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**ACHIEVING LONG-TERM COMMITMENTS TO  
COMPLEX POLICY ISSUES: SHOULD WE BE  
LEGISLATING POLICY TARGETS?**

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**Abstract**

*Many challenges facing society cannot be overcome within a single government's term in office, so effective solutions need to be long-term. Legislation may be a way to achieve this. Policy targets that are enshrined in law will continue to be binding until a future government repeals or amends them. In this paper I seek to determine whether the practice of incorporating policy targets in legislation is the best way to address complex and long-term challenges and, if it is, to what extent they should be incorporated. I refer to the Child Poverty Reduction Bill 2018 to assess the best way to implement durable child poverty reduction targets.*

*It is ultimately argued that some form of law is integral to achieving durable solutions, notwithstanding concerns that arise when policy targets are legislated. The best approach is to enact a requirement to set targets but refrain from legislating the substantive targets themselves. Procedural restrictions should be legislated to protect the targets against amendment or revision by future governments without adequate consultation. Inspiration for these may be taken from the national policy statement framework under the Resource Management Act 1991, with the addition of reporting requirements to ensure compliance is monitored. I recognise that the Child Poverty Reduction Bill complies with this recommended approach, although the current proposal does not include sufficient safeguards to ensure the targets are durable.*

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## 1 Introduction

Many challenges currently facing society are complex and long-term. Climate change, poverty, workplace pay disparity, domestic violence and housing shortages demonstrate just a few examples. Lasting and workable solutions to these problems cannot be found within a single three-year governmental term. Long-term commitments are required to consistently reduce harmful actions.<sup>1</sup> As such, policy is necessarily future-oriented. However, as a fundamental feature of democracy general elections occur regularly, and the government frequently changes. In New Zealand, our Mixed-Member Proportional system (MMP) means that the coalition of parties which comprise the government tends to change every three years even if one major party remains in power for multiple terms.<sup>2</sup> As a consequence of partisan politics, policies being pursued change as this happens. New governments will usually revise or replace existing policy to reflect what they consider to be in society's best interests.

While this regular shift in governance is an important aspect of democracy, the consequent reprioritisation of policy undermines continuity. Constant backtracking prevents effective progress towards resolving the long-term issues which require commitments that transcend a single government's tenure in power. This creates temptation to implement policy that will outlast the incumbent government. In many instances the ideal way to create lasting policy would be to obtain cross-party support. This consensus would enhance the chance of successor governments continuing to pursue it. However, the reality of partisan politics is that cross-party support is difficult to achieve.<sup>3</sup> Opposing parties value different strategies.

An alternative way to achieve long-lasting policy solutions is to enshrine targets in law. This practice provides a permanence that cannot be acquired through regular statements of government policy. Future governments are bound by the targets until amending legislation is passed to revise the duty or remove it from statute, which is subject to public and parliamentary scrutiny.<sup>4</sup> Where legislated targets relate to issues of public concern, it is likely that future governments would be deterred from attempting this task. Repealing a statute that is perceived to operate in favour of the public interest would risk undermining their political standing.

Previously, policy targets have been legislated to varying degrees in New Zealand and overseas. Some statutes have legislated obligations for the government to set targets addressing the issue in question, while withholding substantive targets from the statute itself. These contain specific, procedural provisions which ensure the targets are set and adhered to. New

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<sup>1</sup> Jonathan Boston "Child poverty fight requires political consensus" (30 January 2018) Newsroom <[www.newsroom.co.nz](http://www.newsroom.co.nz)>.

<sup>2</sup> "A history of New Zealand's MMP governments" (19 October 2017) New Zealand Herald <[www.nzherald.co.nz](http://www.nzherald.co.nz)>.

<sup>3</sup> Boston, above n 1.

<sup>4</sup> Richard Macrory *Regulation, Enforcement and Governance in Environmental Law* (2nd ed, Hart Publishing, London, 2014) at 264.

Zealand enacted these provisions in the Fiscal Responsibility Act 1994, now replaced by the Public Finance Amendment Act 2004, and the Climate Change Response Act 2002. While the former does not strictly require the government to set targets, it creates an obligation to report on short-term intentions and long-term objectives regarding fiscal management.<sup>5</sup> It is a transparency-based framework, which encourages consistency in monetary policy and incentivises responsible management through mandatory disclosure of information, rather than enforcing compliance.<sup>6</sup> The Climate Change Response Act is target-based, requiring the Minister to set goals for reducing emissions.<sup>7</sup> However, the Minister retains broad flexibility regarding when to set and amend targets, leaving them vulnerable to the wishes of the government of the day.<sup>8</sup>

Alternatively, legislation can be used to enact substantive policy targets which exist within the legal framework. This was done in the United Kingdom's Climate Change Act 2008 and is proposed in the forthcoming Zero Carbon Bill. In these statutes, the specific targets are expressly included in legislation. This approach is less orthodox and is more susceptible to criticism. However, it arguably enhances the durability of targets in relation to issues which require long-term, stable responses.<sup>9</sup>

The current government proposes to implement targets through the Child Poverty Reduction Bill 2018.<sup>10</sup> If enacted, it will require the Minister for Child Poverty Reduction to set targets to reduce child poverty and provide annual reports to Parliament measuring child poverty levels.<sup>11</sup> This legislation seeks to encourage successive governments to focus on child poverty reduction, create a greater commitment to action and facilitate political accountability and transparent reporting in relation to the published targets.<sup>12</sup> In its current form, it does not purport to legislate the substantive targets themselves, but enacts a requirement for the Minister

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<sup>5</sup> Public Finance Act 1989, ss 26J–26K; while New Zealand's fiscal policy framework refrains from imposing mandatory targets, it remains a useful reference point when assessing the practice of legislating policy targets. The intentions and objectives produced by the Minister of Finance share many similarities with targets. In particular, they ensure consistency and encourage the government to consider the long-term consequences of policy decisions. Where the government chooses to depart from previous objectives, they must explain their reasons for choosing to do so.

<sup>6</sup> *An Introduction to New Zealand's Fiscal Policy Framework* (The Treasury, March 2015) at 2.

<sup>7</sup> Climate Change Response Act 2002, s 224.

<sup>8</sup> Section 224; Duncan Ballinger "Why set greenhouse gas reduction targets in legislation?" (2018) NZLJ 78 at 79.

<sup>9</sup> At 80.

<sup>10</sup> The Child Poverty Reduction Bill 2018 (14-2) was reported from the Social Services and Community Committee on 3 October 2018. This paper was being finalised at that time, so my references to the Bill relate to the version that was initially introduced to Parliament. I note that the Committee suggested further transparency provisions in the form of supplementary reports to be presented to Parliament, in addition to the originally proposed annual report on the percentage of children in poverty generally. In particular, it proposes an annual report analysing identified populations, as well as monitoring reports regarding child poverty related indicators which the Minister for Child Poverty Reduction must identify.

<sup>11</sup> Child Poverty Reduction Bill 2018 (14-1), cl 4.

<sup>12</sup> Child Poverty Reduction Bill 2018 (14-1) (explanatory note) at 1.

to set them.<sup>13</sup> This mirrors the approach that has been taken in the Public Finance Act and Climate Change Response Act.

The practice of enshrining policy targets in legislation has been the subject of considerable debate. Concerns have been identified regarding whether they are sufficiently enforceable, accessible and consistent with constitutional principles. Accordingly, in this paper I seek to assess whether incorporating targets in statute is the best way to achieve long-term commitments to complex policy issues and, if it is, to what extent they should be incorporated. I aim to determine whether this practice is more beneficial than setting targets purely in the political realm, and whether these benefits outweigh the concerns. The Child Poverty Reduction Bill provides a practical example which I use to assess the best way to implement legislated policy targets aimed at reducing child poverty.

I ultimately conclude that the best way to achieve long-term commitments is to adopt the procedural approach that has previously been enacted in the Public Finance Act and Climate Change Response Act. I recognise that the Child Poverty Reduction Bill proposes to follow this method. It will impose an obligation on the Minister to implement targets outside the legislation.<sup>14</sup> However, the efficacy of targets will depend on the level of detail in the statute. The Child Poverty Reduction Bill should include more stringent procedural restrictions than are currently proposed to ensure the targets will be durable and effective. Inspiration for how this might look may be drawn from the resource management framework that authorises national policy statements.

Before reaching my conclusion, it is important to determine whether legislated policy targets are acceptable within our political constitution and recognise any concerns that they give rise to. I begin this assessment in Part II by outlining the role of legislation in New Zealand. Target duties and symbolic legislation share characteristics with legislated policy targets but are accepted as appropriate forms of law in other jurisdictions. Thus, they provide useful points of comparison in evaluating whether the practice of using legislation to enact policy targets is appropriate. In Part III, I assess whether the practice of enshrining targets in statute is an effective way to achieve long-term commitments to overcoming policy challenges. In doing so, I identify the concerns and shortcomings that arise when they are legislated.

In light of apprehensions identified in Part III, I consider alternative methods to develop policy targets solely in the political realm in Part IV. I appraise the competence of approaches that have previously been taken and determine whether they proved efficient and durable. Ultimately, I recognise that the national policy statement framework which exists under the Resource Management Act 1991 could be adapted to suit legislated policy targets. Legislation

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<sup>13</sup> Child Poverty Reduction Bill, above n 11, cl 21.

<sup>14</sup> Clause 21.

should impose a duty on the relevant Minister to create substantive targets which exist outside the law. In addition, the statute should articulate comprehensive procedural requirements which will ensure these targets are durable. I focus on the Child Poverty Reduction Bill in Part V and determine that its current proposals implement the preferable approach. I rely on experience in the United Kingdom to identify beneficial characteristics of effective legislated policy targets and make recommendations for improving the existing proposal's procedural restrictions.

## *II What is the Role of Legislation in New Zealand?*

Before embarking upon an analysis of whether legislating policy targets is the best method to achieve long-term policy commitments, it must first be determined whether they are consistent with expectations of statute in New Zealand. It cannot be argued that they are the best option to achieve their goal if they are an inappropriate use of statute. Accordingly, in this section I consider the role of legislation within our political constitution and conclude that the practice of enshrining policy targets into law is compatible with contemporary expectations. Target duties and symbolic legislation reinforce this determination. They have been enacted overseas and accepted as appropriate forms of law, despite sharing characteristics with policy targets.

### *A Guidance on the Use of Legislation in New Zealand*

According to the Legislation Design and Advisory Committee guidelines, legislation “creates and removes rights, powers, and obligations, sets up or disestablishes institutions, gives governments the means to raise and spend money, and enables citizens to hold decision-makers to account”.<sup>15</sup> While this articulates a broad purpose, it is understood that legislation should be used relatively sparingly. The Cabinet Manual provides that statutes should only be enacted where it is absolutely necessary and the most appropriate means of achieving a policy objective.<sup>16</sup> A 2009 Regulatory Responsibility taskforce concluded that legislation should only be utilised where its benefits outweigh the costs and it is the most effective, efficient and proportionate response to the issue at hand.<sup>17</sup> In some circumstances alternatives may exist which could achieve the policy objective that legislation seeks to respond to. Where legislation is preferred over these alternatives, it should be capable of justification.<sup>18</sup> In the context of policy targets, removing them from the political sphere and into legislation must give rise to substantial benefits which justify their codification.

Legislation must also be capable of effective enforcement.<sup>19</sup> Statutes that lack legal effect may bring the law into disrepute.<sup>20</sup> The rule of law requires that Parliament is mediated by an

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<sup>15</sup> *Legislation Guidelines* (Legislation Design and Advisory Committee, March 2018) at 7.

<sup>16</sup> Cabinet Office *Cabinet Manual 2017* at [7.23].

<sup>17</sup> Graham Scott *Report of the Regulatory Responsibility Taskforce* (September 2009) at 11.

<sup>18</sup> At 15.

<sup>19</sup> *Legislation Guidelines*, above n 15, at 22.

<sup>20</sup> At 15.

authoritative and independent judiciary.<sup>21</sup> If courts could not control the meaning of statutory text, legislation would risk being downgraded to a matter of opinion and its scope and content would become unclear.<sup>22</sup> Judicial review could not be used to ensure public bodies were kept within the scope of their powers conferred by statute.<sup>23</sup> Therefore, Parliament should refrain from passing legislation when it knows the courts would be unlikely to intervene and mediate its application.<sup>24</sup> In Part III I identify barriers to legally enforcing legislated policy targets. If they cannot be effectively monitored by courts, they are arguably incompatible with the role of legislation in New Zealand.

### *B Politics and Legislation in New Zealand*

New Zealand's constitution is unwritten and political. As such, it is administered by Parliament, rather than the courts.<sup>25</sup> It is made up of various sources which include certain statutes, conventions, principles, prerogative powers and judicial judgments.<sup>26</sup> Key principles include representative government, parliamentary supremacy, separation of powers and the rule of law.<sup>27</sup> Based on these constitutional principles, we expect legislation to be enacted by Parliament and enforced by the judiciary. We expect policy to be developed by the executive and monitored by Parliament.

Primary legislation provides the legal framework for the constitution.<sup>28</sup> It is one of the key means through which the government can influence outcomes for society.<sup>29</sup> It regulates individual and collective rights, the operation of markets, distribution of wealth, use of property, and the level of risk to the environment or human safety that is considered tolerable.<sup>30</sup> The extent and significance of its impact on everyday lives is reflected in the high standard that its form and content must adhere to. It should be fit for purpose, constitutionally sound and accessible.<sup>31</sup>

In practice, Parliament is responsible for enacting statutes. Obligations created within legislation carry legal force and are policed by the courts.<sup>32</sup> They are usually general and abstract, aiming to regulate a group of people rather than specific individuals.<sup>33</sup> This ensures

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<sup>21</sup> *R (Cart) v Upper Tribunal* [2009] EWHC 3052 (Admin) at [39].

<sup>22</sup> At [38].

<sup>23</sup> At [38].

<sup>24</sup> Annabelle Lee and Justin Leslie "Judicial Review of Target-setting Legislation" (2010) 15 *Judicial Review* 236 at [34].

<sup>25</sup> Kenneth Keith "On the Constitution of New Zealand: An Introduction to the Foundations of the Current Form of Government" (20 November 2017) Department of the Prime Minister and Cabinet <[www.dpmc.govt.nz](http://www.dpmc.govt.nz)>.

<sup>26</sup> Keith, above n 25.

<sup>27</sup> *Legislation Guidelines*, above n 15, at 21.

<sup>28</sup> Lee and Leslie, above n 24, at [33].

<sup>29</sup> *Legislation Guidelines*, above n 15, at 7.

<sup>30</sup> At 7.

<sup>31</sup> At 8.

<sup>32</sup> "Parliament Brief: What is Parliament?" (21 March 2014) New Zealand Parliament <[www.parliament.nz](http://www.parliament.nz)>.

<sup>33</sup> Miro Cerar "The Relationship Between Law and Politics" (2009) 15 *Annual Survey of International & Comparative Law* 19 at 24.



equality before the law and predictability in its application. Other key features of legislation include formality and systematicity.<sup>34</sup> It should impose obligations that are clearly formed, coherent and balanced; enabling parties to anticipate legal consequences with relative certainty.<sup>35</sup> It should act as a stabilising function above ever-changing societal and political ideals. While it interrelates and responds to changing social events and aspirations, it provides an element of rigidity by capturing these aspirations at a point in time and ensuring certainty in their application until amended through the transparent and thorough legislative process.<sup>36</sup> As I mentioned in the previous section, where it cannot be mediated by courts in the meantime, it arguably violates the rule of law.<sup>37</sup>

The role of policy-making is undertaken by the executive. Under the principle of responsible government, ministers and officials are answerable to Parliament.<sup>38</sup> They may be held accountable in adhering to their policies through various checks, balances and other accountability mechanisms.<sup>39</sup> In addition to this, exercise of executive power is curbed by the threat of political sanctions. These include the risk of public criticism and failing to be re-elected.<sup>40</sup> Policies are not laws as they are not enacted through the proper legislative process. Rather, they are determined by political actors through less formal procedures. As a result, policies may be more aspirational and have the flexibility to adapt and compromise to reflect interests arising outside of politics.<sup>41</sup> However, they are also less transparent as this process is less public than that undertaken by Parliament.<sup>42</sup>

Prima facie, this distribution of power accords with our expectations of law and policy based on constitutional principles. Parliament passes legislation and the judiciary enforces it. The executive develops policy and Parliament monitors it. However, in practice separation of powers is not pure as the executive dominates the legislature. Government ministers must also hold office as Members of Parliament.<sup>43</sup> Although our MMP system means that no single party holds an outright majority in Parliament, there is overlap between those who develop policy and those who enact legislation. Despite this, when policy targets are enshrined in legislation the branch responsible for their creation moves from the executive to the legislature. This practice accords with the principle of parliamentary supremacy, which renders Parliament capable of enacting any law it sees fit.<sup>44</sup>

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<sup>34</sup> Cerar, above n 33, at 24.

<sup>35</sup> At 24.

<sup>36</sup> At 25.

<sup>37</sup> *R (Cart)*, above in 21, at [39].

<sup>38</sup> “Parliament Brief: What is Parliament?”, above n 32.

<sup>39</sup> *Laws of New Zealand Constitutional Law* (online ed) at [134].

<sup>40</sup> At [135].

<sup>41</sup> Cerar, above n 33, at 33.

<sup>42</sup> At 34.

<sup>43</sup> *Laws of New Zealand*, above n 39, at [31].

<sup>44</sup> At [11].

When policy targets move from the political realm and become the responsibility of the legislature, courts are provided with a legal mechanism to ensure accountability. This mechanism is in the form of a judicial declaration for non-compliance.<sup>45</sup> When this occurs, the government is no longer solely responsible to Parliament, but also the courts. This consequence may have constitutional implications which will be discussed in Part III of this paper. Furthermore, where an obligation to create policy targets is legislated, such as that proposed in the Child Poverty Reduction Bill, they exist in a hybrid between legislation and policy. While the ministerial obligation to set targets is created by Parliament and may be enforceable by courts, the substantive targets are set by the executive and monitored by Parliament.

Given this overlap between law and policy, it may be argued that legislated policy targets stretch our traditional expectations of the role of law in New Zealand. However, because separation of powers is not pure, this does not necessarily render the practice inconsistent with our constitutional structure. While it is clear that legislation and policy operate in different roles, that is not to say that the parameters are always clear cut. In the next section I seek to emphasise this reality by examining target duties and symbolic legislation enacted in other jurisdictions. These demonstrate how the role of law is changing to reflect a modernising society. People have become more autonomous in an increasingly global world.<sup>46</sup> Laws are no longer confined to John Austin's conception that they must be commands backed by sanctions.<sup>47</sup> There is scope for them to adopt a more aspirational and communicative role that has previously been associated with policy. Based on this progressing point of view, legislated policy targets are not inconsistent with contemporary expectations of legislation. Whether they are the best method of responding to challenging, long-term policy issues depends on practical questions such as their efficacy and durability.

### *C Target Duties and Symbolic Legislation*

Just as the parameters of legislation are progressing and expanding in New Zealand, expectations of the role and form of law have been stretched in other jurisdictions. Target duties and symbolic legislation share characteristics with legislated policy targets, particularly in regard to criticisms of their enforceability and legitimacy. Despite this, they have been enacted and enforced by courts. As such, they provide a useful point of comparison when assessing the appropriateness of legislating policy targets.

#### *1 Target duties*

The term "target duties" was first used by Woolf LJ in relation s 8 of the Education Act 1944 (UK), which required local education authorities to ensure sufficient schools were available in their area.<sup>48</sup> The term describes aspirational statutory obligations designed to guide public

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<sup>45</sup> Child Poverty Reduction Bill, above n 11, at cl 28.

<sup>46</sup> Catherine Fieschi "Symbolic Laws" (26 February 2006) Prospect <[www.prospectmagazine.co.uk](http://www.prospectmagazine.co.uk)>.

<sup>47</sup> See generally: John Austin *The Province of Jurisprudence Determined* (John Murray, London, 1861).

<sup>48</sup> *R v Inner London Education Authority ex p. Ali* [1990] 2 Admin LR 822.

decision-making, rather than confer reciprocal, enforceable rights on citizens. Notwithstanding mandatory wording, courts interpret them to merely require the relevant public authority to aim for the prescribed standard.<sup>49</sup> They include an in-built “degree of elasticity”.<sup>50</sup> While the authority should conform to a standard which is “not outside the tolerance provided by the section”, failure to achieve the duty is not necessarily justiciable.<sup>51</sup> Accordingly, concerns regarding a lack of enforceability that are identified in relation to legislated policy targets are equally applicable to target duties. They are not enforceable in a suit brought by individuals, as a breach of the target duty will not breach a personal right owed to a particular person or group of people.

Target duties are broad, general and designed to benefit the community as a whole.<sup>52</sup> These characteristics distinguish them from specifically enforceable statutory duties, which crystallise and become enforceable in the context of particular circumstances.<sup>53</sup> Whether or not legislative policy targets are a form of target duty has been debated. In evidence provided to a Joint Committee on the United Kingdom’s draft Climate Change Bill, it was argued that target duties are inherently aspirational.<sup>54</sup> They prescribe a standard that it is desired be met, but there is no guarantee of achievement. Authorities are merely required to use their best endeavours to achieve the prescribed target.<sup>55</sup> Based on this characterization, some commentators have categorised s 1(1) of the Climate Change Act 2008 (UK) as a target duty.<sup>56</sup> This provision legislates a policy goal to decrease greenhouse gas emissions to a specified level by 2050.

This conclusion may be disputed on the basis that target duties and legislated policy targets differ in many respects. Legislated policy targets, such as s 1(1) of the Climate Change Act, are clear and unambiguous duties which should not be downgraded by characterisation as mere targets. Target duties compel authorities to use their best endeavours to achieve the specified goal.<sup>57</sup> Legislated policy targets go beyond this and focus on the outcome, imposing an obligation to actually meet the target.<sup>58</sup> This duty applies equally to statutes that impose procedural obligations to set substantive targets, such as the Child Poverty Reduction Bill. This Bill proposes a definite and explicit obligation to set substantive targets which, once adopted, will do more than guide public decision-making.<sup>59</sup> It will have no in-built elasticity. Relevant actors will be expected to meet the prescribed standard, not some similar threshold which is

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<sup>49</sup> *R v London Borough of Islington ex p. Rixon* [1997] ELR 66 at 69.

<sup>50</sup> *R v Inner London Education Authority ex p. Ali*, above n 48, at 828.

<sup>51</sup> At 828.

<sup>52</sup> Catherine Callaghan “What is a Target Duty?” (2000) 5 *Judicial Review* 184 at [4].

<sup>53</sup> *A v Lambeth London Borough Council* [2001] EWCA Civ 1624 at [26].

<sup>54</sup> Jonathan Church “Enforcing the Climate Change Act” (2015) 4 *UCL Journal of Law and Jurisprudence* 109 at 116.

<sup>55</sup> At 116.

<sup>56</sup> At 116.

<sup>57</sup> At 116.

<sup>58</sup> Lee and Leslie, above n 24, at [9].

<sup>59</sup> Child Poverty Reduction Bill, above n 11, at cl 28.

considered tolerable. The unambiguous duty surpasses the aspirational nature of target duties, even where the substantive targets themselves are not included in statute.

A new form of duty has been identified in recent commentary which arguably encompasses legislated policy targets. Colin Reid defined ‘outcome duties’ as “unqualified legal duties on ministers to achieve certain outcomes which can be met only as the result of a complex aggregation of legislation, decisions, actions and public spending over an extended period”.<sup>60</sup> Their focus on the outcome and recognition of contributing factors is consistent with legislated policy targets. Reid’s assessment of outcome duties identified that they endure similar shortcomings to legislated policy targets and target duties. Courts remain unlikely to award meaningful relief, as to do so would involve interfering with policy prioritisation and resource allocation decisions which are typically undertaken by the executive.<sup>61</sup>

Whether legislated policy targets should be characterised as ‘target duties’, ‘outcome duties’ or a separate form of duty altogether, they share many characteristics with target duties which creates a useful point of comparison. Accusations that target duties lack substance and an ability to be enforced mirror similar criticisms that have been raised in relation legislated policy targets. The concerns outlined below regarding target duties may found concerns as to whether the obligation proposed in the Child Poverty Reduction Bill will be fit to achieve its purpose. However, I also identify a broader purpose that target duties may serve. The Child Poverty Reduction Bill will arguably be valuable in a similar way.

(a) An empty gesture

Calling a duty a “target” risks devaluing the notion of a duty. The term “duty” implies a responsibility, or an obligation of some kind, which suggests something of a mandatory nature.<sup>62</sup> Characterisation as a mere target undermines this implication. It has been argued that by qualifying duties as targets, Parliament may “reassure the public with empty gestures” and the executive may “sit back and take no further notice”.<sup>63</sup> The codification of a duty to address an issue of public concern will often appease those calling for action. However, in the absence of a concrete obligation to accomplish the specified target, the duty may not be achieved. Rather, a target duty may be perceived as an “empty gesture”.<sup>64</sup> While the perception is created that adequate steps have been taken to address the issue in question, nothing changes in substance. This possibility arguably contradicts the expected role of legislation within our

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<sup>60</sup> Colin Reid “A New Sort of Duty? The Significance of “Outcome” Duties in the Climate Change and Child Poverty Acts” (2012) 4 Public Law 749 at 757.

<sup>61</sup> Aileen McHarg “Climate change constitutionalism? Lessons from the United Kingdom” (2011) 2 Climate Law 469 at 477.

<sup>62</sup> Angus Stevenson and Maurice Waite *Concise Oxford English Dictionary* (12th ed, Oxford University Press, Oxford, 2011) at 449.

<sup>63</sup> Harry Woolf and others (eds) *De Smith’s Judicial Review* (7th ed, Oxford University Press, 2013) at 282.

<sup>64</sup> Church, above n 54, at 116.

political constitution; that clear and effective statutes will be implemented by Parliament and policed by the courts.

(b) Lack of enforceability

A lack of enforceability in the event of non-compliance is a major concern with legislated policy targets. In particular, the Child Poverty Reduction Bill purports to limit the courts' ability to enforce compliance with targets.<sup>65</sup> This matter will be outlined in more detail in Part III. The concern applies equally to target duties. An individual cannot bring a suit alleging breach where they have not had a personal right infringed upon. It was noted in *Attorney-General, ex rel McWhirter v Independent Broadcasting Authority* that, by creating target duties, "Parliament has placed statutory duties on government departments and public authorities — for the benefit of the public — but has provided no remedy for the breach of them".<sup>66</sup> Unless a claimant has suffered particular damage over and above everyone else, they cannot apply to the Court in the event of non-compliance.<sup>67</sup>

Courts have identified that target duties may be enforced in certain circumstances. Where a public authority fails to make reasonable efforts to meet the target, they may be found to have breached it.<sup>68</sup> However, as courts are generally reluctant to override the decisions of appropriate authorities regarding the correct allocation of resources, it has been held that they should only interfere where the failure to allocate resources gives rise to a standard of unreasonableness so high that it breaches public law duties.<sup>69</sup> It must satisfy the *Wednesbury* standard of unreasonableness, which requires that the decision was so unreasonable that no reasonable person could have made it.<sup>70</sup> However, even where such unreasonableness may be found the court must still take all relevant circumstances into account in exercising their judicial discretion.<sup>71</sup> The availability of resources is a relevant consideration in determining whether a duty has been breached.<sup>72</sup>

Despite these concerns, other jurisdictions have accepted target duties as an appropriate exercise of legislative power.<sup>73</sup> Notwithstanding their limitations, they are arguably capable of justification because they bring the issue in question to the fore and make resources a relevant consideration. Where political restraints prevent the enactment of stronger statutory

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<sup>65</sup> Child Poverty Reduction Bill, above n 11, cl 28.

<sup>66</sup> *Attorney-General, ex rel McWhirter v Independent Broadcasting Authority* [1973] All ER 689 at 696.

<sup>67</sup> At 696.

<sup>68</sup> *Family Planning Association of Northern Ireland v Minister for Health and Social Services and Public Safety* [2004] NICA 37 at [11].

<sup>69</sup> *Friends of the Earth v Secretary of State for Business Enterprise and Regulatory Reform* [2009] EWCA Civ 810 at [38].

<sup>70</sup> *Associated Provincial Picture Houses Ltd. v Wednesbury Corporation* [1947] 2 All ER 680 at 685.

<sup>71</sup> *R v Central Birmingham Health Authority ex p. Walker* (1992) 3 BMLR 32 at 32.

<sup>72</sup> Laura West "What Price Equality?" (2008) 13 *Judicial Review* 41 at [15].

<sup>73</sup> Examples of legislation enacting target duties include: Education Act 1944 (UK), s 8; National Health Service Act 1977 (UK), s 3(1); Children Act 1989 (UK), s 17.

obligations, these aspects of target duties render them preferable to taking no action. Given the similarities of legislated policy targets, they may be equally as capable of justification.

## 2 *Symbolic legislation*

Symbolic legislation is another form of statute that has pushed the boundaries of expectations of law. These instruments are largely ineffective in their expressly identified purpose but serve other political and social goals.<sup>74</sup> They aim to reassure the public, rather than redress, prevent or punish.<sup>75</sup> Such statutes are used prominently in Scandinavia and Germany. An example is the Norwegian Housemaid Law of 1948. Commentators have argued that this was never meant to be effective and had little effect on the practical position of housemaids.<sup>76</sup> Rather, it aimed to symbolically recognise the rights of housemaids and demonstrate that they were valid.

Symbolic statutes have been considered deceptive and unsubstantial, as opposed to serious or functional.<sup>77</sup> Because they are designed to achieve goals other than those they express, they have been condemned as untruthful, ineffective and detrimental to the perception of legislation.<sup>78</sup> A legal instrument should not purport to solve a problem which, in reality, it cannot. To do so violates the principle of proportionality which requires statutes to be appropriate for their declared purpose.<sup>79</sup> Furthermore, the deceitful and unreliable nature of symbolic legislation may tarnish the public's perception of justice.<sup>80</sup> It risks bringing the legislative process into disrepute and arguably contradicts the rule of law.<sup>81</sup> People should be able to rely on legislation to achieve its specified goals.

Additionally, it has been argued that symbolic statutes occupy parliamentary time and waste public resources while enforcement agencies make futile attempts to administer them.<sup>82</sup> They may also obstruct the development of effective policy by causing people to incorrectly believe the issue they purport to address has been dealt with. These criticisms are reflected in concerns regarding legislated policy targets, which will be set out in Part III. As such, symbolic legislation provides another useful point of comparison. Rather than enacting provisions to be strictly complied with and enforced, lawmakers use symbolic legislation as a means to prioritise relevant matters and convey a desire that their preference be observed.

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<sup>74</sup> Bart van Klink "Symbolic Legislation: An Essentially Political Concept" in Bart van Klink, Britta van Beers and Lonneke Poort (eds) *Symbolic Legislation Theory and Developments in Biolaw* (Springer, Switzerland, 2016) at 19.

<sup>75</sup> Fieschi, above n 46.

<sup>76</sup> Klink, above n 74, at 19.

<sup>77</sup> Jens Newig "Symbolic environmental legislation and societal self-deception" (2007) 16 *Environmental Politics* 276 at 277.

<sup>78</sup> At 277.

<sup>79</sup> At 277.

<sup>80</sup> At 277.

<sup>81</sup> Fieschi, above n 46.

<sup>82</sup> Newig, above n 77, at 277.

Despite the criticisms that symbolic statutes are superficial, empty gestures, they remain somewhat useful. Similarly to target duties, their value arguably lies in the visibility provided to issues, rather than the provision of formal sanctions to influence behaviour.<sup>83</sup> The inevitable influence that politics has over the legislative process means that law is usually enacted only where politicians perceive that its overall benefits will exceed its overall costs.<sup>84</sup> Symbolic legislation provides an alternative option; demonstrating that action has been taken to address a controversial issue while avoiding the costs that a substantive solution would incur.<sup>85</sup> It can trigger political debate and signify a change in accepted norms, which has become recognised as a supplementary role of law.<sup>86</sup> The communicative component means it can have important secondary impacts other than those it expressly purports to achieve. These advantages are arguably reflected by legislated policy targets, which share this communicative characteristic. While their ability to be enforced may be doubted, they spark debate and accord attention to the issue in question.

In contrast, it may be contended that symbolic statutes are also empty gestures. They allow the government to attain political value by demonstrating that an issue of public concern is being addressed, without substantive action being taken.<sup>87</sup> This possibility poses a risk of deceiving the public which is enhanced where the issue is complex. In the context of complicated matters, the general public is more likely to remain ignorant that the measure is substantively ineffective, and the legislature can refer to the intricacy of the issue and unclear causal relations to deflect blame for a lack of result.<sup>88</sup>

Nevertheless, the usefulness of symbolic legislation can be reinforced by an argument that all legislation is inherently symbolic. Those who contend that symbolic statutes are a form of ineffective, deceptive soft law take a narrow view of the relationship between law and society.<sup>89</sup> This perspective aligns with the conclusion reached in the previous section that the role of law in New Zealand is expanding to reflect a developing world. It is no longer always the case that law hovers above society, providing certainties while disconnected from the social, economic and cultural factors that complicate matters.<sup>90</sup> As society becomes increasingly borderless and effective enforcement becomes elusive, law must focus on influencing attitudes and behaviour rather than strictly imposing duties with corresponding sanctions.<sup>91</sup> By serving a purpose that

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<sup>83</sup> Reid, above n 60, at 763.

<sup>84</sup> Newig, above n 77, at 282.

<sup>85</sup> At 282.

<sup>86</sup> Fieschi, above n 46.

<sup>87</sup> A similar concern may be raised regarding legislated policy targets. By enshrining targets in law, the government sends an unequivocal signal that they have committed to taking the necessary action to achieve them. However, when such targets are not accompanied by adequate provisions to check and enforce compliance, the consequences can be more damaging than if nothing had been done and the issue had remained to be addressed.

<sup>88</sup> Newig, above n 77, at 284.

<sup>89</sup> Fieschi, above n 46.

<sup>90</sup> Fieschi, above n 46.

<sup>91</sup> Fieschi, above n 46.

transcends the explicit words of statute, symbolic legislation is an alternative technique that departs from the traditional top-down approach.<sup>92</sup> Rather than providing regulation backed by sanctions, these statutes encourage aspirational norms which seek to indirectly change behaviour through debate and social interaction.<sup>93</sup>

Based on a traditional analysis of the differing roles of law and politics, it could be argued that symbolic legislation demonstrates a move away from orthodox expectations of statute into the realm of politics. However, this view does not prevail in light of newer perceptions of law. The more communicative approach of symbolising changing social norms has traditionally been associated with the aspirational role of policy.<sup>94</sup> But our developing expectations may allow lawmakers to express goals and ambitions which, after acquiring the force of law, would be afforded clear priority. These may not be judicially enforceable in the way that is traditionally expected of statutory obligations, however, it is demonstrated in Part III that this does not necessarily render them invalid.

Not only is there scope for legislated policy targets in this new characterisation of law, but they are arguably capable of justification in accordance with the Cabinet Manual requirement that legislation only be enacted where necessary.<sup>95</sup> Once enshrined in statute, relevant officials have a duty to consistently work towards achieving the specified goal and to take the targets into account when making other policy decisions. Accordingly, the duties aspire to influence wider conduct and decision-making. They work alongside the formation of policy and public management in an influential capacity, rather than providing regulation and sanction through a commanding and rule-based approach. Moreover, the public process of legislating policy targets ensures an element of public consultation and input, furthering the interaction between law and society.

### *III Legislated Policy Targets*

#### *A Why Enshrine Policy Targets in Legislation?*

When Parliament legislates it binds future lawmakers until the law is amended. Therefore, incumbent governments can use legislation to ensure important policy outlasts their tenure in power. While future governments will not be prevented from amending or repealing laws, it is harder to revise targets that are enshrined in statute than mere policy objectives. The legislative process is public. It entails scrutiny by select committees and provides opportunity for public submissions.<sup>96</sup> Furthermore, it is easier to enact laws than to repeal them.<sup>97</sup> New legislation

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<sup>92</sup> Klink, above n 74, at 20.

<sup>93</sup> At 19.

<sup>94</sup> Fieschi, above n 46.

<sup>95</sup> Cabinet Office, above n 16, at [7.23].

<sup>96</sup> “How a bill becomes law” (12 January 2016) New Zealand Parliament <[www.parliament.nz](http://www.parliament.nz)>.

<sup>97</sup> Richard Heaton *When Laws Become Too Complex: A Review into the Causes of Complex Legislation* (Office of the Parliamentary Counsel, March 2013) at 7.



usually carries sufficient benefits and political approval that it can be promoted favourably. Repealing laws while retaining political favour is difficult unless preferable alternatives are ready to replace them. For example, a government would struggle to repeal the Child Poverty Reduction Bill while maintaining support unless they had a viable alternative ready to be immediately implemented. This challenge of repeal or amendment means the Bill will “entrench” child policy reduction targets, with future governments unlikely to revise them without justifiable reasons. This result is desirable in the face of such a complex, inter-generational challenge.

Enshrining policy targets in legislation also allows governments to take a more strategic approach to a long-term goal.<sup>98</sup> A consistent, long-term focus is ordinarily required to achieve satisfactory outcomes in relation to inter-generational issues such as child poverty.<sup>99</sup> Hardship faced by families and children cannot be reduced by the immediate actions of a single government department. Factors from various aspects of public management over a long period of time contribute to people’s wellbeing.<sup>100</sup> Legislated targets are beneficial in providing a continuity of policy which is vital to achieving long-term collaboration. They ensure that decision-making is influenced on a continuing basis, rather than merely until the incumbent government is displaced. Furthermore, the codification of long-term targets signals the policy’s priority and level of importance to the rest of government.<sup>101</sup> This recognition can assist in building a foundation of cross-departmental cooperation. The behaviour of civil servants is likely to be influenced more significantly by targets supported by the force of law than weakly articulated ministerial priorities.<sup>102</sup> The practice also identifies to the public that the government has committed to addressing the issue, thus providing certainty to businesses and international jurisdictions.<sup>103</sup>

Moreover, legislated targets can make the government “less sensitive to the tides of popular opinion”.<sup>104</sup> When pursuing popular politics, elected actors seek to respond to the wishes of the voting public with a view to re-election.<sup>105</sup> Politicians may promote policies or pursue courses of action based on prevailing sentiment at the time. However, this does not always lead to certainty, continuity and preferable results. Public opinion does not always reflect the best interests of those who will be affected. Laypeople may not possess enough information to

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<sup>98</sup> Jill Rutter and William Knighton *Legislated Policy Targets: commitment device, political gesture or constitutional outrage?* (Institute for Government, August 2012) at 5.

<sup>99</sup> Elizabeth Eppel, Donna Provoost and Girol Karacaoglu *From Complexity to Collaboration: creating the New Zealand we want for ourselves, and enabling future generations to do the same for themselves* (Victoria University Institute for Governance and Policy Studies, Working Paper 18/01, May 2018) at 20.

<sup>100</sup> Child Poverty Reduction and Eradication Bill (Draft for Consultation) (explanatory note) at 2.

<sup>101</sup> Rutter and Knighton, above n 98, at 5.

<sup>102</sup> At 6.

<sup>103</sup> At 5.

<sup>104</sup> At 6.

<sup>105</sup> Policy-making is an intrinsically political process; see: Michael Hallsworth, Simon Parker and Jill Rutter *Policy Making in the Real World: Evidence and Analysis* (Institute for Government, April 2011) at 82.

develop well-informed and accurate assessments and decision-makers have additional knowledge which may cause their judgment to differ.<sup>106</sup> Furthermore, frequently changing public opinion can trigger adjustments to ministerial priorities, and thus policies and targets being pursued. This is not always desirable. Long-term commitments through legislated targets lead to better results over a prolonged period of time, particularly in the context of intergenerational issues such as child poverty. Broad societal problems cannot be solved with short-term commitments that frequently change.

*B Is the Use of Legislation Effective in Achieving Long-Term Commitments to Complex Policy Challenges?*

These benefits that I have identified may be impaired if legislated policy targets are not competent in bringing about continuity, consistency and cooperation in policy implementation. In light of my conclusion in Part II that they are not necessarily inconsistent with the role of law in New Zealand, I now seek to determine whether enshrining targets in legislation is an effective way to ensure long-term commitments to addressing complex policy challenges. Various criticisms threaten to undermine their performance. The extent to which they can be legally enforced is limited, their procedural nature creates a risk that they will fail to achieve their specified objectives, and they arguably contradict certain constitutional and democratic principles. These limitations may inhibit the efficacy of the proposed Child Poverty Reduction Bill.

*1 Enforceability*

When policies are developed and implemented by the government without being legislated, the ramifications for non-performance are political. The public will lose confidence in a party that doesn't deliver on the policies it has committed to. The continuous threat of upcoming elections provides constant motivation to maintain political favour. However, once a target is codified in legislation the government becomes bound by additional legal constraints. While this demonstrates an intention to be accountable on the issue, the consequent relocation of responsibility onto the courts has spurred constitutional concerns.<sup>107</sup> There have also been doubts as to the efficacy of legal enforcement. These concerns sustain the perception that legislated policy targets are not an effective use of law, on the basis that Parliament should not enact legislation which cannot be enforced by courts. While I deviated from this orthodox perception of law in Part II, if the targets cannot be enforced a compelling argument arises that legislation is not the best method of implementation.

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<sup>106</sup> Many components are relevant to policy decisions – these can include technical evidence, public opinion, ministerial preference and political principles; see: Hallsworth, Parker and Rutter, above n 105, at 83.

<sup>107</sup> Lee and Leslie, above n 24, at [30].

(a) Legal enforcement

The extent to which courts can enforce legislated policy targets is contentious. They do not confer reciprocal, personal rights on individuals that can found a judicial complaint. While obligations that are enshrined in legislation are theoretically enforceable by way of judicial review, this limits a court to determining whether decisions are lawful, fair, and reasonable.<sup>108</sup> Even if substantive compliance with the duty could be adjudicated, finding an appropriate remedy would be challenging.<sup>109</sup> Courts would be unlikely to order compliance. Judicial review remedies are discretionary, but the doctrine of separation of powers means that courts operate within a limited sphere.<sup>110</sup> They are generally reluctant to issue judgments which may interfere with the “complex and polycentric issues of policy prioritization and resource allocation”.<sup>111</sup> Such decisions require an aggregation of legal, economic and social considerations and are the responsibility of the executive. A court’s interference would induce questions of democracy and legitimacy.

The proposed Child Poverty Reduction Bill limits judicial relief for non-compliance to a declaration which the Minister must present to Parliament within a specified time frame.<sup>112</sup> It explicitly states that targets do not create legal rights which may be enforced in courts.<sup>113</sup> However, as the Minister is already required to provide Parliament with an annual progress report, a declaration would add little to existing statutory obligations.<sup>114</sup> Although it arguably enables a third party to independently review progress, failure to meet the child poverty reduction targets will be apparent in the Minister’s annual report and non-compliance with the duty would be evident. Opportunity will already exist for review by other members of Parliament and concerned citizens. A court’s declaration would simply repeat what is already in the public domain, arguably making it uncontroversial and largely ineffective.

On the other hand, declarations issued by courts are recognised legal remedies. They would carry more legal weight than a routine annual report. They are a formal statement of fact and law which pronounce the existence of a state of affairs.<sup>115</sup> They differ to enforceable, coercive judgments, but that is not to say they are “a mere opinion devoid of legal effect”.<sup>116</sup> Rather, they are recognised “as an active or constitutive remedy”.<sup>117</sup> Recent case law regarding jurisdiction to award declarations of inconsistency in relation to the Bill of Rights Act provides

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<sup>108</sup> Scott, above n 17, at 50.

<sup>109</sup> Teresa Weeks *Examining the UK Climate Change Act 2008* (Productivity Commission, September 2017) at 15.

<sup>110</sup> *Bulk Gas Users* [1983] NZLR 129 at 136.

<sup>111</sup> McHarg, above n 61, at 478.

<sup>112</sup> Child Poverty Reduction Bill, above n 11, cl 28.

<sup>113</sup> Clause 28.

<sup>114</sup> Clause 30.

<sup>115</sup> Peter Young *Declaratory Orders* (2nd ed, Butterworths, Sydney, 1984) at [602]-[603].

<sup>116</sup> Yitzhak Zamir and Harry Woolf *The Declaratory Judgment* (3rd ed, Sweet & Maxwell, United Kingdom, 2000) at [1.02] and [1.07].

<sup>117</sup> Mark Aronson and Matthew Groves *Judicial Review of Administrative Action* (3rd ed, Law Book Company, 2004) at 802.

that they form part of the dialogue between the judiciary and other branches of government.<sup>118</sup> This perception reflects the routine procedure of government, in which Parliament legislates, the executive administers and the courts interpret, which ensures that law reforms to reflect society's evolving needs.<sup>119</sup> While a judicial declaration does not compel a response, it gives rise to "a reasonable constitutional expectation" that the application of law in question will be reevaluated.<sup>120</sup> As such, it would be misguided to conclude that a judicial declaration would provide no value whatsoever.

Notwithstanding this perception of declarations as an appropriate remedy, the timing of judicial review presents further difficulties. If proceedings were brought before the final target expired, they would be too early.<sup>121</sup> A breach will only occur once the target has not been achieved within the specified time frame. But any proceedings brought after the time period would be futile and purely academic.<sup>122</sup> Policy targets are designed to ensure that gradual and consistent steps are taken to resolve a lasting problem. It would be wholly ineffective if a potential claimant had to wait until the time frame expired to bring action.

There is some case law to suggest that courts may effectively hold the government to account in exceptional circumstances. However, the threshold identified in the United Kingdom is very high. In 2009 McCombe J heard a case regarding an expected failure to meet the fuel poverty reduction target set out in the Warm Homes and Energy Conservation Act 2000 and United Kingdom Fuel Poverty strategy.<sup>123</sup> He determined the Secretary of State could only be held accountable if no identifiable part of the Strategy's provisions had been implemented, or if decisions made by the Secretary breached the *Wednesbury* standard of unreasonableness.<sup>124</sup> To satisfy this, there must have been an absence of any measures with potential to achieve the interim and final objectives or a total lack of reasonableness.<sup>125</sup> It is arguable that these standards are too high to be of practical use when seeking to enforce a legislated policy target. Even if it was possible to enforce the Child Poverty Reduction Bill in this way, it would be an insurmountable task to establish that no government policies had progressed towards abating children's hardship.

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<sup>118</sup> *Taylor v Attorney-General* [2017] NZCA 215 at [149].

<sup>119</sup> At [150].

<sup>120</sup> *R v Hansen* [2007] 3 NZLR 1 at [254].

<sup>121</sup> McHarg, above n 61, at 478.

<sup>122</sup> At 478.

<sup>123</sup> *Friends of the Earth*, above n 69.

<sup>124</sup> At [38].

<sup>125</sup> At [41]; *Associated Provincial Picture Houses Ltd*, above n 70, at [685].

(b) Political enforcement

Despite this contention regarding the legal enforceability of legislated policy targets, successive governments would be politically accountable for complying with them.<sup>126</sup> Rather than imposing formal legal sanctions, they act as a crucial incentive to influence decision-making.<sup>127</sup> Their value arguably lies in the visibility they give to relevant issues. This opportunity for political enforcement is expressly set out in the purpose of the Child Poverty Reduction Bill, which includes facilitation of political accountability in relation to the published targets.<sup>128</sup> The Bill will impose a duty to report progress to Parliament and explain non-compliance.<sup>129</sup> These reporting requirements and the public interest may be sufficient to ensure that relevant officials are held to account. However, there is a risk that Parliament and other actors will become remiss and fail to properly scrutinise compliance due to a false sense of security that the government is bound by legislation.<sup>130</sup> Political accountability is only effective where the government's compliance with specified standards is consistently monitored.

Nonetheless, legislated policy targets have further political implications. Targets that are included in legislation acquire an “enhanced status” which ensures they are taken into account in the wider exercise of government functions.<sup>131</sup> It has been held that the target enshrined in s 1(1) of the Climate Change Act 2008 (UK) is a relevant consideration for the government during policy formation.<sup>132</sup> If the proposed Child Poverty Reduction Bill is enacted and binds the government to targets, they will be required to consider the effects of proposed policies on the welfare of children. The legislation will also strengthen the prominence of child poverty reduction in resource allocation decisions.<sup>133</sup>

Consequently, it is incorrect to say that legislated policy targets are entirely unenforceable. They may not be subject to substantive judicial enforcement, but in light of contemporary perceptions of law this does not necessitate a conclusion that policy targets are an inappropriate use of statute. However, their position between mainstream political targets and fully enforceable legal obligations can lead to confusion. The Child Poverty Reduction Bill will be sanctioned by a legal-political hybrid, with the court's enforcement limited to a declaration that will only be subject to political accountability. This complexity may cause compliance to fall through accountability gaps. As a result, it may be argued that no additional benefit will be

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<sup>126</sup> It has been said that “Parliament has become fond of imposing duties of a kind which, since they are of a general and indefinite character, are perhaps to be considered as political duties rather than as legal duties”; see: William Wade and Christopher Forsyth *Administrative Law* (10th ed, Oxford University Press, 2009) at 498.

<sup>127</sup> Reid, above n 60, at 763.

<sup>128</sup> Child Poverty Reduction Bill, above n 11, at cl 3.

<sup>129</sup> Clause 27 and 36.

<sup>130</sup> Lee and Leslie, above n 24, at [28].

<sup>131</sup> Weeks, above n 109, at 17.

<sup>132</sup> *R (London Borough of Hillingdon and others) v Secretary of State for Transport* [2010] EWHC 626 (Admin) at [77].

<sup>133</sup> Weeks, above n 109, at 17.

achieved by legislating the targets. If the statutory duties can only be monitored and enforced politically, little advantage will be gained by enacting them.

## 2 *Unnecessarily add to an overload of legislation*

If policy targets would be equally as effective in the political realm, it is not necessary to enshrine them in law. If this is the case, laws like the Child Poverty Reduction Bill are unnecessary additions to our statute book. The Cabinet Manual specifies that legislation should not be enacted unless it is absolutely necessary.<sup>134</sup> This rule is integral in the face of New Zealand's abundance of legislation. It attempts to restrict law-making ability to situations of genuine necessity. Where other means exist to implement durable policy targets, they should be favoured.

The basis for the rule preventing further, unnecessary laws lies in the complexity of New Zealand's statute book. In 2014 it contained over 1000 principal Acts and nearly 65,000 pages of law.<sup>135</sup> Parliament routinely passes approximately 100 statutes each year.<sup>136</sup> Among new additions, New Zealand lawmakers have a propensity to pass amending legislation while failing to repeal old laws which have become redundant.<sup>137</sup> As a result, our body of legislation is overloaded and largely incoherent. The confusion is compounded by the structure of the statute book. There is no index or subject code to make the law more attainable.<sup>138</sup> As the statute book's size and complexity grows, accessibility of legislation decreases.<sup>139</sup> This consequence is at odds with the rule of law, which requires that law is accessible and clear.<sup>140</sup> The Law Commission has previously identified that this obligation requires law to be available, navigable and clear.<sup>141</sup> Where the statute book includes a large quantity of Acts that aren't coherently arranged, navigability and clarity are lacking.

Moreover, an overload of legislation creates a substantial workload for Parliament. Every statute takes significant time and effort to pass, and MMP has slowed the process in New Zealand.<sup>142</sup> Consequently, we have a significant parliamentary backlog. Unnecessary legislation involves significant costs, including those involved in enacting it as well as complying, administering and enforcing it.<sup>143</sup> This concern is prevalent in the context of legislated policy targets, given the complexity of the topics they address. The targets generally aim to resolve inter-generational challenges of great public concern. They are long-term, and

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<sup>134</sup> Cabinet Office, above n 16, at [7.23].

<sup>135</sup> Geoffrey Palmer "Law-Making in New Zealand – Is There a Better Way?" (Henry Harkness Lecture 2014, University of Waikato, Hamilton, 10 September 2014).

<sup>136</sup> Law Commission *Presentation of New Zealand Statute Law* (NZLC R104, 2008) at 12.

<sup>137</sup> Palmer, above n 135, at 19.

<sup>138</sup> At 34.

<sup>139</sup> Law Commission, above n 136, at 15.

<sup>140</sup> *Legislation Guidelines*, above n 15, at 22.

<sup>141</sup> Law Commission, above n 136, at 3.

<sup>142</sup> Palmer, above n 135, at 7.

<sup>143</sup> *Legislation Guidelines*, above n 15, at 15.

a substantial amount of research and consultation is required to set appropriate targets. In the context of child poverty, the cost of researching, canvassing and developing targets would be onerous and costly. Political consensus on such a contentious issue may be hard to achieve, which would increase the cost and time required to pass the legislation. Therefore, if a satisfactory result could be achieved through political measures, legislation may be unnecessary and not the best way to implement child poverty reduction targets.

### *3 Fail to achieve their purpose*

Legislated policy targets risk appearing to carry more weight than they do, thus becoming empty gestures. The Child Poverty Reduction Bill imposes a duty to set and comply with targets, alongside reporting requirements. This initiative allows the government to take credit for bold action while sending a message to the electorate that they take child poverty seriously. However, because of the challenges with legal enforceability, the strength of this duty would dissipate before a Court.<sup>144</sup> The efficacy of political accountability is only successful to the extent that Parliament and the public monitor compliance. While legislated targets are useful in theory, they may be unsubstantial in practice. If this is the case, the Bill will contradict a core objective of the Legislation Design and Advisory Committee; that legislation should be fit for purpose.<sup>145</sup> If the targets cannot be legislated in compliance with the Committee's guidelines, it may be argued that statute is not the best way to deal with reducing child poverty levels.

### *4 Non-compliance with constitutional and democratic principles*

Enshrining targets in legislation may be perceived as an attempt to entrench policy objectives and bind future governments. While parliamentary sovereignty ensures the targets are not guaranteed to endure, their inclusion in statute limits the ability of successor governments to pursue alternative courses of action. As explained in the introduction to this section, provisions in statute are harder to amend than simple policy commitments. In the context of child poverty, it could be detrimental to a party's political standing if they attempted to publicly repeal or amend a law designed to improve the prosperity of children. This limitation can be framed as a positive feature in the context of inter-generational challenges which require consistent action to exceed a single government's tenure.

Nevertheless, the shift of power in committing to policy targets from the executive to the legislature gives rise to questions of legitimacy and democracy. One commentator concluded that the Climate Change Act 2008 (UK) could "reasonably be described as a constitutional measure" as it is a pre-commitment strategy which promotes long-term interests.<sup>146</sup> She noted that this attempt to bind successor governments may be undemocratic.<sup>147</sup> A core feature of

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<sup>144</sup> Lee and Leslie, above n 24, at [27].

<sup>145</sup> *Legislation Guidelines*, above n 15, at 8.

<sup>146</sup> McHarg, above n 61, at 483.

<sup>147</sup> At 483.

democracy is the ability of elected officials to pursue policies that they consider to be in the public interest. A pre-commitment which binds them to specified targets is at odds with this. It is particularly so where the commitment does not enjoy cross-party support. An opposing party who is later elected may find themselves bound to pursue a policy they do not agree with.

### *5 Place within New Zealand's political constitution*

As established in Part II, according to New Zealand's constitutional structure we expect laws to be enacted by Parliament and enforced by the courts, while policies are developed by the executive and monitored by Parliament. Legislated policy targets exist as a composite between the two instruments. In the proposed Child Poverty Reduction Bill, the legislature intends to enact an obligation to set targets, although the responsibility for quantifying and creating substantive targets reverts to the executive.<sup>148</sup> While this obligation should be judicially enforceable in theory, practical barriers mean the relevant actors are likely to only be politically accountable. This form of legislated policy targets shares more characteristics with policy than law. Despite being formally articulated in the statute book, responsibility for their development, implementation, compliance and enforcement rests in the political sphere.

Nonetheless, this manner of legislating policy targets does not necessitate a conclusion that they are inconsistent with contemporary perceptions of statute, which were outlined in Part II. The concerns that I have identified in this section may support an argument that legislation is not the best way to implement long-term targets. This use of statute may be perceived as unnecessary, not fit for purpose and undemocratic. However, in Part IV I recognise that some element of law is integral to implementing robust trans-governmental duties. Whether or not they are the best way to address complex, long-term challenges will depend on the extent to which the targets are legislated, and the enforcement and compliance provisions provided for.

## *IV Viable Alternatives*

In the preceding section I outlined the reasons why legislated policy targets can be a useful mechanism when addressing long-term policy challenges. I also identified concerns that arise when these targets are implemented in the legislative sphere. These give rise to a possibility that legislation is not the best way to achieve lasting policy commitments to address complex issues. In light of this, it is worthwhile examining the likelihood of durable targets being created through solely political means. In this section I evaluate the efficacy of better public services targets and national policy statements in resolving long-term policy challenges.

### *A Better Public Services Targets*

The better public services targets provide an example of long-term goals that were developed and implemented in the public sector. They were launched by the National Government in

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<sup>148</sup> Child Poverty Reduction Bill, above n 11, at cl 21.



2012. They aimed to ensure a higher performing and more resilient state services which delivered on important issues to New Zealanders.<sup>149</sup> Following the global financial crisis, they sought to achieve this without requiring further expenditure.<sup>150</sup> The state services are sectioned into numerous government departments, each with a narrow focus. While this structure enables departments to be more specialized and effectively managed, it can create a barrier to progress on issues that require participation from multiple agencies.<sup>151</sup> Thus, the better public services targets implemented recommendations of a 2011 advisory group to manage the public sector “less as a collection of individual agencies each pursuing their own objectives, and more as a system focused on a few priority outcomes that will make a difference for New Zealanders”.<sup>152</sup>

Initially, ten important cross-departmental problems were selected. For each, the government identified a desired outcome, a target to be achieved over five years and a measure of how that change would be assessed.<sup>153</sup> Leaders of relevant agencies were collectively responsible for compliance with the targets.<sup>154</sup> They reported on progress to Cabinet and the public every six months.<sup>155</sup> The scheme was largely successful, with substantial improvements in all ten areas.<sup>156</sup> In 2017, ten new targets were set.<sup>157</sup>

These targets differed to legislated policy targets in various ways. They were technocratic, front line goals relating to small-scale objectives which were within the direct control of relevant public services. Examples included increasing infant immunisation rates and providing New Zealand businesses with a one-stop shop for government advice.<sup>158</sup> The former was achieved by providing new mothers with better, timely information through primary and community health organisations.<sup>159</sup> The latter was realised by allowing businesses to file GST through Xero and MYOB software, extending the use of New Zealand Business Numbers to sole-traders, charities and partnerships, and numerous other measures.<sup>160</sup>

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<sup>149</sup> “Better Public Services” (14 January 2015) The Treasury <[www.treasury.govt.nz](http://www.treasury.govt.nz)>.

<sup>150</sup> Rodney Scott and Ross Boyd *Interagency Performance Targets: A Case Study of New Zealand’s Results Programme* (IBM Centre for the Business of Government, 2017) at 7.

<sup>151</sup> At 7.

<sup>152</sup> Maarten Wevers *Better Public Services Advisory Group Report* (November 2011).

<sup>153</sup> “Improving Outcomes: New Zealand’s Better Public Services Results Programme” (18 April 2017) ANZSOG <[www.anzsog.edu.au](http://www.anzsog.edu.au)>.

<sup>154</sup> Scott and Boyd, above n 150, at 38.

<sup>155</sup> David Donaldson “Better Public Services with NZ’s results approach” (14 June 2016) The Mandarin <[www.themandarin.com.au](http://www.themandarin.com.au)>.

<sup>156</sup> Scott and Boyd, above n 150, at 10.

<sup>157</sup> “Better Public Services: Results for New Zealanders” (13 March 2017) State Services Commission <[www.ssc.govt.nz](http://www.ssc.govt.nz)>.

<sup>158</sup> “Better Public Services: Results for New Zealanders”, above n 157.

<sup>159</sup> “Better Public Services Result 3 Immunisation – Case Study: Immunise on Time to Protect Babies” (20 February 2014) State Services Commission <[www.ssc.govt.nz](http://www.ssc.govt.nz)>.

<sup>160</sup> “Better Public Services: Improving Interaction with Government” (13 March 2017) State Services Commission <[www.ssc.govt.nz](http://www.ssc.govt.nz)>.

In contrast, legislated policy targets tend to address broad, large-scale policy issues with many contributing factors. Examples in the United Kingdom have aimed to eliminate fuel poverty, reduce child poverty and curtail the effects of climate change.<sup>161</sup> Proposed legislated policy targets in New Zealand will address child poverty and climate change. Not all elements of these challenges are within the direct control of central government. Using the example of child poverty, politicians can influence the level of taxes, minimum wage, housing supply, healthcare affordability and various other components that influence basic living costs. However, they cannot directly control the prevalence of child poverty in society. Parents and guardians make private choices that inhibit the government's ability to directly allocate benefits to impoverished children. The state has limited influence over the livelihoods of those who are not in state care. Thus, legislated policy targets are general, overarching and broad to reflect this lack of total control, as opposed to the specific and front-line nature of better public services targets. Legislated policy targets require amendment of many different policies relating to a range of governmental matters to achieve progress.

Better public services targets nevertheless provide a useful comparison. They similarly entailed attempts to bind politicians and government departments to meet certain goals through specified targets. They ensured elected actors were politically accountable through the state sector. Announcement of and subsequent failure to comply with better public services targets would have led to similar criticism and public discontent as a failure to comply with legislated policy targets would. The fundamental difference between these two approaches, which gives rise to meaningful comparison, is that better public services targets were not enshrined in statute as legislated policy targets are.

### *1 Comparison: better public services targets vs. legislated policy targets*

#### *(a) Successful features*

In 2017 Rodney Scott and Ross Boyd conducted a case study of better public services targets for the IBM Centre for the Business of Government, which is an international organisation that funds third party public management research with a view to improving government efficacy.<sup>162</sup> They recognised some successful features of the targets. First, because the targets were specific and limited in number, each one was important.<sup>163</sup> The government was able to convey their ambition and a sense of urgency in relation to the issue.<sup>164</sup> The reporting requirements sent a strong signal to the public that they were priority issues for the government.<sup>165</sup> As a result of this prioritization, the relevant public agencies were committed to achieving the goals.

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<sup>161</sup> Warm Homes and Energy Conservation Act 2000 (UK), s 1A; Child Poverty Act 2010 (UK), s 1; Climate Change Act 2008 (UK), s 1(1).

<sup>162</sup> "About the Center for the Business of Government: Connecting Research to Practice" IBM Center for The Business of Government <[www.businessofgovernment.org](http://www.businessofgovernment.org)>.

<sup>163</sup> "Improving Outcomes: New Zealand's Better Public Services Results Programme", above n 153.

<sup>164</sup> Scott and Boyd, above n 150, at 36.

<sup>165</sup> "Improving Outcomes: New Zealand's Better Public Services Results Programme", above n 153.

Secondly, the better public services targets promoted cross-agency cooperation in pursuit of a common goal. The imposition of collective responsibility encouraged this, by removing temptation to deflect blame to other departments and encouraging achievement of the targets instead.<sup>166</sup> In each priority area that was selected, a Minister and department CEO were named to lead the initiative.<sup>167</sup> While numerous agencies were generally involved in each priority area, core decision-making was limited to two or three departments. This distribution maximized the feeling of responsibility by each agency and decreased transaction costs.

These factors identified by Scott and Boyd would arguably apply equally to legislated policy targets. They are also specific and exclusive, thus conveying a sense of importance. Given the undertaking required to enshrine an objective in statute, by legislating policy targets the government of the day signals to the public service and wider community that they prioritise the issue in question. As a result, legislated policy targets similarly foster an ambition across the state sector to achieve the identified target. However, they are less confined to particular agencies and thus could be subject to the Ringelmann effect; which describes the tendency of individuals to become less productive as their group size increases.<sup>168</sup> Because of the general nature of legislation, ideal policy targets in statute would enunciate broad objectives that require a shift in the way the issue is approached by the public sector as a whole. This generality would compel every part of the state services to take a role in achieving it.

#### (b) Enforceability

Better public services targets were developed and implemented entirely in the political realm. They were not enshrined in legislation, although core statutes were amended to assist in achieving the goals.<sup>169</sup> Accordingly, accountability mechanisms were entirely political. Frequent reporting requirements to Cabinet and the public served as a regular check on progress.<sup>170</sup> Amendments to the State Sector Act provided the State Services Commissioner with statutory authority to review the public sector as a whole.<sup>171</sup> These available mechanisms for enforcing the objectives were largely the same as legislated policy targets. In the former, reports were required to be provided to Cabinet. In the latter, they are produced to Parliament. In both cases the public and media would have an active role in holding relevant actors to account. However, legislated policy targets have the added benefit of possible legal enforcement. Although the courts' ability to enforce them is limited, the targets may be recognised as a relevant consideration when determining other policy and the courts may find

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<sup>166</sup> "Improving Outcomes: New Zealand's Better Public Services Results Programme", above n 153.

<sup>167</sup> Donaldson, above n 155.

<sup>168</sup> See generally: Alan Ingham "The Ringelmann effect: Studies of group size and group performance" (1974) 10 *Journal of Experimental Social Psychology* at 371.

<sup>169</sup> The Crown Entities Act 2004, State Sector Act 1988 and Public Finance Act 1989 were amended to ensure better collaboration between public entities and work across boundaries towards collective interests.

<sup>170</sup> Scott and Boyd, above n 150, at 41.

<sup>171</sup> State Sector Amendment Act 2013, s 11.

ministers acted unreasonably if they failed to make meaningful progress towards meeting the targets.

(c) Durability

Better public services targets had a horizontal focus, promoting inter-agency cooperation to address issues which extend beyond the jurisdiction of a single department. They were not designed with a view to ensuring successor governments continued to comply. When the Labour Government chose not to pursue the targets in January 2018, they simply announced they were abandoning the policy.<sup>172</sup> While there was some initial media attention and opposition from National party spokespeople, the decision was quickly forgotten in the midst of numerous policy changes occurring in the new government's first 100 days.<sup>173</sup>

It may be argued that better public targets would have been more resilient if they had been enshrined in the State Sector Act. If that was the case, they would have been legislated policy targets and the Labour Government would have needed to pass amending legislation to repeal the initiative. As discussed in Part III, it is difficult to repeal laws in the absence of justifiable reasons. This fundamental advantage of legislated policy targets is particularly important in relation to issues of national importance, such as child poverty. As well as focusing on horizontal, inter-agency cooperation, they aspire to be trans-governmental and outlast the administration of the day. Child poverty reduction requires the work of numerous government departments, but it also cannot be achieved within a single government's term. The targets need to outlast their tenure in office.

Thus, while the better public services targets were successful in the short-term, their lack of long-term persistence supports an argument that the political sphere is not effective in implementing long-term policy targets. They would have been more durable if provided for in legislation. However, given persisting concerns regarding the enforceability and appropriateness of legislated policy targets, it is worth considering whether they could be provided for by another form of regulation without being substantively included in legislation. In particular, it may be possible to set guidelines through the creation of national standards.

*B National Policy Statements: An Analogy with the Resource Management Act 1991*

National standards could take a form analogous to those prescribed by the Resource Management Act 1991 (RMA). Under the RMA, national environmental standards and national policy statements are produced to guide decision-making and the preparation of plans at regional and local level. National environmental standards are regulations which prescribe

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<sup>172</sup> "PM Jacinda Ardern: Merit in target system, but Labour will set its own" (23 January 2018) New Zealand Herald <[www.nzherald.co.nz](http://www.nzherald.co.nz)>.

<sup>173</sup> Henry Cooke "Bill English Slams the Government for getting rid of public service targets" (23 January 2018) Stuff <[www.stuff.co.nz](http://www.stuff.co.nz)>; "100 days. Here's what we've done." (1 February 2018) Labour <[www.labour.org.nz](http://www.labour.org.nz)>.

technical standards, methods or requirements.<sup>174</sup> They may take effect in a number of different ways, including the prohibition or allowance of certain projects or restriction on the granting of resource consents in relation to a particular activity.<sup>175</sup> Once such a regulation has been made, councils must amend their plans to avoid conflicting with the standard and have regard to relevant national environmental standards when considering resource consent applications.<sup>176</sup>

National policy statements operate on a higher level. They enable central government to prescribe objectives and policies for matters that are nationally significant to achieving sustainable management.<sup>177</sup> Local authorities must amend their documents to give effect to these policy statements.<sup>178</sup> The requirement to “give effect to” means they must be “implemented”, which is a firm objective.<sup>179</sup> It is not sufficient to treat these statements as a list of relevant considerations when exercising their duties. Rather, they provide minimum acceptable standards.<sup>180</sup>

If either of these formats for setting guidelines was to be replicated to ensure departmental cooperation in achieving important policy goals, the national policy statement would be the most appropriate. Rather than prescribing specific, technical standards, they identify high level objectives and policies while leaving lower level authorities with some autonomy in giving effect to them. This approach would be preferable in the context of complex policy issues such as child poverty reduction. Developing knowledge and changing economic and social circumstances mean that the best method may not remain consistent. As such, relevant government agencies should be able to modify their approach to reflect evolving best practice. Furthermore, government departments are relatively small and specialized. Public servants possess expertise that make it preferable for them to be charged with determining how best to implement the objectives.

Developing a framework that is analogous to national policy statements may be the best way to legislate policy targets because it refrains from using legislation as the target-setting device. Rather, legislation enables the relevant Minister to develop a policy statement. This approach mirrors the form of legislated policy targets previously adopted in New Zealand and proposed by the Child Poverty Reduction Bill. In the context of legislated policy targets, these policy statements could be directed at guiding decision-making and policy development. Government department decisions would be required to comply with the targets set out in them. Such standards would be politically enforceable, as better public services targets were. This structure

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<sup>174</sup> Resource Management Act 1991, s 43.

<sup>175</sup> Section 43A.

<sup>176</sup> Sections 44A and 104(1)(b)(i).

<sup>177</sup> Section 45.

<sup>178</sup> Section 55.

<sup>179</sup> *Environmental Defence Society Inc v The New Zealand King Salmon Company Ltd* [2014] NZSC 38 at [77].

<sup>180</sup> At [83] and [132].

would avoid contention regarding whether courts should legally enforce the targets. It would also remedy concerns of whether statutes have been appropriately used and allegations of inconsistencies with democratic and constitutional principles.

Legislated policy targets in the form of national policy statements would additionally achieve inter-agency collaboration, while retaining a trans-governmental commitment. Any government department that made a decision relating to the policy would be required to ensure it acted to implement the goal. The policy statement would not be confined to a single agency. Furthermore, the RMA framework differs to the legislated policy targets previously adopted in New Zealand and proposed in the Child Poverty Reduction Bill by creating a framework of procedural restrictions.<sup>181</sup> To repeal a legislated policy target in the form of a national policy statement, a future government would be required to comply with a procedure similar to s 46A of the RMA. This provision requires the Minister to undertake an extensive procedure of public and iwi consultation or to appoint a Board of Inquiry to report on the proposed national direction. Both procedures provide ample opportunity for public input. A future government would not be able to simply announce an intention to abandon the policy, as was possible in the case of better public services targets.

Nonetheless, this framework of national standards is very specific to the environmental and RMA context. It exists within a wider scheme of consenting authorities and a hierarchical system of governance. It may be challenging to transpose such an initiative to remedy other issues of national importance. Under the RMA there are existing structures and mechanisms in place, such as requirements for resource consents and consenting authorities, which enable compliance to be checked and enforced. Furthermore, the RMA requires that local and regional authorities amend their plans and policies to give effect to national directions.<sup>182</sup> Central government departments subject to legislated policy targets would be limited to ensuring future decisions comply with the standards, but the lack of framework comparable to that which exists under the RMA would not provide proper means to ensure compliance. A failure to do so would be subject only to political accountability, and with a lack of reporting requirements this could easily go unnoticed in many circumstances.

Therefore, the national policy statement framework would need to be adapted to provide a viable scheme to address the challenges that legislated policy targets seek to overcome. Outside the RMA framework and hierarchical system of governance, the concept of statutes authorising ministers to create mandatory national standards, without incorporating the substantive measures into law, is useful in addressing long-term policy issues. In theory, a national standards procedure that legislates stringent processes may achieve the trans-governmental and

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<sup>181</sup> Resource Management Act 1991, s 46A.

<sup>182</sup> Section 55.

collaborative goals that legislated policy targets aspire to. However, alterations would need to be made to reflect the unique framework created by the RMA.

Fundamentally, while the RMA *enables* the government to set national standards, legislated policy targets would *require* that the targets be set. It would be mandatory for the Minister to do so. Furthermore, stringent procedural standards would be required to protect the durability of these targets. Features may reflect s 46A of the RMA, but a statute which legislates policy targets should additionally include regular reporting requirements to ensure transparency as to compliance and progress towards the targets. It should also specify remedies or relief that may be sought in the event of non-compliance, as the Child Poverty Reduction Bill purports to do.<sup>183</sup>

### *V Child Poverty Reduction Bill*

The analysis above elicits a conclusion that some element of law is preferable in setting policy targets that need to endure beyond the incumbent government's tenure in office. However, these targets should be carefully drafted so not to give rise to concerns regarding their enforceability or legitimacy. The best way to achieve this may be to enact legislation which compels the relevant Minister to establish standards, similar to what exists under the RMA. The legislation should provide only procedural elements. However, a direct application of the framework provided for in the RMA may not be workable outside the context of environmental law. Therefore, this section considers elements of the national policy statement scheme in combination with previously legislated policy targets in New Zealand to identify the best practice for enshrining child poverty reduction targets into law.

#### *A To What Extent Should the Child Poverty Reduction Targets be Legislated?*

The best method to legislate policy targets is to enact an obligation to set the targets but refrain from including them substantively in legislation. This approach was previously adopted in New Zealand under the Public Finance Amendment Act 2004 and Climate Change Response Act 2002.<sup>184</sup> It differs to the RMA, in that the requirement to set targets is mandatory. The obligation removes the relevant Minister's discretion and makes it binding to give effect to the legislation.

The proposed Child Poverty Reduction Bill complies with this approach. It purports to establish a requirement that the Minister for Child Poverty Reduction set intermediate and long-term targets for reducing child poverty.<sup>185</sup> This requirement to set targets and adhere to them is incorporated in statute, but the actual, substantive targets are not. They remain the responsibility of the executive; to be set by the Minister on the advice of public servants. This method mitigates concerns regarding the enforceability of statutory obligations. Whereas I

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<sup>183</sup> Child Poverty Reduction Bill, above n 11, at cl 28.

<sup>184</sup> Public Finance Act 1989, s 26J; Climate Change Response Act 2002, s 224.

<sup>185</sup> Child Poverty Reduction Bill, above n 11, at cl 21.

outlined the courts' inability enforce substantive legislated policy targets in Part III, non-compliance with procedural commitments could be adjudicated through judicial review or other accountability mechanisms.

The proposed approach is also preferable to imposing purely procedural obligations without a corresponding duty to set substantive targets, or to codifying purely substantial obligations in legislation. Purely procedural duties would be enforceable but would risk having little success. It is all too common for mandatory procedures to become "box-ticking exercises" without regard to the quality of compliance.<sup>186</sup> Entirely substantive targets tend to be subjective and would provide the responsible parties with too much discretion.<sup>187</sup>

The Child Poverty Reduction Bill's distribution of power is accompanied by obligations to review the targets, present annual reports to Parliament measuring child poverty levels and explain non-compliance.<sup>188</sup> Targets may be changed only by notice in the New Zealand Gazette, and they must always be published on the internet for people to view.<sup>189</sup> Accordingly, while leaving the responsibility of producing substantive targets to the Minister and their advisers, these procedural requirements ensure transparency, compliance and review of progress. They accord with the view of Colin Reid that "policy targets should be strengthened not by unenforceable statutory duties but through the establishment of specific monitoring, reporting and scrutiny mechanisms that will allow effective political accountability to be achieved".<sup>190</sup>

This approach avoids concerns regarding the constitutionality and democratic nature of legislating substantive policy targets. While Parliament enacts procedural duties to be adhered to, the actual questions of policy prioritization and resource allocation are determined by the executive. Successor governments retain their ability to amend the targets as they see fit, provided they comply with the statutory, procedural requirements. This option removes any concerns that the legislation purports to bind future governments.

### *B Characteristics of Legislated Policy Targets: Lessons from the United Kingdom*

By confining the legislation to procedural requirements, the Child Poverty Reduction Bill strikes a good balance of providing legal tools to set targets, while retaining flexibility.<sup>191</sup> This structure accords with recommendations from the Institute for Government, based on

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<sup>186</sup> Andrea Ross "It's Time to Get Serious – Why Legislation is Needed to Make Sustainable Development a Reality in the UK" (2010) 2 Sustainability 1101 at 1114.

<sup>187</sup> At 1118.

<sup>188</sup> Child Poverty Reduction Bill, above n 11, at cl 26, 30 and 36.

<sup>189</sup> Child Poverty Reduction Bill, above n 11, at cl 23.

<sup>190</sup> Colin Reid "Enforcement of Policy Rules" (2009) 132 SPEL 44 at 45.

<sup>191</sup> Child Poverty Reduction Bill, above n 11, at cl 21.



experience in the United Kingdom.<sup>192</sup> The Institute is an independent think tank that undertakes research to maximise governmental efficiency.<sup>193</sup> In 2012 it identified features that best promote the success of legislated policy targets. First, it noted that targets should preserve flexibility regarding how the government will achieve them.<sup>194</sup> Government departments may then use specialist knowledge to devise the most effective and practical means to achieve the desired outcome, while ensuring they can be changed to respond to evolving circumstances without undermining the overall objective.<sup>195</sup> This deference to more specialist decision-makers is precisely the process that the Child Poverty Reduction Bill purports to achieve.

Secondly, the Institute identified that targets should be realistic while remaining broad and general. Rather than seeking to eliminate a problem, they should aim to reduce the scale of it.<sup>196</sup> Targets produce motivation to comply, but unrealistic targets would lack motivational effect. Policy makers would not feel compelled to achieve a goal that is blatantly impossible. One way to ensure that legislated policy targets are realistic is to consider resources at the government's disposal.<sup>197</sup> Goals that are overly optimistic or beyond the capabilities of the public sector should not be established.<sup>198</sup>

While the Child Poverty Reduction Bill refrains from legislating substantive targets and defers this responsibility to the Minister, the requirement to regularly report progress to Parliament will assist in ensuring that targets set under the Act are realistic. A government that is subject to regular appraisal and transparency regarding the issue of child poverty reduction would be unlikely to establish unachievable goals. There would be too great a risk of losing political favour as a result of failing to progress towards the intermediate or long-term targets.

### *C Procedural Safeguards in the Child Poverty Reduction Bill*

It may be contended that the structure proposed in the Child Poverty Reduction Bill will be vulnerable to the risks that targets in the political realm face, as was the case with better public services targets. Its obligations could be susceptible to abandonment at a later date on the whim of a new government. However, this prospect can be avoided by enacting a toolkit of procedural requirements to accompany the policy. The Minister's substantive duties should be supported by regular reporting, review, publication and audit.<sup>199</sup>

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<sup>192</sup> Rutter and Knighton, above n 98; at the time of my research, the principal examples in force in the United Kingdom were the Warm Homes and Energy Conservation Act 2000, Climate Change Act 2008 and Child Poverty Act 2010.

<sup>193</sup> "About Us" Institute for Government <[www.instituteforgovernment.org.uk](http://www.instituteforgovernment.org.uk)>.

<sup>194</sup> Rutter and Knighton, above n 98, at 10.

<sup>195</sup> At 10.

<sup>196</sup> At 10.

<sup>197</sup> At 11.

<sup>198</sup> At 11.

<sup>199</sup> Ross, above n 186, at 1118.

When addressing long-term, complex policy issues such as child poverty, it is integral that provisions are sufficient to ensure the targets are durable. In my view, the measures set out in the Child Poverty Reduction Bill will not operate as sufficient safeguards against alteration by future governments with a view to diminishing their importance or progressiveness.<sup>200</sup> It is unlikely that members of the public would take notice of an announcement in the Gazette or a change in internet publication. Future governments will be left with an objectionable ability to change the targets as they see fit, which contradicts the objective to enact long-term, stable policy.

Similarly, the substantive objectives and targets produced under the Public Finance Act and Climate Change Response Act are arguably not durable enough to remedy long-term policy issues. The duty imposed on the government to produce fiscal policy objectives is drafted to “encourage” consistency in monetary policy over time and require the government to think about long-term implications.<sup>201</sup> It is not designed to outlast the incumbent government and ensure continuity in policy application. Rather, successive governments are free to redefine objectives in the annual fiscal strategy report so long as they explain their reasons for doing so.<sup>202</sup> Additionally, the Climate Change Response Act includes few restrictions on the government’s ability to set, amend or repeal targets. They may be arbitrarily changed by notification in the Gazette after consultation with those who, in the view of the Minister or chief executive, will have an interest in the target.<sup>203</sup> The Minister retains a broad discretion in determining when to amend or set targets, leaving the matter largely subject to the preferences of the government of the day.

The Child Poverty Reduction Bill should be strengthened to include more stringent procedural requirements. It is on this matter that the RMA provides useful guidance. Parliament should impose positive obligations on a government that seeks to amend targets, in order to create a more comprehensive and public process. Public and iwi consultation requirements, modelled on those that exist in the RMA, would substantially strengthen the Bill.<sup>204</sup> Mandatory notification to the public and a minimum waiting period for submissions on proposed changes could be beneficial. These could be accompanied by a requirement that the government take time to review opposing views. Alternatively, the Bill could impose a duty on the government to undertake research and collate expert opinion regarding whether proposed changes represent the best practice, or compel a process that mirrors the Boards of Inquiry provided for under the

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<sup>200</sup> While the Social Services and Community Committee report recommends additional reporting requirements to those proposed in the first version of the Bill, I still do not think these provide sufficient safeguards. Provisions should be included that will limit a government’s ability to amend or revise targets, in addition to the transparency provisions provided for.

<sup>201</sup> John Whitehead *A Guide to the Public Finance Act* (The Treasury, August 2005) at 36.

<sup>202</sup> Public Finance Act 1989, ss 26J–26K.

<sup>203</sup> Climate Change Response Act, s 224.

<sup>204</sup> Resource Management Act 1991, s 46A.

RMA.<sup>205</sup> This requirement would ensure the targets continued to favour the interests of vulnerable children.

The specific and hierarchical system of governance that exists under the RMA means that it does not model transparency provisions which would be sufficient in the context of child poverty. The reporting requirements proposed in the Child Poverty Reduction Bill are imperative and should be retained. Clause 36 requires that an annual report measuring child poverty will be produced to Parliament, which will allow it to function as a check on the executive's compliance and progress towards their targets. The transparency this ensures will also enable the public and media to hold the government to account.

The only way to avoid complying with the procedural requirements contained in the Bill would be to amend the child poverty statute itself, thus subjecting the government to the same political accountability devices as targets would if they were substantively included in legislation. In this way, if the statute contained sufficient procedural safeguards it would ensure adherence to best practice and consistency in application, while retaining flexibility in the development of targets and removing the risk that unenforceable, substantive obligations could undermine the role of legislation.<sup>206</sup>

Additionally, by legislating procedural duties the government will enhance the status of the child poverty problem and their resultant strategy in the public eye. It conveys a clear indication to the public and state services that they have afforded priority to the issue. The public legislative process provides an educational factor; heightening awareness of the problem. This increased consciousness assists in ensuring that a failure to comply with the procedural requirements and produce proper targets would attract attention and, hopefully, criticism. As a result, not only would the procedural nature of this legislation provide a judicial opportunity to hold the relevant actors to account in court, but the effectiveness of political accountability may escalate.

## *VI Conclusion*

In this paper I have considered the use of legislation to enshrine policy targets into law and the best way to implement robust and lasting child poverty reduction targets. The practice responds to a need to create long-term, durable policy to resolve persistent and wide-reaching issues of public concern. I determined that the practice of legislating policy targets is compatible with the role of legislation in New Zealand's contemporary political constitution. However, that is not to say it is the best way to achieve long-term commitments to complex policy goals. Concerns identified in Part III regarding their enforceability, efficacy, necessity and compliance with constitutional principles suggested that legislation may not be the best option.

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<sup>205</sup> Section 47.

<sup>206</sup> Ross, above n 186, at 1119.

Due to these concerns, in Part IV I assessed whether it is possible to develop long-term policy purely in the political realm. I concluded that some element of law is integral to achieving durable obligations. While the better public services targets achieved some success in addressing deep-rooted issues challenging society, they failed to outlast the incumbent government. The new Labour Government abolished them with little public backlash. National standards comparable to those that exist under the RMA framework pose a viable alternative. These regulations are not legislated but are mandated and governed according to statute. While the particular context of environmental law that has been created by the RMA means that alterations would be required to ensure they are durable and effective in different contexts, the general approach is useful. It reflects the form of policy targets that have been legislated regarding fiscal policy and climate change in New Zealand, with the addition of procedural restrictions that these legislated policy targets lacked.

Ultimately, the shortcomings that I outlined in Part III should be taken into account while recognizing that it may not be possible to address long-term policy issues solely in the political realm. To some extent, the force of law is essential to achieving the desired strength and cultural shift that is necessary to accomplish change. However, concerns regarding enforceability and constitutional principles mean that the substantive targets themselves should not be legislated. Legislated policy targets will be the best way to address complex policy challenges such as child poverty so long as an appropriate balance is achieved.

The Child Poverty Reduction Bill is well-drafted in the way that it sets out procedural requirements for the establishment and review of policy targets. As the current Bill proposes, substantive targets should be excluded from the statute but governed by the obligations which are subject to the force of law. This approach remedies concerns as to their durability and enforceability, with the targets themselves protected by legislated duties. These duties are subject to judicial review and parliamentary amendment procedures. However, the procedural requirements set out in the Bill should be strengthened to ensure the targets are effective and durable. Restrictions on the Minister's ability to revise or dispose of targets should exceed those currently proposed, perhaps in a way that emulates the measures provided in the RMA. Regular review requirements should be maintained to ensure transparency regarding compliance with the targets. Based on this formulation, future governments would still be able to amend the legislation if it became apparent at a later date that the chosen targets were inappropriate. However, the more stringent restrictions would ensure such changes would only be made where they reflect the best interests of the vulnerable children they seek to protect.

The question that I sought to answer in this paper was whether enacting policy targets into law is the best way to address complex, inter-generational policy challenges. It appears that the answer depends on how, and to what extent, they are legislated. An analysis of our expectations as to the role legislation in New Zealand and the practical realities of doing so demonstrates

that the substantive targets should not be included in legislation, as has been done in the United Kingdom and is being proposed in New Zealand's Zero Carbon Bill. Rather, the approach taken previously to legislate policy targets in New Zealand should be continued, with inspiration drawn from the RMA to ensure compliance and durability. Legislation should be confined to imposing a duty to set substantive policy targets and procedural requirements to protect their sustainability, as the Child Poverty Reduction Bill purports to do. Not only is this approach suitable, but it will provide beneficial safeguards which ensure targets that seek to achieve goals of national importance are complied with and enforced.

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