LEGISLATION NOTES

The Repeal and Resurrection of "Responsibility"

A Proliferation of Controversial Responsibility Acts?

Various New Zealand governments (and some parties aspiring to government) have embraced the idea of legislating for executive responsibility. The Labour-led Government made front-page news in January 2005 by announcing that it intends to propose a "social reporting law" that will be "the equivalent of the Fiscal Responsibility Act".[1] Less than two months later, the ACT party revealed its policy of introducing a Regulatory Responsibility Act.[2] The model for these proposals is the Fiscal Responsibility Act 1994 ("FRA 1994"),[3] "pioneering"[4] legislation that was passed by a National Government. Despite the possible proliferation of "responsibility legislation", the effect of such statutes is controversial; the FRA 1994 was said to "signify absolutely totally nothing",[5] and to be an attempt at a "legislative contraceptive".[6]

Also in 2005, the Labour-led Government repealed the FRA 1994 and reenacted it as part of the Public Finance Act 1989 ("PFA 1989"). This repeal and reenactment may clarify the practical and legal impact of any future "responsibility Acts" that emulate the FRA 1994.

The Responsibility Act Model: The FRA 1994

The FRA 1994 had two key features: principles of responsibility and reporting requirements. The FRA 1994 required the government[7] to "pursue its policy objectives" in accordance with five "principles of responsible fiscal management":[8]

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[1] Thomson, "Govt plan for annual 'social report'", *The New Zealand Herald,* Auckland, New Zealand, 25 January 2005, A1.

[2] Rodney Hide, "ACT's Plan to Cut Red Tape" (Speech delivered at New Zealand Large Herds Association Conference, Christchurch Convention Centre, Christchurch, 19 April 2005). See also the detailed proposal for a Regulatory Responsibility Act in Wilkinson, *Constraining Government Regulation* (2001) 236-241.

[3] Supra notes 1 and 2. The Charter of Budget Honesty Act 1998 (Cth) is also modeled on the FRA 1994; Robinson, "Can fiscal responsibility legislation be made to work?" (1996) 3 Agenda 419, 427-428.

[4] (22 June 1994) 541 NZPD 2010 (Ruth Richardson).

[5] (7 June 1994) 540 NZPD 1488 (Winston Peters).

[6] (26 May 1994) 540 NZPD 1143 (Michael Cullen).

[7] The FRA 1994 imposes duties on the *executive* government to follow its principles and reporting requirements; FRA 1994, s 4. Compare PFA 1989, s 2.

[8] FRA 1994, s 4(1). Compare PFA 1989, s 26G.

(a) Reducing total Crown debt to prudent levels so as to provide a buffer against factors that may impact adversely on the level of total Crown debt in the future, by ensuring that, until such levels have been achieved, the total operating expenses of the Crown in each financial year are less than its total operating revenues in the same financial year; and
(b) Once prudent levels of total Crown debt have been achieved, maintaining these levels by ensuring that, on average, over a reasonable period of time, the total operating expenses of the Crown do not exceed its total operating revenues; and
(c) Achieving and maintaining levels of Crown net worth that provide a buffer against factors that may impact adversely on the Crown's net worth in the future; and
(d) Managing prudently the fiscal risks facing the Crown; and
(e) Pursuing policies that are consistent with a reasonable degree of predictability about the level and stability of tax rates for future years.

None of these fiscal responsibility principles is a quantified target. The principles are a deliberately vague description of "responsibility", because the drafters of the FRA 1994 intended the government to construe and explain them. Treasury said "[i]t is left to the Government of the day to interpret the relevant fiscal terms...and to justify those interpretations to Parliament and the public."[9]

The FRA 1994 also imposed reporting requirements. It required the executive to publish or lay before the House of Representatives reports assessing executive policy against the principles, or setting out the executive's objectives and intentions in respect of the principles.[10]

The Limited Legal Effect of Responsibility Legislation

The FRA 1994 is peculiar in that courts may have been unable to enforce it. Responsibility legislation modelled on the FRA 1994 might share this feature. There are three reasons why governments might be able to breach such legislation without fear of legal action in the courts.

First, justiciability principles may prevent judicial enforcement. Justiciability principles may not be legitimate, but the courts use them

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[9] New Zealand Treasury, "The Fiscal Responsibility Act 1994: An Explanation" (1995) <http://www.treasury.govt.nz/legislation/fra/explanation/details1.asp> (at 30 September 2005). See also (22 June 1994) 541 NZPD 2015 (Max Bradford).

[10] FRA 1994, ss 6-12; long title cl (a). Compare PFA 1989, ss 26I-26Z; s 1A(2)(c).

nevertheless.[11] For example if a court were to attempt to decide whether an executive had reduced Crown debt to "prudent" levels, as required by principle (a) of the FRA 1994[12], it would have to assess "high policy". Courts have recognized that they do not have the capability to decide on some matters, including high policy.[13] Courts may believe themselves to be neither institutionally competent nor constitutionally appropriate to enforce responsibility legislation.[14]

Secondly, there may be no one who has legal standing[15] to bring an action against a government for breaching responsibility legislation. Statutes like the FRA 1994 may impose duties on government, but these duties are arguably for the general public benefit.[16] Therefore duties imposed by responsibility legislation may not be owed to any particular person (or group of people) who can ask the courts to enforce those duties.[17]

Thirdly, judges might conclude that Parliament did not intend them to enforce responsibility legislation. Such statutes lack explicit judicial enforcement and remedial provisions. However responsibility legislation requires the executive to prepare reports, and to publish these reports or lay them before Parliament. If an executive did not comply with the reporting requirements, or the reports revealed non-compliance with responsibility principles, the executive could expect to face political pressure from Parliament and the public.[18] Parliamentary history shows that when debating the Fiscal Responsibility Bill its promoters did not mention judicial enforcement, but instead explained that they intended political embarrassment to deter executives from breaching the FRA 1994.[19] The courts might conclude that Parliament intended responsibility statutes to be blueprints for the behaviour of political actors, to be enforced by those actors amongst themselves using political processes inside and outside the House.

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[11] See Allan, *Law, Liberty and Justice: the legal foundations of British constitutionalism* (1993) 162-199. Compare Finn, "The Justiciability of Administrative Decisions: A Redundant Concept?" (2002) 30 Fed L Rev.

[12] FRA 1994, s 4(1). Compare the PFA 1989 s 26G(1)(a).

[13] See Allan, supra note 11, 214; Harris, "Judicial Review, Justiciability and the Prerogative of Mercy" (2003) 62 CLJ 631.

[14] See Harris, Ibid.

[15] See Allan, supra note 11, 225.

[16] See New Zealand Treasury, "The Fiscal Responsibility Act 1994: An Explanation" (1995) <http://www.treasury.govt.nz/legislation/fra/explanation/conclusion.asp> (at 30 September 2005).

[17] Allan, supra note 11, 225.

[18] See New Zealand Treasury, "The Fiscal Responsibility Act 1994: An Explanation" (1995) <http://www.treasury.govt.nz/legislation/fra/explanation/details1.asp> (at 30 September 2005); (22 June 1994) 541 NZPD 2010-2011 (Ruth Richardson).

[19] (22 June 1994) 541 NZPD 2010-2011 (Ruth Richardson).

If breaches of responsibility legislation cannot attract court-imposed sanctions, this does not mean that responsibility legislation has no legal effect.

"All Acts of Parliament must fit into the body of the law as a whole",[20] so when interpreting an Act judges can consider other Acts. Responsibility legislation can help judges interpret other statutes that use similar terms or address similar areas of law.[21] *Choudry v Attorney-General*[22] shows that responsibility legislation can also influence the interpretation of common law terms. In *Choudry v Attorney-General*, the Court surveyed Acts that used the word "security" (including the FRA 1994) in order to identify any law that could help the Court define "security" in the context of common law public interest immunity.[23]

Responsibility legislation can shape judicial views of New Zealand's constitutional structure: the FRA 1994 has already done so. The majority in *Lange v Atkinson*,[24] perceived a constitutional change in New Zealand.[25] In a section of the judgment headed "Political Statements in the New Zealand Constitutional Context" the majority stated, "[a constitutional] change nevertheless has occurred in substantial measure. We are citizens of New Zealand rather than subjects of the sovereign."[26] The majority found support for its account of the constitution in the principle of the free flow of information (particularly official information).[27] The majority identified the principle of the free flow of information by examining "legislation regulating the structure of the state sector and the government's spending and fiscal responsibilities, especially the State Sector Act 1988, the Public Finance Act 1989 and the Fiscal Responsibility Act 1994".[28]

If responsibility legislation can affect judicial perceptions of the constitution then responsibility legislation can also affect the development of the common law. In *Lange v Atkinson* the Court decided to develop qualified privilege consistently with the constitutional principles that it had articulated.[29]

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[20] Burrows, *Statute Law in New Zealand* (3 ed, 2003) 168.
[21] Ibid 168-170.
[22] [1999] 2 NZLR 582 (CA).
[23] Ibid 594.
[24] [1998] 3 NZLR 242 (CA).
[25] Ibid 462-465.
[26] Ibid 463.
[27] Ibid 462-465.
[28] Ibid 464.
[29] Ibid 464-478.

The Uncertain Practical Impact of Responsibility Legislation

The practical effect of responsibility legislation (whether or not successive governments will in fact comply with it) has been contentious since the FRA 1994 was proposed.

One view is that responsibility legislation is ineffectual because it does not allow judges to impose sanctions on governments that breach it. Marc Robinson argues that the FRA 1994 was a "fiscal responsibility declaration": a discretionary commitment undertaken by a particular executive government.[30] Robinson states that a "realistic view" of enacted fiscal responsibility declarations is that they "represent an attempt to delude the electorate as to the status of the fiscal constraint".[31] Debating the Fiscal Responsibility Bill, some Opposition politicians also saw it as a promise that was legally and constitutionally unenforceable, and therefore ineffectual:

> "Legislation of this type in this country is meaningless unless this Parliament means to keep faith."[32]
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> "It is a constitutional nonsense. The notion that this Parliament will somehow bind future Governments on fiscal policy...is constitutional stupidity."[33]
>
> "[W]hy should the present Government attempt to constrain the sovereignty of voter choice...It cannot be done".[34]
>
> "It is neither possible nor desirable for this Government to try legislatively to 'strait-jacket in' policy directions in the area of fiscal policy for future Governments."[35]

An extreme expression of this view is that the FRA 1994 is "a wish list of eternal policy clichés, and therefore signif[ies] absolutely totally nothing".[36]

The contrasting view is that legislation like the FRA 1994 can be a powerful constraint on executive behaviour. Perhaps governments can be expected to comply with responsibility legislation, regardless of

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[30] Robinson, "Can fiscal responsibility legislation be made to work?" (1996) 3 Agenda 419, 421.
[31] Ibid.
[32] (7 June 1994) 540 NZPD 1490 (Winston Peters).
[33] (26 May 1994) 540 NZPD 1143 (Michael Cullen).
[34] (22 June 1994) 541 NZPD 2009 (Michael Cullen).
[35] (7 June 1994) 540 NZPD 1483 (Paul Swain).
[36] (7 June 1994) 540 NZPD 1488 (Winston Peters).

whether or not it is enforceable against them in the courts. Promoters of the FRA 1994 expected it to become practically unrepealable and unalterable – "politically entrenched":[37]

> We all know that Parliament cannot bind its successor. But is [the member] trying to tell this House, or indicate, that a Labour Government would not want to be bound by the Bill or would not be bound by it... Although any succeeding parliament can change any legislation, I doubt whether any Government, with this Bill in place would seek to do so.

The Responsibility Act Model: The FRA 1994

The Fiscal Responsibility Act 1994 was repealed on 25 January 2005.[38] Its substance was simultaneously resurrected as part of the PFA 1989.[39] This repeal and effective reenactment has been characterized as merely technical and administrative, part of the "consolidation...[of] the law governing the use of public financial resources".[40]

A Clarification of the Practical Impact of Responsibility Legislation?

Two governments, one National and one Labour-led, have now passed the substance of the FRA 1994. This could be said to evidence widespread political commitment to the version of responsibility it set out, and confirm that the substance of the FRA 1994 (although not its name) has become politically entrenched.

However, the content of the FRA 1994 may now be less visible within the mammoth Public Finance Act 1989 than as the stand-alone FRA 1994.[41] What was once the FRA 1994 now sits within a framework of wide-ranging and technical reporting and governance provisions. That scheme arguably paints the fiscal responsibility principles and associated executive reports as administrative instruments, rather than as overarching requirements for government policy. Less visible principles may be less likely to shape the views of the electorate, the executive, and Parliament. Less visible principles therefore may be less likely to

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[37] (26 May 1994) 540 NZPD 1151 (Clem Simich); see also (22 June 1994) 541 NZPD 2029 (Jim Bolger).

[38] Public Finance Amendment Act 2004, s 37(2).

[39] The author has detected no substantive differences between the FRA 1994 and the corresponding provisions of the PFA 1989.

[40] PFA 1989, s 1A, inserted by Public Finance Amendment Act 2004, s 4.

[41] As a rough comparison, the FRA 1994 had 19 sections, the PFA 1989 now has 8 parts and more than 88 sections.

constrain executive policy and be more vulnerable to amendment or repeal.[42]

Any reduction in the practical influence of FRA 1994 may have been intentional. Professor Jane Kelsey, University of Auckland, characterized the FRA 1994 as a tool to embed a liberal political ethos.[43] Political commentator Colin James observed a subsequent move to entrench a different political ethos: "[i]f social responsibility became as embedded as fiscal responsibility in Government practice...it would likely push political debate on Labour's ground for quite a while. Which is just where Labour wants it."[44]

If the 2005 Labour-led Government deliberately reduced the profile of the FRA 1994 so that it could implement a political agenda opposed to that of the 1994 National Government, this may clarify the function and effect of responsibility legislation. It would support the view that such legislation expresses the political goals of particular executive governments,[45] and will function as enacted manifestos or promises instead of becoming politically entrenched. Statutory versions of "responsibility" that are incompatible with prevailing political views may be decreased in visibility and political importance, to make way for new versions of "responsibility". Indeed, it was within four weeks of the repeal of the FRA 1994 that the Labour-led Government announced its intention to propose a new social reporting law.

A Clarification of the Legal Impact of Responsibility Legislation?

Lange v Atkinson shows that judicial perceptions of the constitution can influence how cases are decided, and that responsibility legislation can influence judicial perceptions of the constitution.[46] Judges who seek to discern general principles of New Zealand's "constitutional" arrangements may be particularly attracted to the broad, general, and explicit statements of principle in responsibility legislation. The practical effectiveness of responsibility statutes may also determine the importance that judges place on such Acts when they define or describe New Zealand's constitution.

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[42] See Kelsey, *The New Zealand Experiment - A World Model for Structural Adjustment?* (1995) 236, citing New Zealand Treasury; Wilkinson, supra note 2, 105.
[43] Kelsey, supra note 42, 237.
[44] James, "Workplace the crucible for social and economic mix" *The New Zealand Herald*, Auckland, New Zealand, 6 December 2004.
[45] See Robinson, supra note 3.
[46] See text above accompanying supra note 24.

Commonwealth courts have indicated that the practical effect of an Act can determine its "constitutional" role.[47] If judges perceive the function of responsibility legislation as declaring[48] a particular executive's political intentions, and consider that such Acts are likely to have limited life-spans, then they may be less likely to conclude that such Acts evidence "basic changes to the constitution"[49] or basic features of New Zealand's constitution. If judges think that responsibility legislation effectively constrains governments, because such Acts embody widely accepted and politically entrenched principles for policy, then they may be more likely to conclude that responsibility legislation reveals principles relevant to New Zealand's constitution.

If judges were influenced by the practical effect of responsibility legislation in this way, observations about the practical role of responsibility legislation could translate into arguments about what legal impact responsibility legislation should have. Observations and arguments about the practical significance of the repeal and reenactment of the FRA 1994 could become legal arguments about what role the FRA 1994 (and other responsibility legislation) should have in judicial views of the constitution.

Conclusion

Technical and administrative changes to responsibility legislation may clarify the practical impact of this type of statute. An accurate picture of the practical impact of responsibility legislation might better allow the electorate to evaluate proposals for new "responsibility Acts". Furthermore, the practical effect of responsibility legislation might determine its legal effect, and influence how judges see New Zealand's constitutional arrangements. Understanding the practical effect of responsibility legislation may therefore be a prerequisite to understanding and predicting how judges view New Zealand's constitutional structure.

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[47] See *Thoburn v Sunderland City* Council [2003] QB [62].
[48] In Robinson's sense; see text accompanying supra note 30.
[49] See text accompanying supra note 24; *Lange v Atkinson,* supra note 24, 461.
[*] The author would like to thank Professor Bruce Harris and Dr Michael Littlewood for their comments on a draft of this note.