subsection that it has completed during that year.

4.139 Clause 16(1) requires every public entity responsible for administering legislation to regularly review all legislation that it administers for compatibility with the principles of responsible regulation. The Taskforce is convinced that consideration of legislation at the time it is created is not sufficient to achieve the purposes of the RR Bill, and that regular review of the body of legislation is crucial to establishing and maintaining quality, effective and efficient legislation in a dynamic environment.

4.140 While the RR Bill is non-prescriptive as to the regularity of review required by clause 16, that may be the subject of advisory guidelines issued by the Minister under clause 15. Transparency as to the annual review activities of each public entity is provided by clause 16(2), which provides that each public entity must include in its annual report a statement of what steps it has taken to comply with its obligation to review legislation for which it is responsible, and the outcomes of any reviews that it has completed in that year.

Clause 17 Publication of information on Internet

17 Publication of information on Internet

(1) Every public entity that is responsible for administering any legislation must publish a list of that legislation on the Internet.

(2) Every public entity that publishes, or provides to a court, information about the compatibility of legislation with the principles (whether for the purpose of section 12, or in accordance with guidelines under section 15, or otherwise) must ensure that the information is published on the Internet throughout the period during which the legislation is in force.

(3) Every person who signs a certificate under section 8 must ensure that a copy of the certificate is published on the Internet throughout the period during which the legislation is in force.

(4) Material required by this section to be published on the Internet by a public entity must be published on an Internet site maintained by or on behalf of the public entity so that it is available at all reasonable times.

4.141 Clause 17 provides for publication of information concerning the body of legislation administered by a public entity, and its compliance with the principles of responsible regulation, on the Internet. Publication must be on an Internet site maintained by or on behalf of the public entity, and be available at all reasonable times (clause 17(4)).

4.142 Three types of information must be made available by a public entity on the Internet under clause 17:

(a) a list of legislation in force that the public entity is responsible for administering (clause 17(1));

(b) information about the compatibility of legislation in force with the principles (whether created for the purpose of providing it to a Court in a declaration of incompatibility proceeding, or in accordance with guidelines issued under the Act) (clause 17(2));

(c) certificates signed in respect of legislation in force (clause 17(3)).

4.143 In addition to being publicly available on the Internet, documents held by public entities that are subject to the Official Information Act 1982 will be able to be requested by the public under that Act in the normal way.

PART 5 - ADDITIONAL RECOMMENDATIONS

5.1 The Taskforce's core task under its terms of reference was the production of a draft RR Bill. However, the Taskforce was also to consider what "supporting arrangements … might be desirable". In this section of the report, the Taskforce sets out its recommendations concerning those supporting arrangements.

5.2 The Taskforce considers that appropriate initiatives within both the legislative and executive branches could usefully support and reinforce the mechanisms in the RR Bill.

Recommended amendments to the Standing Orders of the House of Representatives

5.3 The Taskforce considers that the role of the House of Representatives in scrutinising Bills and other kinds of legislation can be usefully enhanced in two areas: the scrutiny of Bills prior to enactment, and the general scrutiny of delegated legislation following enactment.

- ***scrutiny of a Bill prior to its enactment***

5.4 The RR Bill will require the Minister responsible for a Government Bill, or member of Parliament in charge of Bill other than a Government Bill (as well as the chief executive of the public entity that will be responsible for administering the resulting Act in the former case) to certify as to the compatibility of the Bill with the principles of responsible regulation prior to the Bill's introduction, and again before the commencement of the Bill's third reading (clause 8(1)). Those certificates are required to be presented to the House (clause 10). The requirement of certification at the commencement of the third reading will capture amendments made at select committee, and by Supplementary Order Paper in the Committee stage of the passage of a Bill.

5.5 The effect of those clauses of the RR Bill is to provide that the primary responsibility for informing the House as to the compatibility of Bills with the principles of responsible regulation lies with those who are proposing the Bills. By placing the responsibility on those proposing legislation, the RR Bill aims to ensure that the principles of responsible regulation are taken into account at an early stage of the policy-making process, and not merely as a final "check" against which fully developed policy and legislative proposals are assessed.

5.6 The Taskforce recognises, however, the singular importance of the select committee process to public scrutiny of Bills. It is at this stage that the primary opportunity for public submission on both the substantive merits and the detail of Bills occurs. The Taskforce therefore considers it highly desirable that, as an aspect of the scrutiny of Bills at the select committee stage, each Bill be considered against the principles of responsible regulation, and that members of the public be encouraged to submit on the compatibility of the Bill with those principles.

5.7 To facilitate this, the Taskforce respectfully recommends that the Standing Orders of the House of Representatives be amended to require each select committee to address the compatibility of any Bill referred to it under SO 280 with the principles of responsible regulation in its report back to the House.

Further, the select committee's power to recommend amendments could be amended to specifically include the power to recommend amendments to address any incompatibility between the Bill and the principles of responsible regulation.

5.8 The Taskforce also recommends that the House consider whether a specialist select committee be given the task of scrutinising Bills against the principles of responsible regulation, as opposed to the subject matter select committee to which the Bill is also referred. The Taskforce notes that the establishment of similar specialist "legislative quality" select committees, with an oversight role for all Bills, has been a useful development in other jurisdictions.[77] Such specialist committees allow the accumulation and deployment of a significant pool of specialist expertise on a non-partisan basis. A similar committee was recommended in the final report of the Justice and Law Reform Committee on the White Paper on a Bill of Rights of New Zealand, but not taken forward.[78] The Taskforce considers that, in the event that its recommendations regarding the scrutiny of legislation generally are adopted, as discussed in the next section of this Report, this role could be appropriately given to the Regulations Review Committee, which could be renamed to reflect its wider role.

- ***scrutiny of legislation following enactment generally***

5.9 As discussed earlier in this report, under the 1989 Acts, the House of Representatives exercises certain powers to disallow delegated legislation. In practice, the House acts on the recommendation of the Regulations Review Committee, established under Standing Order 309. The Committee by convention operates on a non-partisan basis, and is chaired by a member of the Opposition.

5.10 In addition to making recommendations to the House on matters under the 1989 Acts, the Committee is also empowered:

(a) to consider draft regulations referred to it by Ministers (SO 309(2));

(b) to consider, in respect of a Bill that is before another committee, any regulation or other delegated legislation making power, or any matter relating to regulations (SO 309(3));

(c) to consider complaints by a person or organisation aggrieved at the operation of regulation (SO 309(5)).

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[77] See, in particular, the Parliamentary Joint Committee on Human Rights, which is responsible for human rights issues that come before either House in the United Kingdom Parliament: Anthony Lester QC "Parliamentary Scrutiny of Legislation under the Human Rights Act 1998" (2002) 33 VUWLR 1. A similar committee, but with responsibility for broader quality issues (including Bills that "trespass unduly on personal rights and liberties", or make such rights "unduly dependent upon insufficiently defined administrative powers" or "non-reviewable decisions", is to be found in the Senate of the Australian Federal Parliament: Standing Orders, SO24; see also Standing Committee for the Scrutiny of Bills "Ten Years of Scrutiny" (25 November 1991) available at <http://www.aph.gov.au/Senate/Committee/scrutiny/10_years/report.pdf>

[78] Justice and Law Reform Committee *Final Report on a White Paper on a Bill of Rights for New Zealand* (1987-90) 17 AJHR I.8c, 11.

5.11 The grounds on which the Committee may consider regulation ought to be drawn to the attention of the House are set out in SO 310(2). These include matters which overlap with the principles of responsible regulation, including that regulation does not "trespasses unduly on personal rights and liberties", "unduly makes the rights and liberties of persons dependent upon administrative decisions which are not subject to review on their merits by a judicial or independent tribunal", or is "retrospective".

5.12 The Taskforce acknowledges the substantial and important work of the Regulations Review Committee in drawing attention to quality of legislation issues, and in considering particular complaints from members of the public who are aggrieved at the operation of legislation. The Taskforce considers that the tradition of non-partisan consideration of these issues is an important reason for the success of the Committee.

5.13 The Taskforce respectfully recommends that the House consider a broader oversight role for the Regulations Review Committee. As discussed above at paragraph 5.8, the Taskforce recommends that the Regulations Review Committee be authorised to review all Bills against the principles of responsible regulation. It also recommends that the Committee be able to review all existing Acts and other legislation.[79] The bases on which the Regulations Review Committee may review legislation under SO 310 should be expanded, to include the compatibility of the legislation with the principles of responsible regulation. The Taskforce envisages that, in the case of Bills, the Regulations Review Committee would be authorised to report its findings to the House. In the case of regulations under the 1989 Acts, the committee would have its existing disallowance powers.

Recommended executive branch initiatives

5.14 The Taskforce has provided, within the draft RR Bill, power for the Minister responsible for the administration of the Act to issue guidelines for the direction of the executive branch (clause 15). This reflects the Taskforce's view, as discussed in the commentary to clause 15, that co-ordination within the executive branch to ensure compliance with the principles of responsible regulation is necessary and appropriate.

5.15 In addition to those statutory powers, the Taskforce recommends that the Government establish a permanent group responsible for reviewing both the body of legislation, and specific proposed or existing legislation, against the principles of responsible regulation and the guidelines issued, and consulting with public entities where appropriate. The Taskforce considers that this role naturally complements and aligns with the role currently played by the Regulatory Impact Analysis Team.

5.16 The Taskforce considers that the principles would significantly reinforce existing Government policies and procedures.

[79] Subject to the 10 year transition period in clause 12(4) of the RR Bill.