

Office of the Minister for Regulation

Chair, Cabinet Expenditure and Regulatory Review Committee

IMPROVING THE QUALITY OF NEW ZEALAND'S REGULATION: REPORT BACK ON A NEW REGULATORY STANDARDS BILL

Proposal

1. This paper outlines my proposed approach to improving the quality of New Zealand's regulation through the passing of a new Regulatory Standards Bill.

Relation to government priorities

2. The Coalition Agreement between the New Zealand National Party and ACT New Zealand includes a 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.
3. Subsequently, in its 100-day plan, the Government committed to start work to improve the quality of regulation, including work on a Regulatory Standards Bill.

Executive summary

4. As part of initial work on this Bill, I have been considering how the Regulatory Standards Bill fits within my broader objectives for the new Ministry and the Regulation portfolio.
5. Regulations, being legal restrictions on the use and exchange of private property, are a major drag on economic productivity. They add cost to activities people do carry out, dissuade people from carrying out activities at all, and erode the country's culture of initiative. I believe that the quality of regulation is as important to productivity as the quality of Government spending.
6. To fix poor regulation, the Government must change the way it regulates. It must improve analysis of new initiatives, systematically review the existing stock of regulation, and upgrade the capability of those implementing regulation.
7. I intend that the new Ministry for Regulation will complement and boost all agencies' focus on lifting the performance of their regulatory systems. It will establish and uphold standards of regulatory quality for new regulations, work with responsible agencies to target and address particular areas of poor regulatory performance through Sector Reviews,

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and support agencies to meet their regulatory stewardship obligations. In this sense, the Ministry of Regulation's role for regulation would be analogous to the Treasury's role for Government spending.

8. My intention is that the Regulatory Standards Bill would support the new Ministry in its role by providing:
 - 8.1 a benchmark for good regulation through a set of regulatory principles that all primary and secondary legislation (regulation) should comply with
 - 8.2 transparency by requiring those proposing and creating regulation to certify whether it is compatible with the principles
 - 8.3 accountability, through new roles for the courts to make declarations of incompatibility with the principles, and to prefer interpretations of legislation that are compatible with the principles.
9. In this sense, the Regulatory Standards Bill plays a role for the regulation of property that is analogous to the Human Rights Act and Bill of Rights Acts for human rights, and the Public Finance Act for Government spending.
10. For clarity, regulation refers to all statutes, regulations (including those made by order-in-council) and regulatory instruments (notices, rules, etc.) which restrict the use or exchange of private property.
11. Using legislation to promote regulatory quality represents a significant change from the status quo. It places limits on the executive's power to regulate in a similar manner the Public Finance Act limits on executive's power to tax and spend. This represents a constitutional shift in how we regulate.
12. At present there is a complex range of quality assurance procedures for new laws, that have accumulated over the past several decades. They were all well intended, but I question their overall coherence. To manage the impact for agencies of any additional requirements the Bill imposes, I have asked my officials to investigate ways in which the wider requirements of the Regulatory Management System (Regulatory Impact Analysis, Departmental Disclosure Statements, Climate Impact Assessment, etc.) could be streamlined or better integrated with other public sector management tools.
13. The narrower definition of regulation - restrictions on the use and exchange of property - should reduce the requirements for Regulatory Impact Analysis in many cases. For example, a policy change to the indexation of benefits should not require problem definition, cost benefit

analysis and so on. It is a fiscal decision that does not affect the use and exchange of private property.

14. I intend to report back to Cabinet seeking policy decisions and agreement to proceed to drafting by mid-April.
15. My aim is to have the Bill introduced and enacted by the end of the year, subject to ongoing Ministerial consultation.

Background

16. As part of its decisions on the Government's 100-day plan, Cabinet invited me to report back on a plan for priority actions to improve the quality of legislation, including on the core components of the new Regulatory Standards Bill, and the timeline for its introduction (CAB-23-MIN-0468 refers).
17. Cabinet has already considered and agreed to my joint proposed approach with the Minister for the Public Service to the establishment of a Ministry for Regulation, to bring increased focus to regulatory quality (CAB-24-MIN-0004 refers).
18. In working on a plan for the Bill, one point of focus has been on how the Bill sits in the context of my objectives for the new Ministry and the Regulation portfolio more broadly. This includes how to best support good regulatory and fiscal stewardship across the public sector, in line with this Government's priorities.

The need to lift regulatory quality

19. As I have previously noted, unneeded, badly designed, or badly implemented regulation imposes unnecessary costs on individuals, businesses and communities. Many of the current policy challenges New Zealand faces, including housing affordability, infrastructure deficits, natural resource use and climate change adaptation are made harder by the deadweight costs of poorly conceived regulation.
20. Conversely, high-performing regulatory systems will be central to achieving the Government's objectives – in particular, in helping drive-up public-sector value on an ongoing basis, as outlined as a key objective for this Government in the 100-day Cabinet paper.
21. There are already a range of processes that are intended to support regulatory quality. However, as I have previously noted, the quality of regulation is extremely poor and holds New Zealanders back in many fields. I attribute this to successive Governments failing to give regulatory activity the emphasis and priority it deserves, for example Treasury as the lead agency carried out Quality Assurance on only 10 Regulatory Impact Statements last year. As a result, our performance in this area is

relatively weak in relation to the other countries with which New Zealanders like to compare ourselves.

22. By comparison, the considerable investment that has been made in good financial governance and reporting systems is reflected in New Zealand's well-established reputation for our fiscal management and reporting disciplines. The challenge is to build that same level of discipline around government regulation.
23. This challenge is even more pressing given that New Zealand has several new or imminent international commitments that will require improvements to the RMS to ensure we meet them.

Broad approach to lifting regulatory quality

24. All Departments will retain their responsibility for regulatory quality in their area. Under the Public Service Act 2020, all departmental chief executives have stewardship responsibilities for legislation administered by their agencies, supplemented by Cabinet-mandated expectations that require agencies to properly govern, monitor and care for their regulatory systems. Agencies are also responsible for ensuring regulatory proposals falling within their responsibilities meet quality standards, including in relation to legislative design and implementation. The establishment of a new Ministry and the passing of new legislation is not intended to lessen that responsibility, but assist and ensure they meet it.
25. I see the role of the Ministry for Regulation as complementing and boosting all agencies' focus on lifting the performance of their regulatory systems, including by:
 - 25.1 establishing and upholding enduring regulatory quality principles to apply to all new regulatory proposals as well as providing a benchmark for existing regulatory systems
 - 25.2 strengthened central scrutiny of the quality of regulatory proposals in priority areas - for instance where there is a potential impact on property rights
 - 25.3 working with responsible agencies to target and address particular areas of poor regulatory performance, through sector reviews, legislative changes and operational improvements
 - 25.4 working closely with the other central agencies to ensure that the government's general regulatory management expectations, processes and tools are well aligned, and avoid unnecessary duplication and complexity, with the general policy, Budget, accountability and reporting arrangements on which they lead

- 25.5 supporting agencies to meet their regulatory stewardship obligations via guidance and capability building.

Approach to a Regulatory Standards Bill

- 26. My starting point for the Bill is the Regulatory Standards Bill which was drafted following the work of the Regulatory Responsibility Taskforce in 2009, and introduced into the House in 2011 and 2021.
- 27. My intention is that the Regulatory Standards Bill would support the Ministry in its role by providing:
 - 27.1 a benchmark for good regulation through a set of regulatory principles that all regulation should comply with
 - 27.2 transparency by requiring those proposing and creating regulation to certify whether it is compatible with the principles
 - 27.3 accountability, through new roles for the courts to make declarations of incompatibility with the principles, and to prefer interpretations of legislation that are compatible with the principles.
- 28. As outlined in my priorities letter to the Prime Minister, I propose that the principles of responsible regulation should include:
 - 28.1 the rule of law;
 - 28.2 protection of individual liberties;
 - 28.3 protection of property rights;
 - 28.4 the imposition of taxes and charges;
 - 28.5 the role of the courts;
 - 28.6 review of administrative provisions;
 - 28.7 good law-making processes.
- 29. Any incompatibility with the principles would need to be justified to the extent that it was reasonable and could be demonstratively justified in a free and democratic society. Further elaboration on each of these principles can be found in the Taskforce's report.

30. Using legislation to promote regulatory quality represents a significant change from the status quo. 9(2)(h) [REDACTED]

[REDACTED] [REDACTED]
[REDACTED]
[REDACTED]

[REDACTED] [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

31. Some commentators in the past have raised questions about the role of the courts. 9(2)(g)(i), 9(2)(h) [REDACTED]

[REDACTED]
[REDACTED]

32. New Zealand is an outlier in its constitutional form. No peer country has a single legislature with no upper house, select committees in proportion to that legislature, no subnational Governments, and no formal written constitution. Elsewhere, however, allowing courts to test regulation against constitutional or quasi-constitutional standards is normal. Australia, Canada, the United Kingdom, and the United States all have varying degrees of the above checks and balances that we lack.

33. New Zealand's simple constitutional form allows fast and decisive action by Governments. For example, during the COVID-19 Response the Government was able to react rapidly and decisively to events given the political will. However, this unbridled power can be seen as a weakness as well as a strength. It can reduce the quality of law making and the certainty citizens face when making decisions to invest in New Zealand.

34. New Zealand's constitutional conventions have been evolving to become more like those of peer countries for some decades. *Fitzgerald vs Muldoon*, the passage of the Bill of Rights Act, and the Declarations of Inconsistency amendment to that Act are all examples of the Courts playing a larger role in our constitutional form. In my view it is inevitable that this evolution will continue, and the Regulatory Standards Bill will not so much contribute to it as ensure principles of good law making are given due prominence within it.

35. While the broad objections can be answered as above, it is important to get the details of the bill right. My officials are working with relevant subject matter experts in the public sector to understand the full implications of the provisions being considered for the Bill, and how any risks or unintended impacts could be mitigated. Key considerations include:

- 35.1 [redacted] 9(2)(h) whether the choice and framing of the principles can be improved, whether the principles should apply equally to all primary and secondary legislation, how to ensure any such principles align with existing statutory provisions (for instance in the Bill of Rights Act), and whether there should be some flexibility for governments to identify additional principles.
- 35.2 whether both Ministerial and departmental certification is necessary, whether the certification of all secondary legislation is necessary and valuable, and whether accurate certification will require specialist expertise.
- 35.3 what effects court involvement could have, 9(2)(h) [redacted] and the costs the Crown could incur in court processes, and whether there are alternative scrutiny or accountability options that could be considered.
36. At the same time, I am considering whether the Bill should include additional provisions to:
- 36.1 support the functions of the new Ministry in relation to evaluating proposals for new regulation and leading the carrying out of regulatory reviews (including the power to seek information as part of the sector review process)
- 36.2 reinforce some expectations on agencies for good regulatory practice (such as ongoing stewardship of regulatory systems and publishing advanced plans for proposed reviews of regulatory systems).
37. I will also consider whether there are additional elements that should be included in the Bill, as more detailed design work is undertaken on the Bill and the Ministry for Regulation's new functions, and how they intersect with the current RMS.
38. I intend to report back to Cabinet by mid-April with more details on my proposed approach, 9(2)(h) [redacted]
[redacted]
[redacted] At that stage, I will be seeking specific policy decisions in relation to the components of the Bill, and agreement to proceed to drafting.
39. My aim is to have the Bill introduced and enacted by the end of the year, subject to ongoing Ministerial consultation.

Impact on other agencies

40. I am aware that some Ministers may have concerns about the impact on their agencies of the additional requirements for good regulation imposed by my proposed Bill and the new functions of the Ministry for Regulation. I have therefore asked my officials to consider ways in which the wider requirements of the RMS (including Regulatory Impact Analysis) could be streamlined or better integrated with other public sector management tools. I also intend to focus the work of the new Ministry on regulations that most affect the economic incentives and activities of businesses and individuals, and their property rights.

Cost-of-living implications

41. There are no cost-of-living implications arising from the proposals in this paper.

Financial implications

42. There are no financial implications arising from the recommendations in this paper. The potential resource requirements for implementing and resourcing the Bill will be worked through as policy work advances.

Legislative implications

43. A bid for the Regulatory Standards Bill has been submitted for inclusion in the 2024 Legislation Programme, and a priority of category 3 (a priority to be passed by the end of 2024) has been sought.

Impact analysis

44. There are no regulatory proposals in this paper, and therefore Cabinet's impact analysis requirements do not apply.

Population implications

45. There are no population implications arising from the recommendations in this paper.

Human rights

46. While there are no direct human rights implications arising from the recommendations in this paper, the principles could reference civil liberties, so any human rights implications would need to be worked through as policy work advances.

Consultation

47. The Department of the Prime Minister and Cabinet, Ministry of Business, Innovation and Employment, Parliamentary Counsel Office, Public

Service Commission, Crown Law Office, Ministry of Justice, and Te Arawhiti were consulted during drafting of this Cabinet paper and the comments received from them are reflected in the paper.

48. 9(2)(h) [Redacted]

49. 9(2)(h) [Redacted]

Communications

50. I propose to communicate the details of the proposed Bill once Cabinet has taken further decisions on it.

Proactive Release

51. I intend to proactively release this Cabinet paper within 30 business days of decisions being confirmed by Cabinet.

Recommendations

The Minister for Regulation recommends that the Committee:

- 1. **note** that the Coalition Agreement between the New Zealand National Party and ACT New Zealand includes a commitment to legislate to improve the quality of regulation, by passing the Regulatory Standards Act as soon as practicable.

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2. **note** that the options I am exploring for the Regulatory Standards Bill would include providing:
 - 2.1 a benchmark for good regulation through a set of regulatory principles that all regulations should comply with
 - 2.2 transparency by requiring those proposing and creating regulation to certify whether it is compatible with the principles
 - 2.3 accountability, through new roles for the courts to make declarations of incompatibility with the principles, and to prefer interpretations of legislation that are compatible with the principles.
3. **note** that using legislation to promote regulatory quality represents a significant change from the status quo.
4. **note** that my officials are currently working with relevant subject matter experts to mitigate any unintended impacts of the Bill.
5. **note** that I am considering whether the Bill should include additional provisions, including to support the functions of the new Ministry and reinforce some expectations on agencies for good regulatory practice.
6. **note** that I have asked my officials to consider ways in which any impacts of these proposals on other agencies can be managed, by streamlining requirements or better integrating them with other public sector management tools.
7. **note** that my aim is to have the Bill introduced and enacted by the end of the year, subject to ongoing Ministerial consultation.
8. **agree** that I will report back to Cabinet by mid-April seeking specific policy decisions in relation to the components of the Bill, and agreement to proceed to drafting.

Authorised for lodgement

Hon David Seymour

Minister for Regulation