In Search of Better Law-Making: 
Why the Regulatory Responsibility Bill won't deliver what it promises

EXECUTIVE SUMMARY

The Regulatory Responsibility Taskforce ("Taskforce") has recommended that Parliament enact the Regulatory Responsibility Bill ("RRB"). This paper considers the argument for the RRB set out in the Report of the Taskforce ("Report") and related materials. We believe the argument fails. Instead, we argue, Parliament should enact neither the RRB nor any likely revised version of it.

In 2007, Rodney Hide MP received a surprising amount of support for an earlier version of the RRB. Members of all parties except the Greens voted for his Bill at its first reading, apparently recognising that its intention to improve the quality of law-making was a good thing. The initial Bill went to the Commerce Committee, which took submissions. The Committee recommended the Bill not pass, and instead suggested that a high-level expert taskforce be established "to consider options for improving regulatory review and decision-making processes, including legislative and Standing Orders options, but not limited to the options that were placed before us." The 2008 Confidence and Supply Agreement between the ACT and National parties agreed to establish the Taskforce. However, its Terms of Reference assumed that a bill was needed, and the Taskforce's efforts were directed to developing and recommending the RRB. The need for a bill, rather than any other option, has never been established, and an opportunity for the potentially valuable and comprehensive review that a taskforce could have carried out, was passed over.

The RRB sets out "principles of responsible regulation," or good law-making. It also spells out mechanisms to ensure that legislation conforms to those principles: allowing people to go to court for a declaration that legislation breaches the principles; requiring the courts to interpret legislation consistently with the principles, where possible; and requiring Ministers and some civil servants to certify whether proposed legislation is consistent with the principles, and if not, whether that is justified. At first, the declaratory jurisdiction and the interpretive direction would only apply to legislation passed after the RRB, but after 10 years they would apply to all legislation, whenever enacted.

Part I of this paper argues that no sound case has been made for the kind of "think big" constitutional reform that the RRB represents. To date, the problem to which the RRB apparently responds has not been adequately defined, and the cause of any such problem has not been diagnosed. The Report did

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not supply detailed evidence or argument about why the quality of legislation in New Zealand is a serious problem. The Report also focuses on economic growth as a justification for its proposal. But not only is it unclear that the RRB will improve economic growth, it is an unduly narrow focus. Economic growth is important, but it is not the only purpose of law-making. Further, driven by its Terms of Reference, which required it to recommend a bill, the Report does not consider alternatives, including existing initiatives to improve law-making. Thus the question remains whether there is a problem of the scale or of the type that advocates of the RRB assume, or whether, if there is, the RRB is the best solution to that problem.

Part II argues that the RRB would be unconstitutional. First, we examine the principles in the RRB. We believe this analysis shows that some of the principles are constitutionally unorthodox and substantively unsound. They are also abstract, so that it will ultimately be judges who make the final decision about what they mean. Second, we believe there is a strong risk that the RRB will invite or require judges to make policy judgments and thus undermine democracy. Asking judges to apply the RRB does not involve the interpretation or enforcement of legislation as normally understood, but the making of policy. The courts are not an institution well placed to making the kinds of moral, social, and economic—in a word, political—judgments that the RRB would require them to make. Such decisions are best left to Parliament: a democratically elected body that is able to consider a wide range of arguments and evidence, is expected to consult with the public, and is able to engage explicitly and transparently in political decision-making. Third, the RRB would involve civil servants in making politically contentious decisions about whether legislation complies with the principles, undermining public service neutrality.

In Part III we briefly outline some alternative reforms to the RRB. These are provisional suggestions. However, if the government was prepared to invest in exploring other avenues in the same way that it has invested in the RRB, much could be done to examine and develop the alternatives that we suggest, as well as other options.

Media commentary has suggested that the likely Government response to the Taskforce’s Report will be a watered-down version of the RRB. We believe that any proposal built on the RRB’s foundations is likely to be just as shaky. Particular aspects of the RRB that are retained in any revised bill—for example, asking judges or civil servants to police compliance with the principles—are likely to remain subject to the criticisms made in this paper.

Finally, while institutional and process reform may improve the law-making process somewhat, if carefully designed and adopted by those to whom it is directed, the most important changes that will encourage improvements in the law-making process are likely to take place in political culture. Changing the law-making culture—including the way that the media and citizens engage with elected officials—does not lend itself to formal reform, and is the responsibility of all citizens.
The Regulatory Responsibility Taskforce ("Taskforce") has recommended that Parliament enact the Regulatory Responsibility Bill ("RRB"). This paper considers the argument for the RRB set out in the Report of the Taskforce ("Report") and related materials. We believe the argument fails. Instead, we argue, Parliament should enact neither the RRB nor any likely revised version of it.

Outline of the RRB

The Taskforce recommends the RRB to answer what it takes to be a general problem with the quality and volume of legislation in New Zealand. The RRB is intended to improve legislation by specifying "principles of responsible regulation," or good law-making, and by introducing mechanisms to ensure that legislation conforms to those principles. These mechanisms are also apparently intended to reduce the overall volume of legislation. The RRB would apply to all legislation and to all regulations except for those made by local bodies (councils) (see Box 1). Its key features are, in brief:

1. The "principles of responsible regulation"
   The RRB sets out eleven "principles of responsible regulation" under the headings: Rule of Law, Liberties, Taking of Property, Taxes and Charges, Role of Courts, and Good Law-making. The RRB requires legislation and regulations to comply with these principles, but also provides that "[a]ny incompatibility with the principles is justified to the extent that it is reasonable and can be demonstrably justified in a free and democratic society."

2. Certification regime
   The Bill requires various persons, notably Ministers and certain civil servants, to certify whether proposed legislation is compatible with each of the principles and if not, to state how it is incompatible and whether any such incompatibility is justified in a free and democratic society.

3. Judicial declarations of incompatibility
   The RRB if enacted would allow litigants to take a case to the courts alleging that a statute or regulation breaches the principles in the RRB. The RRB authorises courts to declare legislation incompatible with the principles (to be an unreasonable departure from them), but not to strike down (invalidate) non-complying legislation or to require compensation. This jurisdiction applies to all but three of the "Good Law-making" principles.

4. Interpretive direction
   The RRB would require the courts to interpret legislation consistently with the principles of regulatory responsibility where possible.

5. Phase-in
   The previous two mechanisms—the judicial declaration of incompatibility and the interpretive direction—would apply initially only to legislation enacted after the RRB but, ten years after the RRB's enactment, would apply to all legislation whenever enacted.

Although it may not have attracted much public attention to date, the proposal is highly significant. Professor Paul Rishworth evaluated the RRB and concluded that it is in form essentially a second New Zealand Bill of Rights Act 1990 ("Bill of Rights Act"), and that in some respects the mechanisms in the RRB enforce the principles of regulatory responsibility more strongly than the Bill of Rights Act enforces the rights it affirms. The proposal is plainly of constitutional importance: indeed a vocal supporter of the RRB calls it a "regulatory constitution." The Taskforce also indicates in its report that it considers the RRB would implement "significant" constitutional change.

History of the RRB

The proposal has been discussed in various forms since 1994. A New Zealand Business Roundtable discussion document in 2001 proposed a draft bill, which Rodney Hide MP adopted in slightly modified form as the Regulatory Responsibility Bill 2006. After passing its first reading with support from all parties but the Greens, the Commerce Committee considered Hide's Bill in 2007 and 2008, and in May 2008 issued a report concluding
that more work was needed before any such legislation should be considered. The Committee recommended that the government establish a high-level expert taskforce to consider options for improving regulatory review and decision-making processes, including both legislative and non-legislative options.9

The ACT Party and National Party agreed in their 2008 Confidence and Supply Agreement to establish the Taskforce.10 Curiously, the Terms of Reference of the Taskforce required that the Taskforce was to produce an amended draft bill. That is, the Terms of Reference assumed that a bill was needed, whereas the Commerce Committee had been open to the possibility that no bill was needed and had recommended a taskforce to consider that very question.

The Taskforce reported back in September 2009, recommending a new draft Regulatory Responsibility Bill.11 It is the Taskforce’s proposed RRB that this paper considers and critiques.

The Taskforce’s Report and proposed RRB has been welcomed by the Minister of Regulatory Reform, the Hon Rodney Hide, and by a number of business groups, including the New Zealand Business Roundtable and Federated Farmers. The Treasury has also hosted a series of three Forums on the RRB at which it invited experts, including one of the authors of this paper, Richard Ekins, to offer feedback to Treasury on the merits of the RRB.

**Box 1. Why the title of the “Regulatory Responsibility Bill” is confusing**

The bill would apply to all legislation—that is, to Acts made by Parliament (also known as primary legislation) and to regulations made by the Executive under a power contained in an Act.

When lawyers use the term “regulation,” they mean laws made under a power delegated by Parliament to the Executive in Council. For example, the Family Courts Act 1980 and Family Proceedings Act 1980 authorise the Executive in Council (Ministers of the Crown presided over by the Governor General) to set Family Court fees by regulation. This type of law—also known as secondary or delegated legislation—is what lawyers understand by “regulation.”

However, the title of the “Regulatory Responsibility Bill” employs an economist’s use of the word “regulation” to mean all statutes enacted by Parliament directly and all regulations made by the Executive in Council or government officials and other government entities under a power set out in statute. The Bill itself does not use the term “regulation” except in its title and in the label it attaches to the “principles of responsible regulation” that it affirms.

Because of the Bill’s scope, it would be more accurate to refer to these as (what the Taskforce thinks are) “principles of good legislation.”

**The argument in this paper**

There are three parts to this paper:

1. We argue that no sound case has been made for the kind of “think big” constitutional reform that the RRB represents. To date, the problem to which the RRB apparently responds has not been adequately defined, the cause of any such problem has not been diagnosed, and an adequate range of solutions has not been considered. Thus the question remains whether there is a problem of the scale or of the type that advocates of the RRB assume, or whether, if there is, the RRB is the best solution to that problem.

2. We also argue that the RRB would be unconstitutional. First, the principles in the RRB are novel and in some cases radical. Second, there is a strong risk that the RRB will invite or require judges to make policy judgments and thus undermine democracy. Third, the RRB would involve civil servants in making politically contentious decisions about whether legislation complies with the principles, undermining public service neutrality.

3. We conclude by briefly outlining some alternative reforms to the RRB. These are provisional suggestions. However, if the government was prepared to invest in exploring other avenues in the same way that it has invested in the RRB, much could be done to examine and develop the alternatives that we suggest, as well as other options.
PART I: THE ARGUMENT FOR THE RRB IS UNCONVINCING

In this part, we examine the argument presented in support of the RRB. We have focused primarily on the argument in the Taskforce’s Report, as this is the leading justification for the RRB. If this argument is flawed—and we believe it is—then the RRB lacks a firm foundation. Further, any efforts to refine the RRB will suffer the same defect, unless they make the necessary foundational argument.

The Taskforce’s Terms of Reference assumed there was a general problem with law-making and directed the Taskforce to produce a draft bill, rather than asking it to carefully consider whether or not there was such a problem, and whether or not such a bill was in fact needed. Sound proposals for legislation to fix a problem should confirm that there is a problem that needs to be addressed and also identify the causes of the problem. The Taskforce should have been required at least to ensure that the bill it was asked to draft responded accurately to a carefully identified problem.

Some supporters of the RRB think that “it is beyond reasonable debate that the quality [of legislation] is too often poor.”12 We disagree. We think that the foundational assumption of the RRB—that the quality of law-making in New Zealand is generally poor—should be established with evidence and subject to evaluation. The Taskforce did advance some arguments that there is a general problem with law-making in New Zealand, and other supporters of the RRB have offered arguments independently of the Taskforce Report, but we do not believe these arguments have established the foundational assumption. We consider these arguments below.

Examples of bad law-making

The Taskforce notes four New Zealand examples of “controversial legislative initiatives:” the cancellation of the 1994 West Coast Accord, the Foreshore and Seabed Act 2004, the forcible unbundling of the Telecom-owned local loop, and the amendment of rules to block a foreign investor’s partial acquisition of Auckland International Airport. No doubt these policies are controversial. But the fact that many people disagree with them does not mean law-making processes are broken. The Taskforce did not clearly explain why it thought each an example of bad law (for example, whether they disagreed with the legislative purpose or the way that the purpose was executed in law), let alone explain what it thought was the root cause of the allegedly undesirable outcomes.

All informed citizens would agree that the quality of legislation is not always as good as it should be. Many controversial laws make newspaper headlines. But the mere fact that people disagree about whether or not certain laws are a good idea or are well-designed does not prove that the law-making process is broken. This is because the question of precisely which legislation is not as good as it should be—and in what respects, and by reference to what standards—is not a matter on which everyone agrees. Disagreement amongst reasonable persons acting in good faith about what legislation should be enacted is a central fact of democratic politics. No democratic law-making process can avoid many citizens thinking that some legislation enacted is not a good idea at all, or not as good as it should be. Bald examples of controversial laws prove only that in a democracy people reasonably disagree about what makes good law.

Other “evidence”

Other “evidence” offered by the Taskforce in support of its proposition that there is a severe problem with the quality of law in New Zealand was similarly underdeveloped, or was simply misleading.

For example, the Report refers to the concerns that others have expressed about the law-making process. The Report relies in particular on one statement by the Legislation Advisory Committee (“LAC”). The LAC drafts a guide to making good legislation that has been approved by Cabinet. Ministers and their officials are required to advise the Cabinet Legislation Committee of the steps they have taken to comply with those LAC Guidelines. The Taskforce Report repeats the LAC’s statement in its Annual Report 2007 that “a weakness with the development of legislation in New Zealand is that there is no comprehensive mandatory process for compliance with the LAC Guidelines.”13 (We should disclose that one of the authors—Richard Ekins—helped write one chapter in those Guidelines.) But the Taskforce Report does not note what follows immediately after this statement,
namely that the LAC had not yet formed a final view on the best mechanism to achieve this, but was working on the issues and had discussed them in its submission to the Commerce Committee on the 2006 version of the Regulatory Responsibility Bill introduced by Rodney Hide. Despite its concerns, the LAC explicitly opposed that version of the RRB.14

Other than this selective quotation of the LAC and the four examples mentioned above, the Report referred briefly to one study of a small sample of Regulatory Impact Statements (assessments of proposed legislation that Cabinet requires Ministers and officials to undertake), and a three-page Government policy statement. These sources were not discussed in any depth. In February 2010, a lawyer who “provided support to the Regulatory Responsibility Taskforce and assisted in the preparation of the taskforce’s report” indicated that the Taskforce, in forming the view that “there were real and important problems with the quality of legislation” and that a legislative response was required, also relied on the many submissions in favour of the 2006 Bill, when it was considered by the Commerce Committee.15 Any such reliance should have been discussed explicitly and the submissions evaluated. The point, after all, of commissioning the Taskforce had been to move the debate beyond the Committee stage, which had noted that there was in fact “little agreement amongst us and submitters as to the appropriate details for a framework for making and reviewing regulation.”16

In the absence of detailed evidence or argument about why the quality of legislation in New Zealand is a serious problem, readers of the Report are instead asked to place much trust in the experience and judgment of the Taskforce members. The Report states that “[i]n the Taskforce’s experience, legislation which turns out to have unforeseen effects often has not been adequately tested at an early stage against fundamental principles and regulatory analysis requirements.” However, it did not outline or explain these experiences.17 Likewise, two former Taskforce members have written that the Taskforce’s views were informed by its members’ experiences, LAC and Treasury thinking, and discussions with senior members of the legal profession.18 Whatever the experience and qualifications of the Taskforce members and of those with whom they consulted, a detailed analysis should have been presented.

### Law-making, “responsible regulation” and economic growth

It is reasonably clear from the Report that the Taskforce thinks that what constitutes good law is law that improves economic growth: when the Taskforce set out the potential costs and benefits of the RRB, it focused exclusively on economic costs and benefits. The Report confidently asserts that “as matters of both principle and practicability, there can and should be less legislation,” and that a better law-making process should improve economic growth and result in less legislation being enacted.19

New Zealand’s economic performance is declining relative to other developed countries, but is this due to too much (poor quality) legislation and regulation? The Report does little to prove such a connection, particularly in light of the fact that New Zealand’s core economic regulation compares well to other countries: New Zealand placed third in the world in the 2010 World Bank’s Ease of Doing Business rankings, and fourth in the 2011 Heritage Foundation and Wall Street Journal Economic Freedom Index.20 Indeed, New Zealand’s relatively high-quality legal framework is the source of a puzzle about New Zealand’s poor economic performance. The Organisation for Economic Co-operation and Development notes, “New Zealand is paradoxically at the forefront of the OECD in adopting policies in many areas that have been shown to lead to high per capita income, and yet it still ranks toward the bottom end of the OECD’s productivity league.”21

The Taskforce seems to think that a particular weakness of New Zealand’s regulatory and economic framework is that protection for private property rights is weak relative to other countries, that this is inefficient, and is a serious problem that must be addressed.22 Yet the Report gives no evidence that New Zealand’s property rights framework is poor relative to other countries, or is the problem that causes our economic under-performance. The 2011 Heritage Foundation and Wall Street Journal Economic Freedom Index gave New Zealand’s property rights regime a score of 95 out of 100, ranking New Zealand first in the world for the quality of its protection for property rights.23
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Less regulation, more economic growth?

The Taskforce asserts that better law-making processes will result in less legislation, and reduce the amount of new legislation that would otherwise be passed. The argument seems to go further than simply saying the RRB will reduce the volume of legislation by preventing growth-inhibiting Acts. Nor is it a claim that particular Acts should be repealed. Rather, it appears to be a larger claim that the total “stock” of legislation should be reduced.

In the absence of legislation, the common law is the default regulator (or non-regulator) of economic activity. The Taskforce’s apparent aim of increasing economic growth, and its apparent view that the stock of legislation should be reduced, suggests a belief that regulation by this judge-made law is generally more conducive to economic growth than regulation by statutes made by Parliament. Yet this is not self-evidently so. For example, corporate limited liability is not an invention of judges but of statute, and is regarded as responsible for much economic activity today. Law Commissioner George Tanner QC argues that, “While a reassessment of corporate liability would be seen as threatening the foundations of business, it seems to me that the RRB] requires it.”

The efficiency and contribution to economic growth that legislation makes must be considered on a case-by-case basis, and a blunt assumption that less is always more is inappropriate. That is why business groups and others who are concerned with economic growth in New Zealand should not necessarily support the RRB, even if they think it will lead to less regulation. In fact, business groups often support or champion proposed commercial regulation. Recent examples include:

- Federated Farmers calling for a ban on pollen imports and an end to artificial pollination of kiwifruit following the outbreak of vine-wasting Psa.
- The New Zealand Hang Glider Pilots Association calling for regulation of hang gliding to assure tourists and enthusiasts that it is a safe, regulated industry.
- Various financial industry services providers supporting the broad move towards regulation of financial advisers in the wake of finance company collapses.
- Irrigation New Zealand (a body consisting predominantly of farmer-irrigators) strongly supporting national regulation requiring water takes to be measured in order to improve the management of fresh water.

Self-interest may often be detected in industry calls for regulation, yet it is also often plausible to think that the proposed regulation would serve the common good, or that in being good for business, the regulation would also be good for the economy and the community more broadly.

It has also been observed that New Zealand has “suffered from two major market/regulatory failures in the past decade namely leaky homes and finance companies.” Arguably the absence of regulation in these cases did not lead to a result that was good for the economy or on any other measure. The Taskforce’s assertion that less regulation leads to economic growth is unconvincing because the Taskforce considered no particular cases of alleged regulatory failure, nor did it examine any of the broader potential public policy rationales that exist for regulation, such as: market failure; asymmetry of market power; information provision to inform choice; and reducing externalities imposed on the wider community from the actions of individuals and businesses.

A more fundamental objection however to the economic growth rationale for the RRB is that law-making also has other ends. There are other reasons to make law and to seek to improve law-making processes, most notably to enact just laws that enable members of the community to flourish, and to enable citizens to participate in peaceful self-government. Economic growth is one ingredient, but focusing on it as the sole or dominant consideration is unduly limited.

Alternatives to legislative action not considered

As we noted earlier, the Taskforce’s Terms of Reference did not ask it to consider other mechanisms for improving law-making, but required it to recommend a bill. This means that many other options (including non-legislative changes to law-making processes) have not been explored.

Potentially useful efforts to improve the law-making
Box 2. Efforts to improve law-making underway

The following initiatives were in development or underway during the Taskforce’s deliberations:

**Productivity Commission**

The Commerce Committee has reported in favour of establishing a New Zealand Productivity Commission broadly modeled on the Australian Productivity Commission, and the New Zealand Productivity Commission Act that will establish the Commission was passed at the end of 2010. One rationale for a Productivity Commission is that an independent policy shop within government could push for policy changes that are beneficial and necessary over the long term, but that might otherwise escape the attention of politicians who sometimes think in terms of constituencies and three-year electoral cycles.

**Proactive disclosure of government information**

The Law Commission is conducting a review of the Official Information Act 1982 and Local Government Official Information and Meetings Act 1978. It has recommended that instead of government agencies waiting until a citizen requests official information under the Acts before disclosing it, as often occurs, that the Acts be amended to require agencies to take all reasonable steps to proactively disclose official information. Such moves might improve transparency and accountability in law-making.

**Regulatory plan requirement**

From 3 August 2009, departments have been required to prepare an annual regulatory plan of all known and anticipated proposals to introduce, amend, repeal, or review legislation or regulations to the extent possible.

**Work to improve Regulatory Impact Analysis**

Cabinet requires certain significant policy proposals to undergo Regulatory Impact Analysis (RIA). The results of RIA are presented in a Regulatory Impact Statement. The requirements for the analysis include that: the problem a proposed policy is intended to address is identified and defined, the objective of the policy is explained, and consideration is given to the full range of feasible options. A number of recent initiatives aim to strengthen and increase compliance with the RIA scheme. These include:

- Treasury being given responsibility for independently assessing significant Regulatory Impact Statements (“RISs”) prepared by departments (prior to November 2008 this responsibility sat with the Ministry of Economic Development), and that other RISs also be quality assured.
- Requiring (from November 2009) that Treasury be consulted early on all proposals with regulatory impacts (via departments completing a Preliminary Impact and Risk Assessment of policy work with potential regulatory implications that will lead to submission of a Cabinet paper). This is intended to ensure that a department’s assessment of whether or not a regulatory proposal is significant (and therefore requires a RIS) is sound.
- Confirming that the RIS is the advice of the department providing it, and not the view of the Minister responsible for that department.

**Reviewing existing regulation**

A number of recent initiatives are intended to ensure that regulations and legislation already in force are subject to on-going monitoring and evaluation:

- Treasury has underway an on-going Regulatory Review Work Programme to review regulation and legislation that is already in force. The work programme is updated on a rolling basis, with the Minister of Finance and Minister for Regulatory Reform having responsibility for setting the programme and co-ordinating across government agencies to deliver on it. The Building Act, Resource Management Act, and the Overseas Investment Act have been among the legislation reviewed recently.
- Since August 2009, departments have been required to put in place systems and processes for the on-going scanning of regulation that they are responsible for.
- Since November 2009, significant regulatory proposals that do not meet RIS standards (but are enacted nevertheless) are subject to post-implementation review.
process other than the RRB are already underway. See Box 2 for examples of these initiatives. Note that this list of examples does not include the many initiatives underway at the department level (for example, Inland Revenue’s recent efforts to use innovative web-based technologies to improve the level and quality of consultation about tax policy). While we do not believe that the Taskforce has shown a general crisis of bad law-making in New Zealand, we do agree there is room for improvement. We tentatively identify at Part III some specific possible weaknesses of current law-making processes and potential solutions that could be considered instead of the RRB.

The bill fails its own measure of good law-making

One would expect a bill espousing principles for good law-making to attempt to adhere to those principles, both in process and in substance.

Law Commission member George Tanner QC (a former Chief Parliamentary Counsel responsible for drafting statutes) has assessed the RRB against each of its own principles, and finds it wanting. For example, he argues that the direction to courts to interpret all existing legislation consistently with the RRB is a retrospective amendment to potentially all legislation, in violation of the RRB’s own statement that law should not operate retrospectively. And as will be discussed below, the principles of regulatory responsibility are vague and unorthodox, making them neither clear nor accessible as the RRB requires of legislation.

The process through which the RRB has been proposed and considered is also no model of good law-making. A proposal of this magnitude called for a sceptical Taskforce, or at least one that was neutral, in order to thoroughly evaluate the issues. However, the architects of the Taskforce created Terms of Reference that required a bill to be produced. Once this was done, it was highly likely that Taskforce members would be those already committed to the RRB in some shape or form, despite the Commerce Committee’s recommendation that “the chair should be an expert who has not been involved in advocating for or against any of the options we considered.” As it happened, the Chair of the Taskforce, Dr. Graham Scott, had prior to his appointment already publicly supported the Regulatory Responsibility Bill 2006, and the Taskforce also included other supporters of earlier versions of the RRB, including the architect of the precursor to the 2006 Bill. Despite the qualifications and experience of the Taskforce members, this is not a model for the fullest possible consideration of the issues.

The process exemplifies the sort of unsound policy-making that Australian Productivity Commissioner Gary Banks cautions against:

In situations where government action seems warranted, a single option, no matter how carefully analyzed, rarely provides sufficient evidence for a well-informed policy decision. The reality, however, is that much public policy and regulation are made in just that way, with evidence confined to supporting one, already preferred way forward. Hence the subversive expression, ‘policy-based evidence’!
PART II: THE REGULATORY RESPONSIBILITY BILL WOULD BE UNCONSTITUTIONAL

The RRB aims to rule out certain statutes and regulations as “unconstitutional” by specifying principles of responsible regulation and by introducing three mechanisms—certification, judicial declarations of incompatibility, and interpretation—to ensure legislation conforms to those principles or at least to make it clear when legislation does not conform. We argue that the bill itself is unconstitutional: Parliament should not enact it. The RRB affirms relatively abstract principles, some of which are constitutionally unorthodox and substantively unsound, the precise content of which is likely to be settled by judicial decision.

In this Part, we consider each of the principles, judicial enforcement of them, and the certification regime. We conclude that the RRB’s affirmation of these principles and reliance on judicial action to enforce them would distort law-making, submit Parliament to improper political pressure to do as the courts direct, and call into question the legal validity of much delegated legislation. Further, the certification regime would politicise the civil service.

Before turning to those arguments, we make two further points. First, affirming in statute some principle of good law-making is to take an underspecified but powerful idea or norm, which informs but does not settle particular decisions, and to make it a legal proposition. The resulting legal proposition, or set of propositions, is then subject to authoritative judicial decision, which gives it a fixed scope and meaning. Once principles have been affirmed in law in this way, later authorities (judicial or legislative) may modify or amend the “established principles.” Turning principles into legal propositions may weaken the force that the unenacted but powerful constitutional norms otherwise had, thus limiting their capacity to influence political behaviour. Precisely this worry informs the objection to giving legal force to constitutional conventions, such as ministerial responsibility. It should not be thought that the only good principle is a principle that has statutory force. Indeed, enactment may rob it of its true force.

Second, despite the Taskforce’s argument that the RRB does not establish legal rights, the RRB does in fact create legal rights. Take one example. The principle that legislation should not (unreasonably) limit a person’s liberty may be restated as saying that a person has a right that his or her liberty not be (unreasonably) limited. True, just as with the Bill of Rights Act, the failure by some law-maker to follow the relevant principle does not invalidate the resulting law; but the premise of the RRB, as with the Bill of Rights Act, is that the law-maker acts wrongly in doing so. Affirming this conclusion in law, and authorising the courts to declare as much or to “fix” it by interpretation, is the entire point of the RRB. This helps to clarify the constitutional significance (and radicalism) of the RRB. Professor Rishworth is entirely right to conclude that the RRB is in fact a second bill of rights. We share his concern that it is unwise to have more than one statutory affirmation of fundamental values.

The “principles of responsible regulation” are unsound

The Taskforce’s argument for the RRB centred on the claim that the principles it affirms are constitutionally orthodox and fit to be justiciable (that is, appropriate for judges to apply and consider). The Report stressed the orthodoxy of the principles, saying it aimed “to provide a simplified and streamlined set of criteria that accord with and reflect broadly accepted principles of good legislation rather than novel principles.” Similarly, Roger Kerr, Chief Executive of the Business Roundtable, has asserted:

There is nothing novel about the enumerated principles. Those holding [the view that they are unorthodox] should be directing their criticisms to documents as old as Magna Carta and the US Constitution and as recent as the LAC guidelines.

However, we suggest that not all of the principles are orthodox. The Taskforce has modified some of them. And many are not fit to be justiciable. Not all the principles warrant affirmation, either in their own right (as principles of good legislation) or as “constitutional” principles. Affirming them would distort law-making and democratic politics.

The Taskforce has not explained adequately how it selected the principles. The Taskforce says only that it drew on the common law, previous versions of the RRB, LAC and Regulations Review Committee guidelines
and principles, and unspecified "other sources." It did not explain how it chose principles from these various sources and excluded others, or why it modified some.

Clause 7(1) of the RRB affirms eleven "principles of responsible regulation" under six subheadings. In what follows, we examine each principle in turn, under the relevant subheading, explaining which principles are novel, rather than orthodox, and to what extent, and which are unfit to be considered and applied by judges.

Rule of law

The rule of law is a powerful idea in legal thought and political practice. However, its precise content is often disputed. The RRB affirms four particular aspects of the "rule of law."

The first aspect is that the law should be clear and accessible. This may seem obvious but its implications are not altogether clear. As Tanner notes, it leaves undetermined the question of to whom must the legislation be clear (laypeople, specialists, or lawyers) or whether the drafting of legislation or the underlying policy itself must be clear.41 Further, as the Taskforce notes, accessibility has multiple meanings (including availability, navigability, and clarity), 42 and it is not immediately apparent from the RRB that all of these meanings are intended.

The second aspect is that the law should not adversely affect rights and liberties, or impose obligations, retrospectively. An injunction against retroactive penalties already exists in the Bill of Rights Act, 43 and the Interpretation Act 1999 provides that enactments are not to have retrospective effect.44 On the face of it, this aspect goes further than these provisions, but the Report does not explain the extent to which this principle is intended to reproduce or expand them, or why that might be necessary.

The third aspect is that every person is equal before the law. The Report argues that this concerns equality in the administration of law rather than substantive equality. The former requires simply that the law, whatever its content, be applied to all persons who fall within its scope; the latter, substantive equality, calls into question the legitimacy of any distinctions that the law itself may make, say between police officers and citizens. The Report eschews this broader right to equality on the grounds that it was considered and rejected in enacting the Bill of Rights Act. However, it is entirely conceivable that the courts will adopt this broader interpretation, which would require and authorise judicial assessment of the merit of any distinction made amongst classes of persons—that is, to evaluate the substantive merits of almost every law-making act.

The fourth aspect is that "issues of legal right and liability should be resolved by the application of law, rather than the exercise of administrative discretion." How one is to distinguish the "application of law" from the "exercise of administrative discretion" is unclear. The principle could, for example, be interpreted to require that all decisions made under a law be made according to detailed, prescriptive rules rather than "principles" that have unsettled meanings open to the interpretation of the person applying it. If so, then the RRB itself violates this principle.

Liberties

The RRB also affirms liberty, paragraph (b) stating 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, except as is necessary to provide for, or protect, any such liberty, freedom, or right of another person.

This principle opens up the policy of just about every statute to review. This is because the principle's prohibition is so broad that it applies to almost all legal rules. Very many legislative acts diminish a person's liberty or freedom of choice. This principle bars the imposition of duties unless those duties are necessary to protect "any such liberty, freedom, or right of another" (the phrase omits "personal security", although the later discussion, at paragraph 4.53 of the Report, implies that this is an oversight). Imagine an Act that prohibits any person from employing another to work in a bakery for more than ten hours per day or sixty hours per week. That Act would depart from paragraph (b), for it restricts the freedom of contract of employer (and employee), and is not necessary to protect any existing liberty or freedom of the employee (or any other person). The legislators might justify the Act by reference to the health of the worker or the need to protect him or her from economic exploitation—that is, by arguing that the Act is a reasonable limit on liberty for those reasons and therefore is consistent with the RRB. This illustrates the
breadth of the principle, and the sorts of argument it would require. Further, as is discussed later, the RRB’s enforcement mechanisms would require the courts simply to choose whether in their opinion the legislation is an unjustifiable limit on liberty; that is, they would just second-guess the legislature’s considered judgment.45

This very general “liberty” principle is not constitutionally orthodox. The law affirms many particular liberties, and in the absence of legal duties persons are free to act as they wish. And of course often some proposed interference with liberty is not justified. However, the point is that one cannot distinguish justified and unjustified duties by way of this simple formula; all the work falls to be done by the justified limitation provision because “liberty” covers so much. This is significant because it means that the principle itself has very little content. We argue further below that the courts should not have authority to review Parliament’s law-making on this extremely broad basis. Notice that the principle is of such scope as to subsume almost the entire Bill of Rights Act, in which, for good reason, “liberty” at large is not affirmed. As we argue further below, the courts lack the competence to evaluate all restrictions on liberty (which goes to the substance of almost every law-making act).46

**Taking of property**

The RRB also states, in paragraph (c), that legislation should “not take or impair … property” unless this is necessary in the public interest and full compensation is paid. Such compensation is to be paid if practicable by those who benefit from the taking. This principle seems to have been the Taskforce’s main concern—its five examples of bad law-making each concern property rights (paragraphs 2.9–2.11).

Law-makers should consider the impact that legislation has on persons and their property but this assessment is politically contentious and should not be justiciable. There is no satisfactory settled legal understanding in any jurisdiction about what constitutes a government “taking” of property, and therefore it is almost impossible to discern the likely scope of this principle. When one first thinks of property being “taken,” what one is likely to imagine is the physical confiscation of tangible property. Constitutional prohibitions against takings of property in other countries have gone further and often include regulations that reduce the value or uses of property short of complete physical confiscation. However, determining what exactly is a “taking,” when compensation should be paid, and by whom, is extremely unclear in all those other jurisdictions. For example, the Fifth Amendment of the US Constitution states that, among other prohibitions, “[…] nor shall private property be taken for public use, without just compensation.” The case law about these few words is “voluminous,” and the position as a whole “highly complex and involves consideration of a unique and often overlapping mix of federal and state constitutional law” that could “hardly be described as clear.”47

New Zealand’s constitutional tradition presumes that the state will compensate owners for expropriation of their property for public use. Legislation, most notably the Public Works Act 1981, gives effect to this presumption and extends it somewhat to include some changes to property rights short of expropriation. Less obvious examples also exist in other statutes, for example the Health Act 1956 provides grounds for the requisitioning of property when responding to an outbreak of infectious disease and expressly provides for compensation for those “injuriously affected.”48

However, the generic takings principle set out in the RRB is novel to New Zealand and leaves many questions unsettled, including the scope of property and the definition of “impairment.”49 Therefore, judges applying the RRB would either have to define takings themselves, or import approaches from other jurisdictions. The first approach would involve our judges going on a (likely futile) “jurisprudential development mission” in trying to define a concept for which there is no clear settled understanding. Given the muddled state of takings law in other jurisdictions the second approach is unlikely to be helpful.

Furthermore, takings law from other countries would likely be unhelpful to New Zealand legislators and judges who would have to try to specify the scope of this principle, because the RRB’s formulation of the principle, prohibiting both taking and “impairment” of private property, appears intended to constitute a particularly extreme form of prohibition against government regulation of property not found in other comparable jurisdictions. The LAC objected to the 2006 Regulatory Responsibility Bill in part because that bill purported to reflect orthodox legal principle but in truth
introduced an unorthodox conception of compensation for impairment, as distinct from expropriation, of property rights. The RRB’s version of this principle is still objectionable on that basis.

The Taskforce argues in paragraph 4.63 that severe impairment of property rights is tantamount to a taking. This is not true or at least not always true: banning a certain kind of dangerous vehicle from the road constitutes a severe impairment of property rights but is not a taking of those rights for communal use. In any event, the Taskforce moves from its premise that severe impairment is a taking to the conclusion in the terms of clause 7(1)(c) that there should be “full compensation for the taking or impairment”—there is no mention of severity here.

The point of the principle appears to be to make it very expensive to limit how property owners may act, for any property owner who suffers loss from regulatory change is entitled to be made whole. Thus, save for making out a justified limitation on the principle, if Parliament wishes to ban dangerous weapons, it must buy them. Legislation imposing mandatory closing times on certain pubs would be an impairment attracting compensation. And legislation criminalising prostitution would arguably be a taking of the goodwill of what would otherwise have been lawful brothels (the Report in paragraph 4.60 implies goodwill is property). These examples suggest that it is wrong to conflate takings and impairment. There is very good reason for the state to compensate property owners for taking their property for communal use. However, it does not follow that the state should compensate property owners for any reduction in the value of their property that is an unintended side-effect of some general law-making act.

More to the point, whatever its substantive merits, the principle that the RRB sets out plainly brings in a very strong doctrine of regulatory takings that is foreign to our constitution. Scott and Wilkinson—two leading members of the Taskforce—have said, in answer to an argument by one of the present authors that a doctrine of regulatory takings is foreign to our constitution:

The objection is baffling. Can he really be arguing that, as a matter of principle, compensation should be paid for a 100 per cent taking but not at all for a lesser taking?

They also point to “existing precedents” in the LAC Guidelines and various statutes. However, it is quite clear that New Zealand’s constitution does not recognise a doctrine of regulatory takings. Lord Radcliffe’s remarks in Belfast Corporation v OD Cars Ltd—affirmed by our Court of Appeal in Superior Lands Ltd v Wellington City Corporation and by the Supreme Court in Waitakere City Council v Estate Homes Ltd—leave no doubt on the matter.

We note further that the Taskforce’s requirement that compensation should be paid by those who benefit from the taking is entirely novel (paragraph 4.62). In this light, consider the recent proposal by Federated Farmers to ban the import of bee pollen. This law-making action might constitute a regulatory taking of the goodwill of the importer’s business (or its net present value), attracting compensation, which should, per the principle, be paid by its beneficiaries. It is not quite clear who the beneficiaries are—farmers perhaps, Federated Farmers in particular as the relevant lobby group, or New Zealanders at large. We suggest that while lawmakers should think carefully about the impact their proposed legal changes will have on persons and their property, the relevant considerations are not obvious and cannot be adequately captured by way of a simple, justiciable rule.

Taxes and charges

Paragraph (d) states that legislation should “not impose, or authorise the imposition of, a tax except by or under an Act.” This is orthodox but largely redundant for, as the Report notes at paragraph 4.67, section 22 of the Constitution Act 1986 already renders invalid any tax that is not imposed by or under an Act.

Paragraph (e), which concerns charges, is less orthodox. It goes beyond the truth that charges should be limited to actual cost recovery, instead introducing the novel idea that charges should be proportionate to the benefits the payer receives. This would create a presumption against, for example, a charge on manufacturers to meet the costs of a public inspectorate, the purpose of which is to benefit consumers. Further, this paragraph limits charges to “the costs of efficiently providing the goods or service,” which seems designed to limit actual cost recovery and to enable argument that a proposed service, function or power should be carried out by an “efficient” (that is,
lower cost) private provider. This would create a norm against public service operations that are less economically efficient than private service alternatives, whereas there may be reasons (probit, equity, transparency, stability, national security) to prefer the more costly public service alternative.

The role of the courts

Paragraph (f) affirms the superiority of the courts in interpreting legislation. This is unobjectionable but does affirm judicial supremacy in settling the scope and meaning of the principles of responsible regulation. Paragraph (g) states that if legislation authorises a Minister or other public body or official to make decisions adverse to any person’s right or liberty, the legislation should “provide a right of appeal on the merits against those decisions to a court or other independent body.” This principle is novel: there is no general entitlement to an appeal on the merits in our constitution. The principle also has a very broad scope, perhaps extending to delegated law-making itself, and ignores the legitimacy of decision-making by Ministers.

Good law-making

The final four paragraphs set out the principles of “Good law-making.” Paragraph (h) states that legislation should not be made unless there has been consultation. Contra the Report, there is no general duty of consultation in our law. Further, it is extraordinary and quite contrary to the Bill of Rights 1688 that on this principle the adequacy of the parliamentary process itself is open to legal argument and judicial ruling: this is profoundly unconstitutional. Opening the detail of the parliamentary process to the close scrutiny and criticism of the courts may distort and undermine that process, which is properly the subject of political not legal discipline. Further, this scrutiny and criticism would be very likely to encourage political contests between the courts and Parliament as those criticisms are made and responded to in the public arena, to the detriment of the mutual respect between both branches of government and public respect for each.

The remaining three principles amount to the truism that one should not make law unless there is good reason to make law. Paragraph (i) states that legislation should not be made (or introduced to the House of Representatives) unless there has been a careful evaluation of the issue, the existing law, the public interest, the relevant options (including non-legislative options), the identity of winners and losers, and foreseeable consequences. We agree. We doubt policy-makers often propose and adopt legislation without considering these points. Their evaluation may sometimes be rushed or confused, but it is hard to imagine one can avoid this by affirming that any evaluation should be careful.

Paragraph (j) states that legislation should produce benefits that outweigh its costs. This is unobjectionable if it is understood to be just a vague direction to consider costs. However, if policy-makers and judges take it to enjoin cost-benefit analysis then it is dangerous. The common good is not an aggregate capable of calculation. The injunction to weigh costs and benefits makes it likely that quantifiable outputs will loom too large in the law-making process. The dangerous consequence is that less readily quantifiable considerations, including moral argument, would be wrongly minimised. This danger is manifested in the Report itself. In the final section of Part 2 of its Report, the Taskforce purports to weigh costs and benefits. The focus is on economic benefits, weighed against actual compliance costs. This is insufficient because it ignores other reasons for good law-making and non-economic objections to the proposal. Finally, paragraph (k) states that legislation should be the most effective, efficient and proportionate response to the issue. This is close to a truism, although it may (wrongly) preclude legislation that aims to support non-legislative arrangements.

The principles and reasonable limits

Finally, we note that the principles that the RRB affirms in clause 7(1) are not the benchmark against which legislation would be tested. The benchmark is the set of principles subject to reasonable limits that “can be demonstrably justified in a free and democratic society,” as authorised by clause 7(2). Settling on such limits is highly contingent and uncertain. The injunction to lawmakers, and to the courts, to test legislation against this benchmark will not involve application of some bright line test, distinguishing good from bad legislation. This will simply compound the uncertainty inherent in the principles themselves.
Supporters of the RRB would be expected to argue that our interpretation of the principles is unsound, or that any departure from the principles is justified in a free and democratic society, and that therefore the RRB complies with its own standards of good law-making. This would merely demonstrate that, as we have argued, the principles do not constitute a determinative or uncontroversial benchmark against which legislation can be tested, and that the “testing” of laws against such vague and contestable principles—particularly by courts and chief executives as the RRB requires—would not help improve law-making and would indeed likely hurt it.

Judicial supervision of democratic decision-making

The RRB’s two central mechanisms to compel conformity to the principles are the certification regime and the jurisdiction for judges to declare that legislation is incompatible with the RRB. It would make the scope and meaning of the principles a question of law and the object of authoritative judicial decision. However, the question of whether legislation is reasonable should not be settled in court, on legal argument, but should instead be open to democratic discussion. The RRB would encourage law-makers to defer to legal advice about what is or is not reasonable legislation rather than to do their constitutional duty and make a reasonable judgment, informed by relevant norms and advice, as to what should be done. This is very likely to weaken the quality of legislation and illegitimately weaken our democratic culture, in which it is for elected law-makers, subject to public scrutiny, to choose what should be done.

The courts should not review legislation against the principles the RRB affirms. Determining consistency with the principles (subject to reasonable limits) is not a technical legal question in relation to which judges have special expertise. The nature of the principles is such that applying them is a substantive moral and political question which is properly the province of elected legislators responsible to voters, as well as officials who are subject to the oversight of elected legislators. Flatly stating, as some supporters of the RRB have, that “it has always been an important role of the courts to interpret and enforce legislation” does not justify giving the courts the jurisdiction to decide whether or not legislation complies with the principles (as justifiably limited): applying the RRB does not involve the interpretation or enforcement of legislation as normally understood, but the making of policy. The argument relies on the prestige of the courts, which rightly derives from their reputation for impartial application of the law, but the RRB would put the courts to work on a fundamentally different task: evaluating the merits of particular policy proposals.

The Taskforce’s defence of the judicial role

The Taskforce rightly acknowledged this problem. The RRB excludes the final three principles (clause 7(1)(i)-(k)) from the scope of the jurisdiction to issue declarations of incompatibility. The reason for this is that “[t]he Taskforce considers that those issues are particularly unsuitable for judicial consideration, given the institutional limits of the adversarial process.” This argument proves too much—the same logic applies to all the principles. Determining whether legislation unreasonably limits liberty or property is equally unsuitable for judicial consideration, yet the RRB authorises just such review. The danger of the jurisdiction is that it invites the courts to review the reasonableness of all legislation. The courts lack the competence for that task and yet there is a real risk that citizens and legislators may defer uncritically to their judgment about the merits of the law.

The Taskforce made four alternative arguments to dismiss concerns that the RRB would improperly subject law-making to judicial supervision. We believe each argument fails.

First, the Taskforce implied, and supporters of the RRB argued, that the force of the RRB would be moral and political, and that therefore cases alleging that legislation or regulations violated the RRB would not often go to court. There is no good reason to believe that many persons would not use the RRB to challenge decisions with which they disagree. Aggrieved parties, who have not been successful in the policy/political process, may well be motivated to sue for a declaration in their favour. It should not be assumed, as the Taskforce does, that they are entitled to such vindication—the court may well simply take a different view to Parliament as to what constitutes a reasonable limit on liberty or property. The jurisdiction empowers those with financial
and legal resources to renew challenges to policy that were unsuccessful in the political process, and to contest them in the courts rather than in the political process where they should be moved. (The RRB attempts, in clause 12, to limit who may apply for a declaration by specifying that an application must be by way of a proceeding for this purpose only. However, this limitation is undercut by an exception for those applying for judicial review of public action, very many of whom are likely to petition the court for a declaration.)

Even if the RRB "worked" by placing Parliament under political pressure not to enact legislation that Parliament thinks aggrieved parties would be likely to challenge under the RRB, that would mean that our elected representatives, rather than using their own judgment, would be making law by trying to predict what judges will say. This entails Parliament abdicating its duty and the subordination of the policy views of our democratically elected representatives to the likely views of judges.

Second, the Taskforce argued that in those few cases where the judges would be required to interpret and apply the RRB, on an application for a declaration of incompatibility, the courts would give "substantial deference to the judgment of the policymakers." That is, when trying to decide what type of laws the vague and unorthodox principles of regulatory responsibility require, the courts would not often come to a different conclusion than that reached by Parliament. This is mere speculation. The courts may well review strictly, and disagree with Parliament about what the principles require, reasoning that Parliament has charged them to police irresponsible law-making. A similar argument is that we should not be worried about authorising judges to take serious account of, but not deferring uncritically to, the judicial opinion. There is no evidence to support the Taskforce's optimistic view. Instead, Parliament may defer to what it thinks the courts might decide or to what the courts do in fact decide, or the courts may exercise their jurisdiction under the RRB strictly and often, and disagree with Parliament's understanding of the principles.

Third, the Taskforce argued that even if the courts were to review the merits of legislation against the RRB principles, and even if the courts were to disagree with Parliament about what the principles require, Parliament could simply ignore the courts. That is, because the RRB does not allow courts to strike down legislation that they find incompatible with the principles of the RRB, but only make a declaration of incompatibility, Parliament could simply ignore a judicial ruling that it had enacted law in contravention of the RRB and refuse to amend the offending statute. The Taskforce referred to the UK's experience with the Human Rights Act 1998 (UK) to support this assertion. However it did not carefully examine the UK experience.

The British courts have issued a number of declarations which have almost without exception all resulted in political acquiescence, that is, in the legislature deferring to the court's declaration that law breached the European Convention on Human Rights (which the Human Rights Act affirms) by amending the relevant law. This may suggest that the RRB will be extremely effective at compelling Parliament to substitute judicial views about what makes good law for its own.

For the RRB to work as the Taskforce intends, without damaging consequences, the conditions must be just right. The courts must exercise the jurisdiction with extreme delicacy and law-makers must respond by taking serious account of, but not deferring uncritically to, the judicial opinion. There is no evidence to support the Taskforce's optimistic view. Instead, Parliament may defer to what it thinks the courts might decide or to what the courts do in fact decide, or the courts may exercise their jurisdiction under the RRB strictly and often, and disagree with Parliament's understanding of the principles.

The final argument that proponents of the RRB make in response to our concerns about the proposed new judicial function is that "[s]hould these fears be borne out, Parliament could amend the act, which the taskforce recommends should be reviewed after five years in any event." To make law in this way—hoping for the best and relying on the chance to hit "undo" if reasonable concerns eventuate—would be reckless. There is no guarantee it will be possible or straightforward to repeal or amend the RRB even if our fears are fully warranted. Indeed, it is likely that at least some—say, lawyers who do well out of the litigation to which the RRB gives rise—would defend the RRB strenuously. Further, repealing or amending an enactment does not repair the damage done to those who suffer from poor policy and decisions made under it. Likewise, some of
the RRB's consequences, such as the politicisation of the judiciary due to their involvement in merits review of legislation, may be irreversible or very difficult to reverse.

In sum, the RRB risks a fundamental constitutional change to the relationship between Parliament and the Courts. Proponents of the RRB disagree, saying that:

The Bill will not alter the relationship between parliament and the courts. Parliament remains sovereign as the unchallenged supreme law-making body. The courts will continue to apply all laws and regulations that parliament passes, as best they can interpret them. There will be no change at all in these fundamental relationships.

This assumes that no change to the relationships between Parliament and the courts, short of allowing courts to strike down (invalidate) legislation, would be significant. Yet, as we have explained, the RRB would likely introduce to our constitutional structure a deference to judges' views about policy matters not currently seen. Such a juridification of law-making would certainly be a fundamental change in the relationship between Parliament and the courts.

The separation of powers

There are many reasons why the juridification of law-making under the RRB would be an unwise constitutional change. Judges are trained as lawyers, and lack the necessary expertise to make informed decisions about the moral, social, and economic policy matters that the RRB would require them to make. The rules of evidence in an adversarial system generally require judges to adjudicate, not investigate, and may prevent them from accessing all the information they might need to make a good decision about policy matters.

Even if judges could sensibly make a decision about the RRB principles, the better accountability mechanisms may be parliamentary or political. Such mechanisms might be more effective, and also allow the judiciary to refrain from making decisions that are likely to be seen to turn simply on moral or political considerations. This would in turn safeguard public respect for the courts as politically neutral arbiters of disputes. Further, RRB challenges to legislation will consume time and resources which the courts ought to devote to adjudicating disputes and which the parties ought to devote directly to law reform.

Responding to this critique, supporters of the RRB have said that it amounts to an unfair criticism of the quality of New Zealand judges. The response is wholly misconceived. It is no criticism of New Zealand judges to say the courts are not an institution well placed to making the kinds of moral, social, and economic—in a word, political—judgments that the RRB would require them to make. Such decisions are best left to Parliament: a democratically elected body that is able to consider a wide range of arguments and evidence, is expected to consult with the public, and is able to engage explicitly and transparently in political decision-making. By contrast, judges are not required or able to consult all those who might have a legitimate interest in the policy implications of their decisions. For example, imagine Parliament enacts legislation to restore the criminal prohibition on prostitution. A litigant might seek a judicial declaration under the RRB that the law unjustifiably infringes liberty (or is a taking of property). A great many people may be affected by or have an interest in the outcome of that decision, but the parties to the litigation would be the litigant and the Solicitor General representing the Crown, and the courts would have no obligation (or indeed capacity) to consult widely with the public.

The Taskforce's Report cursorily acknowledged the institutional reasons why courts are ill-suited to reviewing the merits of policy choices made by Parliament:

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.

Yet the Taskforce gave those “familiar institutional advantages” no further consideration. Instead, it concluded that giving the courts the power to consider policy choices made by legislators is “justified and necessary as a mechanism to ensure compliance on behalf of decision-makers with the principles of responsible regulation.” This assertion is unconvincing. The institutional features of the courts mean they are likely to make worse decisions on average than the executive and legislature about many policy matters. It is unconvincing to argue that giving the courts the power to reach relatively poor quality policy decisions
would cause the other branches of government to make better decisions about those very matters.

The interpretive direction and the rule of law

The RRB’s direction to judges to interpret all legislation consistently with the principles of responsible regulation constitutes a contingent amendment to existing laws. The directive may license dubious interpretation, undermining the rule of law and parliamentary supremacy, and is likely to call into question the validity of much delegated legislation, giving rise to needless uncertainty and litigation.

The RRB directs courts to give statutes an interpretation that is consistent with the principles of regulatory responsibility when possible. (The Taskforce provides no argument whatsoever for the inclusion of this direction, save for the enigmatic remark in paragraph 1.20 that “the existing judicial review jurisdiction would be enlivened by an interpretation provision.”) For ten years after the commencement of the RRB the interpretive direction would only apply to statutes that post-date it; after ten years, the provision applies to all statutes. The point of the delay is to give law-makers an incentive to revise the statute book before the ten-year period expires (this incentive is reinforced by a duty on public entities to review relevant legislation).

The implication is that after ten years, it is sound for the courts to adopt novel meanings of statutes that depart from the understanding and intentions of the relevant law-maker. This means that the RRB constitutes a contingent amendment of all statutes that pre-date it. It would amend every such statute to the extent that the courts can give a novel meaning to the legislation that is consistent with the principles of responsible regulation (as the courts understand them). Parliament should not amend legislation in this undiscriminating way.

Unlike the jurisdiction to issue declarations of incompatibility, the interpretive direction as presently drafted is not limited to a sub-set of the principles. One of the authors pointed out this discrepancy in earlier work and we understand from the members of the Taskforce that this was a drafting mistake and that the interpretive direction should be limited to match the declaratory jurisdiction. The relevant officials in Treasury have been advised and it is very likely they will recommend the RRB be amended to this effect. This is wise as the final three principles are especially unsuited to judicial consideration. However, the objections below apply with equal force to a limited interpretive direction.

The interpretive direction is very likely to undermine the clarity and stability of statute law, because the principles (subject to reasonable limits) are extremely vague. The Taskforce asserts that the directive is not intended to support strained interpretations. However, the courts have struggled to identify the limits of section 6 of the Bill of Rights Act, on which this provision is based. The Taskforce relies on the leading case of R v Hansen to assert that the provision would not license uncertain, radical interpretation. However, this is to ignore the fact that there have been a number of significant and highly radical uses of section 6. Most recently, the full bench of the High Court effectively amended the Adoption Act 1955 by way of an interpretation that explicitly departed from the intended meaning of the enacting legislature. The court held that the reference to “spouses” applying jointly could be interpreted to mean a de facto heterosexual couple rather than a married husband and wife. The court conceded that the latter was the ordinary meaning and was intended by Parliament in 1955 (the context of the Act strongly supported this conclusion), yet still asserted that it had power to interpret the provision otherwise; effectively, to amend it. This approach is flatly contrary to the rule of law and the constitutional supremacy of Parliament.

The RRB’s interpretive direction poses similar dangers.

Further, the interpretive direction will likely destabilise regulations as law. Regulations may only be made under a regulation-making power in an authorising statute. In attempting to interpret statutes consistently with the RRB, judges may read down the empowering statute, adopting strained interpretations of those powers in order to make them consistent with the RRB. For example, (following the lead of the courts in applying section 6 of the Bill of Rights Act in Drew v Attorney-General), judges may decide to read empowering statutes to only allow regulations that impose reasonable limits on liberty or that pass a cost-benefit analysis. By allowing or requiring judges to read down regulation-making powers in this way, the interpretive approach makes regulations subject to invalidation at any time on vague grounds. This undermines the rule of law for it means that citizens and their legal advisors cannot safely predict which regulations are legally valid.
The operation of the direction to interpret statutes consistently with the RRB would also likely render unreliable much existing case law about the interpretation of statutes and regulation. One industry group’s submission in response to the Taskforce Report explains why. The Seafood Industry Council (SeaFIC) states:

We would be less comfortable with the interpretation power being applied retrospectively to legislation enacted prior to the Regulatory Responsibility Bill. In fisheries law, a body of case law has been built up over the years, often as a result of considerable investment by industry in cases designed to clarify disputed legal interpretations. This helps provide certainty with respect to the interpretation and application of the legislation. SeaFIC would be concerned if a requirement to interpret existing law in light of principles that were not in place at the time that law was enacted disrupted the established case law and increased uncertainty for the industry (see further comments on retrospective application below).

This would likely in turn disrupt economic activity in the industry, and be undesirable against the RRB’s own narrow concern of improving economic growth.

Civil servants and the certification regime

The RRB requires various persons to certify whether legislation is compatible with each of the principles and if not, how it is incompatible (and in some cases whether any such incompatibility is justified in a free and democratic society). This regime may appear to be unobjectionable. However, it would in fact undermine current constitutional arrangements in a way that would likely harm law-making.

In respect of a Government bill, the Minister responsible for the bill and the chief executive of the public entity that will be responsible for administering the resulting Act must each certify the bill. For regulations (broadly understood), the Minister responsible for the regulation and the chief executive of the public entity that will be responsible for administering it must each certify it before making it.

The Taskforce assumes that the certification regime in the RRB would “work” better than other certification regimes for legislation currently in place, for example the Cabinet requirements to consider LAC Guidelines and requirements for Regulatory Impact Analysis (RIA) (setting aside the lack of evidence that existing regimes do not in fact work on the whole). This assumption appears to rest on the two key differences between existing certification regimes and that proposed by the RRB:

1. the involvement of chief executives certifying legislation in some instances; and
2. the spectre of judicial declarations of incompatibility encouraging compliance with the certification process.

We have already discussed why judicial involvement in assessing the merits of legislation against the RRB would be unwise and improper. The involvement of chief executives in the RRB certification process is also problematic, as it would undermine current constitutional arrangements that value and protect the political neutrality of civil servants.

The chief executive does not have to state whether or why an incompatibility is justified if a Minister also gives a certificate under clause 8. The reason for this, the Report states, is that the Minister is the appropriate person to judge whether a departure is justified (paragraph 4.106). The Taskforce concludes that in such cases the chief executive’s role “is best limited to the proposal’s technical compliance with the principles set out in clause 7(1).” However, the final two principles require the chief executive to certify whether he or she thinks the benefits outweigh the costs and whether the legislation is the most effective, efficient and proportionate response available. This means the chief executive must in effect certify whether he or she would enact this law.

The certification regime thus promises to grossly politicise chief executives and to arm them to veto government policy in a way that is flatly inconsistent with our constitutional arrangements. This in turn would sharpen tensions between civil servants and Ministers and likely prompt ministerial efforts to stack the civil service with politically congenial personnel, undermining the high-quality, neutral and stable civil service that aids good policy design and law-making. The Business Roundtable’s submission in support of the RRB admits that the RRB’s certification regime would give politicians an incentive to “appoint more compliant chief executives.” The Business Roundtable suggests a requirement (presumably in the RRB) for chief executives to give “free and frank advice in the public interest” to prevent this undesirable outcome.
However, it could simply intensify the imperative for Ministers to appoint chief executives who have similar political views, to increase the likelihood that even when the chief executive gives advice that is completely "free and frank," the advice will be what the Minister wants to hear.

If the Minister does not certify the legislation, the chief executive will be obliged to certify it in full. The Taskforce opines that this will be rare (paragraph 4.107) "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." The Taskforce's speculation is plainly unsound: legislation will (and should) routinely authorise delegated law-makers other than Ministers to depart from the principles (imposing limits on liberty for example).

It is deeply problematic to require chief executives to certify legislation. If one sets aside this problem, certification may seem unobjectionable, for legislators should think carefully before proposing legislation. However, requiring certification against these principles is likely to distort law-making. The scheme is weighted against departures from the principles: it imposes a burden of proof on laws that limit liberty or impair property for example. The principles are not obvious truths about what should be done. They at least require further reasoning and argument to specify them. Further, some of the principles, most notably those concerning liberty, takings, charges, and cost-benefit analysis, are contentious. Affirming these principles inevitably prioritises them, through salience if nothing else, over other values.

The RRB demands that certifying law-makers give reasons when they depart from the principles. Legislators should give reasons for any legislative act, reasons that substantiate the claim to have made good law. More to the point, legislation should be made by way of a process that enables assertions about a proposal's justification to be tested carefully. Unsound principles are likely to distort reasoning. Even if the principles are sound, certification is at best a modest component in a careful deliberative process; much more important are time to consider the detail of proposals and an opportunity for experts, interested parties and other legislators to be heard.
PART III: ALTERNATIVES TO THE REGULATORY RESPONSIBILITY BILL

Media commentary has suggested that the likely Government response to the Taskforce's Report will be a watered-down version of the RRB that requires each government to choose and state its own principles of law-making and to stand by those proposals or justify departure from them.75 Such a proposal might be less damaging to current constitutional arrangements than the version of the RRB preferred by the Taskforce. Nevertheless, laws of this sort require careful justification as a response to an identified problem. Without this, they are unsound policy. Therefore, such a proposal, were it to eventuate, would be a legislative response relying on the same poor—and virtually non-existent—problem, definition and diagnosis on which the RRB currently rests. If the next iteration of the RRB still involved judges or chief executives policing compliance with the government’s chosen principles of regulatory responsibility, many of our criticisms of the Taskforce’s version of the bill would apply.

Further, even if the Taskforce’s version of the RRB were amended such that judges and chief executives would not police compliance with the chosen principles, it would still be far from clear that such a law would do more good than harm. If the RRB is enacted, it is unlikely that subsequent legislators will remove principles from the list (to avoid seeming to oppose them) but it is very likely that they will add to the list of principles, depending on their political preferences, including other arguable desiderata of good legislation, such as sustainability, Treaty of Waitangi principles, conformity to international obligations, or respect for socio-economic rights and human dignity, etc. That this is likely is confirmed by the fact that there have already been other proposals for statutes to set out “principles” of sound policy-making. The previous government floated a “Social Reporting Act” similar to the Fiscal Responsibility Act 1994, and various groups have called for similar legislation including a “Treaty of Waitangi Responsibility Act,” and an “Infrastructure Responsibility Act.”76

The law-making principles affirmed in such an Act would thus be likely to expand into an endless list of platitudes. This will add further compliance costs and collapse the relevant benchmark into a vague injunction to consider whatever may be relevant. It is unclear how continued use of such a benchmark would make law-making more transparent or how it would supplement rather than obfuscate more direct forms of political discourse and accountability.

Further, even if any eventual variation of the RRB were to make no change whatsoever to law-making processes or the current constitutional balance, proceeding with the RRB in some form or other may nevertheless have costs. The focus on the RRB or variations of it has diverted time and attention away from other, potentially more promising options.

Alternative reform possibilities

We began this analysis of the RRB by explaining why we thought that:

1. no good reason to be especially pessimistic or despairing about New Zealand’s law or its law-making processes has been shown (certainly not to the extent of justifying the RRB as a response); and yet
2. there are nonetheless a number of more particular and specific ways in which those processes could be improved.

We now identify some potential problems with law-making processes and possible solutions that may deserve further attention.

These suggestions are tentative. The problems identified and solutions suggested below should be investigated with a level of care—including considering a range of solutions—as yet not given to the RRB. The Regulatory Responsibility Taskforce itself worked on just one proposal, and existed for six months between the naming of its members and the presentation of its report to the Minister for Regulatory Responsibility. It cost a total of $585,000 ($432,000 in fees and expenses of the seven Taskforce members, and $153,000 in funding the Treasury to act as the Secretariat of the Taskforce).77 With similar resourcing, much progress might be made on testing and developing a range of the proposals below. We include these suggestions in this paper simply to illustrate the range of ideas neglected
thus far. The recently announced constitutional review provides an opportunity for some of these suggestions to be considered thoroughly and in detail.

**Existing initiatives**

There are also, as mentioned above, a number of initiatives already underway to improve law-making processes (see Box 2). It may be that over time, if those initiatives prove successful, there is even less need for further reform. The Taskforce did not cover the potential impact of these initiatives on law-making. The Business Roundtable, a supporter of the RRB, has asserted that "little has come of" recent initiatives to strengthen the Regulatory Impact Analysis (RIA) process. The only justification given for this statement is two examples of Regulatory Impact Statements (RISs) certified by Treasury as inadequate. However more detailed Treasury data may indicate some improvement. From November 2008 (when Treasury became responsible for assessing the quality of RISs) until November 2009 (when a number of changes to the RIA scheme took effect), 29 percent of RISs reviewed by Treasury were found to be inadequate. From November 2009 the percentage of RISs reviewed found not to meet requirements has fallen to 10 percent. This data does not conclusively show that policy-making has improved, but it is more informative about the overall quality of RISs than the two examples selected and cited by the Business Roundtable.

Now that the New Zealand Productivity Commission Act 2010 is in force, the Productivity Commission might also be expected to have an impact on the standard of law and policy. The Australian Productivity Commission has made such a contribution despite the absence of an RRB in Australia.

New initiatives to improve law-making (some only a year old and some not yet in place) deserve to be monitored and evaluated for their actual impact rather than to be dismissed.

**Our tentative further suggestions**

First, our unicameral Parliament may legislate very quickly and successive governments have abused urgency to avoid scrutiny or debate. Reform of parliamentary process and perhaps consideration of reintroducing an upper chamber may be warranted. The extent to which the three-year electoral cycle may encourage hasty law-making and the use of urgency could also be considered.

Second, as with other common law systems, New Zealand may lack sufficient controls on the delegation of law-making authority. It is constitutionally improper for Parliament to delegate certain questions to others and yet the scope of delegation is at times not scrutinised carefully. There could also be further inquiry into the extent to which Parliament exercises control over New Zealand’s entry into international treaty obligations.

Third, the executive may at times fail to employ proper controls on how Departments formulate policy, how the resulting policy is considered by Cabinet, and hence how it is brought before Parliament. If policy is formulated too quickly or without sufficient input from senior officials responsible to Cabinet, then there is a risk that Cabinet fails to exercise proper control over the policy process and the law-making agenda. It would be wise for Cabinet to impose more demanding requirements on how departmental policy proposals are translated into bills. Recent changes intended to strengthen and increase compliance with the Regulatory Impact Analysis process are relevant to this end, but further incremental options could be considered as necessary.

There is perhaps a place for testing of policy proposals by some particular agency (other than the courts), either to assess whether a careful and considered policy-making process has been followed and/or to point out departures from significant principles and then to request an explanation for such. One might establish such an agency by legislation as an Office of Parliament or Cabinet might direct its creation without statutory authorisation. Properly staffed, such an agency might have the expertise to review and to comment on the merits of policy proposals, in the limited sense noted above. An executive agency that worked primarily before proposals were brought before Parliament might achieve much with a low profile, thereby avoiding intense political scrutiny. An Office of Parliament might both address proposals before and after their introduction, commenting on the relevant aspects of said proposal and helping inform and arm Members of Parliament, including perhaps a specialist committee, to review legislation. The United States Congress has a number of specialist staffing bodies which assist legislators in this way (the most prominent being the Congressional Budget Office), and their example, which
does improve the capacity of legislators to participate in the process, might well warrant attention.

The Business Roundtable objected that such a body (or tasking an Ombudsman or Productivity Commission with the role of working on legislation before it is brought to Parliament) would be ineffective because it would exist "at the pleasure of the executive and parliament and can easily be influenced through appointments, funding, or informal pressures." However, there is no evidence that existing bodies such as the Ombudsmen, the LAC, and Regulations Review Committee have been compromised in this way.

Fourth, the body of legislation currently in force is a composite of rules enacted by successive Parliaments and delegated law-makers, some of which will now be outdated or unworkable and warrant amendment or repeal. It is difficult to arrange time in the law-making agenda for this purpose. The Law Commission does valuable work overseeing legislation once enacted but it too has difficulty securing political response to the problems that it may identify. That is to say, policymakers, most notably Cabinet, could improve the extent to which they monitor and update legislation in force. The new Productivity Commission and the Regulatory Review Work Programme that is underway may deliver some improvement on this front.

Fifth, there should be an inquiry into whether concerns voiced about the quality of legislation are in fact concerns about poor administrative implementation of laws and regulations. Broadly sound policies may be implemented poorly in practice. Administrators lacking appropriate expertise, resources, or incentives may do much violence to the intent of a policy. Solutions could be focussed not only on law-making processes, but on ensuring that various regulators and administrators implement laws in a way that is consistent with their original aim. The Australian Productivity Commission stresses implementation issues in its work to improve Australia's legislation.

Sixth, we should explore ways to strengthen the evidence base needed for sound policy-making. The Australian Productivity Commissioner Gary Banks argues that "[w]ithout evidence, policy makers must fall back on intuition, ideology, or conventional wisdom – or, at best, theory alone." One of the dangers of forming policy unsupported by evidence is that "... policies that haven't been informed by good evidence and analysis fall more easily prey to the 'Law of Unintended Consequences' – in popular parlance, Murphy's Law – which can lead to costly mistakes." Banks explains that an essential ingredient for evidence-based policymaking is data, yet:

[a] major failing of government in Australia, and probably world-wide, has been in not generating the data needed to evaluate their own programs .... Overall, we are seeing funding for data collections actually being cut. This is partly a consequence of the so-called 'efficiency dividend' in the public sector and the blunt way it is imposed. A consequence is that agencies that have responsibilities for collecting data, vital survey information and other data collections are being jeopardised. This seems particularly perverse at a time when governments are seeking to promote evidence-based policy making!

It is worth asking whether there is or is not sufficient data collection on the effectiveness of government programmes in New Zealand. As Banks recommends, "[w]e need to ensure that all government programs are designed and funded with future evaluation and review in mind," particularly because, even if broadly well-designed, most novel policies are essentially experiments. While monitoring and evaluating government programmes involves cost, it can provide an evidence base that can help bring a swift end to failed policy experiments. This may save costs in the long run. The government's cost-saving drive in the face of persistent deficits is necessary, but it should be slow to sacrifice the evidence needed to monitor and evaluate policy.

Seventh, the extent to which law-makers do, and should, routinely disclose the evidence and advice they use to make decisions about the law should also be reviewed and possibly strengthened. Currently, some advice and evidence used to support policy decisions may be revealed only if a reporter or other interested citizen makes a request for that information under the Official Information Act 1982. The Law Commission's Review of the Official Information Act may lead to useful changes, but other complementary government policies and efforts could also be considered.

Eighth, the extent and adequacy of consultation processes should be examined. It may be that in many cases, by the time policy is released to the public for consultation, much of the thinking and work that determines the policy outcome has already been done. The problem may have been defined, evidence base
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built, experts consulted, and theoretical frameworks chosen, with consultation confined to eliciting comment on selected options. These stages of policy development may have been done very well, or not, but may have lacked much input from outside the relevant government department or Cabinet. The potential for more transparent consultation earlier in policy-making processes—including the agenda-setting and problem definition stages—could be considered, as should improved and innovative methods of consultation. Such effort might improve the evidence base on which policy is built, and also increase public involvement and confidence in law-making. The model of the Tax Working Group based at Victoria University of Wellington in 2009 and 2010, while not perfect, is instructive. The Tax Working Group involved many academics, officials, practitioners, and other experts. It received more than 15 new background analyses of various aspects of the tax system and made these publicly available, along with summaries of the Working Group’s five session meetings. A range of tax reform options were proposed, modeled, analysed, and critiqued. A conference was held to air analyses and options. The relatively open and participatory format generated public debate.

Ninth, the need for and options to increase policy coherence should be considered. Laws and regulations that impact on similar activities or people may be developed in a silo-based way by different departments. The interactions of different laws that affect similar activities or people may cause difficulties in practice. Recent changes to the RIA process, and the creation of a Productivity Commission, may help to encourage a more integrated approach to law-making and eliminate duplicative and inconsistent legislative regimes.

Many other options for improving law-making have been suggested and also deserve consideration. For example, at a symposium on the RRB, one proposal made was to combine the LAC (which generally reviews bills after they are introduced to Parliament) with the Legislative Design Committee (set up in 2006 to provide advice in developing legislative proposals, but which meets infrequently and only when there is a request for assistance) into a single Legislation Standards Committee with both pre- and post-legislative scrutiny functions and adequate resources to carry them out. Other proposals included considering what principles in the RRB if any, might be capable of being adapted for inclusion in the Bill of Rights Act and strengthening the certification mechanisms of the Bill of Rights Act, requiring that the Regulatory Impact Analysis include consideration of what would happen if a policy failed, and considering a well-supported ministerial office with responsibility for the promotion of good legislation.

Finally, while institutional and process reform may improve the law-making process somewhat, if carefully designed and adopted by those to whom it is directed, the most important changes that will encourage improvements in the law-making process are likely to take place in political culture. Changing the law-making culture—including the way that the media and citizens engage with elected officials—does not lend itself to formal reform, and is the responsibility of all citizens.
ENDNOTES

1 Regulatory Responsibility Taskforce (Dr Graham Scott, Chair; Paul Baines; Hon David Caygill; Richard Clarke QC; Jack Hodder SC; Dr Don Turkington; Dr Bryce Wilkinson) Report of the Regulatory Responsibility Taskforce (Wellington: 2009), available at http://www.treasury.govt.nz/economy/regulation/rrb/taskforcereport.


5 R. Kerr, "A ‘Regulatory Constitution’ for New Zealand?" Policy 28(2) (Centre for Independent Studies, 2010), 8.

6 The Report states that "the existing constitutional and operational framework cannot be expected to deliver [less legislation and better legislation] without significant changes", implying that the RRB would be such a change. Regulatory Responsibility Taskforce, Report of the Regulatory Responsibility Taskforce, II.


9 Commerce Committee, Report of the Commerce Committee: Regulatory Responsibility Bill.

10 "To reduce the red tape and regulatory interventions that are reducing investment and depriving New Zealanders of jobs, National and ACT agree that the Government will establish a task force to carry forward work on the Regulatory Responsibility Bill considered by the Commerce Committee of Parliament in 2008. The membership of the Taskforce to be jointly agreed by National and ACT," National-ACT Confidence and Supply Agreement (18 November 2008), policy programme point 5, available at http://www.act.org.nz/files/agreement.pdf.


16 Commerce Committee, Report of the Commerce Committee: Regulatory Responsibility Bill.

17 The Taskforce presumably relied to some extent on the 2001 report written by Taskforce member Dr. Bryce Wilkinson noted above, given Wilkinson’s participation in the Taskforce, his report’s position in the history of the RRB, and its salience to the issues at hand. However, the Taskforce did not explicitly rely on the 2001 report, citing it only once, as part of a list on cost-benefit analysis: Regulatory Responsibility Taskforce, Report of the Regulatory Responsibility Taskforce, 16, note 8. The 2001 paper contained a chapter on the “Evidence of the Need for Regulatory Reform.” While it is beyond the scope of this paper to analyse the 2001 report (and in any event as we have said it was not explicitly relied on by the Taskforce), the paper relies, as does the Taskforce Report, on lists of examples of bad law-making without detailed analysis of why those laws were poor. Further, it could not of course have taken into account recent developments including those listed in Box 2.


22 The Taskforce’s four New Zealand examples of “bad law-making” all appear to be intended to demonstrate “ takings” of private property rights (although, due to being under-developed, this is the author’s reconstruction of the argument). The Report further gives an example of a US Supreme Court decision upholding compulsory acquisition of private homes for private property development, and notes that the Public Works Act 1981 rules this out in New Zealand but says it would be possible for Parliament to legislate to this effect. This is true, but a very odd example given that our law currently prevents a taking of property of this kind, while the US Constitution, which has a rule against takings, did not. Quigley and Evans make a similar case for the need for greater protection of private property rights in N. Quigley and L. Evans, “Compensation for Takings of Private Property Rights and the Rule of Law” in R. Ekins (ed), Modern Challenges to the Rule of Law (Wellington: LexisNexis, 2011 forthcoming).

23 The Heritage Foundation and the Wall Street Journal, “New Zealand,” 2011 Index of Economic Freedom, available at http://www.heritage.org/index/country/NewZealand. The Heritage Foundation (a US think tank "whose mission is to formulate and promote conservative public policies based on the principles of free enterprise, limited government, individual freedom, traditional American values, and a strong national defense") defines protection of private property as “the ability of individuals to accumulate private property, secured by clear laws that are fully enforced by the state ... the degree to which a country’s laws
protect private property rights and the degree to which its government enforces those laws. ... [and] the likelihood that private property will be expropriated and analyzes the independence of the judiciary....” The Heritage Foundation and the Wall Street Journal, “Property Rights,” 2013 Index of Economic Freedom, available at http://www.heritage.org/index/property-rights.

33 The Chair of the Taskforce was Dr. Graham Scott, who had in an editorial on 22 March 2008 stated, “New rules to stabilize the share of the state in the economy and impose a national benefit test on regulatory powers in the manner of the Regulatory Responsibility Bill before the Parliament would also help to establish a sounder basis for economic policy than the haphazard intervention of ministers with short political fuses.” G. Scott, “Some Concerns about the State of the State in NZ,” New Zealand Centre for Political Research (22 March 2008).
36 See Regulatory Responsibility Taskforce, Report of the Regulatory Responsibility Taskforce, 38. See also New Zealand Business Roundtable, “Submission on Questions Arising from the Regulatory Responsibility Bill Prepared by the Regulatory Responsibility Taskforce,” 7, which states “Nor do we agree with those who equate principles with legal rights. Principles are a guide to action, but can be properly and rightfully departed from for good reason in a particular case, without illegality. For example, in many cases compensation for impairment of a minor nature to a poorly identifiable group would be impracticable. In contrast, violation of a (legal) right is illegal.” We note that the submission seems to contradict itself in later stating “We are opposed to any proposals that would have the effect of converting principles for testing laws and regulations into novel rights. For example, we would oppose attempts to add ‘treaty principles’ or welfare rights to the list of principles.” If the RRB did not create (or affirm) rights, then it could not cause any concern, that including Treaty or other principles would create rights.
40 R. Kerr, “A Regulatory Constitution” for New Zealand?, 8, 12.
42 Regulatory Responsibility Taskforce, Report of the Regulatory Responsibility Taskforce, paragraph 4.3.3.
44 Interpretation Act 1999, section 7.
45 This example is based on the decision of the United States Supreme Court in Lochner v New York 198 US 45 (1905).
46 To be clear, by this we do not mean “invalid” in the sense that the RRB does not allow judges to strike down legislation that they find inconsistent with the RRB.
51 Paragraph (c) is an improvement on its precursor in the original bill, clause 6(2)(e), which proscribed taking or impairing property save for an essential public interest and on payment of full compensation.
55 [2007] 2 NZLR 149, 168.
Before November 2009 the certification categories were: Adequate; Qualified Adequacy; and Inadequate. However the Treasury states that these categories are broadly the same as the categories used after 2009, which are: Meets Requirements; Partially Meets Requirements; and Does Not Meet Requirements. Treasury cautions that, “Failure to achieve a ‘meets requirements’ does not necessarily mean that the policy is poor or that poor performance by officials or Ministers is to blame. For example, in emergency situations consultation might not be practical, accounting for a RIS Partially or Not Meeting Requirements.” The Treasury, Regulatory Impact Statement Assessments November 2008 to August 2010, 4 October 2010, available at http://www.treasury.govt.nz/publications/informationreleases/ris/assessments.


Thank you to Jez Weston for helpful discussions and suggestions on these points.


P. Rishworth, “A Second Bill of Rights for New Zealand?”, 3. Note that Rishworth does not propose duplicating any principles as they appear in the RRB in the New Zealand Bill Of Rights Act 1990. However Rishworth suggest that variations of rights (not necessarily as they appear in the RRB) such as “security of the person” and “property” could be considered for inclusion in the Bill of Rights Act. Rishworth also stresses at 8 that “amending the Bill of Rights is a serious business and would have to be done after much study and consultation and in a bi-partisan way.”
