



Treasury Report: Regulatory Standards Bill: Possible amendments

Date:	22 March 2024	Report No:	T2024/763
		File Number:	SH-11-2-7-7

Action sought

	Action sought	Deadline
Hon David Seymour Minister for Regulation	<p>Agree to the critical success factors set out in this paper.</p> <p>Agree that officials should develop a recommended package of measures based on the proposals in this paper</p>	26 March 2024

Contact for telephone discussion (if required)

Name	Position	Telephone	1st Contact
Elisa Eckford	Principal Advisor, Regulatory Strategy	9(2)(a) (wk)	N/A (mob)
Pip van der Scheer	Manager, Regulatory Strategy	9(2)(a) (wk)	9(2)(a) (mob) ✓

Minister’s Office actions (if required)

Return the signed report to Treasury.

Note any feedback on the quality of the report

Enclosure: No

Treasury Report: Regulatory Standards Bill: Possible amendments

Executive Summary

On 27 February, following consideration of your paper on the proposed Bill, EXP invited you to report back in May with a further paper refining your proposals 9(2)(f)(iv), 9(2)(h) (EXP-24-MIN-0003 refers).

As a starting point for identifying alternative measures, we have identified a set of critical success factors based on our understanding of your priorities for system improvements. We are keen to get your feedback on whether these fully capture your objectives for the Bill.

We have then focused on identifying a range of possible measures that could be implemented over time to deliver a significant lift in regulatory quality to achieve the proposed critical success factors, without recourse to the courts.

Based on our analysis of provisions in the Public Finance Act and Public Service Act, we think your objectives would be most effectively achieved through multiple interventions at different points of the legislative process, and through a mix of both statutory and non-statutory mechanisms.

We see possible alternative measures to the courts falling into four broad categories:

- strengthened Executive processes, particularly disclosure statement requirements that require agencies to show whether and how they have complied with principles of responsible regulation in the development of new legislative proposals (supported by independent and expert scrutiny where required), along with strengthened legislative approval processes
- greater scrutiny of laws by Parliament and strengthened Parliamentary processes
- new and strengthened powers and requirements in relation to the regulatory oversight role played by the Ministry and Minister for Regulation, along with Ministerial and agency obligations to improve the quality of new and existing regulation
- recourse for individuals and businesses that provides specific mechanisms for raising and responding to concerns about instances where principles of responsible regulation are not being adhered to.

We would like to discuss the proposed alternative measures with you to identify whether you think they have merit, either as individual measures or as a package.

We note that, regardless of what measures you choose to proceed with, there will be costs associated with the strengthened accountability, transparency, scrutiny and public participation involved. Therefore, trade-offs may be needed in relation to scope or timing, given likely resource constraints. There will also be other considerations to be worked through, including ensuring that any new measures complement existing ones and avoiding significant increases in compliance costs. We can provide further advice on these issues once we receive your feedback on the options set out in this report.

Based on your feedback, we can work with key agencies to develop your preferred options in more detail, and provide you with a draft Cabinet paper by early April, to allow for ministerial consultation ahead of the EXP meeting on 7 May 2024. We will also need to begin work on a Regulatory Impact Statement (RIS) in support of the proposal.

We will also shortly provide you with advice on proposed modifications to the principles of responsible regulation, as well as consideration of how best to provide for them in primary as opposed to secondary legislation.

This timeframe is subject to your decisions and feedback on this report. If you would like officials to consider and provide advice on different options, this would likely delay the report-back date to EXP.

Recommended action

We recommend that you:

- a **note** that we have worked with agencies to identify a range of possible measures that could be implemented over time to deliver a significant lift in regulatory quality, without recourse to the courts.

Noted

- b **agree** that the critical success factors set out in this paper fully capture your objectives for the bill:
- i. embedding of well-understood and widely accepted standards in relation to the content of regulation and the process for developing it
 - ii. expert input quality assurance to provide assurance about consistency of legislative proposals with these standards
 - iii. independent and expert review of existing regulation to assess consistency with these standards
 - iv. recourse for individuals and businesses to have their concerns about legislative design and the broader operation of regulatory systems heard and responded to
 - v. clear accountability for particular legislation and the operation of specific regulatory systems
 - vi. transparency about any steps taken (or not taken) where regulation has been found to be unjustifiably inconsistent with standards

Yes/No

- c **agree** that, following a discussion at your meeting with officials on Tuesday 26 March 2024, officials will develop a recommended package of measures covering the following areas:
- i. strengthening disclosure statement requirements and legislative approval processes
 - ii. strengthening Parliamentary scrutiny
 - iii. strengthening regulatory oversight powers and requirements along with obligations on Ministers and agencies

- iv. providing specific mechanisms to enable individuals and businesses to raise concerns about poor regulation

Yes/No

- d **note** that we are aiming to provide you with advice on potential modifications to the principles of responsible regulation by early April 2024

Noted

- e **note** that, subject to your feedback and decisions in relation to the possible options set out in this report, we could aim to provide you with a draft Cabinet paper by early April, to allow for ministerial consultation ahead of the EXP meeting on 7 May 2024.

Noted

Pip van der Scheer
Manager, Regulatory Strategy Team

Hon David Seymour
Minister for Regulation

____ / ____ / ____

Treasury Report: Regulatory Standards Bill: Possible amendments

Purpose of report

1. This report outlines possible alternatives to the involvement of the courts in applying statutory principles in the 2021 version of the Regulatory Standards Bill. It should be read alongside Treasury Report T2024/573, which sets out potential interim measures to lift regulatory quality.
2. It also updates you on our progress with developing further advice on the principles in the Bill, and sets out proposed next steps to achieve a May report back to the Cabinet Expenditure and Regulatory Review Committee (EXP).

Context

3. On 27 February, following consideration of your paper on the proposed Bill, EXP invited you to report back in May 9(2)(f)(iv) [REDACTED] (EXP-24-MIN-0003 refers).
4. 9(2)(h) [REDACTED]
5. In previous advice, we have outlined the range of issues to work through in relation to the Bill to address these concerns (refer T2024/171). We will also shortly provide you with advice from Crown Law, 9(2)(h) [REDACTED] (refer T2024/539).
6. This report reflects and builds on this advice, as well as our ongoing discussions with the Parliamentary Counsel Office (PCO), Ministry of Justice, and the Ministry of Business, Innovation and Employment (MBIE), who all have a strong interest in the bill.
7. As we are going through a transition period to the new Ministry for Regulation, the Regulatory Strategy team in Treasury (the functions of which are transferring to the new Ministry) has taken the lead on developing this advice. It has been fully consulted on with the Establishment Team at the Ministry, who are comfortable with its recommendations.
8. It also reflects further thinking we have done on comparisons with relevant provisions in other legislation, including the Public Finance, Public Service and Bill of Rights Acts – in particular, focusing on how these regimes create strong incentives for the Executive via legislative expectations, 9(2)(h) [REDACTED]

Identifying a range of alternative measures

Broad approach

9. We have focused on identifying a range of possible measures that could be implemented over time to deliver a significant lift in regulatory quality, without recourse to the courts. These measures could build on and strengthen existing processes, as well as introducing new levers, and could sit alongside any of the interim measures set out in Treasury Report T2024/573.

10. As a starting point for identifying alternative measures, we have identified a number of **critical success factors** based on our understanding of your priorities for system improvements, including:
- embedding of well-understood and widely accepted standards in relation to the content of regulation and the process for developing it
 - expert input /quality assurance to provide assurance about consistency of legislative proposals with these standards
 - independent and expert review of existing regulation to assess consistency with these standards
 - recourse for individuals and businesses to have their concerns about legislative design and the broader operation of regulatory systems heard and responded to
 - clear accountability for particular legislation and the operation of specific regulatory systems.
 - transparency about any steps taken (or not taken) where regulation has been found to be unjustifiably inconsistent with standards.
11. In our view, and based on our analysis of provisions in the Public Finance Act and Public Service Act, we think your objectives would be most effectively achieved through multiple interventions at different points of the legislative process, and involving a mix of both statutory and non-statutory, as well as ex ante and ex post mechanisms. For instance, the Bill could mirror similar provisions in these Acts in relation to:
- requirements for agencies and Ministers to articulate how they propose to meet mandated standards, and to report regularly on whether standards are met
 - requirements for system-wide monitoring and reporting to ensure the Regulatory Management System as a whole is working to lift regulatory quality
 - provision for statutory and non-statutory means to support achievement of these requirements – e.g. powers to require the provision of information or the issuing of instructions/guidance
 - transparency throughout the system – e.g. by tabling reports in Parliament
 - changes to Parliamentary processes – e.g. a new Legislative Scrutiny Committee to review Bills against the standards, to hear complaints, and to review Acts.
12. We note that, regardless of what measures you choose to proceed with, there will be costs associated with the strengthened accountability, transparency, scrutiny, and public participation involved. Therefore, trade-offs may be needed in relation to scope or timing, given likely resource constraints. There will also be other considerations to be worked through, including ensuring any new measures complement existing ones and avoiding significant increases in compliance costs. We can provide further advice on these issues once we receive your feedback on the options set out in this report.

Components of an alternative package

13. This report focuses on **four key components of an alternative package** that could help achieve the critical success factors above:
- strengthened Executive processes, particularly disclosure statement requirements that require agencies to show whether and how they have complied with principles of responsible regulation in the development of new legislative

proposals (supported by independent and expert scrutiny where required), along with strengthened legislative approval processes

- greater scrutiny of laws by Parliament and strengthened Parliamentary processes
- new and strengthened powers and requirements in relation to the regulatory oversight played by the Ministry and Minister for Regulation, along with Ministerial and agency obligations to improve quality of both new and existing regulation
- recourse for individuals and businesses that provides specific mechanisms for raising concerns about instances where these principles are not being adhered to, and having those concerns responded to.

Strengthened disclosure statements and involvement in legislative approval processes

14. As we have previously advised, the **disclosure statement provisions** currently set out in Part 4 of the Legislation Act (but not yet brought into force) provide for the setting of legislative guidelines or standards by a government notice and require departments to report to the House on any departures from those standards.
15. In our view, these provisions provide a solid starting point for transparent assessment of new legislative proposals against agreed statutory principles.
16. The current disclosure requirements set out in the Legislation Act could also be strengthened to support greater transparency and accountability by:
 - ensuring the standards explicitly reference constitutional, legislative and regulatory management principles that legislative proposals should comply with
 - requiring expert input/quality assurance to provide assurance about consistency of legislative proposals with these principles, similar to current Treasury quality assurance of Regulatory Impact Statements, as well as audits of the quality of disclosure
 - bringing together transparently in one place 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. to support free and frank advice or legal professional privilege)
 - providing for these additional mechanisms to be reported to the House, with the House's attention brought to any inconsistency with the principles, and the Government's reasons for why this inconsistency is justified.
17. There is a further consideration about how broadly disclosure requirements should apply. The current disclosure requirements cover primary legislation, with only an optional extension to certain types of secondary legislation. While we do not think that the RSB requirements should apply generally to all secondary legislation (because it would not be useful or cost-effective for the many very minor pieces of secondary legislation made each year) the disclosure requirements could be adjusted to require disclosure of information and explanations for more significant classes of secondary legislation.
18. Another area of focus could be on **influencing the legislation programme**, so that poor proposals are weeded out from the start, and the programme is focused on delivering legislation that meets core standards. Early intervention is a much more efficient and cost-effective use of resources than intervening late in the process (or processes post-enactment). As a central agency, the Ministry for Regulation should have a significant role in reviewing and advising on legislative bids, and you could work with the Leader of the House on advice to Cabinet on the shape of the programme.

19. This could be combined with **strengthening policy approval processes**, again so that poor proposals are more effectively weeded out.

Strengthened Parliamentary scrutiny

20. If brought into force, the strengthened statutory disclosure statement requirements will help strengthen the Executive's accountability to Parliament for consistency of new legislative proposals with principles of responsible regulation.
21. This accountability could also be significantly reinforced through changes to Standing Orders that increase the ability of the House to scrutinise legislation proposed, and regulatory activities undertaken, by the Executive.
22. One option is to **establish a new Legislative Scrutiny select committee**, either by expanding the role of the Regulations Review Committee or creating a new committee similar to the Australian Commonwealth's Senate Standing Committee for the Scrutiny of Bills, with a mandate to:
- review Bills and their associated disclosures against appropriate constitutional and legislative principles. This would bring frequent and consistent scrutiny to new legislative proposals, and at a time when those legislative proposals are relatively easy to amend
 - undertake reviews of existing legislation and making recommendations to Parliament, (and changes could be made to enable Parliament to act directly on those recommendations).
23. An alternative or complementary mechanism is to **establish an Officer of Parliament** to perform functions similar to those of the Auditor-General or an Ombudsman in relation to regulation. This new Officer of Parliament role could include auditing the quality of disclosures made to Parliament and the quality of legislation provided to it.

Strengthened regulatory oversight powers and requirements, along with obligations on Ministers and agencies

24. Measures to increase Parliamentary scrutiny of legislation could be complemented by **provisions in legislation** to:
- hold responsible Ministers and departments to account for ensuring all aspects of their regulatory systems operate consistently with the principles
 - provide the Minister and Ministry for Regulation with powers to support a strong regulatory oversight role and responsibilities in relation to the effective operation of the Regulatory Management System as a whole.
25. Such measures could mirror provisions in legislation administered by other central agencies (in particular, the Public Finance Act) and could include:
- a Ministerial power to set requirements or issue whole-of-government directions to government agencies to support effective regulatory system design and stewardship
 - a requirement for portfolio Ministers and/or regulatory agencies to develop and report against plans for how they intend to ensure their stock of legislation is compliant with the principles
 - establishment of the Ministry for Regulation's system leadership role for the regulatory management system

IN-CONFIDENCE

- a power for the Ministry for Regulation to issue instructions to government agencies to improve the operation of the regulatory management system
 - a requirement for the Ministry for Regulation to produce a regular report to Parliament assessing overall performance against the principles
 - specific obligation that, consistent with the principles in the Public Service Act, CE's' stewardship obligations include a requirement for regular review, maintenance and improvement of legislation (and possibly equivalent obligations on Ministers)
 - powers for the Ministry for Regulation to require provision of information from agencies to:
 - enable comprehensive periodic reporting on proposed regulatory review/stewardship obligations
 - enable comprehensive reporting on actual regulatory review activity/steps to improve regulatory system performance
 - issue instructions to specify what form this information should take
 - undertake reviews of specific sectors.
 - obligations for the various plans and reporting covered above to be tabled in Parliament and published by departments/the Ministry for Regulation.
26. Such provisions would have the benefit both of strengthening accountability and transparency throughout the system, and giving the Ministry for Regulation a solid statutory basis to take on a central agency role – noting that, as part of the establishment process, thought is being given to any further statutory powers or obligations that could support the functioning of the Ministry.

Recourse for individuals and businesses

27. Provision for individuals and businesses to raise concerns and seek some form of action in relation to poorly designed or implemented legislation would helpfully strengthen accountability and transparency, as well as incentives for the Executive to regulate responsibly. The Regulatory Standards Bill 2021 provided a mechanism for people to have their concerns heard and responded to via the involvement of the courts – though only in relation to whether the specific principles in the bill had been breached.
28. The **proposed sector reviews** will be a good starting point to ensure the perspectives of regulated parties are brought to bear on consideration of the impacts and costs of regulation in particular sectors – however this will only cover those areas that are subject to these reviews.
29. Beyond sector reviews, there are possible alternative mechanisms to the courts in providing recourse to citizens, which could also enable consideration of broader impacts of regulation beyond the current principles (e.g. how regulation has been implemented by an agency). Key considerations in determining which of these mechanisms would best achieve your objectives in providing recourse to citizens include:
- the nature of the decisions and/or remedies sought – for instance where there is a requirement to consider issues relating to the consistency of regulation with statutory principles, or whether the focus is on surfacing and addressing broader concerns about the impacts of poorly designed or implemented legislation, and identifying opportunities for regulatory reform

- the extent to which independence from Ministers and responsible agencies is required
 - the nature of the skills and capability required, and how the specialist expertise located within the Ministry for Regulation or elsewhere could most efficiently be used
 - the desired scope and focus of the mechanism – for instance, avoiding the creation of complex or duplicated pathways to challenge government decisions (such as the duplication of existing mechanisms that consider breaches of human rights or that already provide a means to review administrative actions or decisions)
 - costs –establishing and operating a separate body with the specialist knowledge and capability needed would be significantly more costly than a mechanism operating within the Ministry for Regulation or an existing agency.
30. One option is the establishment of a **specialist tribunal**, which we understand you have raised as a possibility to provide a similar mechanism to the courts. Tribunals generally fall into three categories – administrative review, civil dispute resolution and occupational licensing/professional discipline. A tribunal established to consider issues relating to inconsistency with statutory principles for responsible regulation would need a wider remit than any of these, in that it would consider larger public policy questions about regulation itself, rather than reviewing specific decisions made under existing policy or regulation (which would then differ from existing tribunal models). The novelty of this approach would mean significant thinking about the design would be required, and the appropriateness of a tribunal taking on such a role would need to be worked through. 9(2)(h)
- In addition, there are practical matters to be considered, including the cost of establishing and maintaining a specialist tribunal, how it would gain its expertise and how it would be funded and staffed.
31. Other options include **strengthened Parliamentary mechanisms** outlined above, including giving a new Legislative Scrutiny Committee a similar role to the Regulations Review Committee to deal with complaints about primary legislation. Any person or organisation aggrieved at the operation of primary legislation could complain to the Committee, with the new Committee having the power to draw an Act to the special attention to the House. Alternatively, a new Officer of Parliament role could include acting on complaints from the public about consistency with legislative standards. This could overtake some of the role of the Regulations Review Committee in hearing complaints about secondary legislation, which might provide for a more systematic review of complaints. Special processes could be developed to so that recommendations from these bodies would need to be acted on, and these would need to be worked through with the Office of the Clerk.
32. Another set of options could involve **establishment of a function within the Ministry for Regulation** – for instance, a Statutory Officer, or a point of contact for individuals and businesses to raise concerns. Coupled with transparent reporting and communication processes, these sorts of initiatives could focus more broadly on the impacts of regulation on individuals and business beyond legislative quality. There could be broader opportunities to connect this initiative with work to reduce the costs of compliance and improve processes for small businesses. There are examples of this in overseas jurisdictions, such as:
- the Ontario Regulatory Registry (a centralised hub offering a platform for users to provide feedback on proposals or issues)

- general contact points offered by the Ministry of Service Alberta and Red Tape Reduction in Canada and Better Regulation Victoria in Australia.
33. However, we note such mechanisms can create significant costs and may not always be effective in driving change.

Principles of responsible regulation

34. As previously advised, our view is that the principles of responsible regulation also need some modification, as well consideration about how best to provide for them in primary as opposed to secondary legislation, and we have work underway to enable us to provide you with further advice on this.
35. Our current thinking is that a modified Bill could divide its principles into two types:
- **legislative or regulatory system design principles** adjusted from those in the 2021 Bill to avoid inconsistent overlaps with principles in other legislation (and to more closely align with the principles in the LDAC guidelines) to better recognise that accepted principles of good regulatory design are generally rebuttable presumptions rather than settled legal rules, and to provide for the supplementation and adjustment of the principles over time
 - **regulatory management principles** that could be amended to include principles addressing other elements of the regulatory cycle, such as the monitoring and proactive periodic review of existing legislation and regulatory systems, and to address areas where the principles may create overly onerous requirements (e.g. e.g. demonstrating that legislation is the most effective, efficient and proportionate response).
36. In our view, distinguishing between these two types of principles makes it easier to assign different statutory duties or responsibilities relating to different principles. We propose to provide you with more detailed advice on this shortly.

Next steps

37. We are keen to discuss with you the proposed measures outlined above to identify whether you think they have merit, either as individual measures or as a package.
38. If you wish to proceed with any of the options outlined above, we can work with key agencies to develop the proposed elements in more detail, along with further advice on the principles of responsible regulation, and provide you with a draft Cabinet paper by early April, to allow for ministerial consultation ahead of the EXP meeting on 7 May 2024. We will also need to begin work on a RIS in support of the proposal.
39. However, this timeframe is subject to your decisions and feedback on this report. If you would like officials to consider and provide advice on different options, this would likely delay the report-back date to EXP.
40. In addition, once we have your decisions on any revisions to the Bill, we will begin more detailed work to consider how any impacts of these proposals on other agencies can be managed through streamlining requirements or better integrating them with other public sector management tools, as noted in your EXP paper (EXP-24-MIN-0003 refers).