Reckless Lawmaking and Regulatory Responsibility

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I Introduction

On 15 March 2011, the Minister for Regulatory Reform, the Hon Rodney Hide, introduced into Parliament a government bill entitled the Regulatory Standards Bill (“RSB”). The RSB is identical, save in name, to the Regulatory Responsibility Bill (“RRB”) recommended in September 2009 by the Regulatory Responsibility Taskforce (“Taskforce”).¹ The point of the RSB is to improve the quality of lawmaking in New Zealand, reducing the regulatory burden on citizens and in this way spurring economic growth. The scheme of the RSB is to affirm eleven “principles of responsible regulation” and to adopt three mechanisms to help ensure that legislation conforms to those principles.

This article considers the argument for the RSB made out in the Report of the Regulatory Responsibility Taskforce (“Report”) and related materials and evaluates the merits of the Bill. We argue that the Taskforce’s argument fails and that Parliament should not enact the RSB. For, while the ostensible aim of the RSB is to improve the quality of lawmaking, the legislation is a poor means to this end and is likely to distort the legislative process, not least by unsettling our constitution’s long established and reasonable separation of powers between Parliament and the courts.

The structure of the article is as follows. Part II briefly outlines the provisions of the RSB. In part III, we argue that the Report failed to adequately define or diagnose the problem to which the RSB responds and that the Taskforce, driven by its terms of reference, failed to consider alternatives. Parts IV and V examine and evaluate the principles of responsible regulation, arguing that some are unorthodox or unsound, and also suggesting that it is dubious to affirm in statute vague principles of good lawmaking. Part VI contends, against the Taskforce, that inviting the courts to review the quality of legislation in the way that the RSB mandates is contrary to democratic principle and the separation of powers. Part VII argues that the interpretive direction threatens the rule of law. And part VIII points out that the certification regime threatens public service neutrality.

II The Legislative Scheme

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¹ Regulatory Responsibility Taskforce (Dr Graham Scott, Chair; Paul Baines; Hon David Caygill; Richard Clarke QC; Jack Hodder SC; Dr Don Turkington and Dr Bryce Wilkinson) Report of the Regulatory Responsibility Taskforce (prepared for Hon Bill English, Minister of Finance and Hon Rodney Hide, Minister of Regulatory Reform, 2009).
Clause 7(1) of the RSB sets out the eleven “principles of responsible regulation”, or good lawmaking, under the headings: Rule of Law, Liberties, Taking of Property, Taxes and Charges, Role of Courts, and Good Law-making. The clause provides that all primary legislation and all regulations, except for those made by local bodies, should comply with these principles, subject to the proviso in clause 7(2) 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.”

The RSB sets out three mechanisms that are intended to ensure that legislation complies with the principles of responsible regulation, as reasonably limited. The first mechanism is the certification regime. Clauses 8 to 10 of the RSB require 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.

The second mechanism is a jurisdiction for judicial declarations of incompatibility. The RSB would empower litigants to take a case to the courts alleging that a statute or regulation breaches the principles in the RSB. Clause 12 of the RSB authorises courts to declare legislation incompatible with the principles (that is, to unreasonably depart from them), but not to invalidate non-complying legislation or to order compensation be paid. This jurisdiction applies to all but three of the principles. The third mechanism is the interpretive direction. Clause 11 of the RSB requires that wherever the courts can give an enactment “a meaning that is compatible with the principles” (subject to justifiable limitation under clause 7(2)), then “that meaning is to be preferred to any other meaning”. That is, the courts must interpret legislation consistently with the principles of regulatory responsibility where possible. The second and third mechanisms — the judicial declaration of incompatibility and the interpretive direction — would apply initially only to legislation enacted after the RSB but, ten years after the RSB’s enactment, would apply to all legislation whenever enacted.

III The Argument for the Regulatory Standards Bill

This part examines the argument presented in support of the RSB, which is “the latest version of a legislative idea that has been around since the late 1990s”. 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

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2 The Bill 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.
3 Regulatory Standards Bill 2011 (277-1), cl 13. [RSB 2011]
4 RSB 2011, cls 12(1), 14.
5 RSB 2011, cls 11(3), 12(4).
7 Bryce Wilkinson “Constraining Government Regulation” (Discussion paper prepared for New Zealand Business Roundtable, Federated Farmers of New Zealand (Inc), Auckland Regional Chamber of Commerce and Industry and Wellington Regional Chamber of Commerce, November 2001) at [8.5.1].
8 Regulatory Responsibility Bill 2006 (Bills Digest No 1410).
consider options for improving regulatory review and decision-making processes, including both legislative and non-legislative options.10

The ACT Party and National Party agreed in their 2008 Confidence and Supply Agreement to establish the Taskforce.11 Curiously, the Terms of Reference required the Taskforce 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. In consequence, other options (including non-legislative changes to lawmaking processes)12 have not been explored. We have previously noted that other options to improve lawmaking exist and deserve consideration, and that there have been recent efforts to improve lawmaking, including changes to Cabinet’s Regulatory Impact Analysis process and the creation of a Productivity Commission, which may also remove the need for legislative action.13

The Taskforce reported back in September 2009, recommending a new draft Regulatory Responsibility Bill.14 The Taskforce’s Report and proposed RRB was welcomed by a number of business groups, including the New Zealand Business Roundtable and Federated Farmers. The Treasury 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 Bill.15 The Minister for Regulatory Reform, the Hon Rodney Hide MP, introduced the RRB (renamed as the RSB but otherwise identical to the Taskforce’s version of the Bill) to Parliament on 15 March 2011. Treasury’s Regulatory Impact Analysis of the RSB did not support the Bill, concluding that “[w]e doubt the chosen principles can attract the broad-based support necessary to induce enduring behavioural changes, and compliance costs could exceed benefits. The interpretive direction presents a particular risk of unintended outcomes”.16

We focus primarily on the argument in the Taskforce’s Report, as this is the leading justification for the RSB. If this argument is flawed, then the RSB lacks a firm foundation, and any efforts to refine the RSB17 will suffer the same defect, unless and until the necessary foundational argument is made.

A The lack of problem definition

The Taskforce’s Terms of Reference assumed there was a general problem with lawmaking 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.18 Sound proposals for legislation to fix a problem should confirm that there is a problem to be addressed and also identify the causes of the problem.19 The Taskforce should have been required to ensure that the Bill it was asked to draft responded accurately to a carefully identified problem.

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13 See ibid, at 8. These options now include some legislative alternatives set out by the Treasury in its Regulatory Impact Statement, above n 6.
14 Regulatory Responsibility Taskforce, above n 1.
15 Treasury Regulatory Impact Statement, above n 6, at [44].
16 Ibid, at 17.
17 For example, see ibid.
18 Office of the Minister of Finance and Office of the Minister of Regulatory Reform Regulatory Responsibility Taskforce — Term of Reference (9 March 2009).
Some supporters of the RSB think that “it is beyond reasonable debate that the quality [of legislation] is too often poor.”20 We disagree. In our view, the foundational assumption of the RSB — that the quality of lawmaking in New Zealand is generally poor such that a “step change” in performance is needed — should be established with evidence and subject to evaluation. The Taskforce advanced some arguments that there is a general problem with lawmaking in New Zealand, and other supporters of the RSB have offered arguments independently of the Taskforce Report, but these arguments, analysed below, do not establish the foundational assumption.

The Law Society notes that the Taskforce Report did not explicitly define what it meant by poor quality legislation, but that this could mean: poor legislative drafting; poor regulatory design leading to the poor implementation of an otherwise sound policy choice; poor policy choice; or failure to observe high-level constitutional principles.21 Rather than specifying the perceived problem (or problems) in this way, the Taskforce reported 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.22 The Taskforce did not clearly explain why it thought each an example of bad law, let alone explain what it thought was the root cause of the allegedly undesirable outcomes.

The Taskforce may have intended these examples to demonstrate poor policy choice, but the mere fact that the examples were controversial does not prove that a poor policy choice has been made or that the lawmaking process is broken. The question of what policies are appropriate is not a matter on which everyone agrees.23 Disagreement amongst reasonable persons acting in good faith about which legislation should be enacted is a central fact of democratic politics. No democratic lawmaking 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.

B “Other evidence” unpersuasive

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 misleading.

For example, the Report refers to the concerns that others have expressed about the lawmaking process.24 The Report relies in particular on one statement by the Legislation Advisory Committee (“LAC”). The LAC has drafted a guide to making good legislation, which has been approved by Cabinet.25 Ministers and their officials are required to advise the Cabinet Legislation Committee of the steps they have taken to comply with those LAC Guidelines.26 The Taskforce Report repeats the LAC’s statement in its Annual Report 2007 that “a weakness with the development of legislation in New Zealand

22 Regulatory Responsibility Taskforce, above n 1, at [2.11].
23 This point is made also by the New Zealand Law Society’s “Submission to the Regulatory Responsibility Taskforce on the Questions Arising from the Regulatory Responsibility Bill”, above n 21, at 2; see also Treasury Regulatory Impact Statement, above n 6, at 5.
24 Regulatory Responsibility Taskforce, above n 1, at [2.4].
26 Ibid, at 8.
is that there is no comprehensive mandatory process for compliance with the LAC Guidelines.”

We 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 for achieving better quality legislation”, 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 about compliance with the LAC Guidelines, the LAC explicitly opposed that version of the RRB.

The Taskforce Report also 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 to the Commerce Committee in favour of the 2006 Bill. Any such reliance should have been discussed explicitly and the submissions evaluated. The Taskforce had been commissioned 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].”

In the absence of detailed evidence or argument about why the quality of legislation in New Zealand is a serious problem, readers of the Taskforce 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.” 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.

Whatever their experience and qualifications, a detailed analysis should have been presented.

28 Ibid.
29 Legislation Advisory Committee Activities of the Legislation Advisory Committee During 2007: Report to the Attorney-General, above n 27, at [20].
32 Select committee report, above n 9, at 2.
33 Regulatory Responsibility Taskforce, above n 1, at [2.4].
35 The Taskforce presumably relied to some extent on the 2001 report written by Taskforce member, Dr Bryce Wilkinson noted above n 7, 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 paper, citing it only once, as part of a list on cost-benefit analysis: Regulatory Responsibility Taskforce, above n 1, at 16, fn 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 there have been recent attempts to improve the lawmaking process.
C Lawmaking, “responsible regulation” and economic growth

The Report clearly suggests 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 better legislation” and that a better lawmaking process should improve economic growth and result in less legislation being enacted. Likewise, the Hon Rodney Hide MP has asserted that “if [the RSB] is passed by Parliament, it will contribute to a marked improvement in economic performance in New Zealand”.  

New Zealand’s economic performance is declining relative to other developed countries, but the Report does little to prove that the cause is too much (poor quality) legislation and regulation, particularly in light of the fact that New Zealand’s core economic regulation appears to compare well to other countries. While the methodological and data limitations of such rankings should be acknowledged, New Zealand placed third in the world in both the 2010 and 2011 World Bank’s Ease of Doing Business rankings and fourth in the Heritage Foundation and Wall Street Journal 2011 Index of Economic Freedom. Such surveys suggest that, prima facie, “New Zealand does not have fundamental problems with legislative quality when compared with other OECD countries.” 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.”

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. 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 aforementioned Heritage Foundation and Wall Street Journal 2011 Index of Economic Freedom gave New Zealand’s property rights regime a score of 95 of 100, ranking New Zealand first in the world for the quality of its protection for property rights.

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36 Regulatory Responsibility Taskforce, above n 1, at [1.2] and [1.3]; Part 2 generally.  
38 Treasury Regulatory Impact Statement, above n 6, at [6].  
39 While Wilson argues these rankings are targeted at developed countries, the ranking list includes other OECD countries. The preferred ranking measure cited by Jesse Wilson “Raising Regulatory Standards” [2011] NZLJ 99 at 100 (Klaus Schwab The Global Competitiveness Report 2010-2011 (World Economic Forum, Geneva, 2010)), is based on perceptions of executives via a questionnaire administered by two business-funded groups.  
43 The Taskforce’s (under-developed) analysis of four New Zealand examples of “bad law-making” seems to imply that each was a “taking” of private property rights without compensation. Quigley and Evans make a similar case for the need for greater protection of private property rights in Lewis Evans and Neil Quigley “Compensation for Takings of Private Property Rights and the Rule of Law” in Richard Ekins (ed) Modern Challenges to the Rule of Law (LexisNexis, Wellington, 2011) at 233.  
44 The Heritage Foundation and the Wall Street Journal “New Zealand” (2011) 2011 Index of Economic Freedom, above n 40. The Heritage Foundation (a United States 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
Treasury notes that despite the international surveys suggesting that New Zealand’s regulatory quality does not have fundamental problems, “informed domestic opinion” consistently suggests that legislation could be much better than it is. However, this does not mean that there is a sound understanding or even agreement among such opinion-holders about what constitutes good regulation, what causes poor regulation, and what should be done to address any problems identified.

D Less regulation, more economic growth?

The Taskforce asserts that better lawmaking processes will result in less legislation, reducing “the amount of legislation that would otherwise be passed”. The argument seems to go beyond the claim that the RSB 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. This is not self-evident. For example, corporate limited liability is not an invention of judges but of statute, and is regarded as responsible for much economic activity. Law Commissioner George Tanner QC argues that, “[w]hile a reassessment of corporate liability would be seen as threatening the foundations of business, it seems to me that the [RRB] requires it.” Treasury’s Regulatory Impact Statement on the RSB notes some regulation may improve market efficiency:

... agencies have suggested that the result might be a business environment that unduly favours incumbents over new market entrants if governments refrain from making any regulation that impairs private property rights. This environment could weaken competition and market efficiency.

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45 Treasury Regulatory Impact Statement, above n 6, at [7]. Supporters of the RSB refer often to this view among businesses as evidence of a problem; see Wilson, above n 39, at 100; Office of the Minister for Regulatory Reform Memorandum to Cabinet Economic Growth Committee EGI (11): Adoption of the Regulatory Responsibility Bill Drafted by the Regulatory Responsibility Taskforce (2 February 2011) at [53].

46 Select committee report, above n 9, at 2–3.

47 Regulatory Responsibility Taskforce, above n 1, at [1.2].

48 Ibid, at [2.18].


50 Treasury Regulatory Impact Statement, above n 6, at 14. Also note that business groups often support or champion proposed commercial regulation: see, for example, Adam Bennett “Pollen Import Ban Sought to Save Kiwifruit Industry” New Zealand Herald (New Zealand, 22 November 2010); Grant Bryant “Hang-gliding industry calls for regulation” The Southland Times (Otago, 10 December 2010); Irrigation New Zealand “Irrigation NZ backs national regulation for water measuring” (press release, 20 April 2010); Investment Savings and Insurance Association “ISI Supports Financial Adviser Regulation Proposals” (press release, 7 July 2008). While self-interest may often be detected in such calls for regulation, it is also often argued or plausible to think that the proposed regulation would serve the common good, perhaps by helping business thrive.
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.

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 either 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 potential public policy rationales 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 to the economic growth rationale for the RSB is that lawmaking also has other ends. There are other reasons to make law and to seek to improve lawmaking 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.

**IV The “principles of responsible regulation”**

The RSB is plainly of constitutional importance: a vocal supporter of the RSB calls it a “regulatory constitution”. The Taskforce also indicates that it considers the RRB would implement “significant” constitutional change. Its aim is to rule out certain statutes and regulations as “unconstitutional” by specifying principles of responsible regulation and by introducing three mechanisms 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 in the broader sense because it 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.

The Taskforce’s argument for the RSB centred on the claim that the principles it affirms are constitutionally orthodox and fit to be justiciable. 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, not all of the principles are orthodox. The Taskforce has modified some of them. By comparison to the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990 (NZBORA), many of the principles in the RSB are not well established in domestic or international law. Many are not

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51 Auckland Regional Public Health Service “Submission on the Questions Arising from the Regulatory Responsibility Bill” (26 August 2010) at [27].
52 Ibid, especially [23], [27] and [28].
54 Regulatory Responsibility Taskforce, above n 1, at [1.2].
55 Ibid, at [1.12].
56 Kerr, above n 53, at 12.
fit to be justiciable. Not all the principles warrant affirmation, either in their own right (as principles of good legislation) or as “constitutional” principle. Affirming them would distort lawmaking and democratic politics.

Clause 7(1) of the RSB affirms eleven “principles of responsible regulation” under six sub-headings. Below we examine each principle in turn, under the relevant sub-heading, explaining which principles are novel, rather than orthodox, and to what extent, and which are unfit to be considered and applied by judges.

A Rule of law

The rule of law is a powerful idea in legal thought and political practice. However, its precise content is often disputed. Paragraph 7(1)(a) of the RSB affirms four particular aspects of the “rule of law.” “The first, second and fourth provide that the law should be clear, accessible and prospective, and that rights and liabilities should turn on application of law and not on administrative discretion.

The third aspect affirmed 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 NZBORA. The Taskforce also places (far too) much weight on the Supreme Court of Canada’s argument that “equality under the law” introduces substantive equality but “equality before the law” does not. The courts might well adopt this broader interpretation, which would require and authorise judicial evaluation of the merits of any distinction made amongst classes of person, which would call into question the substantive merits of almost every law-making act.

B Liberties

The RSB also affirms liberty, paragraph 7(1)(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.

As Treasury stated, in sum this principle is objectionable because “it does not reflect a well-established legal principle and a lot of legislation will be incompatible with it”. 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”,

57 Regulatory Responsibility Taskforce, above n 1, at [4.38]–[4.43].
58 Ibid, at [4.41].
60 There are problems with affirming these three aspects of the rule of law: see further Richard Ekins and Chye-Ching Huang, above n 12, at 10.
61 Treasury Regulatory Impact Statement, above n 6, at 19.
although the later discussion implies that this is an oversight). Further, as we explain below, the RSB’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.

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. 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 the justified limitation provision because “liberty” covers so much. The freedoms in ss 13–18 of the NZBORA are subsumed by liberty, in which, for good reason, “liberty” at large is not affirmed. This is significant because it means that the principle itself has very little content. Part VI of this article argues that the courts should not have authority to review Parliament’s lawmaking on this extremely broad basis. As we argue further below, the courts lack the competence to evaluate all restrictions on liberty (which goes to the substance of almost every lawmaking act).

C Taking of property

The RSB also states, in paragraph 7(1)(c), that legislation should “not take or impair … property without the consent of the owner” 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 examples of bad lawmaking all concern property rights.

Lawmakers 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. Constitutional prohibitions against takings of property in other countries have gone further than prohibiting physical confiscation of tangible property to 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 those other jurisdictions. For example, the Fifth Amendment of the United States Constitution states, 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”. 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,

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62 Regulatory Responsibility Taskforce, above n 1, at [4.53].
63 See parts IV and V below.
65 Regulatory Responsibility Taskforce, above n 1, at [2.9]–[2.11].
67 Tanner , above n 49, at 26–27.
68 Hodder examines a selected aspect of the constitutional development of property protections, namely the experience of 17th century England. Hodder does not explain why this history — itself a narrow snapshot of the relevant historical experience — grounds or justifies a generic presumption against takings or impairment of the kind the Taskforce proposed and we
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”.

Unlike these specific protections, the generic takings principle set out in the RSB is novel to New Zealand and leaves undefined “property”, “taking”, “public use” and “impairment”. Therefore, judges applying the RSB 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 any more enlightening.

Furthermore, the relevant doctrine in other jurisdictions would be unlikely to be helpful to New Zealand legislators and judges who would have to try to specify the scope of this principle, because the RSB’s formulation of the principle, prohibiting both taking and “impairment” of private property, appears intended to constitute a particularly extreme proscription of 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 RSB’s version of this principle remains objectionable on that basis.

The Taskforce argues that severe impairment of property rights is tantamount to a taking. This is not true or at least not always true: for example, arguably 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 cl 7(1)(c) that there should be “full compensation for the taking or impairment” — there is no mention of severity in the proposed statutory text.

In response to our argument that cl 7(1)(c) is a particularly extreme form of a generic presumption against regulatory takings arguments, supporters of the RSB point to United States takings jurisprudence and New Zealand free trade and bilateral investment treaties. Neither source establishes a presumption that regulatory changes should be fully compensated, without regard to the severity of the impact, and without regard to the process via which the regulation was enacted. As Bertram notes, the United States takings clause requires only “just” compensation and that the taking be for “public use”, both restrictions

critique, as opposed to specific provisions for compensation of the kind already found in the statute book: Jack Hodder, “Public Law, Property Rights, and Principles for Legislative Quality” Working Paper on file with the authors.

Oddly, the Report of the Regulatory Responsibility Taskforce, above n 1, at [4.62] and fn 49 states that the “public benefit” requirement has been inserted to prevent situations such as in United States case of Kelo v City of New London 545 US 469 (2005), in which “private property was taken by the government for use in an inner-city development to be owned by a private corporation”. The US Fifth Amendment takings clause has a similar public use requirement; the Kelo case is significant for the very reason that the Supreme Court found that the use of eminent domain in that situation was for “public use” because even though the land taken was to be developed by a private corporation, general public economic benefits were expected.

Tanner, above n 49, at 27.

For example, Wilkinson, above n 7, at 187 notes that United States case law provides “little clarity” on the meaning of a taking.

Legislative Advisory Committee “Legislation Advisory Committee Submission for the Commerce Select Committee on the Regulatory Responsibility Bill” (15 February 2008) at 5.

Wilson, above n 39, at 101.
about which there is much jurisprudence and literature. Wilson emphasises that the property clause is subject to the justifiable limitations cl 7(2). That is, perhaps the extremity and breadth of the RSB takings principle would be limited by way of cl 7(2). However, as with the liberty clause, relying on the courts to do the hard work by way of the justified limitation provision is unsatisfactory, as we explain further in part VI.

The point of the takings 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. Legislation criminalising prostitution would arguably be a taking of the goodwill of what otherwise have been lawful brothels (the Report 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 lawmaking act.

The takings principle that the RSB sets out plainly brings in a very strong doctrine of regulatory takings that is foreign to our constitution. Scott and Wilkinson — two 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:

This 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 generic 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.

Further, the Taskforce’s requirement that compensation should be paid by those who benefit from the taking is novel. In this light, consider the recent proposal by Federated Farmers to ban the import of bee pollen after the discovery of a vine-wasting virus in New Zealand kiwifruit. This lawmaking action might constitute a regulatory taking of the net present value of the goodwill of the importer’s business, 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

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77 Wilson, above n 39, at 101.
78 Regulatory Responsibility Taskforce, above n 1, at [4.60].
79 Wilkinson and Scott, above n 34, at 48.
80 Ibid.
81 *Belfast Corporation v OD Cars Ltd* [1960] AC 490 (HL).
82 *Superior Lands Ltd v Wellington City Corporation* [1974] 2 NZLR 251 (CA) at 255–256.
83 *Waitakere City Council v Estate Homes Ltd* [2006] NZSC 22. This citation was incorrect. I found an alternative citation: *Waitakere City Council v Estate Homes Ltd* [2006] NZSC 112, [2007] 2 NZLR 149. This case referred to *Belfast* but did not explicitly comment on Lord Radcliffe’s remarks in *Belfast*.
84 Bennett, above n 50.
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.

D Taxes and charges

Paragraph 7(1)(d) of the RSB 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 noted, s 22 of the Constitution Act 1986 already renders “invalid any tax that is not imposed by or under an Act.”

Paragraph 7(1)(e), which concerns charges, is less orthodox. It goes beyond the orthodox proposition 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 (for example, probity, equity, transparency, stability, national security) to prefer the more costly public service alternative.

E The role of the courts

Paragraph 7(1)(f) affirms the superiority of the courts in “authoritatively determining the meaning of legislation”. This is unobjectionable but does affirm judicial supremacy in settling the scope and meaning of the principles of responsible regulation. Paragraph 7(1)(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: our constitution recognises no general entitlement to an appeal on the merits. The principle’s scope is also very broad, arguably extending to delegated law-making itself and ignoring the legitimacy of decision-making by ministers.

F Good lawmaking

The final four paragraphs of subcl 7(1) set out the principles of “Good law-making.” Paragraph 7(1)(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 answered in the public arena, undermining comity between both institutions 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 7(1)(i) states that legislation should not be made (or introduced to the

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85 Regulatory Responsibility Taskforce, above n 1, at [4.67].
87 This principle is reflected in the right of the House to be the sole judge of its own proceedings; see Philip A Joseph Constitutional and Administrative Law in New Zealand (3rd ed, Brookers, Wellington, 2007) at [12.4.2].
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. If the evaluation is rushed or confused, it is hard to imagine one can avoid this by affirming that any evaluation should be careful.

Paragraph 7(1)(j) states that legislation should “produce benefits that outweigh its costs to the public or persons”. 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 injunction to weigh costs and benefits makes it likely that quantifiable outputs will loom too large in the lawmaking process, with less readily quantifiable considerations, including moral argument, being 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 was on economic benefits, weighed against actual compliance costs. This is insufficient because it ignores other reasons for good lawmaking and non-economic objections to the proposal.

Finally, paragraph 7(1)(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.

V Affirming Principles in Statute

Not only are many of the principles unorthodox or unsound, the form that they take is objectionable, for five reasons.

First, affirming in statute some principle of good lawmaking 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.


89 See New Zealand Law Society, above n 21, at 4–5.
90 See ibid.
91 Conventions may be considered binding by those who participate in public life even though they are not enforceable by the courts, and draw their power from “history, tradition, symbolism and their cross-party support”; see Constitutional Arrangements Committee Inquiry to Review New Zealand’s Existing Constitutional Arrangements (1.24A, August 2005) at fn 357.
Second, it has been argued that some of the principles are norms that have already been given legal form, as they are found in some form in the common law. 92 Setting aside the objection — addressed above — that the principles are not in fact all orthodox restatements of existing common law, concretising in statute norms already found in common law may nevertheless be objectionable. 93 The Taskforce has not considered whether concretising common law in statute may stifle the development of that common law. Further, principles enacted in statute, even if novel, may influence the development of the common law, and how judges perceive New Zealand’s unwritten constitution. 94 The Taskforce did not consider these potential impacts on the common law of enacting principles in the form found in the RSB.

Third, selecting some principles of good lawmaking, while rejecting others, inevitably prioritises the chosen principles, through salience if nothing else, over other values that may be relevant to a decision to legislate. In Treasury’s words, affirming the chosen principles “raises their profile”. 95 This is concerning not only because it may lead to relevant considerations being under-emphasised, but also because the Taskforce has not explained adequately how it selected principles that would be prioritised. 96 The Taskforce said only that it drew on the common law, previous versions of the Bill, LAC and Regulations Review Committee guidelines and principles, and unspecified “other sources”. 97 It did not explain how it chose principles from these various sources and excluded others 98 or why it modified some.

Fourth, despite the Taskforce’s assertion to the contrary, the RSB does create legal rights. 99 For 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 liberty not be (unreasonably) limited. Just as with the NZBORA, the failure by some lawmaker to follow the relevant principle does not invalidate the resulting law; but the premise of the RSB, as with the NZBORA, is that the lawmaker 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 purpose of the RSB. This helps to clarify the Bill’s constitutional significance (and radicalism). As Paul Rishworth concludes, the RSB is in fact a second bill of rights, and that in some respects the mechanisms in the RSB enforce the principles of regulatory responsibility more strongly than the NZBORA enforces the rights it affirms. 100 We share Rishworth’s concern that it is unwise to have more than one statutory affirmation of fundamental values. 101

Finally, we note that the principles that the RSB affirms in cl 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 cl 7(2), borrowing language from s 5 of the NZBORA. 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

92 See for example, Regulatory Responsibility Taskforce, above n 1, at [4.35] and [4.58].
94 Ibid.
95 “Setting out principles in legislation raises their profile by providing formal Parliamentary endorsement of their form and importance, and will get them more attention.” Treasury Regulatory Impact Statement, above n 6, at 14.
96 The Law Society also noted that “it is unclear … how the principles have been chosen or on what basis they could be considered “established”, or more established than other principles.” New Zealand Law Society, above n 21, at 3.
97 Regulatory Responsibility Taskforce, above n 1, at [1.12].
98 For example, Treasury appeared to be particularly concerned about the omission of principles recognising “the benefits of aligning NZ regulation with international norms, or coordination with trading partners”. Treasury Regulatory Impact Statement, above n 6, at 14.
99 See Regulatory Responsibility Taskforce, above n 1, at [4.25].
100 Rishworth, above n 64, at 4.
application of some bright line test, distinguishing good from bad legislation. This will simply compound the uncertainty inherent in the principles themselves.

VI Judicial Supervision of Democratic Lawmaking: Declarations of Inconsistency

The RSB’s jurisdiction for judges to declare that legislation is incompatible with the RSB (and the interpretive direction), would make the scope and meaning of the principles a question of law and the object of authoritative judicial decision.

This is inappropriate, because 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. 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 RSB would encourage lawmakers to defer to legal advice about what is or is not reasonable legislation rather than doing their constitutional duty and making a reasoned 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 lawmakers, subject to public scrutiny, to choose what should be done.

Flatly stating, as some supporters of the RSB 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 RSB 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 RSB would put the courts to work on a fundamentally different task: evaluating the merits of particular policy proposals.

A The defence of the judicial role

The Taskforce rightly acknowledged the problem with judicial supervision of the RSB. The RSB excludes the final three principles (cl 7(1)(i)-(k)) from the scope of the jurisdiction to issue declarations of incompatibility, because the Taskforce considered 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 RSB authorises just such review. The danger of the jurisdiction is that it invites the courts to review the reasonableness of all

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103 New Zealand Business Roundtable, above n 20, at [3.3.4].

104 RSB 2011 (277-1), cl 12(1).

105 Regulatory Responsibility Taskforce, above n 1, at [4.124].
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 and its supporters have made five arguments to dismiss concerns that the RSB would improperly subject lawmaking to judicial supervision. We believe each argument fails.

First, the Taskforce implied and supporters of the RSB have expressly stated that the force of the RSB would be moral and political, meaning that cases alleging that legislation or regulations violated the RSB would not often go to court. Clause 12 of the RSB attempts to limit who may apply for a declaration by specifying that an application must be by way of a proceeding for this purpose only. 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. Treasury, on Crown Law’s advice, anticipates that declarations will likely be sought frequently as part of judicial review in the first few years of the RSB, and anticipates significant costs of defending such applications. 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 did, that they are entitled to such vindication — a court may well simply take a different view from 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.

Even if the RSB “worked” by placing legislators under political pressure not to enact legislation they think likely to be challenged in court, that would mean that our elected representatives, rather than using their own judgment, would be making law by trying to predict how judges will apply the RSB. This entails Parliament abdicating its duty and the subordination of the policy views of our democratically elected representatives to the likely views of judges. In practice, this would likely mean that the policymaking process would increasingly rely (particularly with respect to certification) on lawyers who would be instructed to anticipate how courts would interpret the principles. Treasury notes:

The legal concepts involved, and the need to consider how the courts might interpret them, will make it highly desirable to use lawyers trained for the task. … [w]ith expert certifiers, and perhaps 1600 certificates required each year … certification may become divorced from policy development …

The view of lawyers may in practice trump the views of other policy makers about what makes good law and in deciding whether or not law complies with the principles of regulatory responsibility.

Second, the Taskforce argued that in those few cases where 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 policy-makers.” 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 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 lawmaking. A similar argument is that we should not be worried

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107 Treasury Regulatory Impact Statement, above n 6, at 15.
108 Hon Rodney Hide MP stated to the Wellington Employers Chamber of Commerce “… if you as a citizen believe that a law doesn’t meet the ‘good regulation’ principles, you will be able to apply to the Courts. If the Courts agree with you, they will issue a ‘declaration of incompatibility’”. Rodney Hide “Speech to Wellington Employers Chamber of Commerce Business Breakfast” (Wellington, 14 April 2011).
110 Regulatory Responsibility Taskforce, above n 1, at [4.122].
about authorising judges to assess the merits of legislation against the RSB principles because “[b]y any standards, New Zealand courts are conservative in their approach”.\textsuperscript{111} Yet the RSB, by requiring judges to adjudicate on policy matters, may change that. Judges may take the RSB as a signal that Parliament now considers them competent to make decisions about all manner of policy choices — including in proceedings not involving the RSB — previously left to democratic politics.\textsuperscript{112}

Third, the Taskforce argued that even if the courts were to review the merits of legislation against the RSB principles, and even if the courts were to disagree with Parliament about what the principles require, Parliament could simply ignore the courts.\textsuperscript{113} That is, because the RSB does not allow courts to strike down legislation that they find incompatible with the principles of the RSB, Parliament could refuse to amend a statute that the courts found offended the RSB. The Taskforce referred to the United Kingdom’s experience with the Human Rights Act 1998 to support this assertion. However it did not carefully examine the United Kingdom 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.\textsuperscript{114} This may suggest that the RSB will be extremely effective at compelling Parliament to substitute judicial views about what makes good law for its own.\textsuperscript{115} Treasury argues that declarations of incompatibility under the RSB would not likely have as strong an impact on New Zealand lawmakers, because declarations of incompatibility under the Human Rights Act 1998 (UK) indicate a breach of international human rights obligations. But this does not mean that declarations would have no undesirable impact.

For the RSB to work as the Taskforce intended, without damaging consequences, the conditions must be just right. The courts must exercise the jurisdiction with extreme delicacy and lawmakers 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 RSB strictly and often, and disagree with Parliament’s understanding of the principles. Treasury notes this uncertainty is itself undesirable:\textsuperscript{116}

\[\text{… the declaration procedure could still create uncertainty in the business environment. The prospect that legislation may be challenged in court, even if the ultimate remedy has no legal effect, raises uncertainty as to whether the law will remain stable or will be amended. This uncertainty is compounded by the fact that it is difficult to predict how the courts will interpret the principles.}\]

The fourth response that proponents of the RSB give 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

\textsuperscript{111} Kerr, above n 53, at 11.
\textsuperscript{112} For further discussion see Chye-Ching Huang, above n 93, at 91–92.
\textsuperscript{113} Regulatory Responsibility Taskforce, above n 1, at [2.14].
\textsuperscript{114} For such an exception, note Hirst v The United Kingdom (No 2) (2006) 42 EHRR 41 (Grand Chamber, ECHR), finding a blanket ban on prisoners voting contrary to the Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (European Convention on Human Rights), and subsequent lack of legislative action, but also note that Greens and M.T. v The United Kingdom (60041/08 and 60054/08) Section IV, ECHR 23 November 2010 may encourage the legislature to revisit the issue.
\textsuperscript{115} The jurisdiction was enacted to give effect to the United Kingdom’s obligations under the European Convention on Human Rights. The relevant benchmark for the United Kingdom courts is the jurisprudence of the European Court of Human Rights, which is much more specific and detailed than the principles the RRB affirms.
\textsuperscript{116} Treasury Regulatory Impact Statement, above n 6, at 15.
recommends should be reviewed after five years in any event”. 117 To make law in this way — hoping for the best and relying on the ability to repeal it if reasonable concerns eventuate — would be reckless. There is no guarantee it will be possible or straightforward to repeal or amend the RSB even if our concerns are warranted. Indeed, it is likely that at least some — say, lawyers who do well out of the litigation to which the RSB gives rise — would defend the RSB strenuously. 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 RSB’s consequences, such as the likely politicisation of the judiciary from involving it in merits review of legislation, may be irreversible or very difficult to reverse. 118

The final defence of the judicial role is the assertion that it would be constitutionally insignificant: 119

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 defence of the judicial role erroneously 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 RSB would likely introduce to our constitutional structure a deference to judicial views about policy matters. Such juridification of lawmaking would certainly be a significant change in the relationship between Parliament and the courts. As the New Zealand Law Society concluded “[a]ny alteration to the relationship between Parliament and the courts is a significant constitutional change and such changes should be made only after a considered full review of New Zealand’s constitutional structure”. 120

B The separation of powers

There are many reasons why the juridification of lawmaking under the RSB would be an unwise constitutional change. Judges are trained as lawyers, and may lack the necessary expertise to make informed decisions about the moral, social, and economic policy matters that the RSB would require them to make. As the Law Society noted “… the courts’ expertise is with law, whereas the assessing of the way in which the principles operate will take the courts into other fields”. 121 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 decisions about the RSB principles, the better accountability mechanisms may be parliamentary and 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. RSB challenges to legislation will also consume time and resources that the courts

117 Kerr, above n 53, at 11.
118 The new conceptions of justiciability and the role of the courts in the RSB may also “leak out” and be adopted by courts in contexts other than RSB review. For example, judges might take the RSB as a signal that Parliament considers the courts competent to review tax and budget policy against the principles of fiscal responsibility in the Public Finance Act 1989 Part II; see Chye-Ching Huang, above n 93, at 92.
119 New Zealand Business Roundtable, above n 20, at [3.3.8].
120 New Zealand Law Society, above n 21, at 5.
121 Ibid, at 4.
ought to devote to adjudicating disputes and which the parties ought to devote directly to law reform or political contest.

Responding to this critique, supporters of the RSB have said that it amounts to an unfair criticism of the quality of New Zealand judges.\(^{122}\) It is no criticism of New Zealand judges to say the courts are not an institution well placed to make the kinds of moral, social, and economic — in a word, political — judgments that the RSB would require. 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. A great many people may be affected by or have an interest in the outcome of a declaration of inconsistency issued under the RSB, 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.\(^{123}\)

The Taskforce’s Report cursorily acknowledged the institutional reasons why courts are ill-suited to reviewing the merits of policy choices made by Parliament:\(^{124}\)

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.

The Taskforce gave those “familiar institutional advantages” no further consideration. Instead, it concluded that giving the courts the power to review policy choices made by legislators is “justified and necessary as a mechanism to encourage and ensure compliance on the part of decision-makers with the principles of responsible regulation.”\(^{125}\) This assertion is unpersuasive. The institutional features of the courts mean they are likely to make worse decisions on average than the legislature and executive 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.

### VII The Interpretive Direction and the Rule of Law

The RSB’s direction in cl 11 to judges to interpret all legislation consistently with the principles of responsible regulation constitutes a contingent amendment to existing laws. The direction 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. Treasury concludes that it is “highly risky and could have significant unintended effects”.\(^{126}\)

The RSB directs courts to give statutes an interpretation that is consistent with the principles of regulatory responsibility when possible. The Taskforce provided no argument for the inclusion of this direction, save for the enigmatic remark that “the existing judicial review jurisdiction would be enlivened

\(^{122}\) Wilkinson and Scott, above n 34, at 48.
\(^{123}\) Greater use of amicus briefs would be insufficient to address this democratic deficit; see for example Kathleen M Sullivan “Epistemic Democracy and Minority Rights” (1998) 86 Cal L Rev 445 at 448–449.
\(^{124}\) Regulatory Responsibility Taskforce, above n 1, at [4.120].
\(^{125}\) Ibid, at [4.121].
\(^{126}\) Treasury Regulatory Impact Statement, above n 6, at 15.
by an interpretation provision”. 127 For ten years after the commencement of the RSB the interpretive direction would only apply to statutes that post-date it; after ten years, the provision applies to all statutes. The delay is intended to give lawmakers 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). 128

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 lawmaker. This means that the RSB 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. 129

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, 130 and Treasury officials, and the Minister of Regulatory Reform and the Minister of Finance have been advised of it. 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. 131 Yet the RSB as introduced to Parliament did not remedy this apparent oversight. Even if the oversight is later remedied, the objections to the interpretive direction set out herein will still apply.

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 asserted that the direction is not intended to support strained interpretations. However, the courts have struggled to identify the limits of s 6 of the NZBORA, on which this provision is based. The Taskforce relied on the leading case of  

R v Hansen  

[2007] NZSC 7, [2007] 3 NZLR 1. 132 to assert that the provision would not license uncertain, radical interpretation. 133 However, this is to ignore the fact that there have been a number of significant and highly radical uses of s 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. 134 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), 135 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 RSB’s interpretive direction poses similar dangers.

These dangers are exacerbated because some of the principles in the RSB are novel and unorthodox, which Treasury worries may lead to the interpretive direction leading the law to “change in unexpected ways and may give rise to unexpected remedies”. 136 Treasury noted, for example, “the property rights

127 Regulatory Responsibility Taskforce, above n 1, at [1.20].
128 RSB 2011, cl 16.
129 For an elaboration of this analysis of radical uses of interpretive directions in which courts use them to authorise departures from the intent of the enacting legislature, see Richard Ekins “Rights, Interpretation and the Rule of Law” in Richard Ekins (ed) Modern Challenges to the Rule of Law (Wellington, LexisNexis, 2011) 165.
131 As Treasury notes, “it is not clear what it would mean to interpret the law in line with the good law-making principles” Treasury Regulatory Impact Statement, above n 6, at 15.
133 Regulatory Responsibility Taskforce, above n 1, at [4.112], fn 72.
134 In the matter of application by AMM and KJO to adopt a child [2010] NZFLR 629 (HC).
135 Ibid, at [16]–[18].
136 Treasury Regulatory Impact Statement, above n 6, at 15.
principle could lead to compensation being awarded in respect of government actions where the government had no intention of paying compensation.”  

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 RSB, judges may read down the empowering statute, adopting strained interpretations of those powers in order to make them consistent with the RSB. For example, (following the lead of the courts in applying s 6 of the NZBORA in *Drew v Attorney-General*) judges may decide to read empowering statutes to only authorise regulations that impose reasonable limits on liberty or that pass a cost-benefit analysis. By authorising or requiring judges to read down regulation-making powers in this way, the interpretive direction 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 RSB would also likely render unreliable much existing case law interpreting statutes and regulation, and it “will inevitably increase uncertainty about the meaning of legislation until enough jurisprudence builds up around it”. As an illustration, the Seafood Industry Council (SeaFIC) submitted to the Minister for Regulatory Reform:

> 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… .

The uncertainty would likely disrupt economic activity in the fisheries industry, and also in other sectors of the economy, which would be undesirable against the RSB’s narrow concern of improving economic growth.

VIII  Civil Servants and the Certification Regime

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

The Taskforce assumed that the certification regime in the RSB would “work” better than other certification regimes for legislation currently in place, for example the Cabinet requirements to consider

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137 Ibid.
139 Treasury *Regulatory Impact Statement*, above n 6, at 15.
140 Seafood Industry Council “Submission on Questions Arising from the Regulatory Responsibility Bill prepared by the Regulatory Responsibility Taskforce, June 2010” (27 August 2010) at [31].
141 RSB 2011, cl 8(1).
142 RSB 2011, cl 8(3).
LAC Guidelines and requirements for Regulatory Impact Analysis (RIA). This assumption appears to rest on the two key differences between existing certification regimes and that proposed by the RSB: (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 assessment of the merits of legislation against the RSB would be unwise and improper. Chief executive involvement in certification under the RSB would also be 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 cl 8. The reason for this, the Report stated, was that the Minister is the appropriate person to judge whether a departure is justified. The Taskforce concluded 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. As Treasury notes, “[o]fficials may wish to certify accurately, but will be uncomfortable about doing so if their conclusions differ from their Minister’s, who must also certify”. This increased tension between civil servants and Ministers would 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 lawmaking. The Business Roundtable’s submission in support of the Bill admits that the certification regime would give politicians an incentive to “appoint more compliant chief executives” and suggests a requirement for chief executives to give “free and frank advice in the public interest” to prevent this undesirable outcome. This would not remove the imperative for Ministers to appoint chief executives who have similar political views, to increase the likelihood that 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 opined that this will be rare “as generally the power to make legislation will be interpreted not to delegate the power to make legislation inconsistent with the principles of responsible regulation”. The Taskforce’s speculation is plainly unsound: legislation will (and should) routinely authorise delegated lawmakers 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 lawmaking. The scheme 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.

143 Regulatory Responsibility Taskforce, above n 1, at [4.106].
144 Treasury Regulatory Impact Statement, above n 6, at 14.
145 New Zealand Business Roundtable, above n 20, at [3.3.2].
146 Regulatory Responsibility Taskforce, above n 1, at [4.107].
The RSB demands that certifying lawmakers 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.

IX Conclusion

Parliament should not enact the RSB. The Bill lacks sound foundations: the problem it seeks to address has neither been well-defined nor its cause diagnosed, and insufficient consideration has been given to alternative ways to improve lawmaking. Many of the principles the Bill affirms are heterodox and should not be justiciable. The principles jointly form a vague and distorted code for lawmaking, which judges will have authority to interpret and to specify. The declaratory jurisdiction, certification regime, and interpretive direction constitute a scheme that promises to privilege the policy views of judges over the considered judgment of elected representatives. The RSB thus threatens to undermine our democratic culture, to politicise chief executives, and to distort the lawmaking process. While ostensibly a measure intended to improve the quality of legislation, the RSB is what its supporters decry — a legislative proposal that lacks sound foundations and which departs sharply from settled constitutional principle, the enactment of which would be reckless.

147 As we previously discussed in Richard Ekins and Chye-Ching Huang, above n 12.