Chapter 14

Administrative Law Through a Regulatory Lens: Situating Judicial Adjudication Within a Wider Accountability Framework

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14.1 Introduction

The complaint that regulatory developments in New Zealand have been characterised by an unreflective reliance on the courts is not a new one.[1] Recent proposals for regulatory management in New Zealand, notably the Regulatory Standards Bill 2011, and discussions over the course of the Regulatory Reform Project, suggest that this reliance on the courts is an aspect of a larger issue: a need for greater clarity as to the purposes and modes of accountability. In this chapter we outline an expanded accountability framework addressed to this larger issue. To explicate and develop that framework we apply it to two New Zealand case studies: the decision of the Court of Appeal in *Lab Tests*;[2] and the recent proposal, contained in the Regulatory Standards Bill 2011, for the use of judicial declarations of incompatibility with reference to a set of nominated regulatory principles.

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1 David Goddard "Regulatory Error: Review and Appeal Rights" (paper presented to the Legal Research Foundation Conference, Auckland, September 2006): "I then survey existing review and appeal rights in respect of regulatory decisions in New Zealand. There does not appear to be any principled basis for the mix of rights currently available: the only pattern I can discern is a focus on what review is realistic before a High Court judge sitting alone … ".

2 *Lab Tests Auckland Ltd v Auckland District Health Board* [2008] NZCA 385, [2009] 1 NZLR 776.

The object of our inquiry is judicial adjudication in administrative law. Administrative law plays a secondary role in regulation.[3] Regulation is first and foremost about the achievement of social goals; for example, the efficient and affordable provision of electricity or of telecommunications,[4] the optimum level and type of foreign direct investment,[5] or a fit-for-purpose consumer credit regime.[6] Administrative law plays an ancillary role in relation to those social goals. It is concerned with process values that address *how* those social goals are realised: (a) whether their implementation complies with the relevant legal framework; (b) the way decision making is conducted; and (c) the rationality of the reasoning. This distinction between the social goals pursued by regulation and the process values served by administrative law creates the possibility, and indeed likelihood, of a tension between them. In our Stage One chapter we examined this tension as it plays out within traditional administrative law in New Zealand.[7]

In this chapter, the object of our inquiry remains administrative law, and more particularly judicial adjudication, but our frame has shifted. We evaluate judicial adjudication in administrative law against the wider framework of regulatory accountability. The concept of accountability is adopted as the frame because its breadth is "just right" to bring regulatory concerns to an evaluation of administrative law, without losing a focus on administrative law as an object of study. A thoroughgoing regulatory approach is too broad, moving administrative law, and indeed accountability more generally, into the background. A central focus on the effective realisation of social goals puts many of the key questions we want to ask of administrative law's ancillary, process function into too soft a focus.[8] Against that, we need a frame broader than administrative law's traditional focus on "legal accountability" to press the question of how administrative law contributes to regulation.[9] We follow Cane and McDonald's suggestion that scholars interested in the place of administrative law in regulation are best advised to extrapolate from administrative law's traditional focus on accountability, narrowly conceived, to evaluate it against a broader accountability framework. In

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3 Peter Cane and Leighton McDonald *Principles of Administrative Law: Legal Regulation of Governance* (Oxford University Press, Melbourne, 2008) at 9–10. This paragraph and the next draw on that work, at 7–12. See also Peter Cane "Administrative Law as Regulation" in Christine Parker and others (eds) *Regulating Law* (Oxford University Press, Oxford, 2004) 207.

4 See Paul Scott and David de Joux "Uncertainty and Regulation: Insights From Two Network Industries" (ch 11) in this volume.

5 See Daniel Kalderimis "Regulating Foreign Direct Investment in New Zealand – Further Analysis" (ch 3) in this volume.

6 See Graeme Austin "The Regulation of Consumer Credit Products – Interrogating Assumptions About the Objects of Regulation" (ch 8) in this volume.

7 Rayner Thwaites and Dean Knight "Review and Appeal of Regulatory Decisions" in Susy Frankel (ed) *Learning from the Past, Adapting for the Future: Regulatory Reform in New Zealand* (LexisNexis, Wellington, 2011) 215.

8 Peter Cane and Leighton McDonald *Principles of Administrative Law: Legal Regulation of Governance* (Oxford University Press, Melbourne, 2008) at 10.

9 Peter Cane and Leighton McDonald *Principles of Administrative Law: Legal Regulation of Governance* (Oxford University Press, Melbourne, 2008) at 10–11.

this we are part of a broader contemporary turn in administrative law scholarship, directed at better engaging administrative law with the regulatory state.[10]

Public accountability is a protean concept, and a rigorous definition is required before it can be usefully employed in any evaluative exercise. We adopt a leading contemporary definition of accountability, drawn from Mark Bovens' work in political science.[11] He defines public accountability as a social relationship where:[12]

(a) there is a relationship between an actor and a forum;
(b) in which the actor is obliged;
(c) to explain and justify;
(d) his or her conduct;
(e) the forum can pose questions;
(f) pass judgment; and
(g) the actor may face consequences.

The objective of an analysis of public accountability is to determine whether, and to what extent, a given subject is accountable, or a given regulatory scheme leads to optimal accountability. It is an integral component of any attempt to analyse accountability arrangements that there is a range of possible findings: from optimal accountability arrangements to clear pathologies of accountability.[13] In relation to the pathologies, we need to consider not only the familiar possibility of accountability deficits, but also that of accountability overloads. Accountability overloads are circumstances in which, to put it crudely, the relevant actor is so occupied giving account within various, possibly competing accountability frameworks, that he or she has no time to do his or her job.[14]

We also adopt Bovens' typology of different types of accountability. Bovens analyses the concept of accountability as containing within it three main perspectives on the accountability relationship: *constitutional, democratic* and *learning*.[15] The changing regulatory environment is likely to require adaptation of

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10 See, for example, Mark Elliott "Ombudsmen, Tribunals, Inquiries: Re-Fashioning Accountability Beyond the Courts" in Nicolas Bamforth and Peter Leyland *Accountability in the 21st Century Constitution* (forthcoming 2013).

11 As to the prominence of Bovens' definition in the accountability literature, see the following: "Bovens definition has been widely used in the literature and offers an appropriate framework within which to consider the challenges of accountability for Special Procedures mandate holders"; Philip Alston "Hobbling the Monitors: Should UN Human Rights Monitors be Accountable?" (2011) 52 Harv Int'l LJ 561 at 639; Julia Black "Constructing and contesting legitimacy and accountability in polycentric regulatory regimes" (2008) 2 Regulation & Governance 137 at 150; Christoph Ossege "Accountability – are we better off without it?: An empirical study on the effects of accountability on public managers' work behaviour" (2012) 14(5) Public Management Review 585 at 589.

12 Mark Bovens "Analysing and Assessing Accountability: A Conceptual Framework" (2007) 13 ELJ 447 at 452.

13 Mark Bovens, Thomas Schillemans and Paul 'T Hart "Does Public Accountability Work? An Assessment Tool" (2008) 86 Public Administration 225 at 227–230.

14 See Derek Gill "Applying the Logic of Regulatory Management to Regulatory Management in New Zealand" (ch 15) in this volume.

15 Mark Bovens "Analysing and Assessing Accountability: A Conceptual Framework" (2007) 13 ELJ 447 at 462–467; Mark Bovens, Thomas Schillemans and Paul 'T Hart "Does Public

existing accountability frameworks. This may involve greater attention to largely neglected perspectives on accountability (at least by public lawyers) such as the learning approach. Alternatively, it may involve innovative combinations of constitutional and democratic accountability, as contemplated in modern rights instruments such as the New Zealand Bill of Rights Act 1990 or the Human Rights Act 1998 (UK) (HRA). In this chapter we attend to how the different perspectives on accountability work, by themselves and in combination.

We begin by drawing out the salient features of each perspective, giving particular attention to the perspective least familiar to the public lawyer: the learning perspective. Bovens' accountability perspectives are first applied to common law developments in judicial review. We use the relatively recent Court of Appeal decision in *Lab Tests* to highlight how the three different perspectives intersect with arguments about the shape of judicial review doctrine and intensity of review,[16] the subject of our Stage One chapter. In *Lab Tests*, the values underlying the constitutional and democratic perspectives were well-represented in deliberations about the nature and intensity of judicial intervention in regulation and, unusually, framed in explicit terms. The learning perspective received fleeting mention, to highlight the lacuna in empirical evidence in New Zealand about the instrumental influence of judicial review in administrative and regulatory betterment.

We then apply Bovens' framework to a more unorthodox recent proposal to deploy judicial adjudication in regulatory management. The Regulatory Standards Bill 2011 contained a proposal to use judicial declarations of incompatibility in relation to nominated regulatory principles. This declaratory mechanism was drawn from human rights law. We argue that tensions between democratic and constitutional perspectives on accountability were not squarely addressed, undermining a clear vision of the courts' role, and that this has practical consequences for the effectiveness of the intervention. The learning perspective on accountability was ignored, and we argue it needs to be accommodated in developing accountability frameworks for the modern regulatory state.

14.2 Perspectives on accountability

14.2.1 *Three perspectives: constitutional, democratic and learning*

We have turned to political science for a framework to evaluate how the courts might contribute to, or compromise, accountability. Using frameworks developed outside law is apposite. The impetus for taking a regulatory approach to accountability is the need to situate legal accountability within the broader framework.

Our account works with the insight – given systematic form by Bovens – that accountability can, and is, understood to serve a number of different purposes. A

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16 Accountability Work? An Assessment Tool" (2008) 86 Public Administration 225 at 230–233. *Lab Tests Auckland Ltd v Auckland District Health Board* [2008] NZCA 385, [2009] 1 NZLR 776.

central feature of his analysis is the need to address the tensions or trade-offs involved between different purposes of accountability. Some types of trade-offs are well understood in current New Zealand discussions; others less so.

Bovens identifies three recurrent answers in the literature to the question of "Why is accountability important?". Each of these answers provides a different rationale for accountability and leads to a different perspective on the appropriate relations between the actors involved in the accountability relationship. He summarises the literature as demonstrating that:[17]

> Accountability is important to provide a democratic means to monitor and control government, for preventing the development of concentrations of power, and to enhance the learning capacity and effectiveness of public administration.

He disaggregates this bundle into a constitutional, a democratic and a learning perspective on accountability:

(1) *Constitutional accountability* is directed at the prevention of corruption and the abuse of power. The central idea here is that of checks and balances, of countervailing institutional powers. Good governance from this perspective arises from an appropriate equilibrium between the different powers of state.

(2) *Democratic accountability* helps citizens control public office holders. Conceived on a principal-agent model, each principal in the chain of delegated authority seeks to monitor the implementation of delegated public tasks by holding the agent to account. At the end of the accountability chain are the citizens, who indicate their displeasure by voting for other representatives.[18]

(3) *Learning accountability* sees the purpose of public accountability as to induce the executive branch to learn, to supply "feedback based inducements" to office holders and agencies "to increase their effectiveness and efficiency".[19] Bovens explains that "accountability mechanisms induce openness and reflexivity in political and administrative systems that might otherwise be inwards looking".[20]

The immediate utility of Bovens' accountability map, delineating the different purposes that are served by accountability,[21] is that it helps to generate a set of

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17 Mark Bovens "Analysing and Assessing Accountability: A Conceptual Framework" (2007) 13 ELJ 447 at 462, citing Peter Aucoin and Ralph Heintzman "The Dialectics of Accountability for Performance in Public Management Reform" (2000) 66(1) International Review of Administrative Sciences 45 for this statement.

18 Mark Bovens "Analysing and Assessing Accountability: A Conceptual Framework" (2007) 13 ELJ 447 at 463. For an almost identical statement of idea of a "chain of accountability" (governed by constitutional conventions) in the New Zealand context see Matthew Palmer "Ministerial Responsibility versus Chief Executive Accountability: Conflict or Complement?" (paper presented to Institute for International Research Conference "Analysing and Understanding Crucial Developments in Public Law", Wellington, 4 April 2001).

19 Mark Bovens, Thomas Schillemans and Paul 'T Hart "Does Public Accountability Work? An Assessment Tool" (2008) 86 Public Administration 225 at 232.

20 Mark Bovens, Thomas Schillemans and Paul 'T Hart "Does Public Accountability Work? An Assessment Tool" (2008) 86 Public Administration 225 at 232.

21 Bovens and his fellow authors note that behind the three perspectives outlined lie the effects of accountability on the legitimacy of the political system at large: Mark Bovens, Thomas Schillemans and Paul 'T Hart "Does Public Accountability Work? An Assessment Tool" (2008) 86

evaluative criteria enabling the assessment of whether a particular subject is accountable, or a particular proposal furthers the goal of accountability. The animating idea behind each of the three perspectives above can be translated into a "central evaluative criterion". For *constitutional accountability* the question for evaluation is the extent to which the arrangement curtails executive abuse of power or privilege. In relation to *democratic accountability* the question is the degree to which the regime or arrangement helps a democratically legitimate body to monitor and evaluate executive behaviour, and makes the executive responsive to that body's preferences.[22] Under the *learning perspective*, the question is whether the accountability arrangement provides an incentive for the public official or body to consistently focus on achieving desirable societal outcomes.[23]

These central evaluative criteria can, in turn, be used to generate a series of concrete evaluation questions to be asked of the arrangement or proposal under consideration. This next level of detail, manifesting the given perspective at the level of direct application to a given accountability relationship, can be seen in the application of the perspectives to the illustrations below at [14.3] and [14.4].

14.2.2 *An integrated evaluative framework*

To this point we have outlined three different perspectives on accountability. All this talk of perspectives may seem to suggest that any evaluative exercise cannot hope to be more than equivocal.[24] An accountability arrangement that performs well from one perspective may be inappropriate from the vantage point of another. Too much emphasis on the constitutional perspective, for example, might lead to a proceduralism that hampers the reflexivity, and hence the efficiency and effectiveness, prized under the learning perspective.[25] As Bovens, Schillemans and 'T Hart conclude, "[i]n short, like most other social phenomena, accountability is multifaceted, and cannot really be meaningfully assessed by means of a single criterion".[26]

That does not rule out an integrated evaluative framework, as long as one accepts that the framework will necessarily involve more than one criterion. Bovens and his fellow authors complete their enterprise of building an evaluative framework by returning to Bovens' definition and unpacking it into three components. These are:[27]

Public Administration 225 at 239. They also note that the above account assumes we are dealing with a state-centred, single governance system: at 232.

22 Mark Bovens, Thomas Schillemans and Paul 'T Hart "Does Public Accountability Work? An Assessment Tool" (2008) 86 Public Administration 225 at 231.

23 Mark Bovens, Thomas Schillemans and Paul 'T Hart "Does Public Accountability Work? An Assessment Tool" (2008) 86 Public Administration 225 at 232.

24 Mark Bovens, Thomas Schillemans and Paul 'T Hart "Does Public Accountability Work? An Assessment Tool" (2008) 86 Public Administration 225 at 233.

25 Mark Bovens, Thomas Schillemans and Paul 'T Hart "Does Public Accountability Work? An Assessment Tool" (2008) 86 Public Administration 225 at 234.

26 Mark Bovens, Thomas Schillemans and Paul 'T Hart "Does Public Accountability Work? An Assessment Tool" (2008) 86 Public Administration 225 at 234.

27 Mark Bovens, Thomas Schillemans and Paul 'T Hart "Does Public Accountability Work? An

(1) the actor should be obliged to inform the forum about his conduct ("information provision");

(2) there should be an opportunity for the forum to debate with the actor about his conduct and an opportunity for the actor to explain and justify his conduct in the course of this debate ("debate"); and

(3) both parties should know that the forum or a salient third party can pass judgment and present the actor with salient consequences ("consequences").

Each constituent component of the definition (ie information provision, debate and consequences) can then be characterised in three different ways, supplying three different evaluative criteria answering the three different perspectives on accountability. The result is most easily visualised in the following table, adapted from Bovens:[28]

Table 14.1 Accountability components

	Democratic	**Constitutional**	**Learning**
Information provision	Democratic chain of delegation is informed about the conduct and consequences of executive actors.	Forum gains insight into whether agent's behavior is in accordance with laws, regulations and norms.	Information gathering and provision routines yield an accurate, timely and clear diagnosis of important performance dimensions.
Debate	Interaction concentrates on conformity of action with principal's preferences.	Interaction concentrates on conformity of actions with laws and norms.	Ongoing, substantial dialogue with clients and other stakeholders about performance feedback.
Consequences	Ability of democratic chain of delegation to modify the actor's policies and/or incentive structures.	Forum should be able to exercise credible 'deterence' vis à vis the actor.	Sufficiently strong outside actors to make accountors anticipate, yet sufficiently 'safe' culture of sanctioning to minimize defensive routines.
Cumulative effect	Actor acceptance of principal's right to control its policies and	Actor awareness that powerful watchdog(s)observe	Actor commitment to continuous improvement by

Assessment Tool" (2008) 86 Public Administration 225 at 230 - 234.

[28] Edited version of Table 4 from Mark Bovens, Thomas Schillemans and Paul 'T Hart "Does Public Accountability Work? An Assessment Tool" (2008) 86 Public Administration 225 at 238.

	performance.	its integrity and check its powers.	dialogue-induced focus on outcome achievement.

When brought to bear on a component of an accountability relationship, each perspective will raise different concerns about how that component should be structured, and what constitutes optimal and pathological accountability with respect to that component. These different perspectives will also, at least in part, generate contradictory criteria in relation to a given component.

Through the illustrations that follow we highlight the diversity of responses to the issue of how to secure accountability, the way in which this diversity is reflective of different normative starting points corresponding to the different rationales of accountability, and the tension between them. This tension need not be a problem. However, there is a need for a clear vision as to what form of accountability is appropriate in a given instance and as to how the different forms of accountability will interact, in order to ensure that they do not undermine each other.

14.2.3 *The learning perspective: an underappreciated concept*

The constitutional and democratic perspectives on accountability are the staples of public law in New Zealand; their very nature and the tensions between them, are reasonably well understood. By way of contrast, the learning perspective remains something of an interloper in conventional debates in public law in New Zealand, shuffled off for those concerned with public administration, rather than law, to deal with. This disciplinary divide means that debates about the place of adjudication in regulatory reform, usually conducted by lawyers or those with a legal background, are at their weakest with respect to the learning perspective and the tensions between it and the other perspectives.

This weak point in the discussion matters. In extra-legal terms, key features of the contemporary environment in which regulation operates increase the salience of the learning perspective. The key features of the environment advanced in most contemporary accounts of regulation and governance,[29] both within New Zealand and without,[30] are the increasing complexity of the issues confronted in regulation, the uncertain effects of a given policy intervention, and a rapid rate of flux or change. The critical point is that the learning perspective is at least a partial

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29 Andrew Gamble and Robert Thomas "The Changing Context of Governance: Implications for Administration and Justice" in Michael Adler (ed) *Administrative Justice in Context* (Hart Publishing, Oxford, 2010) 3. They see complexity as the primary challenge for contemporary governance more generally, beyond the area of regulation.

30 See Derek Gill, Stephanie Pride, Helen Gilbert and Richard Norman *The Future State* (Institute of Policy Studies Working Paper 10/08, May 2010), available at <http://ips.ac.nz/publications/files/3790f871257.pdf>. Notably, the Treasury Regulatory Impact Statement on the Regulatory Standards Bill emphasised the complexity of the current regulatory environment.

response to how to operate a functional regulatory system in these conditions. To quote one of our colleagues in this project:[31]

> In domains where the exact cause of the problem and the solution are not known in advance, different ways of working are required. … Where the problem is known but the solution is not, techniques are required that involved learning the way forward. … It allows for "fast failure" by promptly reversing "bad" change and reinforcing "good" change.

This describes the learning perspective. The function of accountability on this perspective is to provide "a regular mechanism to confront administrators with information about their own functioning and forces them to reflect on the successes and failures of their past policy."[32]

The distinction between the constitutional and the learning approaches may seem subtle; a number of participants in project workshops raised the overlap between the approaches. The mechanisms of constitutional accountability themselves constitute a type of learning. Those subject to a successful legal challenge learn to have due regard for the legal constraints in which they operate. When operating in an optimal fashion, a regard for proper process and legality is instilled, and a valuable corrective administered to those found to have diverged from legal requirements.

In drawing the distinction, we do not deny that stern correction can instil lessons. But the sense in which such correction constitutes a lesson is secondary to its function as a form of redress for the person wronged. Further, the literature suggests that great care needs to be taken in predicting exactly what lessons the subject of a legal challenge will take from the correction. Certainly, the impact of judicial review and appeal on bureaucratic and regulatory processes is a young field of study,[33] whose initial results counsel caution in making claims for the educative function of judicial review and appeal in bureaucratic decision making.[34]

Accepting that constitutional accountability itself involves a type of learning should not obscure the important differences between the constitutional and learning perspectives. The constitutional perspective centrally involves holding the parties to the existing (legal) regulatory framework. This is predominantly an "outside in" approach to regulatory learning. The legal framework is determined elsewhere, in the legislature or executive, and then applied to the dispute. By way of contrast, the learning perspective involves an on-going iterative process of self-modification and adjustment of a regulatory framework. Courts shape regulatory

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31 Derek Gill "Regulatory Management in New Zealand: What, How and Why?" in Susy Frankel (ed) *Learning from the Past, Adapting for the Future: Regulatory Reform in New Zealand* (LexisNexis, Wellington, 2011) 173 at 201–202.

32 Mark Bovens "Analysing and Assessing Accountability: A Conceptual Framework" (2007) 13 ELJ 447 at 464.

33 The concept of the "impact" of judicial review and appeal in governance is itself a complex one. The key dimensions of that complexity are usefully sketched in Peter Cane and Leighton McDonald *Principles of Administrative Law: Legal Regulation of Governance* (Oxford University Press, Melbourne, 2008) at [11.2.3].

34 Peter Cane and Leighton McDonald *Principles of Administrative Law: Legal Regulation of Governance* (Oxford University Press, Melbourne, 2008) at ch 11.

arrangements by way of adjudication. But the rationale for the constitutional perspective is not to encourage bureaucratic decision makers, or other stakeholders, to raise issues and develop standards and solutions as part of an on-going dialogue with each other, it is to redress grievances.

14.3 Judicial review and accountability: *Lab Tests*

14.3.1 *Accountability perspectives in the design of judicial review doctrine*

Bovens' three perspectives on accountability are readily applicable to common law developments in judicial review.[35] In judicial review proceedings, judges ultimately determine the balance drawn between the three accountability perspectives by the way they shape the nature of the judicial review process. It is the task of reviewing judges to articulate the purpose and nature of the judicial review process and to settle the doctrines and intensity of review applicable to individual cases.[36] Any legislative influence on the principles and doctrines applied in individual cases is limited and arises indirectly through the manner in which administrative power is delegated and any shaping of the surrounding context.

Inevitably, judicial review doctrine and methodology is heavily grounded in the *constitutional* perspective. Judicial review stands as an exemplar of Bovens' constitutional accountability because, by definition, it involves independent and external review of the actions of the bureaucracy against public law norms by a public (judicial) functionary,[37] in other words, checks and balances par excellence. But the discipline of judicial review is also alert to the importance of *democratic* accountability. The shape of judicial review doctrine has, in many respects, been drawn to respect the role of the democratic perspective. Judicial review traditionally emphasises policing the boundaries of delegated power; generally the

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35 Here our focus is on common law judicial review, as this was the accountability mechanism deployed in the *Lab Tests* case. Other forms of judicial supervision, such as appellate review, share some similarities with common law judicial review; however, as the nature, mode and intensity of appellate review are heavily influenced by the statutory mandate given to the courts, it is difficult to generalise and directly equate appellate review with common law judicial review. See, generally, Rayner Thwaites and Dean Knight "Review and Appeal of Regulatory Decisions" in Susy Frankel (ed) *Learning from the Past, Adapting for the Future: Regulatory Reform in New Zealand* (LexisNexis, Wellington, 2011) 215.

36 See Rayner Thwaites and Dean Knight "Review and Appeal of Regulatory Decisions" in Susy Frankel (ed) *Learning from the Past, Adapting for the Future: Regulatory Reform in New Zealand* (LexisNexis, Wellington, 2011) 215.

37 Given the limits of our illustrative example, we do not directly apply the accountability framework to other external and independent accountability such as the Ombudsman or Auditor-General. Indeed, the alignment of these bodies to the different accountability perspectives may depend more on the nature of the function being discharged. For example, grievance resolution processes deploy aspects of the constitutional perspective, albeit that the absence of legal sanctions often means there is a political and therefore democratic element. More informal support and guidance from these bodies picks up on the learning perspective.

merits of a decision are only subject to light-handed review for *Wednesbury* unreasonableness.[38] In doing so, judicial review doctrine leaves space for alternative forms of accountability, particularly chains of democratic accountability through ministerial responsibility and the ballot box.

As we noted in our Stage One chapter, however, judicial review is not monochromic.[39] Nowadays, there is a plurality of review methodologies and depths, each drawing a slightly different balance between the constitutional and democratic perspectives. In some areas, the courts have been willing to place greater emphasis on the constitutional perspective and to engage in more intensive judicial scrutiny of the merits of a decision; in others, light-handed review of merits is preserved and faith is placed in democratic networks to provide the necessary accountability. While the precise balance between the constitutional and democratic perspectives varies, these two perspectives are evident in the reasoning in judicial review cases.[40]

A similar dichotomy is sometimes expressed in the terms of the red and green lights – the emblems devised by Harlow and Rawlings to depict differing conceptions about the role of judicial review.[41] The red light theory is driven by the desire to uphold the rule of law and to protect the rights, interests and expectations of citizens. The courts are not shy about intervention in administrative affairs and are more likely to substitute their view for the view of the decision maker. Preventing abuses of power is the catch-cry of redlight theorists. In contrast, the green light theory emphasises the separation (or, rather, division) of powers principle and recognises the limits of judicial function. Democratic action, particularly collective expression of the public interest, is to be facilitated and supported by the courts; judicial deference is accorded to decisions which are better held to account through the political process.

The learning perspective and its associated values do not receive much direct consideration in judicial review cases. As we note above, there is an emerging body of literature which analyses the "impact" of judicial review and intervention.[42] Here, in the context of the learning perspective, we are concerned with impact other than sanctioning and deterring non-compliance with administrative laws and norms by public bodies or officials; the learning perspective encourages dialogue and reflexivity in order to improve overall the effectiveness and efficiency of public

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38 *Lab Tests Auckland Ltd v Auckland District Health Board* [2008] NZCA 385, [2009] 1 NZLR 776 at [363].

39 Rayner Thwaites and Dean Knight "Review and Appeal of Regulatory Decisions" in Susy Frankel (ed) *Learning from the Past, Adapting for the Future: Regulatory Reform in New Zealand* (LexisNexis, Wellington, 2011) 215.

40 These competing values are sometimes expressed as "legal" and "political" constitutionalism. See, for example, Adam Tomkins "The Role of the Courts in the Political Constitution" (2010) 60(1) UTLJ 1.

41 Carol Harlow and Richard Rawlings *Law and Administration* (3rd ed, Cambridge University Press, Cambridge, 2009) at ch 1.

42 See, for example, Simon Halliday *Judicial Review and Compliance with Administrative Law* (Hart Publishing, Oxford, 2004); Marc Hertogh and Simon Halliday (eds) *Judicial Review and Bureaucratic Impact* (Cambridge University Press, Cambridge, 2004); Peter Cane *Administrative Law* (5th ed, Oxford University Press, Oxford, 2011) at 409–422.

bodies and officials. The findings of existing research are tentative and sceptical about the impact of judicial review on the systemic improvement of public administration. Cane's conclusion following his review of the judicial impact literature is that, beyond redressing individual grievances against the administration, judicial review has "some general impact on the organization and practices of public administration, although the extent and nature of that impact is unclear".[43]

Despite this emergent body of research, an underlying assumption of many of the calls for more extensive and intensive judicial supervision is that judicial adjudication will lead to better administrative and regulatory decision making. We are sceptical of the confidence reposed in this proposition and believe that development of common law judicial review motivated by that objective, particularly any greater move to merits review, would benefit from greater empirical evidence as to what judicial review has and can achieve in this respect.[44]

14.3.2 Lab Tests: *background*

This tension between the constitutional and democratic perspectives is evident in the recent, high-profile *Lab Tests* case. It usefully serves to highlight the differing accountability perspectives in play. It is a rare example of a case in which the purpose and nature of judicial review were subjected to extensive discussion; more often these considerations lurk in the shadows of deliberations on the selection and application of judicial review doctrine. The learning perspective also received some passing mention, but was not explored in any great detail.

In *Lab Tests* the Court of Appeal rejected a challenge to a district health board's procurement decision, ruling that that the commercial context dictated a limited approach to review.[45] The lower court adopted a broad-based "probity in public decision making approach" to reviewing the tender and decision making process.[46] It found that the district health board had failed to consult certain health organisations and also failed to address one tenderer's conflict of interest arising from previous access to confidential information not available to other tenderers. On appeal, however, the Court of Appeal ruled that the standard of review adopted by the lower court was too strict and that it improperly insisted on procedural obligations above and beyond those set out in the statute. It ruled that in the particular commercial context, judicial intervention was only appropriate in cases of corruption, fraud, bad faith or analogous situations.[47]

The tensions between constitutional and democratic accountability were central

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43 Peter Cane *Administrative Law* (5th ed, Oxford University Press, Oxford, 2011) at 422.

44 For a discussion of different approaches that might be adopted for any such empirical analysis and related methodological issues, see Peter Cane *Administrative Law* (5th ed, Oxford University Press, Oxford, 2011) at 410–414.

45 *Lab Tests Auckland Ltd v Auckland District Health Board* [2008] NZCA 385, [2009] 1 NZLR 776 at [88].

46 *Diagnostic Medlab Ltd v Auckland District Health Board* [2007] 2 NZLR 832.

47 *Lab Tests Auckland Ltd v Auckland District Health Board* [2008] NZCA 385, [2009] 1 NZLR 776 at [91].

to the determination of the case. First, all the judges reflected on the proper role and purpose of judicial review in the particular class of cases. Arnold and Ellen France JJ expressed concern that the challenge to the district health board's decision sought to move the courts beyond their proper role. "[D]isputes such as this are not well suited to being dealt with in judicial review proceedings", Arnold J said, rejecting the suggestion that the court ought to engage in a more vigilant inquiry to ensure "good hygiene in public decision making".[48] Hammond J framed similar concerns in terms of the purpose of judicial review, identifying two competing schools of thought.[49] On the one hand, there is the "orthodox" approach which respects the decision of the first instance decision maker and adopts a "highly constrained ability to interfere", at least as it relates to the merits of the case.[50] On the other hand, a "modernist" approach contends that judges have "independent capacity to intervene by way of judicial review to restrain the abuse of power and to secure good administration".[51] The modernist or "good hygiene" approach echoes the values of the constitutional perspective, seeking to subject the decision making process to greater scrutiny and to enable judicial intervention in cases where administrators have failed to live up to good administrative standards or practices.

The values underlying the constitutional perspective were at the forefront of the unsuccessful tenderer's efforts to have the court engage in more intensive review. However, due to the special nature and context of district health board decision making, the Court placed greater emphasis on democratic processes for subjecting the commercial decisions of the board to account. Pointing to the Privy Council's decision in *Mercury Energy*, Arnold J said "[g]enerally other accountability mechanisms (such as ministerial control and parliamentary oversight) are likely to be seen as more appropriate."[52] An analysis of the other non-judicial accountability mechanisms suggested that they were relatively potent;[53] in particular, "[t]he Minister has considerable power in relation to the membership and performance of DHB boards, and has various options to maintain or improve their performance".[54]

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48 *Lab Tests Auckland Ltd v Auckland District Health Board* [2008] NZCA 385, [2009] 1 NZLR 776 at [342] and [343].

49 *Lab Tests Auckland Ltd v Auckland District Health Board* [2008] NZCA 385, [2009] 1 NZLR 776 at [361].

50 *Lab Tests Auckland Ltd v Auckland District Health Board* [2008] NZCA 385, [2009] 1 NZLR 776 at [362]. There was no dispute between the parties that failure to comply with the empowering statute would be reviewable strictly under the ground of illegality: *Lab Tests Auckland Ltd v Auckland District Health Board* [2008] NZCA 385, [2009] 1 NZLR 776 at [56] and [363].

51 *Lab Tests Auckland Ltd v Auckland District Health Board* [2008] NZCA 385, [2009] 1 NZLR 776 at [367].

52 *Lab Tests Auckland Ltd v Auckland District Health Board* [2008] NZCA 385, [2009] 1 NZLR 776 at [59].

53 *Lab Tests Auckland Ltd v Auckland District Health Board* [2008] NZCA 385, [2009] 1 NZLR 776 at [80]–[84] and [89].

54 *Lab Tests Auckland Ltd v Auckland District Health Board* [2008] NZCA 385, [2009] 1 NZLR 776 at [89].

Second, the Court expressed doubts about its relative institutional competence to engage in a strict supervisory process. Rejecting the unsuccessful tenderer's submission that it should take a "hard look" at the district health board's assessment of the bids' value for money, Arnold J said:[55]

> … we do not think that a court is well placed to assess on a judicial review application the medical, economic and other complexities raised by an evaluation process such as that undertaken in the present case.

Moreover, the judges also expressed concern about the extent of the material placed before the Court, the length of the original hearing and the length of the judgment required to dispose of the allegation on appeal:[56]

> The factual and other subtleties are too great to be dealt with in what is supposed to be "a relatively simple, untechnical and prompt procedure" …, which normally does not involve cross-examination.[57]

14.3.3 Lab Tests: *constitutional and democratic perspectives in action*

A number of points can be made about the Court's approach. First, and most importantly, the curial discourse about the shape and intensity of judicial review supervision is enriched in this case by explicit reference to the competing accountability perspectives, at least the constitutional and democratic perspectives. This can be contrasted with contemporary instances where the courts have settled on more intensive scrutiny and intervention without reference to the competing perspectives.[58] This more explicit approach enables a better and more comprehensive assessment of the effect of modulating the depth of judicial scrutiny and the relative effectiveness of judicial supervision in promoting accountability.

Second, the deliberation on the balance between constitutional and democratic perspectives is instructive. While it is not our intention, for present purposes, to engage in an extended critique of the evaluation of the competing perspectives in this particular case, the factors relied on provide some colour to the accountability framework we have promoted.

On the one hand, the Court of Appeal favoured electoral and ministerial responsibility, assessing that they were – at least in principle – better suited to deliver accountability for the decision taken by the district health board. The elective character of district health boards was referred to on several occasions,

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55 *Lab Tests Auckland Ltd v Auckland District Health Board* [2008] NZCA 385, [2009] 1 NZLR 776 at [340].

56 *Lab Tests Auckland Ltd v Auckland District Health Board* [2008] NZCA 385, [2009] 1 NZLR 776 at [13], [14], [342] and [343].

57 *Lab Tests Auckland Ltd v Auckland District Health Board* [2008] NZCA 385, [2009] 1 NZLR 776 at [342] (citation omitted).

58 See, for example, the lines of local government cases examined in Dean Knight "Local Democracy and Community Views: Obligation and Observance" in Claire Charters and Dean Knight (eds) *We, The People(s): Participation in Governance* (Victoria University Press, Wellington, 2011) 284.

although its effectiveness as an accountability process was largely assumed. Arnold J characterised the triennial election cycle as "relatively short", concluding that "electors dissatisfied with the performance of a board will have an effective remedy if they can persuade sufficient voters to their way of thinking".[59] Similarly, Hammond J quipped rhetorically, "is there something wrong with the traditional remedy of 'throwing the rascals out of office'?"[60]

Direct responsibility to the electorate is the exemplar of the democratic perspective. The forum is a public one, where electors assess the performance of their delegates over the preceding term against the electors' preference, both in terms of policies they supported and bureaucratic culture and behaviour they exhibited ("information provision" and "debate"). In a formal sense, the "consequences" are blunt: (re-)election or otherwise. The "cumulative effect" of elective responsibility has greater informal instrumental influence. Elected board members continually exposed to impending elections are expected to modify their behaviour throughout the electoral term to maximise their prospects of re-election. At least in principle, therefore, the weight placed on electoral responsibility has a degree of merit. However, the Court's analysis would have been more robust if it had more fully explored two factors which have the potential to slightly dilute the extent of electoral responsibility:[61] (a) hybrid board membership;[62] and (b) modest voter turnout.[63]

The responsibility of the district health board to the Minister was also significant in the adoption of a light-handed curial approach. Arnold J characterised the ministerial powers of appointment, supervision and intervention as "considerable".[64] He pointed to a range of statutory powers which enable the Minister to "maintain or improve … performance".[65] These features included powers of appointment (of up to four board members, along with the chairperson and deputy chairperson), the ability to direct policy, extended monitoring powers (including the ability to appoint a Crown monitor) and broad intervention and dismissal powers.[66]

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59 *Lab Tests Auckland Ltd v Auckland District Health Board* [2008] NZCA 385, [2009] 1 NZLR 776 at [89].

60 *Lab Tests Auckland Ltd v Auckland District Health Board* [2008] NZCA 385, [2009] 1 NZLR 776 at [403].

61 One of the few studies on the impact of elections on district health boards is unsure about their effectiveness generally, but cautiously acknowledges that elections appear to have some value in terms of bureaucratic oversight: Robin Gauld "Are elected health boards an effective mechanism for public participation in health service governance?" (2010) 13(4) Health Expectations 369.

62 Only seven board members are elected; up to four others may be appointed by the Minister: New Zealand Public Health and Disability Act 2000, s 29.

63 Voter turn-out for district health board elections has averaged 47 per cent of the last four elections: Department of Internal Affairs *Local Authority Election Statistics 2010* (Wellington, 2010) at 23.

64 *Lab Tests Auckland Ltd v Auckland District Health Board* [2008] NZCA 385, [2009] 1 NZLR 776 at [89].

65 *Lab Tests Auckland Ltd v Auckland District Health Board* [2008] NZCA 385, [2009] 1 NZLR 776 at [89].

66 *Lab Tests Auckland Ltd v Auckland District Health Board* [2008] NZCA 385, [2009] 1 NZLR

Again, the statutory context spoke strongly of democratic responsibility and the Court's acknowledgement of the strength of this dimension is sound. The statutory regime enables significant "information provision" and "debate", enabling interaction between the board and Minister about the attainment of the Minister's preferences. While the Minister is removed from day-to-day governance, he or she has the power to obtain information on the district health board's activities (including the ability to formally appoint a representative for that purpose) and has the ability to express his or her preferences to the district health board formally (through ministerial directions) or informally (through appointees and other means). The Minister also has the power to impose significant "consequences" to ensure conformity with his or her performance objectives, most severely, the power to dismiss the board if he or she is "seriously dissatisfied" with its performance. It is assumed that the "cumulative effect" of these features is acceptance by the board of the need to serve the Minister and to adjust their performance in the light of Minister's preferences. Again, though, the instrumentalism associated with these relationships is largely assumed, based on the statutory scheme. The analysis of the effectiveness of these accountability processes would have been enhanced by empirical or socio-legal evidence corroborating its significance, given the somewhat novel nature of the relationship (especially due to the hybrid nature of the board and potentially conflicting accountability lines between the board and the electoral public and the Minister respectively). Regardless, recent experience has demonstrated the willingness of ministers to use their monitoring and coercive powers over district health boards[67] and this augments the conclusion about the potent nature of these accountability processes.

On the other hand, the Court was sceptical about its own ability to promote good governance through its infrequent, circumscribed and process-bound supervisory jurisdiction – doubting its efficacy in this context and these circumstances to provide adequate accountability. The judicial reluctance to engage in more wide-ranging and intensive review is an acknowledgment of the limitations of the court as an accountability "forum" in complex, factual disputes. The constraints of the judicial process mean it is difficult to engage in the level of "information provision" and "debate" commensurate with the "consequences" at stake. Put simply, the courts lack the expertise and competence necessary to adjudicate on such matters; other non-judicial accountability mechanisms are better suited because they are more able to cope with the information provision and debate required.[68] The approach adopted by the Court has a stout pedigree, reflecting the concerns about the limits of the judicial

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776 at [81]–[84].

67 A number of Crown monitors have been appointed; for example, at the end of 2011, Capital and Coast, Hutt Valley and Southern District Health Boards: see Auditor-General *Health sector: Results of the 2010/11 audits* (Wellington, 2012) at 10. Further, the Minister dismissed the Hawke's Bay District Health Board in February 2008 and replaced it with commissioners.

68 This can be contrasted, of course, with the questions of legality per se; as Hammond J noted, statutory construction is "a 'comfortable' task for a court, which can set about it without any disconcerting suggestion that the court is outside its proper bailiwick": *Lab Tests Auckland Ltd v Auckland District Health Board* [2008] NZCA 385, [2009] 1 NZLR 776 at [363].

role expressed in functionalist jurisprudence.[69] This concern can be seen particularly in Arnold J's comments about the extended nature of the hearing and the voluminous material submitted – a concern that litigants were seeking to engage the judiciary in a mode of scrutiny that the Court felt fell outside its capacity, as shaped by the limited confines of the supervising jurisdiction.

Finally, it is encouraging to see some allusion to the learning perspective and the extent to which judicial supervision makes a measurable contribution to regulatory betterment. Hammond J made passing reference to instrumentalism and the importance of understanding the impact of judicial review when shaping judicial review doctrine. He exhorted that:[70]

> … we should not overlook the problem that if the goal of administrative law is to be defined partly in terms of somewhat broader objectives – such as, for instance, the promotion of good governance – one would normally pay close regard to the empirical evidence that administrative law can actually achieve that end.

Hammond J lamented the lack of local empirical evidence assessing "whether administrative law as a behaviour modification mechanism in government actually works", while noting the overseas experience is that administrative law only makes a "modest contribution" to this goal.[71] The corollary of this is, he said, that if "substantive doctrines as are developed for merit review should go only to what might be termed 'true excesses'."[72]

Hammond J properly questions the assumption underlying the promotion of more intensive judicial supervision, that curial supervision is an effective mechanism for achieving good governance and improving administrative decision making. While Hammond J's remarks can be read as an implicit reference to the learning perspective, he did not dissect this instrumental dimension. Indeed, his remarks bundle together impact which is intended to sanction and deter non-compliance (in the sense of policing conformity with administrative law standards) and impact which facilitates learning (in the sense of encouraging reflexive and systemic improvement in the effectiveness and efficiency of administrative action). Nor is the extent to which the former may inhibit the latter drawn out in any detail.

In any event, Hammond J's broader proposition is sound. It is unsatisfactory that the assessment of the value of judicial supervision as an instrument of regulatory betterment is undertaken in the absence of empirical evidence drawn from local conditions. It is incumbent on the protagonists for more extensive and more intensive judicial intervention in the heart of administrative decision making to provide greater evidential foundation of its curative role. Only then can the move to greater intervention be justified on the grounds of its success as a behavioural

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69 See, for example, Martin Loughlin "The Functionalist Style in Public Law" (2005) 55(3) UTLJ 361.

70 *Lab Tests Auckland Ltd v Auckland District Health Board* [2008] NZCA 385, [2009] 1 NZLR 776 at [398].

71 *Lab Tests Auckland Ltd v Auckland District Health Board* [2008] NZCA 385, [2009] 1 NZLR 776 at [398].

72 *Lab Tests Auckland Ltd v Auckland District Health Board* [2008] NZCA 385, [2009] 1 NZLR 776 at [398].

modification tool in administrative and regulatory decision making.

14.4 Legislative design: the Regulatory Standards Bill

14.4.1 *Background*

The Regulatory Standards Bill 2011 is a recent, high-profile proposal for regulatory intervention in New Zealand that intended to make judicial adjudication a central mechanism in the *management* of regulation. Despite the Bill's bumpy conception and uncertain future, it still provides an interesting and useful case-study to illustrate different conceptions of accountability and the role of judicial adjudication in regulatory betterment.

The Regulatory Standards Bill had its origins in a Member's Bill, the Regulatory Responsibility Bill, introduced by ACT Party MP, Hon Rodney Hide, in 2006. The Bill was ultimately rejected by the Commerce Committee, but the committee recommended "that the Government establish a high-level expert taskforce to consider options for improving regulatory review and decision-making processes".[73] In accordance with a commitment contained in the confidence and supply agreement between the National and ACT parties adopted following the 2008 election,[74] a taskforce was established to carry forward work on the Bill and it duly reported in late 2009.[75] The Regulatory Standards Bill 2011 subsequently introduced into Parliament was almost identical to that prepared by the Regulatory Taskforce.

For present purposes, the Regulatory Standards Bill has two key, related features: (a) a certification process, requiring the relevant Minister and chief executive to sign a certificate addressing the legislation's compatibility with nominated principles of responsible regulation;[76] and (b) provision for an individual to challenge legislation in court on the basis of the nominated regulatory principles. The relevant remedial outcomes of such a court challenge are two-fold. First, in their interpretive role, the courts must give an enactment a meaning compatible with the principles (if such an interpretation "can" be accorded).[77] Second, the courts may issue a declaration that a provision is incompatible with one or more of the principles[78] where this declaration has no effect on legal validity.[79] The power to make judicial declarations of incompatibility was explained as providing for "monitoring of the certification process, and accordingly incentives for accurate

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73 Report of the Commerce Committee [2005-2008] 14 AJHR 1.22C at 31.

74 "National-ACT Confidence and Supply Agreement" (16 November 2008), available at <www.act.org.nz/files/agreement.pdf>.

75 Regulatory Responsibility Taskforce *Report of the Regulatory Responsibility Taskforce* (Treasury, 2009), available at <www.treasury.govt.nz/economy/regulation/rrb/taskforcereport>.

76 Regulatory Standards Bill 2011, cls 8–10.

77 Regulatory Standards Bill 2011, cl 11.

78 Regulatory Standards Bill 2011, cl 12.

79 Regulatory Standards Bill 2011, cl 13; and see cl 14.

certification".[80]

In the course of vetting and considering the Bill, Treasury and the Regulations Review Committee expressed robust criticism of it.[81] Following the 2011 election, the Regulatory Standards Bill has not been pursued, despite the return of the National and ACT parties to government. Instead, both parties agreed in their confidence and supply agreement to work on an alternative Bill based on Treasury's preferred option (Option 5).[82] Treasury's Option 5 does not employ the same judicial mechanisms and focuses on enhanced pre-introduction and parliamentary vetting of regulatory and legislative proposals. At this stage, it looks highly unlikely that the adjudicatory mechanisms contemplated in the Regulatory Standards Bill will become part of the institutional framework for regulatory management in New Zealand. However, we still consider the proposed scheme is a useful case-study to illustrate the particular understandings of adjudication as an instrument of regulatory betterment that evidently have some purchase in New Zealand. Our focus here is on mechanisms proposed by the Taskforce and contained in the Bill, centrally court ordered declarations of incompatibility, rather than on the principles themselves.[83]

14.4.2 *Applying Bovens' accountability framework to the Regulatory Standards Bill*

Accountability, as defined above, is a social relationship between an actor and a forum. In what follows, the Regulatory Standards Bill is characterised in terms of the three components of our integrated evaluative framework set out earlier: "information provision", "debate", and "consequences".[84] Under the Regulatory Standards Bill, the Minister and the chief executive are explicitly directed to provide

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80 Regulatory Standards Bill (explanatory note) at 2.

81 Treasury *Regulatory Impact Statement: Regulating for Better Legislation – What is the Potential of a Regulatory Responsibility Act* (2011), available at <www.treasury.govt.nz>; Commerce Committee *Interim Report on the Regulatory Standards Bill* (30 September 2011) at Appendix B.

82 National-ACT Confidence and Supply Agreement (5 December 2011), available at <www.parliament.nz>. The agreement recorded: "the Minister for Regulatory Reform will work closely with the Minister for Finance to achieve a mutually agreed outcome, based on the Treasury's preferred option (Option 5), for enacting within the next 12 months".

83 For a critical evaluation of the principles see, for example, George Tanner "How Does the Proposed Regulatory Responsibility Bill Measure Up Against the Principles? Changing the Role of Parliament and the Courts" (2010) 6(2) Policy Quarterly 21 and see also the comments on Richard Ekins, Geoff Bertram and Paul Rishworth in that issue; Richard Ekins and Chye-Ching Huang "In Search of Better Law-Making: Why the Regulatory Responsibility Bill Won't Deliver What it Promises" (Maxim Institute, Guest Paper, February 2011), available at <www.maxim.org.nz>; and Chye-Ching Huang "Regulatory Responsibility and the Law" [2010] NZLJ 91. For a positive evaluation of the principles see the contributions of Tim Smith, David Caygill and Graham Scott in the above issue of the Policy Quarterly and Jack Hodder "Public Law, property rights and principles for legislative quality" in New Zealand Law Society *Administrative Law – the Public Law Scene in 2011* (New Zealand Law Society, Wellington, 2011) 27.

84 See text accompanying n 27.

the relevant information to Parliament.[85] As for any judicial declaration of incompatibility; the forum in which the court's declaration constitutes information is not specified under the Bill. In so far as the judiciary is conceptualised as "monitoring" the certification process, then the forum for a judicial declaration, understood in terms of Bovens' information provision is Parliament. Nonetheless, the true target of the Bill lies elsewhere. While falling outside the formal accountability framework provided under the Bill, the Taskforce clearly intended the Bill to influence the persons behind the legislation, the policy makers and drafters responsible for generating and drafting the relevant regulatory intervention.[86] The Bill is intended to indirectly influence these individuals by putting to justification those who have to certify a regulatory measure's compatibility with the principles, or those who have to defend a claim of compatibility in court.[87]

The nature of the debate about those principles in Parliament takes its cue from the constitutional perspective, and concentrates on conformity of the legislation with the relevant principles, where that is given content by judicial rulings on the principles, or legal advice directed at anticipating those rulings.[88]

As to consequences, there are no formal consequences as long as one confines oneself to the courts. The issuance of a declaration of incompatibility does not affect the legal validity of a measure.[89] The expectation is that a court ruling constitutes information to be fed into parliamentary and wider public debate, potentially generating a response in the legislature. The consequences are political. The intent is that this political response will in turn modify the behaviour of those developing and drafting legislation, bringing them into conformity with the nominated regulatory principles. There is an incomplete forum, the courts, nestled within the larger forum of Parliament, to complete the accountability relationship.

The combination of constitutional and democratic perspectives on accountability in the Bill centres on the fact that a mechanism usually associated with the constitutional perspective, judicial adjudication on statutory standards is, in its declaratory operation, largely stripped of legal consequences. This mechanism is instead offered as part of a certification process which is grounded in democratic accountability. We argue that what emerges has the effect of simultaneously undermining the workings of constitutional and democratic accountability, while ignoring the potential contribution of the learning perspective on accountability.

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85 Regulatory Standards Bill 2011, cl 10.

86 Regulatory Responsibility Taskforce *Report of the Regulatory Responsibility Taskforce* (Treasury, 2009) at [4.122].

87 Regulatory Standards Bill, cl 12(2) provides that "the public entity responsible for administering the legislation" has to be given the opportunity to provide the litigant and the court with a statement of compatibility, and notice of any proceeding for a declaration has to be given to the Solicitor-General.

88 The Regulatory Standards Bill (explanatory note) at 2 refers to policing the requirement of certification for "accuracy".

89 Regulatory Standards Bill 2011, cl 14.

(a) The constitutional perspective

The judicial declaratory mechanism contained in the Regulatory Standards Bill was adopted from the declaration of incompatibility mechanism contained in the HRA.[90] In so doing, the Taskforce was presumably inspired by the marked success of the HRA mechanism in prompting legislative responses protective of the rights to which the HRA gives effect.[91] We argue that in the transplantation of the mechanism to the New Zealand regulatory context, there was insufficient attention to the subtleties of the HRA, or to its relationship with its own legal context. As a result, the declaratory mechanism in the Bill has adverse consequences for constitutional and democratic accountability that are not anticipated in the experience of the HRA.

Under the HRA, the primary mechanism is the interpretive one. The assertive use of the interpretive mechanism contemplated under the HRA speaks to what has been termed "strong form dialogue" between the branches.[92] To the extent possible, legislation is interpreted so as to protect rights.[93] It is open to the legislature to reverse that interpretation should it wish to do so expressly. The present point is that an application of the interpretive provision of the HRA, and any legislative response, are legal moves, a strong form version of inter-branch dialogue, with a direct impact on an individual's legal position.

Under the HRA, the declaration of incompatibility is understood as being complementary to the interpretive mechanism, playing a residual role. It is "an exceptional course"[94] and a "measure of last resort"[95] only to be considered when a court cannot remove any incompatibility through interpretation, or by operation of

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90 As explicitly noted in the *Report of the Regulatory Responsibility Taskforce* at [4.118]. The taskforce cites s 3(2) of the Human Rights Act 1998 (UK) (HRA), but we assume the intended reference was s 4 (which provides for the declaration of incompatibility).

91 For a current statistical snapshot of the use of declarations of incompatibility under s 4 of the HRA see United Kingdom Ministry of Justice *Responding to human rights judgments: Report to the Joint Committee on Human Rights on the Government response to human rights judgments 2011-12* (United Kingdom Ministry of Justice, September 2012) at Annex A, available at <www.justice.gov.uk>. The Ministry of Justice notes that, in the period between 2 October 2000, when the HRA entered into force, and 31 July 2012: 27 declarations have been made, 19 of which have become final in their entirety (that is, the declaration was not subject to appeal, in whole or in part). Of those 19, 11 have been remedied by later primary legislation, three have been remedied by remedial order under s 10 of the HRA (UK), four were related to provisions that had already been remedied by primary legislation at the time of the declaration and one is under consideration as to how to remedy the incompatibility.

92 The phrase, and the concept, of "strong-form dialogue" are from Tom Hickman "Constitutional Dialogue, Constitutional Theories and the Human Rights Act 1998" [2005] Public Law 306. For a discussion of the Regulatory Standards Bill in terms of dialogue see Jack Hodder "Public Law, property rights and principles for legislative quality" in New Zealand Law Society *Administrative Law – the Public Law Scene in 2011* (New Zealand Law Society, Wellington, 2011) 27 at 41, 42, and 44.

93 Human Rights Act 1998 (UK), s 3.

94 *Sheldrake v Director of Public Prosecutions* [2004] UKHL 43, [2005] 1 AC 264, [2004] 1 All ER 1 at [28] per Lord Bingham.

95 *R v A (No 2)* [2001] UKHL 25, [2002] 1 AC 45, [2001] 3 All ER 1 at [44] per Lord Steyn.

the ultra vires rule for subordinate legislation. A declaration does not provide a legal remedy,[96] "the import of such a declaration is political not legal".[97] Nevertheless, as we discuss below in relationship to democratic accountability, such a declaration is issued in the shadow of potential further legal proceedings before the European Court of Human Rights, with whose rulings the United Kingdom has an obligation to comply.[98]

By way of contrast, in the Regulatory Standards Bill, the judicial declaratory mechanism is given greater prominence and its role transformed. The Taskforce envisaged that the interpretive mechanism would be used less assertively than in the United Kingdom, increasing the relative prominence of the declaratory mechanism.[99] More fundamentally, the declaratory mechanism is recast as monitoring the legislative vetting process,[100] providing incentives for ministers and chief executives to adopt a fuller reading of "incompatibility". Where someone disagrees with the executive's certification of a measure as compatible, he or she can pursue a separate, stand-alone proceeding for a declaration of incompatibility.[101] Conversely, the court is understood as having nothing additional to contribute if the executive has already issued a declaration of incompatibility.[102]

In the Taskforce's Report, and in the writings of sympathetic commentators, the minimal and orthodox nature of the changes the Bill sought to effect was emphasised.[103] These statements were addressed to concerns that the Bill might

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96 Although it does have legal consequences for remedying the incompatibility in the form of a "fast-track" procedure whereby primary legislation may be amended by ministerial order: HRA (UK), s 10.

97 *A v Secretary of State for the Home Department* [2004] UKHL 56, [2005] 2 AC 68, [2005] 3 All ER 169 at [152] per Lord Scott.

98 Convention for the Protection of Human Rights and Fundamental Freedoms 213 UNTS 211 (opened for signature 4 November 1950, entered into force 3 September 1953), available at <www.conventions.coe.int>.

99 Regulatory Responsibility Taskforce *Report of the Regulatory Responsibility Taskforce* (Treasury, 2009) at [4.110], available at <www.treasury.govt.nz/economy/regulation/rrb/taskforcereport>.

100 Regulatory Standards Bill 2011 (explanatory note) at 2.

101 Regulatory Standards Bill 2011, cl 12(3).

102 The Taskforce stated that the issuance of a declaration by a court would be "truly moot" if those responsible for the legislation have already certified that it is incompatible with the principles: Regulatory Responsibility Taskforce *Report of the Regulatory Responsibility Taskforce* (Treasury, 2009) at [4.119]. It is further suggested that the fact that a certificate of incompatibility has been issued is likely to provide grounds for a strike out: Regulatory Responsibility Taskforce *Report of the Regulatory Responsibility Taskforce* (Treasury, 2009) at [4.128]. This can be contrasted with the position under the HRA (UK) jurisprudence. A legislative choice to proceed with legislation in the face of a ministerial declaration of incompatibility may be accorded "great weight" in a court's proportionality analysis as indicating the importance Parliament attaches to a measure: *R (on the application of Animal Defenders Ltd) v Secretary of State for Culture, Media and Sport* [2008] UKHL 15, [2008] 1 AC 1312, [2008] 3 All ER 193 at [33] per Lord Bingham. It remains a consideration to be factored into a full legal analysis by the court. It does not obviate the court's role.

103 Regulatory Responsibility Taskforce *Report of the Regulatory Responsibility Taskforce* (Treasury, 2009) at [4.117] and [4.123]–[4.135]; Jack Hodder "Public Law, property rights and principles for legislative quality" in New Zealand Law Society *Administrative Law – the Public Law Scene in 2011* (New Zealand Law Society, Wellington, 2011) 27; Tim Smith "The

trench on parliamentary supremacy. There appears to have been little consideration of the departures from the normal understandings of the judiciary's role involved when they are "transformed from arbiters of rights, albeit subject to legislative overrule, to a form of privileged pressure group".[104] This is to "reposition … the courts within the forum of ordinary politics, providing not a check or balance, but counsel".[105]

In terms of the constitutional perspective, the reason for wanting a judicial declaratory mechanism is presumably the desirability of having compatibility with the principles assessed in an appropriately legalistic way.[106] But the way in which this judicial mechanism is deployed under the Regulatory Standards Bill risks draining the judicial role of features that render it distinctive. If the court is simply performing a certification exercise that is intersubstitutable with that performed by the Minister or chief executive as part of a certification process, then the case for a judicial contribution becomes less compelling.

(b) The democratic perspective

The judicial mechanisms under the Regulatory Responsibility Bill also need to be analysed through the lens of democratic accountability. Here the primary issues are the fit between the judicial contribution and the nature of the democratic debate, along with the effectiveness of the judicial contribution.

Following through Bovens' evaluative framework, the information provided to Parliament through a judicial declaration of incompatibility is familiar from the constitutional perspective – the conformity of the legislation with the nominated principles. This information is intended to sound in the democratic sphere. The animating idea is that the courts' interpretation and application of the principles is accepted by the legislature as correct, and that the legislative debate is on how to respond to the fact of incompatibility as conclusively determined by the court. The prospects for debate of such a form are unclear. It has been said of New Zealand that:[107]

> The idea that anything, even judicial views on what individual rights demand of society, should get in the way of an elected Parliament's law making role simply does not get much traction in our thinking about the constitution ought to work.

Regulatory Responsibility Taskforce: A View from Inside the Room" (2010) 6(2) Policy Quarterly 14.

104 Tom Hickman "Constitutional Dialogue, Constitutional Theories and the Human Rights Act 1998" [2005] PL 306 at 309–310. Tim Smith's commentary, which does address concerns about the Regulatory Standards Bill putting the judiciary in an unaccustomed role, is an exception to this statement: Tim Smith "The Regulatory Responsibility Taskforce: A View from Inside the Room" (2010) 6(2) Policy Quarterly 14 at 18–19.

105 Tom Hickman "Constitutional Dialogue, Constitutional Theories and the Human Rights Act 1998" [2005] PL 306 at 310.

106 The explanatory note to the Bill refers to the declaratory mechanism providing "incentives for accurate certification": Regulatory Standards Bill (explanatory note) at 2.

107 Andrew Geddis "The Comparative Irrelevance of the NZBORA to Legislative Practice" (2009) 23 NZULR 465 at 487. See also Matthew Palmer "New Zealand's Constitutional Culture" (2007) 22 NZULR 565 at 582–586.

Related issues can be addressed by turning from the nature of the debate to its consequences.

The intention is that a court's opinion on whether the legislation so conforms will have political consequences. Here the political conditions in which those comments are received are critical. The Taskforce's case for the declaratory mechanism is predicated on it providing "meaningful consequences in the event of non-compliance" with the regulatory principles.[108]

The closest analogue in terms of a parliamentary certification mechanism in the New Zealand political context is the section 7 process under the New Zealand Bill of Rights. Geddis has concluded that the parliamentary certification mechanism "appears to be at its weakest when it comes to protecting those rights most likely to be overlooked in the legislative process".[109] In contrast, "the situations in which it may actually have some effect" are those in which the public was already disposed to accept the necessary discipline required to adhere to the rights, without the intervention of the Attorney-General's section 7 certificate.[110] The question is whether the Regulatory Standards Bill is likely to suffer from the same weakness.

The Taskforce report does not directly address the workings of a declaratory mechanism in the New Zealand context. It instead relies on the precedent of the HRA, noting that the language of the relevant clause was taken from the HRA and citing the case of *A v Secretary of State for the Home Department.*[111] In that case, the House of Lords issued a declaration of incompatibility in relation to what the government had presented as a central piece of national security legislation. In response, the Parliament repealed the incompatible legislation, replacing it with legislation which did not have the defect giving rise to the declaration.[112] A declaration under the HRA may have certain legal consequences not contemplated by the Regulatory Standards Bill.[113] But, like the declarations under the Regulatory Standards Bill, a declaration under the HRA has no effect on the legal validity of a measure.[114] Despite this lack of effect on legal validity, the British record on legislative remediation of declared breaches has been impressive. Where a

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108 Regulatory Responsibility Taskforce *Report of the Regulatory Responsibility Taskforce* at [4.121].

109 Andrew Geddis "The Comparative Irrelevance of the NZBORA to Legislative Practice" (2009) 23 NZULR 465 at 488.

110 Andrew Geddis "The Comparative Irrelevance of the NZBORA to Legislative Practice" (2009) 23 NZULR 465 at 488.

111 *A v Secretary of State for the Home Department* [2004] UKHL 56, [2005] 2 AC 68, [2005] 3 All ER 169.

112 The legislative response, the Prevention of Terrorism Act 2005, introduced "control orders" that applied equally to citizens and non-citizens and so were not discriminatory in the manner of the legislation repealed, where that discrimination had grounded the declaration of incompatibility.

113 Most notably, under the Regulatory Standards Bill there is no provision for a remedial order by which the executive can respond to a declaration without going through the legislature, akin to s 10 of the HRA (UK).

114 This is not strictly correct. While the validity of the legislation is unaffected, an individual could bring an action under s 7(1)(a) of the HRA for compensation under s 8: see Clive Walker "Prisoners of 'War all the Time'" [2005] EHRLR 50 at 68.

declaration of incompatibility has become final in its entirety,[115] the British Parliament has, by and large, remedied the incompatibility identified either by remedial legislation or a remedial order under section 10 of the HRA, or has taken steps to do so.

New Zealand has to be very careful in drawing any sustenance from the effectiveness of British declarations in achieving legislative change.[116] It cannot be assumed that the same culture of responsiveness will develop in New Zealand. Critically, litigants in the United Kingdom can always bring a claim before the European Court of Human Rights in Strasbourg, where the United Kingdom has an obligation to comply with that court's decisions.[117] The British government is ill-advised to be dismissive of a declaration by its national courts as the European Court of Human Rights is likely to give considerable weight to the reasoning of the United Kingdom Supreme Court in support of a declaration of incompatibility. In the European sequel to the very example cited by the Taskforce, the European Court of Human Rights endorsed the reasoning of the House of Lords in *A v Secretary of State for the Home Department* and awarded damages against the United Kingdom.[118] The case for thinking that declarations would be effective in the New Zealand context is underdeveloped.

(c) The learning perspective

As noted above, the underlying objective of the Regulatory Standards Bill was to instil respect for the nominated regulatory principles in the bureaucracy. The concern is very much with changing bureaucrats' behaviour. It is in relation to this goal that the learning perspective on accountability has risen to prominence. The real interest of the Regulatory Taskforce and the Regulatory Standards Bill was in influencing policy makers drafting policy and regulation long before it hit the floor of Parliament.[119] It might be expected that the Regulatory Standards Bill would have some such influence.

Such an expectation is consistent with our anecdotal understanding of the impact of the New Zealand Bill of Rights Act. While Geddis speaks of the "comparative irrelevance" of the New Zealand Bill of Rights Act to the legislative process, his account may be unduly partial because of its focus on the formal aspects of the legislative process. He concedes that it is difficult to measure the impact of the legislative vetting process informally inside the bureaucracy.[120] It can

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115 By "final in its entirety", we mean that the declaration was not subject to appeal, in whole or in part.

116 Claudia Geiringer "On a Road to Nowhere: Implied Declarations of Inconsistency and the New Zealand Bill of Rights Act" (2009) 40 VUWLR 613 at 641.

117 Convention for the Protection of Human Rights and Fundamental Freedoms 213 UNTS 211 (opened for signature 4 November 1950, entered into force 3 September 1953).

118 *A v United Kingdom* (2009) 49 EHRR 29,625, [2009] All ER (D) 203 (Feb) (ECHR).

119 Regulatory Responsibility Taskforce *Report of the Regulatory Responsibility Taskforce* (Treasury, 2009) at 4.122.

120 Andrew Geddis "The Comparative Irrelevance of the NZBORA to Legislative Practice" (2009) 23 NZULR 465 at 472 and 472–473. We are less sceptical than Geddis of the impact of the s 7 vetting process on the development of legislative proposals. Our position is, like his,

reasonably be assumed that the vetting process has some prophylactic influence prior to introduction into Parliament.

The objective of the Regulatory Standards Bill is that the bureaucracy internalise the Bill's values, as expressed in the nominated principles. This raises issues of both effectiveness and desirability. In terms of effectiveness, as noted above, the existing literature on the impact of judicial review does not provide grounds for confidence that the messages the judiciary intends to impart will be understood and operationalised by the relevant bureaucratic decision makers. In addition, to the extent that the Bill is predicated on a mistrust of the bureaucracy, a defensive response of the part of the bureaucracy would be unsurprising.

More fundamentally, in terms of desirability, we return to the features of the regulatory environment that increase the salience of the learning perspective: the increasing complexity of the issues confronted in regulation, the uncertain effects of a given policy intervention, and a rapid rate of flux or change. The learning perspective aims to enlist the regulators in information gathering and provision to yield an accurate, timely and clear diagnosis of the regulatory problems that call for a solution, and the effect of past and present solutions. A reliance on judicial interpretation and application of pre-ordained regulatory benchmarks appears more likely to cut across, rather than enable, any such efforts by the bureaucracy. This emphasis on prescription over adaptation runs counter to the current needs of regulatory management as outlined, for example, in Derek Gill's chapter in this project.[121]

We appreciate that our focus on problems with the blending of constitutional and democratic accountability frameworks contained in the Regulatory Responsibility Bill can read as public lawyers' wariness of institutional innovation. We are not wary of change per se. The context for governance is changing, and it would be surprising if that did not mean that there was a need for a change in accountability frameworks – in order for them to remain, or to become, effective. Our turn to a broader concept of accountability is motivated in part by the need to step back from particular court focused proposals and ask what counts as effective accountability in different settings, as a necessary precursor to any evaluation of a measure.

14.5 Conclusion

Public accountability serves a number of different purposes: constitutional; democratic; and learning. These different purposes lead to different evaluative criteria for the different elements of the accountability relationship: information provision; debate; and consequences. In a regulatory environment of considerable complexity, the key issue is how the framework for public accountability can adapt

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based on anecdote and impression.

121 Derek Gill "Regulatory Management in New Zealand: What, How and Why?" in Susy Frankel (ed) *Learning from the Past, Adapting for the Future: Regulatory Reform in New Zealand* (LexisNexis, Wellington, 2011) 173.

to best ensure that the purposes of accountability are met. This will require innovation in institutional frameworks and practices.

Traditional administrative law, centred on judicial review, needs to be aware of the multiple forms of accountability in calibrating its own internal standards of review, as we discussed in the context of the *Lab Tests* decision. Where there is an interest in deploying traditional adjudicatory techniques in other aspects of regulation, such as regulatory management, there is a need to consider the effect of transposing familiar mechanisms and institutions into new settings, and directing them at serving different forms of accountability. If this is not done in a way that is careful to tease out the impact of the changes on the different logics of accountability, and the institutions involved, it risks misdirecting effort.

Analytic clarity as to the different purposes of accountability, and the different logics that aid or hinder each of those purposes, cannot in itself answer the question of whether there is a problem, to which the intervention offered is a solution. There are unavoidable value judgments involved as to whether there are sufficient checks and balances, whether there is adequate democratic accountability, or sufficient reflexivity, in the system.[122] But clarity as to the different purposes of accountability does direct you to ask questions relevant to the form of accountability sought.

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[122] Mark Bovens "Analysing and Assessing Accountability: A Conceptual Framework" (2007) 13 ELJ 447 at 467.