




To	Hon David Seymour, Minister for Regulation		
Title	Alternative approach to providing for regulatory responsibility principles	Number	MFR2024-077
Date	26 July 2024	Priority:	Medium
Action Sought	Agree to the recommended actions	Due Date	30 July 2024
Contact Person	Pip van der Scheer, Manager	Phone	9(2)(a)
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Attachments	Yes (Annexes 1 and 2)	Security Level	UNCLASSIFIED

Executive summary

1. At your meeting with officials on Tuesday 9 July, you asked officials to explore how the Regulatory Standards Bill could be weighted more towards setting standards for good regulatory policy making (for instance, robust problem definition and cost benefit analysis).
2. This briefing proposes a revised approach to the Bill based on the approach to fiscal responsibility in the Public Finance Act. This approach has a more direct focus on lifting the robustness of the Government’s regulatory policy processes and the stewardship of regulatory systems by responsible Ministers and departments compared to the previous approach (2024-063 refers).
3. Key differences between the two approaches are summarised in **Annex 1** and include a narrowing of statutory principles to focus solely on standards for regulatory policy development and regulatory system stewardship, and assessment of the consistency of regulatory proposals against the principles earlier in the regulatory policy process (i.e. before the drafting of legislation takes place) via Regulatory Impact Analysis (RIA) and other processes.
4. Under this revised approach, the Act would set principles of responsible regulation in primary legislation both in relation to:
 - regulatory proposals (including new regulation and proposals to amend existing regulation) focusing on robust processes for regulatory policy development and implementation (e.g. problem definition, analysis of costs and benefits, consultation with affected parties, and post-implementation review)
 - the management of regulatory systems, focusing on good stewardship practices (such as considering the ongoing need for regulation, whether that regulation is fit for purpose, and minimisation of compliance costs).
5. The Government would be required by the Act to pursue its regulatory programme in a way that upholds the principles by setting and giving effect to requirements, processes and expectations in Regulatory Responsibility Statements (RRSs). These statements would be issued by the Minister for Regulation, tabled in the House and made publicly available. All responsible Ministers and agencies would be required to give effect to RRSs.



6. RRSs could also be used to set the Government's overall approach to regulation (for instance, by requiring particular scrutiny of regulation that constrains the use and exchange of private property).
7. Initial drafting of this part of the Bill is attached as **Annex 2**.
8. Depending on your preferences in relation to the coverage of the principles and how they are given effect to, we can provide you with further advice on the other components of the Bill. However, our initial thinking is that, similar to the previous approach, this approach would include:
 - mechanisms to transparently show whether and how Ministers and agencies have complied with the requirements, processes and expectations in RRSs in relation to regulatory proposals and regulatory systems they are responsible for
 - a regulatory oversight role for the Minister/Ministry for Regulation via a requirement to publicly report on the consistency of government regulatory practices with the principles periodically, along with provision for regulatory reviews and any supporting powers needed for the Minister/Ministry to discharge these functions
 - a recourse mechanism, although this would likely be focused more on the robustness of underlying policy and stewardship practices rather than on issues relating to legislative content and design.
9. Benefits of this approach include its more direct focus on the quality of government decision-making and the care and maintenance of regulatory systems, building on the well-established fiscal responsibility provisions of the Public Finance Act. It also provides for a more defined central agency role for the Minister and Ministry for Regulation focused on regulatory policy and practice and allows for a more integrated approach with work to strengthen and streamline the regulatory policy making process (including RIA requirements). **9(2)(h)**

10. On the other hand, this approach to the Bill does not lend itself as well to consideration of broader rights/liberties and constitutional principles – and its interaction with the disclosure regime under Part 4 of the Legislation Act would still need to be determined (although our initial view is that it could work well alongside the disclosure regime if it is retained).
11. Following your feedback on this briefing, we can advise you further on how other components in the Bill could be provided for, and update the slides for Ministerial consultation (including providing a more concise summary of the proposal). We also propose to commission further advice from the Crown Law Office and Legislation Design and Advisory Committee (LDAC) on the preferred approach, as well as continuing to engage with other agencies.
12. In addition, we will provide you with advice on options for broader public and stakeholder engagement and consultation to inform the next stages of the policy development process.



Recommended action

13. We recommend that you:

- a **note** that we have developed a revised approach to establishing and giving effect to regulatory responsibility principles based on your feedback, with key differences to the previous approach set out in Annex 1 *Noted*
- b **note** that PCO has provided initial drafting to show how such an approach might be provided for in a Bill set out in Annex 2 *Noted*

EITHER

- c **agree** to proceed with further work on the basis of this revised approach, including:
 - i. setting principles of responsible regulation in primary legislation in relation to new regulatory proposals (focusing on robust processes for regulatory policy development and implementation) and in relation to the management of regulatory systems (focusing on good stewardship practices)
 - ii. giving effect to these principles via processes and expectations set out in Regulatory Responsibility Statements issued by the Minister for Regulation, tabled in the House and made publicly available *Agree / Disagree*

OR

- d **agree** to proceed on the basis of the previous approach (2024-063 refers), which is weighted more towards issues of legislative design *Agree / Disagree*
- e **note** that, once you indicate your preferred approach, we will:
 - i. provide further advice on the other components of the Bill, including the recourse mechanism *Noted*
 - ii. commission further advice from the Crown Law Office and the Legislation Design and Advisory Committee (LDAC) *Noted*
 - iii. update the slides for Ministerial consultation, including providing a more concise summary of the proposal *Noted*



- iv. provide you with options for public and stakeholder engagement and consultation to inform the next stages of the policy development process

Noted

- f **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)

Pip van der Scheer

Manager

Ministry for Regulation

Date:

Hon David Seymour

Minister for Regulation

Date:



Purpose of report

14. This briefing sets out an alternative approach to the one previously provided to you (2024-063 refers) in relation to the scope of regulatory responsibility principles and how they could be provided for in a Regulatory Standards Bill.

Context

15. At your meeting with officials on Tuesday 9 July, you asked officials to explore how the Bill could be weighted more towards setting standards for good regulatory policy making (for instance, robust problem definition and cost benefit analysis).
16. You also agreed to seek approval from the Attorney-General for Parliamentary Counsel Office (PCO) to begin drafting work on the principles and related components of the Bill prior to Cabinet approvals. The Attorney-General has now granted that approval.
17. We have subsequently worked with PCO to identify how a Bill could be focused more on good regulatory policy making, including developing some initial drafting for such a Bill.

Broad approach

18. Our previous approach focused on establishing broad principles relating to the design and content of legislation, as well as in relation to the regulatory policy process, based on the 2021 Bill. Given the focus on legislative development, this approach was weighted more towards assessment of the consistency of drafted legislation immediately before its introduction to the House, or of the making of secondary legislation (as well as setting requirements for responsible Ministers/agencies in relation to existing legislation).
19. The revised approach to the Bill outlined in this paper proposes a more direct focus on lifting the robustness of the Government's regulatory policy processes and the stewardship of regulatory systems by responsible Ministers and departments. This includes provision for assessment of consistency of regulatory proposals earlier in the regulatory policy process (i.e. before the drafting of legislation takes place) in addition to expectations that responsible Ministers and departments will undertake regular reviews of the operation of their regulatory systems, as well as relevant legislation.
20. Key differences between the previous approach and a revised approach are set out in **Annex 1**.
21. The discussion below primarily focuses on how this revised approach could establish and give effect to regulatory responsibility principles – and PCO has provided some initial drafting to illustrate what these components of the Bill could look like for your consideration, based on this approach and building on relevant fiscal responsibility provisions from the Public Finance Act 1989 (see **Annex 2**). The wording of the actual principles is preliminary and requires further consideration and discussion.
22. The discussion below also touches on how other components of the Bill (e.g. mechanisms for assessing consistency of new/existing regulation and a recourse mechanism) could be best provided for to support this approach. We can provide further detailed advice on these components of the Bill once we have confirmed your preferred approach to the principles.



Establishment of regulatory responsibility principles

23. Under this revised approach, the Act would set principles of responsible regulation in primary legislation both in relation to:
 - *regulatory proposals* (including new regulation and proposals to amend existing regulation) focusing on robust processes for regulatory policy development and implementation (e.g. problem definition, analysis of costs and benefits, consultation with affected parties, and post-implementation review)
 - *the management of regulatory systems*, focusing on good stewardship practices (such as considering the ongoing need for regulation, whether that regulation is fit for purpose, and minimisation of compliance costs).
24. The table below sets out what proposed principles might cover in relation to each of these (and **Annex 2** sets out how they might appear in a draft Bill).

Table 1: Proposed coverage of principles in primary legislation

Area	Coverage of proposed principles
New regulatory proposals	<ul style="list-style-type: none"> • Definition of problem, including identification of any underlying causes • Identification of policy objective • Consideration of existing law and arrangements that already seek to address the issue • Consideration of options • Consideration of costs and benefits and where they are likely to fall • Consideration of any conflicts or interactions with existing law • Consideration of whether legislation is necessary and/or the most appropriate means of achieving the policy objective • Provision for adequate consultation • Consideration of consistency with New Zealand’s international obligations • Adequate consideration of and planning for implementation, monitoring and review
Management of regulatory systems	<ul style="list-style-type: none"> • Consideration of whether regulation continues to be reasonably necessary and appropriate • Consideration of whether the regulatory system continues to be fit for purpose • Elimination or minimisation of any unnecessary regulatory burdens and undue compliance costs • Consideration of whether relevant regulators have the requisite capability and capacity to perform their functions effectively • Elimination or minimisation of any conflicts or adverse interactions with other regulatory systems



Application of principles

25. The Government would be required by the Act to pursue its regulatory programme in a way that upholds the principles by setting and giving effect to requirements, processes and expectations in Regulatory Responsibility Statements (RRSs). These statements would be issued by the Minister for Regulation, tabled in the House and made publicly available. All responsible Ministers and agencies would be required to give effect to RRSs.
26. Under this approach, RRSs could:
 - set requirements, processes and expectations for regulatory proposals (predominantly via RIA requirements)
 - set requirements, processes and expectations for managing existing regulation (predominantly via expectations on Ministers and agencies for regulatory system stewardship and reporting)
 - set Government's overall approach to regulation (e.g. requiring particular scrutiny of proposed or existing regulation that constrains the use and exchange of private property)
 - set the scope of what would be covered by the principles (e.g. what secondary legislation would be included, or what proposals should be exempt from RIA requirements or consultation).
27. Consistent with the fiscal responsibility principles in the Public Finance Act, there could be an allowance for the Government to temporarily suspend requirements set out in a RRS in part or in whole (for instance immediately following an election or in emergency situations) as long as it publicly states the reasons for such a suspension and how long such a suspension would last.
28. Based on the Legislation Guidelines¹, we propose that RRSs would be instruments made under legislation.² While this would place them at a similar level to current Cabinet circulars and government policy positions on RIA and stewardship, a key difference is that Ministers and agencies would be required by the Act to give effect to RRSs. In developing further advice, we would need to engage with the Cabinet Office to discuss the interaction between RRSs and Cabinet requirements.
29. RRSs would also be tabled in Parliament. In accordance with Parliamentary practice, we expect that a Select Committee would take on a scrutiny role and oversee the government's performance in a similar manner to Parliamentary scrutiny of fiscal performance. However, as the RRSs would not be secondary legislation, they could not be formally disallowed.

¹ The Legislation Guidelines recommend that powers that "set or state a strategy, policy, or intent that will influence decision-making but not themselves set enforceable rights or obligations" are more appropriately provided for in non-legislative instruments such as Government Policy Statements rather than in secondary legislation.

² This would make them equivalent to the Government Policy Statement on land transport, immigration instructions, emissions reduction plans and other statements and plans made under legislation.



30. 9(2)(h)

31. **Annex 2** sets out an initial draft of how RRSs could be provided for in a Bill, and examples of the provisions they could contain.

Other components of the Bill

32. As noted above, depending on your preferences in relation to the coverage of the principles, and how they are given effect to, we can provide you with further advice on the other components of the Bill.

33. However, our initial thinking is that, similarly to the previous approach, the revised approach would have mechanisms to transparently show whether and how Ministers and agencies have complied with the requirements, processes and expectations in RRSs in relation to the regulatory proposals and regulatory systems they are responsible for. This could be done via the RIA system and regulatory stewardship requirements for agencies, and through some statement of responsibility type mechanism for Ministers.

34. As previously proposed, the Bill could also establish a regulatory oversight role for the Minister and Ministry for Regulation via a requirement to produce a regular report to Parliament assessing overall performance against the principles (similar to an audit function), along with provision for any supporting powers needed for the Minister and Ministry to discharge these functions.

35. The role of a recourse mechanism would likely be different under this approach compared to the previous approach – as it would focus more on the robustness of underlying policy processes (and potentially stewardship practices) rather than on issues relating to legislative content and design.

Further implications of revised approach

36. In our view, focusing a Bill on good regulatory policy and stewardship practices could have several benefits compared to the previous approach:

- it focuses directly on lifting the quality of government decision-making and the care and maintenance of regulatory systems by building on, strengthening and elevating the importance of existing RIA and regulatory stewardship expectations
- it is recognisably related to the fiscal responsibility provisions of the Public Finance Act, which have been successful in improving performance through a range of governments
- it provides for a more defined central agency role for the Minister and Ministry for Regulation predominantly focused on regulatory policy and practice, with the Attorney-General, supported by PCO, focused on legislative design



- it allows for a more integrated approach with work to strengthen and streamline the regulatory policy making process (including the RIA requirements), and could be helpful from a presentational point of view in allaying concerns about the amount of new compliance requirements for departments (given the Bill would focus on improvements in the same space as work to improve the RIA system)
- 9(2)(h)

37. On the other hand, this approach to the Bill does not lend itself as well to consideration of broader rights/liberties and constitutional principles – and its interaction with the disclosure regime under Part 4 of the Legislation Act would still need to be determined.

Next steps

38. Following your feedback on this advice, we can provide further advice on how other components in the Bill could be provided for (including initial drafting on core components related to the principles). We will also update the slides for Ministerial consultation, including providing a more concise summary of the proposal.
39. In addition, once you have identified a preferred approach, we would:
- commission further advice from the Crown Law Office and LDAC on the proposed approach to the principles and their application.
 - provide you with advice on the nature and extent of public and stakeholder engagement and consultation to inform the next stages of the policy development process.



Annex 1: Key differences between previous and revised approach

Component of Bill	Previous approach	Alternative approach
Coverage of principles	<p>Principles cover four broad areas:</p> <ul style="list-style-type: none"> 9(2)(h) [REDACTED] [REDACTED] [REDACTED] [REDACTED] 	Principles cover good regulatory development and stewardship practices
Provision for principles	A high-level principle for each broad area, along with more detailed considerations, set out in primary legislation, with provision for the Minister for Regulation and Attorney-General to add more considerations (approved by resolution in the House)	Detailed principles set out in primary legislation
Standing of principles	9(2)(h) [REDACTED]	The principles would only be upheld through Regulatory Responsibility Statements (RRSs) rather than having any independent standing
How principles are given effect	Notices issued by the Minister for Regulation and the Attorney-General with the approval of the House would set out how Ministers and agencies should report on consistency of draft and existing legislation with the principles.	Government required to uphold the principles though the issuing and giving effect to Regulatory Responsibility Statements (RRSs). RRSs would apply to all responsible Ministers and agencies and would set out processes and expectations for giving effect to the principles as well as the Government's overall approach to regulation. RRSs would be issued by the Minister for Regulation, tabled in the House and made publicly available.



Component of Bill	Previous approach	Alternative approach
Other components	<p>Approach would also:</p> <ul style="list-style-type: none"> • provide for responsible Ministers/agencies to consider and disclose consistency of in relation to new legislative proposals and existing legislation • establish a regulatory oversight role for the Minister/Ministry for Regulation by producing a regular report to Parliament assessing overall performance against the principles • provide for regulatory reviews and any supporting powers needed for the Minister/Ministry to discharge their statutory functions • provide for a recourse mechanism to consider instances of inconsistency with the principles 	<p>Approach would also:</p> <ul style="list-style-type: none"> • establish mechanisms to transparently show whether and how Ministers and agencies have complied with the requirements, processes and expectations in RRSs in relation to regulatory proposals and regulatory systems they are responsible for • establish a regulatory oversight role for the Minister/Ministry for Regulation by producing a regular report to Parliament assessing overall performance against the principles • provide for regulatory reviews and any supporting powers needed for the Minister/Ministry to discharge their statutory functions • provide for a recourse mechanism to consider instances of inconsistency with the principles



Annex 2: Initial Drafting of components of an alternative Regulatory Standards Bill