Briefing Paper

2024-063

Ministry for Regulation

To	**Hon David Seymour, Minister for Regulation**		
Title	**Further advice on a preferred option for a Regulatory Standards Bill**	Number	**2024-063**
Date	**5 July 2024**	Priority:	**Medium**
Action Sought	**Agree to the recommended actions**	Due Date	**12 July 2024**
Contact Person	**Pip van der Scheer, Manager**	Phone	9(2)(a)
Contact Person	**Elisa Eckford, Principal Advisor**	Phone	9(2)(a)
Attachments	**Yes (Annexes 1-3)**	Security Level	**IN CONFIDENCE**

Executive summary

1. This briefing provides you with further advice following your discussion with officials on 20 June on a preferred option to take forward a Regulatory Standards Bill (2024-038 refers).

2. It proposes an approach that would make greater provision for principles in primary legislation, largely based on the Queensland Legislative Standards Act 1992 and the Legislation Guidelines administered by the Legislation Design Advisory Committee (LDAC) and adopted by Cabinet, in which the Bill would:

   - set out broad principles (as previously proposed), establishing them as fundamental legislative principles, or something similar, for the purposes of the Bill
   - set out more detailed considerations as examples of things to be applied when assessing the consistency of legislation with the principles
   - provide the ability for further considerations to be added via notices approved by the House
   - set out how these principles and considerations should be applied – for instance to clarify that these principles are provided to support Parliamentary scrutiny of legislation, have no interpretative effect, and do not affect the validity of any legislation.

3. In our view, this approach could achieve more certainty and durability than the proposal in the previous briefing, while 9(2)(h) maintaining consistency with the Legislation Guidelines on how best to provide for principles in primary legislation.

4. This briefing also proposes how the respective roles of the Minister for Regulation and the Attorney-General could be clarified in relation to the matters covered in the Bill – noting that there will likely be a degree of overlap between the Minister for Regulation's and the Attorney-General's roles in relation to any new powers and functions established in the Bill:

   - the Attorney-General and the Minister for Regulation could have joint responsibility for matters relating to setting regulatory responsibility standards, including what classes of legislation these standards should apply to, and what assessments of consistency against those standards should include (noting that we are proposing this be done with the assent of the House, similar to current Part 4 of the Legislation Act)

- the Minister for Regulation could have responsibility for setting more detailed expectations in relation to the processes Ministers and agencies should follow to assess, report on, and improve the consistency of legislation they put forward or administer
- the Minister for Regulation could be responsible for the establishment and operation of a recourse mechanism for complaints about inconsistent regulation
- the Minister for Regulation could have responsibility for regulatory oversight – e.g. monitoring and assessing performance in relation to consistency with the principles across the public sector.

5. The briefing also provides additional details on a proposed option to establish a board of experts (a 'Regulatory Standards Board'), appointed by the Minister for Regulation, as an alternative recourse mechanism to the courts.

6. We have attached a pack of draft sides intended to support consultation with your Ministerial colleagues, for your review – noting that these slides are currently drafted on the basis on the proposed approach set out above. These slides also include material on the proposals to streamline and strengthen the regulatory policy making process, as discussed at our meeting with you on 25 June (2024-047 refers).

7. Once you provide us with your feedback in relation to the advice above, we can reflect any changes you would like us to make to the slides.

Recommended action

8. We recommend that you:

a **note** the attached advice from LDAC in relation to the principles as provided for in the 2021 Regulatory Responsibility Bill — *Noted*

b **agree** to proceed to Ministerial consultation on the basis of the proposed approach set out in this briefing to:

i. make greater provision for regulatory responsibility principles in primary legislation — *Agree / Disagree*

ii. clarify the respective responsibilities of the Minister for Regulation and the Attorney-General in relation to statutory powers and functions in the Bill — *Agree / Disagree*

iii. establish a statutory Regulatory Standards Board to consider complaints about legislation that is inconsistent with regulatory responsibility principles — *Agree / Disagree*

c	**note** that we will provide you with revised slides for Ministerial consultation, reflecting your feedback on the proposals in this paper	*Noted*
d	**note** that, if you wish to proceed on the basis of the proposals above, we:	
	i. would commission further advice from Crown Law and LDAC on the proposed approach to the principles and considerations	*Noted*
	ii. would recommend that you seek agreement from the Attorney-General for PCO to begin to draft matters relating to the wording of the principles, considerations and effect of the principles, in advance of Cabinet policy decisions	*Noted*
	iii. would provide the table setting out the respective responsibilities for the Minister for Regulation and the Attorney-General (Table 2 below) as a separate slide for a discussion with the Attorney-General.	*Noted*
e	**agree** that this briefing will not be made public until proactive release of the final Cabinet paper, to ensure that you have sufficient time to consider and make decisions on the Bill.	*Agree / Disagree*

9(2)(a) [redacted]

Pip van der Scheer
Manager
Ministry for Regulation
Date: 5 July 2024

Hon David Seymour
Minister for Regulation
Date:

Purpose of report

9. This briefing:

- provides you with further advice following your discussion with officials on 20 June of a preferred option to take forward a Regulatory Standards Bill (2024-038 refers)
- attaches for your review a pack of draft slides, to support consultation with your ministerial colleagues.

Context

10. At your meeting with officials on 20 June, you indicated your preference for an approach to a Regulatory Standards Bill that included:

- setting standards via a few high-level principles in primary legislation, with the power for Ministers to issue secondary legislation (notices) setting out more detailed standards
- giving practical effect to the current good law-making principles by creating some statutory powers to set expectations around good regulatory practices via issuing instructions to departments
- requiring both Ministers and agencies to provide assurance of consistency of new legislative proposals with standards and Ministers to provide justifications for any inconsistency
- setting requirements for Ministers and agencies to publish a plan for reviewing their existing legislation for consistency and reporting against that plan
- providing some broader requirements and powers to enable the Ministry to play a strong oversight role, including reporting regularly to Parliament on overall performance against the standards.

11. However, you asked officials to consider how more provision could be made for the principles in primary legislation. You also sought more clarity about the respective roles of the Attorney-General and the Minister for Regulation in relation to the powers that we are proposing the Bill provides.

12. In addition, you indicated that you wanted officials to do further work on a Ministerially appointed board as an alternative recourse mechanism to the courts.

13. 9(2)(h) [redacted] The LDAC advice expressed support for work to improve the quality of legislation, but cautioned that principles in primary legislation need to be carefully drafted to avoid the creation of significant legal risks and costs to the Crown, and to meet best practice standards of legislative design. This includes avoiding setting strict legal tests in primary legislation, or treating rebuttable interpretive presumptions as settled legal rules – which, in LDAC's view, the 2021 Bill does.

14. LDAC's initial advice on the principles is attached as **Annex 1**, for your information. It should be noted that this advice was given at a preliminary stage of policy development (based on the provisions of the 2021 Bill) and is a high-level summary of LDAC's initial advice. We will continue to engage with LDAC as the policy and Bill progress.

Greater provision for principles in primary legislation

15. The Legislation Guidelines state that principles in primary legislation "should be used with care and not as enforceable substantive rights or duties."[1] The Guidelines set out some specific considerations that should be made when considering the use of statutory principles, including that they should be formulated in a way that:

- supports and enables decision-making in line with the policy of the legislation
- guides and limits the exercise of powers and duties under the legislation
- avoids imposing unquantifiable statutory obligations, exposing the Crown or other people to unjustified judicial review risk in respect of the exercise of discretion, or creating a risk of liability for negligence.

16. To help ensure the proposal is consistent with the Guidelines, we propose making more provision for the principles in primary legislation via an approach based on the Queensland Legislative Standards Act 1992, in which the Bill would:

- set out broad principles (as previously proposed) establishing them as fundamental legislative principles, or something similar, for the purposes of the Bill
- set out more detailed considerations as examples of things to be applied when assessing the consistency of legislation with the principles
- provide for the ability for further considerations to be added via notices approved by the House
- set out how the principles and considerations should be applied – for instance to clarify that these principles are provided to support Parliamentary scrutiny of legislation, have no interpretative effect, and do not affect the validity of any legislation.

17. 9(2)(h) [redacted]

18. The table below sets out an example of how this could work in practice, and **Annex 2** maps this proposed approach against the principles in the 2021 Bill.

19. In our view, this approach could achieve more certainty and durability than the proposal in our previous briefing, by establishing in primary legislation both fundamental principles of legislative quality, as well as more detailed considerations that should be made when assessing the consistency of legislation with these principles. 9(2)(h) [redacted]

[1] Legislation Guidelines (2021 edition). The Guidelines are administered by LDAC and adopted by Cabinet.

20. We note that, if you support this approach, more work will be required on the wording of the principles, and the selection and wording of the considerations, to ensure that they will support improvements in quality, 9(2)(h) [redacted] Some of this work will need to be done prior to Cabinet policy decisions, but we will need to leave space during the drafting process to ensure that the provisions all fit together coherently. We therefore think it would be desirable if PCO was able to begin to formally work with us to develop the drafting of these key components prior to Cabinet policy decisions, which would require the agreement of the Attorney-General.

Table 1: Example of proposed provision for principles in primary legislation

High level principle to be given sufficient regard	Examples of considerations to be applied when assessing consistency	How principles should be applied
9(2)(h) [redacted]		

[2] 9(2)(h) [redacted]

9(2)(h)

21. If you wish to proceed on the basis of this approach, we:

- would commission further Crown Law advice on any legal risks or issues with this approach and how these could be mitigated
- would seek further LDAC guidance in relation to consistency of this approach with best practice legislative design
- recommend that you seek agreement from the Attorney-General for PCO to begin to draft the matters covered by the table above (wording of the principles, considerations and effect of the principles) in advance of Cabinet policy decisions. We could draft a letter to support you to do this.

22. This could be done in tandem with Ministerial consultation.

Clarity about roles of Minister for Regulation and Attorney-General

23. Given the Attorney-General's role as the senior Law Officer of the Crown, their role in relation to BORA[3], and their responsibilities in relation to the quality of legislation,[4] there will be a degree of overlap between the Minister for Regulation's and the Attorney-General's roles in relation to any new powers and functions established in the Bill.

24. At times this may require these Ministers to act jointly. For instance, Part 4 of the Legislation Act 2019 provides that both the Attorney-General and the Minister responsible for administering Part 4 of the Act (which would likely be the Minister for Regulation) would be responsible for issuing secondary legislation setting out what disclosure statements under that Part should contain (through notices which would need to be affirmed by the House). However, there will also be areas where it is appropriate (and more efficient) for the Minister for Regulation to have sole responsibility.

25. We therefore propose clarifying these Ministers' respective roles in relation to the Bill along the following lines:

[3] Noting that the Attorney-General has responsibility to report on inconsistency with the BORA – and that principles in 2021 Bill have some overlap with those principles.
[4] For instance, through the Attorney General's responsibilities in relation to the functions of PCO as set out under the Legislation Act 2019, which have the purpose of promoting high-quality legislation for New Zealand that is easy to find, use, and understand.

- the Attorney-General and the Minister for Regulation would have joint responsibility for matters relating to setting regulatory responsibility standards, including what classes of legislation these standards should apply to, and what assessments of consistency against those standards should include (noting that we are proposing this be done with the assent of the House, similar to current Part 4 of the Legislation Act)
- the Minister for Regulation would have responsibility for setting more detailed expectations in relation to the processes Ministers and agencies should follow to assess, report on and improve the consistency of legislation they put forward or administer
- the Minister for Regulation would be responsible for the establishment and operation of a recourse mechanism for complaints about inconsistent regulation
- the Minister for Regulation would have responsibility for matters relating to the monitoring and assessment of overall agency performance for consistency with the principles across the public sector (regulatory oversight).

26. The table below sets out how this approach would translate into the proposed powers and functions in the Bill.

Table 2: Proposed powers and functions and related responsibilities

Area	Statutory power or function	Responsibility
Regulatory responsibility standards	Propose any other considerations to be taken into account when assessing consistency of legislation.	Minister for Regulation and the Attorney-General jointly (approved by a resolution of the House).
Application of standards to new legislative proposals	Specify in relation to agency/Ministerial reporting on consistency to the House: • what information this reporting must include • requirements to support the quality of this reporting (e.g. expert input or quality assurance requirements) • what classes of secondary legislation must be reported on.	Minister for Regulation and the Attorney-General jointly (approved by a resolution of the House).
	Issue directions relating to the format and publication of the reporting above.	Minister for Regulation
Application of standards to existing legislation	Issue whole-of-government directions in relation to how Ministers/agencies report on their plans to review their stock of legislation against the principles, along with the outcomes of reviews.	Minister for Regulation

Application of standards to policy proposals	Issue instructions relating to processes and expectations about how the principles apply to the development of regulatory policy proposals e.g. requirements for regulatory impact analysis aimed at supporting consistency of resulting legislation with the principles.	Minister for Regulation
Recourse mechanism (if a statutory basis is preferred)	Exercise/undertake any powers and functions relating to the establishment of a recourse mechanism in the Executive (e.g. appointing members to a board)	Minister for Regulation
Regulatory oversight	Require provision of information from agencies to support Ministry for Regulation reporting to Parliament on overall performance against the principles (similar to an audit function).	Minister/Ministry for Regulation
Regulatory reviews	Exercise/undertake any powers/functions required to support the conduct and effectiveness of regulatory reviews e.g. in relation to how information is supplied.	Minister/Ministry for Regulation
Other Ministry functions	Exercise/undertake any powers/functions required to support any other Ministry functions.	Minister/Ministry for Regulation

27. If you decide to proceed on the basis of this approach, we can provide this table as a separate slide for a discussion with the Attorney-General.

Further details on a proposed Ministerially appointed board of independent experts

28. We previously advised you on a range of options for a recourse mechanism for the public to raise complaints about legislation that does not meet the regulatory principles set in the Bill. These options were based on the following set of assumptions:

- Complaints can only be related to existing legislation – as there are existing mechanisms in relation to the development of new legislation (e.g. consultation requirements, select committee processes).
- Where a complaint is about a particular decision (rather than the legislation the decision was made under) this must go to the appropriate dispute resolution forum e.g. complaints about benefit decisions should go through the bespoke Work and Income process.
- Complaints cannot be vexatious or trivial – to ensure that resource is focused on complaints that have the most significance, the recourse mechanism must have discretion about whether complaints should be heard.

- The complaints mechanism must be cost effective.
- Individuals must be directly impacted by the legislation to raise a complaint – though we do consider representative groups should have the ability to raise complaints on behalf of members in some instances.
- Complaints result in a non-binding finding – the recourse mechanism issues a finding, rather than a binding remedy (e.g. compensation or a requirement for changes to be made to legislation). As well as being provided to the complainant, we recommend these findings are made publicly available. They could also be referred to you as Minister for Regulation (as well as relevant Ministers/agencies).

29. Since then, officials have been progressing work on an option to establish an independent board of experts (a 'Regulatory Standards Board'), appointed by the Minister for Regulation, as an alternative recourse mechanism to the courts. There is a potential structural model for this in the United Kingdom's Regulatory Policy Committee, which is a group of independent experts, with experience in business, law and economics, appointed by the Minister (noting however that the Committee is focused on quality assurance of regulatory impact analysis). As previously discussed with you, key considerations for the design of a Board include:

- having a range of expertise to inform findings, including economic and public policy
- enabling flexibility in the matters considered and how they are considered
- alignment with existing dispute resolution processes (which consider individual decisions) and with the Ministry's other functions (e.g. regulatory reviews and issues raised to the regulatory response team)
- cost-effective design and operation, including scalability, given uncertainty about the potential volume of complaints.

30. The objectives, structure and functions of a Board could either be established in the Bill, or set in a terms of reference (i.e. with no statutory basis). Giving a Board a statutory basis would likely give it more profile and durability and is likely a better fit with their role in issuing formal findings, compared to an advisory role. However, it would also make it less flexible – for example, setting objectives and functions in legislation means that it would be more difficult for a Board to be refocused on new areas as priorities change. However, on balance, we think a statutory board is most likely to be consistent with your objectives.

31. Under a statutory board model, individuals are generally appointed by the responsible Minister (sometimes in consultation with other Ministers) and are supported in delivering their functions by the relevant government agency. Examples of existing statutory boards include:

- the Standards Approval Board, appointed by the Minister for Commerce and Consumer Affairs, and set up under the Standards and Accreditation Act 2015. The Board is made up of seven industry experts and supports Standards New Zealand in its development process, providing independent decision making and checks and balances. The Board

makes appointments to standards development committees[5], ensures due process has been followed in the development or revision of standards and approves the publication of new or revised standards.

- The New Zealand Geographic Board established under the New Zealand Geographic Board (Ngā Pou Taunaha o Aotearoa) Act 2008. The Board is chaired by the Surveyor-General (a statutory officer within Land Information New Zealand), has nine external members, and makes proposals to the Minister for Land Information about naming places and features in New Zealand
- The Building Practitioners Board, which is a statutory body with seven members constituted under Part 4 of the Building Act 2004 to oversee the Licensed Building Practitioners Scheme. The functions of the Board are to hear appeals against licensing decisions of the Registrar of Licensed Building Practitioners (LBPs), investigate and hear complaints about LBPs, and approve rules for LBPs (which have the status of secondary legislation).

32. We think it will be important that Board processes are seen to be transparent and independent and that the Board is structured to act independently from Ministers. This will help gain and maintain public confidence in the Board's findings.

33. We consulted with Te Kawa Mataaho - Public Service Commission (PSC) on a draft of this briefing. PSC noted that there should be a clear rationale for establishment of any additional body, particularly in statute, and highlighted that further work should consider what the functions of such a body would be and whether it would support or cut across Ministers' and agencies' accountability to Parliament for the quality of legislation. We propose to continue to work with PSC in relation to these considerations.

34. In addition to establishing a Board, the Bill could include a statutory requirement for responsible agencies or Ministers to respond to any Board findings on inconsistency, similar to requirements being considered in relation to regulatory reviews (2024-060 refers). However, ensuring that reports are made public may provide a sufficient incentive for agencies/Ministers to respond without such a requirement.

35. It is difficult to assess the likely cost of a statutory board (including both the cost of the Board's operation and servicing costs for the Ministry for Regulation) in advance of detailed design work. However, some indicative figures from 2023/24 for other models range from $0.157m for the Standards Approval Board to $0.783m for the New Zealand Geographic Board, and an estimated $1.2m for the Builders Practitioners Board.[6]

Next steps

36. We have attached a pack of draft slides intended to support your consultation with your Ministerial colleagues, for your review – noting that these slides are currently drafted on the basis of the proposed approach set out above (see **Annex 3**). These slides include material

[5] The standards development committees are convened for the development of a specific standard and made up of a range of interests of the field in question. The Standards Approval Board ensure the committee has a balanced mix of skills, knowledge, experience and sector representation.
[6] These costs include board fees, board expenses (flights, accommodation etc) and secretariat costs.

on the proposals to streamline and strengthen the regulatory policy making process, as discussed at our meeting with you on 25 June (2024-047 refers).

37. Once you provide your feedback in relation to the advice above, we can reflect any resulting changes in the slides.

38. In addition, if you wish to proceed with the approach outlined above, we:

- would commission further advice from Crown Law and LDAC on the proposed approach to the principles and considerations
- would recommend that you seek agreement from the Attorney-General for PCO to begin to draft matters relating to the wording of the principles, considerations and effect of the principles in advance of Cabinet policy decisions. We can draft a letter to support this
- will provide the table setting out the respective responsibilities for the Minister for Regulation and the Attorney-General (Table 2 above) as a separate slide for a discussion with the Attorney-General.

18 March 2024

Jonathan Ayto
Principal Policy Advisor
Regulatory Strategy Team, The Treasury

Via email: jonathan.ayto@treasury.govt.nz

Tēnā koe Jonathan,

Regulatory Standards Bill

1. Thank you for meeting with the Legislation Design and Advisory Committee (LDAC) to discuss the Regulatory Standards Bill (the Bill).
2. This letter of advice responds to the matters set out in your memorandum dated 28 February 2024, and the matters discussed at the meeting on 8 March 2024. The advice is preliminary, given that Cabinet has yet to make detailed policy decisions on legislation matters relating to the Bill, including the role of the courts, alternatives, the scope, and wording of the principles. We look forward to further engagement with officials as the Bill continues to develop, particularly once detailed policy decisions are made.
3. We ask that you consult with us before referring to the advice, or a summary of it, in any briefings to the Minister or subsequent Cabinet papers.
4. The starting point for LDAC's advice is that we support any work by officials and the Minister to improve the quality of legislation. There is much that can and should be done to improve quality. LDAC has advocated for this since its establishment. However, the regulatory management system is complex, and while there are opportunities, there are no silver bullets. We should, therefore, focus on changing incentives of participants in the system; designing new interventions to improve quality, potentially including legislation; and ensuring that the existing interventions are optimal to support quality.
5. We have framed our advice as follows:
    - **Part A – Major Constitutional Change Envisaged –** The Bill envisages significant constitutional changes which need to be fully recognised by officials and Ministers.
    - **Part B – Alternatives should be considered –** An alternative – and in our view preferable - approach to achieving the objective is to reinforce the current role of parliament by:
        - making changes to parliamentary and executive expectations and processes; and
        - if considered necessary, to make legislation based on a version of Part 4 of the Legislation Act (including the use of secondary legislation).

- **Part C – Advice if legislation is to be developed using the approach of the draft bill –** If legislation is developed using the approach in the draft Bill:
    - the concept of justifiable limitations and consistent interpretation borrowed from New Zealand Bill of Rights Act 1990 (NZBORA) is not the right framing for this context; and
    - the wording of the principles is problematic. Among those identified with previous iterations of the Bill, a key issue is that they would treat rebuttable interpretive presumptions as settled legal rules.

PART A – THE BILL ENVISAGES SIGNIFICANT CONSTITUTIONAL CHANGE

6. The stated purpose of the Bill is to improve the quality of regulation (which includes primary and secondary legislation). It seeks to do that by:
    - creating stronger incentives on the executive to act consistently with legislated principles when designing regulation by setting out principles in primary legislation and requiring certification about compatibility with those principles; and
    - creating new roles for the courts to: (i) monitor certifications; (ii) make declarations of inconsistency; and (iii) drive interpretations consistent with the principles to all other laws.
7. All those changes have significant constitutional implications.
8. New Zealand's constitutional framework is based on parliamentary sovereignty. This means that the legislature is supreme over the other branches of government: the executive; and the courts.
9. An important corollary of parliamentary sovereignty is that policy and value judgements inherent in balancing competing rights, interests and values made by parliament rather than the courts or the executive.
10. In practice, however, New Zealand has tended to have a strong executive, which dominates parliament and, as a result, often treats parliament as part of the government's process for making laws. The executive's largely free hand in regulation carries with it risks of poor quality regulation with relatively limited parliamentary scrutiny.
11. In some cases, regulatory quality depends heavily on the specific minister responsible for it. Executive processes are not necessarily sufficiently robust to provide an effective check and balance where a minister and their officials give regulatory quality less attention.
12. There are a range of reasons why our executive is relatively powerful in relation to regulation – a unicameral parliament, partially written constitution, relatively small parliament, strong party discipline, a select committee system that generally works well if not skipped or truncated, short parliamentary terms, and capability/ resourcing imbalances between the executive and the opposition.
13. The proposed Bill would make a significant change to these constitutional arrangements by giving the courts a new role in scrutinising the content of legislation. The courts currently have a limited role, including under NZBORA, when legislation impacts on fundamental individual rights. The Bill would expand the Courts' role to scrutinising the content of all legislation against principles in the Bill. That marks a significant change to New Zealand's constitutional arrangements.

14. Even if a Regulatory Standards Bill did not give the courts an express role, it would mark a significant change in New Zealand's constitutional arrangements because it would be a legislative pronouncement of the principles that should be followed when making regulation. A number of implications arise from this:

    - If enacted, the Bill would be an attempt by the current parliament to pass legislative constraints on how future parliaments legislate. On orthodox constitutional theory, that is not possible – the current majority cannot bind a future majority;
    - Putting that point to one side, even without an explicit role for the court, it is likely that the courts would have reference to the principles over time (an addition to current judicial interpretation practice) and develop the law based on what is essentially a statement of constitutional principle. A direct parallel here is the courts' creation of remedies for breaches of NZBORA, including damages, and the declaration of inconsistency. Similar remedial development by the courts, perhaps in unexpected ways, seem likely over time; and
    - It is worth noting that when NZBORA was passed 34 years ago, decisions like the Supreme Court's decision on the three strikes legislation, or on claims for damages for breaches of rights, and declarations of inconsistency were not foreseeable. Similar unpredictable and likely irreversible developments can be expected under the Bill as currently designed.

PART B – ALTERNATIVE APPROACH TO ACHIEVING OBJECTIVE IS TO REINFORCE CURRENT ROLE OF PARLIAMENT

Make changes to Parliamentary and Executive expectations and processes

15. LDAC suggests, as an alternative, addressing the regulatory quality problems the Bill seeks to remedy through measures to strengthen parliament's ability to act as a supreme parliament. This includes improving executive expectations and processes.

16. The objective would be to enable parliament to treat the executive as the main source of legislative proposals for it to consider, rather than the executive treating parliament as the stamp of approval for government policy. And to do this without precipitating a step change in the role of the courts.

17. To achieve this objective, LDAC recommends focusing on interventions that:

    - support greater scrutiny of laws by parliament and the ability for parliament to act independently of the executive (this could include a legislative scrutiny committee or an Officer of Parliament, potentially changes to the makeup of select committees and disincentivising urgency (e.g. automatic ex post reviews), and developing the scrutiny role that parliament used for Covid legislation;
    - support better public scrutiny of laws (e.g., on exposure drafts or through the public submission process at select committees);

- improve executive processes that drive the quality of legislative proposals before they get to parliament, including improving, rationalising, and supplementing legislative quality (i.e. RIA, Cabinet, legislation programme, and consultation); and
- improve the visibility to parliament of legislative quality matters arising out of government legislative proposals, including legislative disclosure statements, ministerial statements to select committee and general policy statements, and (if retained) availability of RIA.

18. There is still balance here – we would not intend to make parliament more supreme. Our constitutional makeup is based on His Majesty's Government driving the legislative agenda, ministers being accountable to parliament and votes being made along party lines. In addition, courts interpret legislation, support decision quality through administrative law, and are responsible for the development of the common law.

19. Most of all, we recommend engaging with parliament on a formal and informal basis on what would make parliament a stronger scrutineer of legislative quality. This stronger scrutiny would also create stronger incentives for improved regulatory quality within the executive.

An alternative approach to the proposed Bill - base the Bill on Part 4 of the Legislation Act (including the use of secondary legislation)

20. LDAC's advice is that most of the changes that would support parliament's role in supporting improved regulatory quality are mostly non-legislative (given effect through Standing Orders and other House procedures). This is also true of changes that would support better regulatory processes and outcomes within the executive (e.g. given effect through the Cabinet Manual and other cabinet mandated requirements, potentially overseen more closely by the Ministry of Regulation working in conjunction with LDAC and the Cabinet Office, among others).

21. A potential role for legislation remains. This is at the interface between the executive and parliament. Legislation like this would have parliament effectively setting its expectations of the executive. While relatively rare, it is used in this kind of situation, for example in setting requirements for responsible fiscal management in the Public Finance Act 1989 or requiring child poverty reporting under the Child Poverty Reduction Act 2018.

22. As you are aware, parliament has already enacted a scheme to set expectations of disclosure to it on regulatory quality. This is in Part 4 of the Legislation Act 2019, which is due to come into force in March 2026 or earlier by Order in Council.

23. In our view, Part 4 is a good starting point for an alternative legislative design for the Bill and would likely be more consistent with the Legislation Guidelines and many of the quality principles outlined in the draft Bill on which you are advising. The statutory purpose of Part 4 is:

    - to better inform parliamentary and public scrutiny of government-initiated legislation; and
    - to promote good administrative practices for the development of such legislation.

24. This aligns well with the analysis of the regulatory quality issues the Bill seeks to address and the objective outlined above.

25. Further, the Part 4 disclosure regime has some clear advantages over the Bill in how it gives effect to principles of good regulation:

- Instead of setting these in the Act, the Bill provides for legislative guidelines and standards to be set in secondary legislation, and for parliament to be involved in setting them. This provides for flexibility for the principles to evolve over time (and likely result in coalescence on common principles by different governments); and
- It also provides for how consistency with the guidelines and standards is addressed being set in secondary legislation. This allows these to be refined over time, and for ministerial directions to support a consistent approach across agencies.

26. The use of secondary legislation and directions should mean that the standards and guidelines in Part 4 are clearly part of a discourse between parliament and the executive, which does not involve the courts. This approach significantly reduces (but does not entirely remove) the risk of the courts elevating those principles into hard law. It is more similar to the approach adopted for the principles of responsible fiscal management in s 26G of the Public Finance Act 1989.
27. LDAC is not saying that commencing Part 4 is sufficient, or that Part 4 cannot be improved on. We recommend instead that you use the model that Parliament has already adopted as a starting point around which to build an alternative legislative design for the Bill.
28. Under this model, it is possible that the current principles in the Bill could be dropped into secondary legislation (modified as necessary), safe in the knowledge that they can be adjusted and evolve over time to continue to improve regulatory quality with parliamentary, rather than court, oversight.

PART C – ADVICE IF LEGISLATION IS TO BE DEVELOPED USING THE APPROACH OF THE DRAFT BILL

29. This section contains advice if the alternative outlined above is not accepted, and the approach in the draft Bill is adopted instead. Further comments are set out in Schedules 1 to 3. Please note that the comments in schedules 1 and 2 are preliminary and cover some of the same ground as advice from the Law Commission and others on previous iterations of the Bill.

NZBORA is not the right framing for this context

30. Chapter 3 of the LDAC guidelines provides that new legislation should fit into the existing body of law. Aspects of the Bill are modelled on NZBORA and assume that:
    - principles of good legislative design are analogous to the individual's rights and freedoms contained in NZBORA; and
    - the NZBORA model of justifiable limitations and interpretative presumptions can be applied to legislative design principles.
31. LDAC's view is that the analogy with the rights and freedoms in NZBORA is not a good one. It does not provide an appropriate model for advancing improved regulatory quality (including design). We set out in Schedule 1 some differences between the two and the risks of adopting a NZBORA model.
32. The "demonstrably justified in a free and democratic society" test from NZBORA, which is applied by the courts in relation to fundamental human rights and freedoms, is inappropriate in this

context. In the legislative design context there are trade-offs to be made between many of these principles, many of which are contestable at least to some degree. Deciding on these trade-offs, priorities and value is one of the main functions of the political process in a free and democratic society, not a legal question for the courts.

The principles in the Bill are problematic

33. Schedule 2 highlights some of the main issues with specific principles in the Bill. Given the timeframes for preparing this advice, we have mainly focussed on collating advice that has been given previously by the PCO, by the Law Commission, and by various commentators in the *Policy Quarterly*[1] that examined a previous version of the Bill. We are happy to work through these key points with you as policy decisions are made.

34. If the Bill were to proceed with some or all the principles, a lot more analysis is required. This includes, seeking further advice from:

    - Crown Law on legal risks; and
    - PCO on drafting of the Bill.

35. In addition, the principles need to be tested against some worked examples (e.g., how would the taking of property principle interact with the Government's proposed resource management and infrastructure reforms and the Bill itself in the form to be presented to ministers for their consideration).

36. At a general level, some the key points are as follows:

    - some of the principles treat what are at common law rebuttable interpretive presumptions as settled legal rules. The Bill treats these common law principles as less fluid and flexible than they tend to be in reality (and does not acknowledge that the modern approach to statutory interpretation is purposive);[2]
    - many of the principles are in tension with each other. How the tensions should be reconciled is unclear, and the "reasonable and demonstrably justified" test is not helpful in what inevitably will be political decision-making with a level of uncertainty;
    - some of the principles do not require articulation in the Bill because they are covered by existing legislation (including NZBORA and the Constitution Act). In some cases, the approach to these matters in the Bill is inconsistent with existing legislation. This will create uncertainty;

---

[1] Policy Quarterly Volume 6 – Number 2 – May 2010, The Institute of Policy Studies, School of Government at Victoria University of Wellington, available at https://ojs.victoria.ac.nz/pq/issue/view/515

[2] The meaning of legislation must be ascertained from its text and in light of its purpose and its context: Legislation Act 2019, s 10(1). The courts have held that this is the proper starting point for questions of interpretation, rather than common law presumptions. For example, see, *Financial Markets Authority v ANZ Bank New Zealand Ltd* [2018] NZCA 590 at [40].

- a reader might be led to think that the principles contain a definitive statement of the requirements for good legislation. However, there are many gaps (eg, important values relating to the Treaty of Waitangi, obligations under international law, privacy, the delegation of legislative power, the enforcement of legislation, and so on). These gaps reduce the credibility of the proposal and will impair buy-in:
- the principles bear little resemblance to the principles stated to be fundamental common law principles in the LDAC Guidelines[3], which are the current benchmark in practice, on a day-to-day basis, for New Zealand legislation. This lack of congruence may imply that the principles as described in the Bill have not attained the status of "fundamental" or "well-established" principle in most cases;
- some of the principles are vague, open-ended, and inherently subjective. There is likely to be considerable debate about the precise meaning of the principles (especially given that they do not correspond with fundamental or well-established principles). There is also likely to be considerable uncertainty on behalf of departments, other public entities, the courts, and other users about how to apply the principles. This becomes particularly problematic where judicial interpretation is involved; and
- given that the principles do not correspond with fundamental or well-established principles, they are unlikely to be durable across successive governments and will not achieve "buy-in" across the legislative system. This is likely to compromise efforts to achieve meaningful, long-term improvements to the quality of legislation.

37. Schedule 3 captures some further helpful points from the relevant *Policy Quarterly* issue on the Bill and the Law Commission's 2007 advice on the Regulatory Responsibility Bill.

Certification and justification

38. The Bill sets the minister and the chief executive of the public entity as the people responsible for certifying compatibility of regulation with the principles. As noted above, the purpose of these interventions should be to improve the visibility to parliament of legislative quality matters arising out of government legislative proposals.

39. Our advice is to take care to allocate these roles and responsibilities to the person who is best placed and most appropriate to give the advice or make the relevant judgement. To be consistent with their respective roles, matters of justification should be for ministers (i.e. the reasons for departure from the principles), while identifying consistency or otherwise with the principles can be given to the relevant department.

40. In either case, there is potential for advice from relevant agencies, including the PCO, and other agencies such as the Ministry of Justice and the Ministry for Regulation.

41. In our view, the Bill is not aligned with this approach, because it requires the minister, and in some circumstances, the chief executive to justify the departures.

[3] Legislation Guidelines (2021 edition) Chapter 2.3

42. By contrast Part 4 of the Legislation Act — which provides for chief executives to approve disclosure statements — is likely to be consistent with their role because it provides for the statement to provide information rather than justification. In this context, an alternative to the current Bill based on Part 4 of the Legislation Act would be add a ministerial "comply or explain" approach, with departures explained by the responsible minister and consistency of otherwise signed off by the chief executive.

Next steps

Thank you again for meeting with LDAC. We appreciate you engaging throughout the policy process and encourage you to be in touch again once detailed policy decisions have been made.

Nāku iti noa nā,

9(2)(a)

Guy Beatson
Deputy Chair
Legislation Design and Advisory Committee

SCHEDULE 1 – PROBLEMS WITH THE NZBORA ANALOGY

43. This schedule contains preliminary comments about the NZBORA analogy used in the Bill. Please let us know if you would like us to develop these comments into formal advice.

***Problem**: The rights and freedoms affirmed in the NZBORA are (generally) not in tension with each other.*

44. The rights and freedoms affirmed in the NZBORA are (generally) not in tension with each other. By contrast, good legislative design involves trade-offs between competing principles. This "trade-off" concept is not adequately accommodated by the concept of incompatibility with the principles needing to be demonstrably justified in a free and democratic society. The justification test under NZBORA involves balancing limitations on individual rights against important social objectives being promoted by the legislation rather than balancing multiple trade-offs between competing principles. In addition, the tensions, priorities, and trade-offs between different design principles are often heavily value informed by political judgement. Asking whether any incompatibilities are justified in a free and democratic society is unhelpful in this context.

45. Principle (j) — *that legislation should produce benefits that outweigh the costs of the legislation to the public or persons* — provides a good illustration. This principle will often be in conflict with other principles, which using a NZBORA analysis will not help to resolve. For instance, the costs of the legislative regime may be increased by the nature and scope of appeal rights (principle (g)(I)), requirements for consultation (principle (h)), and paying compensation for any impairment of a property right (principle (c))). Similarly, the value of benefits will depend significantly on the value various part of the community put on the outcomes the regulation is seeking to deliver. In many cases, those benefits are also unquantifiable (that is, qualitative rather than quantitative).

46. Therefore, there are trade-offs to be made between these competing principles and there is no reasonably objective answer about whether a legislative proposal passes the principles. Instead, the answer involves evaluative judgement which must be informed by the priority that elected representatives (ministers and MPs) give to competing interests within the community. Whether the trade-offs are appropriate is a policy question rather than a legal one.

47. Resulting risks for adopting the NZBORA model include:

- The principles in the Bill do not work well as an interpretative principle (cl 10 of Bill). It is usually relatively straightforward to identify the interpretation of legislation that is compatible with the rights and freedoms affirmed in NZBORA. By contrast, under the Bill, it will be difficult to assess which interpretations conform best with either all of the principles collectively or one principle individually. These are not questions that judges are best suited to answering;
- The question of whether the principles have been complied with involves value judgements. This means there is substantial uncertainty about how courts might will interpret the principles or a single principle in any particular case;
- It is likely to lead to greater politicisation of judiciary as public policy questions become increasingly litigated in courts and the values of individual judges become increasingly determinative in the outcome of litigation;

- Greater risk that choices parliament makes on public policy questions will not finally settle matters (e.g. decisions like the Supreme Court's decision on three strikes legislation are likely to become more common); and
- Unsuitable to have any non-political actor certifying that principles have been complied with because compliance with principles inherently involves the exercise of a (small p) political judgement.

***Problem**: NZBORA based on well-established and recognised rights and international obligations.*

48. The NZBORA based on well-established and recognised rights and international obligations, by contrast, the proposal in the Bill is novel internationally. There is, therefore, no existing body of case law from overseas that can be used to assist in resolving difficult issues.

49. A key risk in adopting the NZBORA model is that not only will there be greater litigation of public policy questions, but there will also be uncertainty about the outcome of litigation. All questions are likely to be ones of first impression both in NZ and internationally. That uncertainty is likely to undermine the effective operation of regulatory systems, which is contrary to the policy intention of the Bill.

***Problem**: NZBORA confined to cases that raise rights issues.*

50. The Bill's principles operate across the whole field of legislation, while NZBORA is confined to cases that raise much narrower rights issues.

51. Resulting risks for adopting the NZBORA model:

    - Most judges have some expertise in questions of individual rights (particularly in the criminal sphere which many judges will see every day);
    - By contrast, the regime under the Bill will apply across the statute book, meaning that Judges will not have similar expertise in relation to the wide array of legislation that would come before them under the Bill to which the Bill's principles would need to be applied; and
    - Further the breadth of the regime proposed by the Bill increases the risk that judges will make judgements in some areas where regulatory choices have a political dimension or subject to significant uncertainty. Judgements in these circumstances are more appropriately made by those who are democratically accountable.

***Problem**: Unclear interaction with existing law in two directions.*

52. First, some of the principles in the Bill overlap with rights in NZBORA (principles (a)(ii), (b), (g)). Principle (b) in particular is worded in a way that potentially overlaps (in a very unclear manner) with several of the rights set out in NZBORA. For example, to what extent does "liberty" overlap with the democratic and civil rights set out in ss 12 – 18 of NZBORA (such as freedom of movement and association), as well as the more obvious overlap with s 22 (liberty of the person)? Does "personal security" encompass the right to freedom from unreasonable search and seizure under s 22 of NZBORA? Principle (b) also refers to a right to property, which is not referred to in NZBORA.

53. Second, the principles in the Bill may be in tension with outcomes required under NZBORA. The statement in the Bill that the principles do not limit NZBORA is unlikely to be sufficient guidance as to how to resolve any such tensions.

54. There is a risk in adopting the NZBORA model for the Bill because it is unclear how the courts are supposed to deal with those interactions. This will likely lead to significant litigation and significant uncertainty. There are already existing issues in the ongoing debate about how ss 4, 5, 6 of NZBORA (the interpretive directions) operate together.

SCHEDULE 2 - ISSUES WITH PARTICULAR PRINCIPLES

55. This schedule contains preliminary comments about the principles in the Bill. Please let us know if you would like us to develop these comments into formal advice.

(a) Rule of law

56. The exact nature of the rule of law is contestable. As reported in the *Capital Letter* (21 December 2023), UK Supreme Court Justice Lord Jonathan Sumption has noted that;

> "...it's clearly one of the basic building blocks of any society, especially a democracy, but the trouble about it is people don't agree about what it means. "I think it means basically that the law has got to be clear, it's got to be non-retrospective, it's got to apply generally to the rulers as well as the ruled. And it's got to be subject to the right to go to a fair and independent court to challenge public decisions according to a fair process."

57. Careful work would be required to ensure that any rule of law principles lines up with settled understandings. For example, there are significant distinctions between "equality under the law" (substantive equality) and "equality before the law" (equality in the administration of law) that would need to be worked through to ensure that Parliament's intent is clear. As noted by Richard Ekins in the Policy Quarterly on the Bill, "Specifying this aspect of the rule is risky. It is perfectly conceivable that the courts will, either now or in ten years' time, interpret the phrase to introduce substantive equality and so to require judicial assessment of the merit of any distinction made amongst classes of person." (page 10)

58. One aspect of the rule of law principle is that "the law should be clear and accessible". George Tanner, in his article in the Policy Quarterly on the Bill, makes the point that "clear" and "accessible" lack precision in the context in which they are used in the Bill. To whom must the legislation be clear: a specialist? a highly intelligent person? a person of average intelligence? Is "clear" directed at the drafting or the policy or both? As noted in the article "It is difficult to lay down hard-and-fast rules in this regard. Much depends on the subject matter."

(b) Legislation should not diminish a person's liberty, personal security, freedom of choice or action, or rights to own, use, and dispose of property, except as is necessary to provide for, or protect, any such liberty, freedom, or right of another person

59. This principle incorporates concepts in a way that is broader than is generally recognised in the constitutions of other common law countries.

60. The NZBORA already specifies a broad range of rights and freedoms. These NZBORA rights and freedoms are familiar concepts internationally. In contrast, the matters in this principle go well beyond what has been recognised internationally and would involve New Zealand venturing into unchartered territory.

61. Some of the concepts in the principles in the Bill draw on mere presumptions of statutory interpretation. The presumptions are not hardened principles of law – they are rebuttable. Parliament always has the right to displace these presumptions. As Lord Scarman observed in relation to the principle of no deprivation of property without expropriation, "the principle is not an overriding rule of law: it is an aid amongst many others developed by the judges in their never-

ending task of interpreting statutes".[4] Common law presumptions are not intended to override clear language, context, and purpose.[5] They are a guide to addressing ambiguity.

62. However, the principles the status of certain presumptions of interpretation into specific rules that restrict what legislation should do. This would represent a significant new fetter on legislation and needs serious consideration across a range of current and prospective government legislative policy proposals.

63. The precise meaning of the values in this principle are vague and elusive. The terms have no settled meaning. Such vague and open-ended concepts cannot be translated into legislation with any certainty.

64. One particularly vague and open-ended expression is "freedom of choice or action". It could be argued that virtually any restriction or requirement in legislation results in a person's "freedom of choice or action" being diminished in some respect. Absolute freedom of choice is antithetical to the notion of regulation. All regulation limits choices. That is the point.

65. Given the inherently ambiguous nature of these concepts, including them in the Bill would be likely to increase the risk of litigation and would involve the courts entering into areas that are more appropriate for parliamentary consideration.

66. As noted by George Tanner in the Policy Quarterly on the Bill:

> "The point in its simplest terms is that the liberty principle as expressed in the bill is not recognised in English law: what is recognised is that in the interpretation of legislation, clear words are needed to interfere with fundamental rights. They are different things. There is a great danger in attempting, as the bill does, to package up into a single statutory statement a raft of common law presumptions and rules which the courts use in different contexts all the time."

67. In light of the above, the principle should not remain in the Bill. Its inherently ambiguous nature cannot be cured by the drafting process.

(c) Taking or impairment of property

68. This principle presents significant fiscal and legal risks for the Crown. In particular, the principle goes much further than similar provisions in other jurisdictions.

69. The principle extends the concept of a "taking" of property to include an "impairment" of property. Other jurisdictions may, in some circumstances, may recognise that a particularly severe "impairment" may be so significant that it is tantamount to a taking. However, the unqualified concept of impairment in the Bill significantly extends the potential scope of the concept.

70. A high proportion of legislation could be said to involve an impairment of property in one way or another. Under the principle, this would create an expectation of "full compensation" in a broad range of circumstances.

71. The principle requires "full compensation". Other jurisdictions are subtly different. They require "just compensation" or "fair compensation", which is likely to be less onerous. This could have significant implications, for example, for Treaty settlements and their finality. Treaty settlements,

---

[4] *Secretary of State for Defence v Guardian Newspapers Ltd* [1985] AC 339 at 363.

[5] Burrows and Carter at 433.

by design, do not involve the Crown paying "full compensation" and such compensation as is paid is not paid "by the persons who obtain the benefit of the taking".

72. Richard Elkins has noted in the Policy Quarterly on the Bill:

> "The point of the principle is to make it very expensive to limit how property owners may act, for any property owner who suffers loss from regulatory change is entitled to be made whole. Thus, if Parliament wishes to ban dangerous weapons, it must buy them. Legislation imposing mandatory closing times on certain pubs would be an impairment attracting compensation." (page 10)

73. The principle provides that the compensation must be provided, to the extent practicable, by those who obtain the benefit. This idea does not appear in any other similar overseas provision. We understand from the Regulatory Responsibility Taskforce minutes that it considers that "providing a mechanism for confronting rent-seeking lobbyists with the costs they seek to impose on the community can usefully alter incentives." However, this is not a well-recognised idea, and it would be very difficult to apply in practice.

74. As noted by George Tanner in the *Policy Quarterly* on the Bill, the legal landscape in the United States with respect to takings is highly complex. New Zealand should be cautious about importing a body of overseas law without knowing precisely what it is or where it might lead:

> "*It would be unwise to enact a law which prohibits in the most general language the taking or impairment of property, leaving it up to the courts to define its parameters by reference to the law in some other jurisdiction or to embark on a jurisprudential development mission of its own*."

75. The notion of a takings clause was considered and rejected in the context of NZBORA. See Sir Geoffrey Palmer's article in the New Zealand Law Journal ([2001] NZLJ 163) contains a useful discussion of the issue. The following sets out some limited extracts from that article. However, we recommend that the Treasury read the full article to get a better feel for the issues:

> "There has been no real effort in New Zealand to constitutionalise property rights, as has been done in some other countries. But the history of the New Zealand Bill of Rights Act 1990 is instructive….
>
> Consideration was given to the question of property rights in formulating the Bill of Rights Act. There were submissions made to the Select Committee that property rights should be included. I recall in a particular meeting John Fogarty QC (as he now is), in which he advocated this course. …
>
> But there were further considerations of both a principled and a pragmatic character. First, the bold inclusion of an indeterminate right to property, however defined, may ignore the highly complex character of the institution of property itself. The ideological and cultural controversies are considerable: there was, and is, without doubt, no community consensus in relation to such a right. …
>
> In New Zealand, that practical life and those ways of thinking are in significant part pervaded by the principles and effect of the Treaty of Waitangi. The Treaty can be argued to bestow property rights in some respects.
>
> The potential cost to the Crown of a general protection of property rights from expropriation may have been considerable. Its effects could be indeterminate. It is hard to resist the conclusion that, were such a measure to be adopted, it would need careful and rigorous

> analysis across a wide range of government policy areas, to try and determine the effects in advance….
>
> The argument made in favour of constitutional protection must be balanced against the competing arguments for the protection of interests other than those of private enterprise. Takings jurisprudence enables the balancing of those interests by way of a requirement of compensation for all expropriations. Such an approach has considerable appeal, not least to the extent that it compels governments to contemplate in a meaningful fashion the consequences of their actions for private interests.
>
> However, and as I have noted, it also represents a significant bar to flexible policy-making and implementation. Such flexibility is greatly prized in the expedient political culture of New Zealand. …"

76. The article reinforces the point that "careful and rigorous analysis across a wide range of government policy areas" should be undertaken before including a "takings" principle.

77. As noted above, the takings principle covers similar ground to proposals to include a property right in the NZBORA. If a property right has merit, it should be included in NZBORA (rather than introduced indirectly via this Bill).

(d) Not impose, or authorise the imposition of, a tax except by or under an Act

78. This principle and the principle in paragraph (e) are already substantively covered by s 22 of the Constitution Act 1986 ("It shall not be lawful for the Crown, except by or under an Act of Parliament, — (a) to levy a tax …"). However, the principles use different language, which could cause uncertainty.

79. It is hard to see how this principle is intended to operate in practical terms. In what ways could a Bill be inconsistent with this principle? It may only have any application in relation to secondary legislation (for example, where an Act authorises regulations to impose a "fee", but the actual "fee" that is imposed is more in the nature of a tax).

(e) Not impose, or authorise the imposition of, a charge for goods or services (including the exercise of a function or power) unless the amount of the charge is reasonable in relation to the benefits that payers are likely to obtain from the goods or services; and the costs of efficiently providing the goods or services…

80. The principle goes further than traditional thinking about charges by requiring the charge to be reasonable in relation to the benefits that the payers are likely to obtain. In many cases, there may be very little substantive "benefit" to the payers. For example, the service may be provided as part of a regulatory regime that provides a considerable public benefit but no real benefit to the payers that are subject to the regime (e.g., a licensing regime that provides benefits to consumers but very little benefit to licence holders).

81. It is also not clear how this principle and the principle in paragraph (d) are intended to apply to levies imposed in secondary legislation to fund regulatory functions. Levies allocate the costs of operating the regime to classes (or clubs) of participants (and through them end users) according to the relative benefits or risk exacerbated to the system by that class of participants. By doing so, levies relieve the general taxpayer from paying for functions that benefit or are caused by groups of taxpayers (e.g. classes of financial market participants, and through them investors).

82. In strict terms, levies are a form of targeted tax. They could, therefore, be covered by principle (d). However, the reference to the exercise of functions and powers in principle (e) implies that levies may be intended to be covered by paragraph (e). That is problematic, because the language of principle (e) is inconsistent with the role of levies in the system.

(f) Preserve the courts' role of authoritatively determining the meaning of legislation

83. The intended scope of this principle could be clarified. Possibly this is mainly aimed at ouster clauses. If so, it may be better to express this principle in terms of legislation not restricting the right to apply for judicial review. But if that is the case, the point is already covered by s 27(2) of NZBORA.

84. The requirement that decision-makers act within the law is fundamental to the rule of law. Ouster clauses (privative clauses) remove or limit the ability of the courts to judicially review a decision. As a result, they interfere with the courts' constitutional role as interpreters of the law and so undermine the rule of law.

85. This means that the rule of law principle in principle (a) arguably already covers the concept (and may not need to be separately covered here).

86. In addition, Parliament may wish to amend a law in light of a judgment given in court proceedings. Examples include cases where a court has interpreted a provision in legislation in a way that departs from previous understandings, or where a particular outcome has been reached in litigation and parliament wishes to countermand it. Parliament may also wish (for the same reasons) to amend the law in light of the anticipated outcome of a court proceeding that is still in progress.

87. The LDAC Guidelines (12.2) note that the starting point is that parliament is entitled and empowered to act in this way. Parliament may make and amend any law. That includes altering the law declared in completed court cases, or by amending or otherwise clarifying the law that is likely to arise in pending cases. The fact that litigation is on foot or has been concluded does not put the law at issue in a case beyond the reach of legislation. The LDAC Guidelines, however, set out three important considerations in relation to this sort of legislation (*see* Guideline 12.2).

88. Careful consideration should be given to ensure that this principle (f) does not undermine Parliament's ability to act in the ordinary way referred to above.

(g) Decisions that may adversely affect any liberty, freedom, or right etc, ... subject to merits appeal and legislation should state appropriate criteria

89. A requirement for a merits appeal principle elevates it from its current setting of guidance and states it in more absolute terms than it currently exists.

90. There is a significant issue with the phrase "provide a right of appeal on the merits". Currently, many decisions are subject only to judicial review. Judicial review may not look at the "substantive merits" as such. Providing a right of appeal on the merits in all cases goes beyond the status quo (and could result in a significant increase in litigation) and would undermine the effective operation of many regulatory systems (immigration is a good example where appeal rights are carefully circumscribed to prevent gaming of the system and encourage timely resolution of deportation cases for very good policy reasons).

91. Also, legislation often confers a discretion on a decision-maker without explicitly stating criteria. If the decision has only a minor or inconsequential effect on rights or freedoms, there is little need to list specific criteria. Even if no criteria are specified, ordinary administrative law rules apply.

92. The principle requiring criteria to be stated is unduly open-ended and uncertain. How comprehensive must the criteria be? Does the principle preclude discretion? Discretion is often necessary to ensure decisions are made fairly, and to avoid harsh consequences that can result from strict adherence to criteria.

93. Principle (g) is restricted to rights and freedoms referred to in principle (b). This gives those rights and freedoms more importance than other rights and freedoms contained in NZBORA, which is anomalous.

94. One alternative is to adopt the test in section 4(3)(a) of the Queensland Legislative Standards Act 1992: this "makes rights and liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review". This test may provide more flexibility in terms of deciding how the power is defined and what sort of review is best in each case.

(h) Legislation should not be made unless, to the extent practicable, the persons likely to be affected by the legislation have been consulted

95. This principle requires consultation "to the extent practicable" with those likely to be affected. Currently, there is no general requirement to consult outside the government. This, therefore, is a major change in practical terms to the current approach to consultation. The principle applies in relation to some legislation where it would not be necessary or desirable. For example, minor or trivial legislation, sensitive legislation, urgent or emergency legislation, legislation where consultation adds little or no value (e.g., "mechanical" legislation that makes an annual CPI adjustment). An argument could be made that recent "100-day" legislation would infringe this principle because it proceeded without a consultation process (as understood at common law).

96. If this was read to mean the executive must consult before promoting legislation, it arguably has the potential to undermine the accepted convention that is reflected in s 9(2)(f)(iv) of the Official Information Act, which gives protection to the decision-making process while policy is under active consideration.

97. Precedents on the statute book tend to refer to consultation with persons that are "substantially" affected. Such a qualification reduces risk. In contrast, the principle is more open ended. This more flexible approach is consistent with the Legislation Guidelines which promote the value of consultation but in a proportionate way.

(i) Legislation should not be made unless there has been a careful evaluation of various matters, including the issue concerned, the effectiveness of existing law, public interest in addressing the issue, and other options for addressing reasonably available for addressing the issue

98. Richard Elkin has noted, in relation to the good law-making principles, in the *Policy Quarterly* on the Bill that:

> "… it is extraordinary and quite contrary to the Bill of Rights 1688 that on this principle the adequacy of the parliamentary process itself is open to legal argument and judicial ruling." (page 11)

(j) Legislation should produce benefits that outweigh the costs of the legislation to the public or persons

99. Based on experience, it appears to be very difficult for officials to quantify the "benefits" and "costs" of many proposals. In many policy areas (for example, in the justice or social policy areas) the "benefits" are often qualitative rather than quantitative, and "costs" (notably in the longer term) are not quantifiable. Accordingly, it may be impossible to make an objective and meaningful assessment of whether the benefits outweigh the costs in many cases.

100. The test leaves little room for value judgement even though decisions about benefits and costs routinely involve these types of judgements. There is a proper role of value judgements, political ideology, or representative concerns within policy-political processes that this principle ignores.

(k) Legislation should be the most effective, efficient, and proportionate response to the issue concerned that is available.

101. The principle refers to legislation as the most effective, efficient, and proportionate response. Legislation may not always reflect what may be the "optimal" solution. Bills face many practical challenges before they become law. In particular, they often reflect a political compromise or consensus (i.e., ensuring that the Bill will "have the numbers"). In these political circumstances, it will not be possible for a minister, or chief executive, to certify that it reflects the most effective response, even if the alternatives are outlined.

102. By way of contrast, the Queensland Legislative Standards Act 1992 refers only to the "way the policy objectives will be achieved by the Bill and why this way of achieving the objectives is reasonable and appropriate" (i.e. it doesn't need to be an "optimal" solution).

SCHEDULE 3: COMMENTARIES

103. Because so much has been said on previous iterations of the Bill it is a real challenge just to identify the key material. We can assist you to access that material if you need. In the meantime, this schedule identifies 2 key pieces of material that we consider to be most relevant and influential.

George Tanner's Policy Quarterly article about the Regulatory Responsibility Bill

104. There is great material in this article that would provide help for officials as it covers issues around the individual principles, including lack of clarity, dangers of importing legal concepts from other jurisdictions, the fact that the common law does not recognise a "right of appeal", nor does natural justice etc. Key points:

- The principles stated in the Bill reflect/are based on interpretive presumptions (arguably based on an outdated interpretive approach under which the common law was fairly hostile to statute law) and are quite different in nature to the statements of fundamental rights found in NZBORA.
- There is great danger in packaging up these presumptions (which are all extremely context dependent) and serving them up as principles/absolutes.
- There is no "freedom of choice", or general "liberty", principle recognised in English or New Zealand law.
- The International Covenant on Civil and Political Rights that are recognised in New Zealand law are already reflected in NZBORA.

105. George's conclusion on page 32 contains an excellent summary;

> "The bill falls short of complying with many of its own principles. Its use of open-textured language leads to uncertainty of meaning. It attempts to define good law making by reference to a set of simple principles: in doing so it obscures the complexities inherent in them and creates the same lack of clarity and uncertainty that it seeks to prevent. Legislating is a complex business. The bill suggests it is not. The bill suffers from an acute lack of problem definition and does not properly identify and assess workable alternatives. Without massive additional resources, it would be impossible to make all existing legislation compliant with the principles in the bill within ten years: the time frame is unrealistic and unachievable. The bill is a disproportionate and inappropriate response to the issue it seeks to redress."

Law Commission 2007 advice: Quality of Regulation – Regulatory Process Disciplines

106. These are key points applicable to the draft Bill that the Law Commission made to the Minister of Commerce in a letter dated 31 January 2007 on the Regulatory Responsibility Bill:

- there is the possibility of the juridification or judicialisation of the policy making process.
- the Bill would undermine the inherent flexibility of the policy-making process, rigidify principles of regulatory responsibility and treat certain common law principles as less fluid than they tend to be in reality.
- to allow the Bill to proceed could well damage the prospects of achieving worthwhile regulatory reform in an optimum way.

107. We can provide you with a copy of the letter if you wish.

Annex 2: Mapping of 2021 principles under proposed approach

Principles from 2021 Bill	Proposed high level principle to be given sufficient regard	Examples of considerations to be applied when considering consistency
Cl 6(1)(a) Be consistent with the rule of law Cl 6(1)(f) Preserve the courts' role of authoritatively determining the meaning of legislation Cl 6(1)(g) Provide a right of appeal in relation to the merits of decisions that may adversely affect any liberty, freedom, or right	9(2)(h)	9(2)(h)
Cl 6(1)(b) Not diminish a person's liberty, personal security, freedom of choice or action, or rights to own, use, and dispose of property Cl 6(1)(c) Not take or impair, or authorise the taking or impairment of, property without the consent of the owner		
Cl 6(1)(d) Not impose, or authorise the imposition of, a tax except by or under an Act Cl 6(1)(e) Not impose, or authorise the imposition of, a charge for goods or services (including the exercise of a function or power) unless the amount of the charge is reasonable		
Cl 6(1)(h) Not be made unless, to the extent practicable, the persons likely to be affected by the legislation have been consulted Cl 6(1)(i) Not be made (or, in the case of an Act, not be introduced to the House of Representatives) unless there has been a careful evaluation of costs, benefits etc Cl 6(1)(j) Produce benefits that outweigh the costs of the legislation to the public or persons Cl 6(1)(k) Be the most effective, efficient, and proportionate response to the issue concerned that is available.		

1. Why a Regulatory Standards Bill?

- There are limited legislative levers in New Zealand to ensure that the content of new regulation meets clear and well-understood standards, and its policy development process follows good practices. Once enacted, there are limited mechanisms to ensure adequate governance, monitoring and care of existing regulation, which can erode its quality and fitness-for-purpose.
- New Zealand scores relatively poorly for oversight/quality control and methodology in adhering to Regulatory Impact Analysis requirements, and we are well below the OECD average on ex-post evaluation of regulations (OECD iReg Survey, 2021).
- In addition, very few agencies have developed formal plans for the maintenance and development of their regulatory systems (Regulatory Stewardship Survey conducted by the Treasury, 2022).

A number of specific factors lead to poor regulatory quality

- Range of standards provided for in different places that are not applied coherently through the development of new legislative proposals
- Limited incentives for agencies/ Ministers to ensure policy development and impact analysis are robust
- Limited capacity and capability in some areas, making it more difficult to undertake robust policy development and impact analysis
- Relatively weak oversight and assurance mechanisms to support quality of policy and impact analysis by agencies
- Limited incentives for agencies/ Ministers to review quality of existing legislation
- Lack of mechanisms to transparently hold Ministers/agencies to account for poor quality legislation
- Lack of effective avenues for recourse for individuals and businesses impacted by poor regulation

- The 2021 Regulatory Standards Bill sought to address these issues by
  - providing a benchmark for good regulation through a set of regulatory principles that all regulation should comply with
  - providing transparency by requiring those proposing and creating regulation to certify whether the regulation is compatible with the principles
  - providing monitoring of the certification process through a new declaratory role for the courts.

2. Context for current proposal

Coalition agreement commitment to legislate to improve the quality of regulation, ensuring that regulatory decisions are based on principles of good law-making and economic efficiency, by passing the Regulatory Standards Act as soon as practicable.

Changes in the regulatory management landscape since the Regulatory Standards Bill was first developed, including the introduction of the disclosure statement provisions in Part 4 of the Legislation Act 2019.

Cabinet Expenditure and Regulatory Review Committee (EXP) discussion in February seeking refined proposals [redacted] 9(2)(f)(iv) [redacted] (EXP-24-MIN-0003 refers).

- A revised Regulatory Standards Bill would still aim to improve regulatory quality by embedding clear standards throughout the policy and legislative development process. However, changes to address the risks identified in relation to court involvement include:
  - recasting the principles in the Bill into high-level principles underpinned by more detailed considerations, rather than the strict legal tests in the 2021 Bill
  - removal of provisions in the 2021 Bill requiring the courts to prefer interpretations of legislation that is compatible with the regulatory responsibility principles
  - potential replacement of the courts in finding legislation inconsistent with the principles with a mechanism within the executive
  - establishing new statutory powers and expectations to ensure clear accountability and transparency for regulatory quality.
- The aim is to bring the same discipline to regulatory management as New Zealand has for fiscal management

3. Broad approach proposed in a revised Regulatory Standards Bill

- New legislative and administrative mechanisms will seek to support and incentivise consistency with regulatory responsibility standards

Critical success factors

- Embedding of well-understood standards in relation to the content of regulation and the processes for developing and reviewing it
- Mechanisms to provide assurance about consistency of legislative proposals with these standards
- Embed expectations and streamline processes to support impact analysis, increasing the focus at early stages and at LEG
- Independent and expert review of existing regulation to assess consistency with these standards
- Recourse for individuals and businesses in response to concerns about legislative design and the broader operation of regulatory systems
- Clear accountability for particular legislation and the operation of specific regulatory systems
- Transparency about any steps taken where regulation has been found to be unjustifiably inconsistent with standards

- Approach in proposed Bill drawn from:
  - existing standards and guidance e.g. the Legislation Guidelines
  - fiscal responsibility and public sector stewardship expectations in the Public Finance Act 1989 and Public Service Act 2020
  - current disclosure statement provisions in Part 4 of the Legislation Act 2019
  - international comparators, including Queensland's Legislative Standards Act 1992.

- Approach would be supplemented by:
  - administrative measures (e.g. Cabinet office circulars, RIA and other guidance)
  - possible Parliamentary measures to strengthen its role in scrutinising legislation (e.g. looking at the role of the Regulations Review Committee).

4. Summary of key components of a revised Regulatory Standards Bill

Standards	Mechanisms for embedding standards in policy development and legislative drafting processes	Mechanisms for assessing and improving consistency of new legislative proposals with standards	Mechanisms for assessing and improving consistency of existing legislation with standards	Mechanisms for hearing complaints about consistency of legislation with standards
Establishment of regulatory responsibility standards via primary and secondary legislation.	Embedding of relevant standards via requirements for regulatory impact analysis and other processes throughout policy development, as well as during legislative drafting.	Requirements that draft legislation be assessed for consistency with standards, and that assessment published, with provisions for appropriate responses from the responsible Minister to any inconsistency.	Requirements that existing legislation be assessed over time for consistency with standards, and that assessment published, with provisions for appropriate responses from the responsible Minister to any inconsistency.	The courts fulfil this function in the 2021 RSB – but an alternative is the establishment of an executive body such as a Ministerially-appointed board to hear complaints about regulation that is inconsistent with the principles.
Standards set out in high-level principles and more detailed considerations in primary legislation	The Minister for Regulation could issue instructions relating to processes and expectations about how the principles apply to the development of regulatory proposals	Responsible Chief Executives would assess and report on consistency of draft legislation, and responsible Minister must justify any inconsistency with the principles	Responsible Chief Executives and Ministers would regularly review legislation for consistency and report on results. Minister would need to justify any continuing inconsistency.	Appropriate mechanism in place to hear and effectively respond to complaints about legislation inconsistent with the standards

5. Other potential components of a Regulatory Standards Bill

- Provision for Ministry for Regulation regulatory oversight role:
  - Requirement for the Ministry for Regulation to produce a regular report to Parliament assessing overall performance against the principles (similar to an audit function)
  - Powers for the Ministry for Regulation to require provision of information from agencies to support this reporting (similar to provisions in the Public Finance Act 1989).

- Provisions to support the conduct and effectiveness of regulatory reviews e.g. in relation to how information is supplied.

- Other provisions to support the broader functions of the Ministry.

Components of the revised Bill in more detail

6. Regulatory responsibility standards

High-level principles to be given sufficient regard	9(2)(h) [redacted]
Examples of considerations to be applied when assessing consistency with principles	[redacted]
Ability to add further considerations	The Minister for Regulation and the Attorney-General could propose other considerations to be taken into account via secondary legislation that could be issued after it has been approved by a resolution of the House.
Effect of standards	These standards would be expressed as broad standards rather than strict legal tests – more detail on how they should be applied would be set out in administrative guidance. 9(2)(h) [redacted]

7. Improving the regulatory policy process to support the Bill

- Strengthened requirements under a revised Regulatory Standards Bill need to be embedded in the policy process.
- Streamlining the existing Regulatory Impact Analysis (RIA) requirements requires earlier engagement by Ministers and officials in problem definition and potential alternatives to regulation.
- The current RIA requirements focus on the Regulatory Impact Statement for policy decisions, which can be:
  - too late to inform the problem definition and consideration of alternatives
  - too early to inform detailed impact analysis and implementation risks.
- Earlier consultation with the Ministry for Regulation should inform a stronger focus on tricky issues and a more straightforward process for others.
- Where there are significant risks or an unclear problem definition (or other rationale for regulation) in a Cabinet proposal, Cabinet could be asked if it wants the work to continue.

Tailoring RIA requirements to the appropriate stage of policy development	Requiring early consultation with the Ministry for Regulation when work on regulatory options starts.	RISs and QA provided before Ministerial consultation on regulatory policy decisions.	The Ministry supporting LEG committee with regulatory disclosures and certifications before approval to introduce regulation.
Streamlining the RIA requirements	Earlier clarity about expectations for analysis, degree of consultation, and scrutiny required.	Simplified RIS template, clearer exemptions to providing a RIS, and more proportionate QA.	
Strengthening compliance	Public reporting on RIA compliance and QA.	Independent *ex post* reviews of RISs and adherence to regulatory principles.	

8. Assessing and improving consistency of draft legislation with standards

Application of principles

The Bill would establish a set of requirements for responsible Ministers and agencies to ensure that sufficient regard is given to the principles in relation to new legislative proposals

New requirements for Ministers and departments to assess and report on consistency with principles

The Chief Executive of the administering agency would prepare a statement assessing consistency with the principles of regulatory responsibility

The responsible Minister would report to the House on the reasons why any inconsistency with the principles is justified

An agency would publish on its website all the key information and evidence supporting the agency's assessment of compliance with the principles (subject to any good reasons for withholding that information, e.g. commercial sensitivity or legal professional privilege)

New powers for Minister for Regulation and Attorney-General in relation to how this assessment is done and reported on

The Minister for Regulation and the Attorney-General would issue a notice with the approval of the House specifying:

- what information the statements and reports above must include
- any requirements to support the quality of reports (e.g. expert input or QA requirements)
- what classes of secondary legislation the statements and reports above must be prepared for.

The Minister for Regulation could issue directions relating to the format and publication of the statements and reports above

9. Assessing and improving consistency of existing legislation with standards

Application of principles

The Bill would establish a set of expectations and powers to ensure that sufficient regard is given to the statutory principles in relation to existing legislation

New requirements for Ministers and departments in relation to review of existing legislation

All Chief Executives would be required to regularly review, maintain and improve legislation administered by their agency.

Ministers/agencies would be required to publicly report on plans to review their stock of legislation against the regulatory responsibility principles, along with the outcomes of reviews (including any inconsistencies with the principles that have been identified, and proposed actions to remedy any inconsistencies).

Ministers would be required to report to the House on the reasons why any inconsistency with the principles identified via agency reviews, and not proposed to be remedied, is justified.

New powers for Minister for Regulation in relation to how departments report on reviews on their legislation

The Minister for Regulation could issue whole-of-government directions to government agencies in relation to how they fulfil this obligation, including what the reports above must contain.

10. Responding to complaints about consistency of legislation with standards

Purpose

The Bill would establish a mechanism for individuals and businesses to raise complaints about primary and secondary legislation that does not meet the principles. Where a regulation was found to not meet the principles of the Bill, the result would be a finding of inconsistency.

Options

An alternative to the courts (as provided for in the 2021 Bill) is an executive mechanism like a Regulatory Standards Board, that could be established to hear complaints. Such a Board could be made up of independent members, with a range of expertise.

High-level design considerations

- Complaints can only be related to existing legislation – as there are existing mechanisms in relation to the development of new legislation (e.g. consultation requirements, select committee processes).
- Where a complaint is about a particular decision (rather than the legislation the decision was made under) this must go to the appropriate dispute resolution forum e.g. complaints about benefit decisions should go through the bespoke Work and Income process.
- Complaints cannot be vexatious or trivial – to ensure that resource is focused on complaints that have the most significance, the recourse mechanism must have discretion about whether complaints should be heard.
- The complaints mechanism must be cost effective.
- Individuals must be impacted by the legislation to raise a complaint
- Complaints result in a non-binding finding that is published – the recourse mechanism issues a finding, rather than a binding remedy (e.g. compensation or a requirement for changes to be made to legislation).

Any option could be supported by increased Parliamentary scrutiny via new or strengthened parliamentary mechanisms. The 2009 Regulatory Responsibility Taskforce recommended changes to Standing Orders and the role of the Regulations Review Committee to strengthen parliamentary scrutiny.