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Questions arising from the Regulatory Responsibility Bill, June 2010

The New Zealand Law Society (Society) welcomes the opportunity to respond to *Questions arising from the Regulatory Responsibility Bill prepared by the Regulatory Responsibility Taskforce, June 2010* (discussion paper).

The need for a Regulatory Responsibility Bill

- a. Do you agree that the quality of legislation (Acts, statutory regulations, tertiary legislation) in New Zealand is often not as good as it could or should be? If so, what do you see as the main problems with quality, and the main causes of those problems? If not, please explain the reasons for your view.

This question highlights the central problem with the Regulatory Responsibility Bill (RRB) process thus far – problem definition. In this sense the RRB is failing to meet its own standards for policy development.

The “quality of legislation” could refer to a number of possible problems with legislation, and thus implicate a number of possible causes. In discussions of the RRB and the quality of legislation it is often not clear what particular aspect of quality is being referred to, and indeed this can be a moving target. As a result participants in the debate run the real risk of talking past each other.

For example, a reference to poor quality legislation could be implying:

- Poor legislative drafting
- Poor regulatory design, resulting in poor implementation of an otherwise sound policy choice (for example, unintended consequences)
- Poor policy choice (e.g. poor problem definition, poor selection of policy response, costs exceeding benefits, poor prioritisation of limited government resources)
- That higher level constitutional principles have been offended – human rights, property rights, socio-economic rights or principles, etc.

It is unlikely that the question relates to the first aspect of quality identified above – the technical quality of legislation, how clearly and economically drafted it is, and so on. We do not understand stakeholders to be suggesting this is the issue, and, in general, the Society considers the quality of legislation in fact to be very high.

However, it is not clear that there is a consensus as to which of the other aspects of quality of legislation are at issue and should be addressed. Equally, the potential underlying causes need to be investigated and isolated. Looking at the potential quality problems, the potential causes to be investigated could include:

- A lack of commitment to higher level constitutional principles (raising the question of which ones)
- A need to invest in the skills, capacity and resources of the public sector
- The political imperative of the three year election cycle and its impact on quality policy processes
- The role of Ministers' offices in the policy process
- The role and capacity of opposition research units – given the political imperative of a new government delivering on its election promises, policy developed by opposition research units has assumed a growing importance

It is not clear that the RRB process has, as yet, isolated the aspect of quality that is said to be lacking, demonstrated this is so, and identified the underlying cause. While the select committee considering the RRB heard from submitters agreeing there was a problem with the quality of legislation, it is not clear whether submitters all agreed that the problem was at the level of constitutional principle, policy choice, regulatory design, or some other aspect of quality.

The RRB as currently drafted assumes the problem is one of a lack of commitment to particular constitutional principles, and the debate over the Bill has proceeded in those terms. This raises some important policy questions as to whether some principles (e.g. property rights) should be prioritised over others (e.g. socio-economic rights; Treaty of Waitangi principles). It is likely that, in the community, there are diverse views about the overall quality of legislation framed at this level, and the diversity would reflect different conceptions of the role of government. The Society is reluctant to comment on these policy choices, as its members might reasonably hold different views. However this submission will focus on the issues of problem definition discussed above, and the questions asked in this consultation as to the likely effect or impact of the proposals in the RRB.

- b. Do you agree that existing parliamentary and administrative processes are unlikely to be sufficient to encourage substantial improvements in the quality of legislation? Please explain the reasons for your view.

This question raises the issues of problem definition discussed above. Until there is clarity as to the aspect of quality at issue, and the underlying cause, it is difficult to comment on which existing parliamentary and administrative processes are relevant.

The nature and scope of the Bill

- a. Do you agree that systematic testing of legislation against a set of established principles will help improve regulatory quality?

Principles could be selected to address the various aspects of quality discussed above. However it is far from clear that this approach would improve quality. The principles are at a high level of generality and it is not difficult to imagine that most legislative proposals could and would be regarded by their proponents as being consistent with the principles.

- b. What is your view on the range and appropriateness of the principles identified by the Taskforce?

It is unclear in the Taskforce Report and in this set of questions how the principles have been chosen or on what basis they could be considered “established”, or more established than other principles.

Also, it can be said that some of the principles replicate general principles of law already operating (e.g., the principles about taxation) or are so broad that they are susceptible to unpredictable interpretations (liberty, personal security, freedom of choice or action), or are better placed (if they are to operate in the legal system) in the New Zealand Bill of Rights Act 1990 (e.g. property).

But it is very easy to foresee that New Zealanders could equally propose various other sets of principles. Some would argue for the inclusion of socio-economic rights, or of the Treaty of Waitangi, or of multiculturalism and social inclusion – all these could be declared as principles against which legislation had to be tested. Once again, it is not clear that this would be an advance, as governments and legislators of the day are likely, in their own various ways, to regard their proposed measures as compatible with the principles.

All that said, there might be some advantages gained by requiring that policy-makers turn their minds to a stated set of principles. The greater problem is the expectation in the RRB proposal that these principles are capable of ready discernment such that it can be said of a particular proposal that it infringes them.

- c. If you favour additions or changes to these principles, what would they be and why?

The Society does not itself advance additions or changes. Rather, in the answers it has given to the previous two questions it suggests that the articulation of general principles does not amount to the benchmark that may be envisaged.

- d. The Taskforce considered that all levels of legislation (i.e. primary, secondary, and tertiary) should be tested against a set of principles. What levels of legislation do you think would benefit from such testing?

If there were to be principles at all, then there is no reason they should not apply to all three levels.

The effectiveness and impact of the Bill

- a. Do you agree that stronger benchmarking, transparency and monitoring mechanisms will improve the quality of New Zealand's legislation? Are there other mechanisms that you consider would be superior? Please explain the reasons for your view.

As suggested above, the articulation of the principles may do some good in turning the minds of legislators and policy-makers to some foundational issues. But all this could be imposed by government of its own volition, and does not need to be imposed by legislation.

- b. What are the likely effects of the principles/certification/declaration of incompatibility incentive structure?

The declaration of incompatibility structure takes an idea developed in the limited field of human rights law (notably the United Kingdom's Human Rights Act 1998) and seeks to render it applicable to the whole range of legislative measures that affect liberty and property. It has the capacity to "judicialise" controversies about social and economic policies, and to tie up the time of government employees and the judicial system in attending to litigation.

- c. What are the likely effects of the requirement that Ministers and Chief Executives responsible for legislation certify as to its compliance with the Principles of Responsible Regulation, including the likely effects on the relationship between Ministers and government officials?

As suggested above, the articulation of the principles may do some good in turning the minds of legislators and policy-makers to some foundational issues. But all this could be imposed by government of its own volition, and does not need to be imposed by legislation.

Also, as noted already, the generality of the principles means that most policies could be regarded as being consistent with the principles, at least by those who are advancing them.

- d. Are the courts the best external body to assess the consistency of legislation with the principles set out in the Taskforce's Bill? If not, what other bodies might fulfil this role?

The Society submits that the answer to this question is a clear no, so far as courts are concerned. Reasons for this view include the fact that the courts' expertise is with law, whereas the assessing of the way in which the principles operate will take the courts into other fields.

- e. What are the likely effects of giving the courts, or your preferred alternative agency if you have one, a role in assessing whether legislation is compatible with a set of legislative principles?

It could lead to much litigation, or else perhaps none – the latter if the declarations were not heeded by governments. Either is problematic.

- f. Under the Bill, a court's exercise of the declaration of incompatibility procedure does not affect the validity of the legislation at issue. Nevertheless, some commentators suggest that the Bill will alter the relationship between Parliament and the courts, particularly given that the courts must take into account whether any breach of the principles is

“justified in a free and democratic society” when deciding whether to make a declaration of incompatibility.

- Do you think that such suggestions are accurate?

The Society thinks that the proposal would force courts to enter into arenas that they are not well suited for and which are not legal issues as such. The problem, therefore, is not so much that “declarations” might alter the relationship between the courts and the legislature – though this could be a consequence – but that the proposal invites the litigation of social and economic policies. If this type of litigation were to be taken up by citizens and corporations, it could overwhelm the courts. On the other hand, if it proved to be of little value to litigate – because courts would not readily make declarations or because they had no impact on government – then the principles themselves would become impotent and perhaps undervalued.

Conversely, when (as is the status quo) they are not written down and declared in legislation, these principles have a clarity and force (along with others of course). But they are debated in the political realm.

- If so, do you think that the potential benefits of improving the quality of legislation in New Zealand are such that alterations to the relationship between Parliament and the courts are justified?

No. This is far from established. Any 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.

- Could the Bill be improved in this respect?

It could restrict its proposals to a Chief executive or Ministerial certification process alone. This alteration however would not address the points made above about the quality of legislation and the appropriateness of the principles selected.

- g. The Bill directs the courts to prefer interpretations of legislation that are consistent with the principles (initially only in respect of new legislation, but applying to all legislation after 10 years). The New Zealand Bill of Rights Act contains a similar provision. What do you think the likely effects of this provision would be on the body of New Zealand law?

In most respects it is likely to be minimal. Insofar as property is concerned, it could be greater. But the answer then is to promote an amendment to the New Zealand Bill of Rights Act for the inclusion of a right to property so that all rights are dealt with in that one statute. While a recent members Bill proposed such an addition to the New Zealand Bill of Rights Act, it lacked the policy work needed to make choices about the framing of the amendment, and the full public engagement necessary for legitimacy.

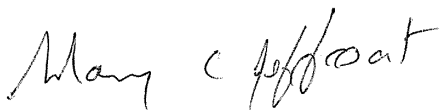
Clarifications on the Regulatory Responsibility Bill and potential alternative mechanisms?

- a. Are there any other aspects of the Regulatory Responsibility Bill that you consider could be clarified or improved?
- b. The Taskforce's Regulatory Responsibility Bill suggests one set of measures for improving regulatory quality in New Zealand. Given your answers to the questions outlined above, can you think of any possible measures not suggested by the Taskforce that might help improve regulatory quality? These measures may be supplementary to the Taskforce's suggestions or in place of some or all of them. Please explain the reasons for your view.

There is nothing to add at this point to the matters already raised.

This submission was drafted with the assistance of the Society's Law Reform Committee. For further information, please contact the Committee's secretary, Vicky Stanbridge (NZLS Legal Affairs Department), ph (04) 463 2912 or vicky.stanbridge@lawsociety.org.nz.

Yours sincerely



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