TE TAI ŌHANGA
THE TREASURY

Treasury Report: Regulatory Standards Bill - Initial Advice and Options

Date:	15 December 2023	**Report No:**	T2023/2064
		File Number:	SH-11-2-7-20-1-4

Action sought

	Action sought	Deadline
Hon David Seymour **Minister for Regulation**	**Note** the contents of this report **Agree** to the proposed approach for the March report-back to Cabinet	18 December 2023

Contact for telephone discussion (if required)

Name	Position	Telephone		1st Contact
Felicity Parsons	Senior Analyst, Regulatory Strategy	9(2)(a) (wk)	N/A (mob)	✓
Kerryn Fowlie	Director, Economic Strategy	9(2)(a) (wk)	N/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 - Initial Advice and Options

Executive Summary

The 100 day plan Cabinet paper invites 'the Minister to bring back to Cabinet within the first 100 days a plan for the core components of [a] new Regulatory Standards Bill and the timeline for its introduction'. This will form part of a wider package of work to improve the quality of regulation, including reporting to Cabinet on 'the preferred approach to establishment of the new regulation agency and the approach to the disestablishment of the Productivity Commission' (CAB-23-MIN-0468).

We understand that your starting point of reference for the new Regulatory Standards Bill is the member's Bill of the same name that you introduced in 2021. The substance of the 2021 Bill is the same as the Bill proposed by the Regulatory Responsibility Taskforce in 2009 and introduced as a government Bill in 2011. The Taskforce's report, and the analysis, public commentary and submissions that subsequently appeared, provide us with a considerable starting resource to draw upon in advising you on the Bill.

Since that work was done, there have been a range of legislative and administrative developments that we also need to take into account, including:

- the introduction of the disclosure statement regime (both the existing administrative regime and the statutory regime not yet brought into force);
- the passing of the Legislation Act 2019;
- the operation of the New Zealand Bill of Rights Act 1990 (including past and current Amendment Bills); and
- international good regulatory practice expectations.

This report aims to provide initial options for how the questions and issues could be considered and worked through, which we are seeking your guidance on. This will inform the initial scoping of the regulation work programme. These options centre around the Bill's three primary elements:

- principles or standards for quality legislation,
- mechanisms through which proposed legislation and existing legislation will be assessed against these principles, and
- mechanisms to encourage or require legislative decision-makers to give attention to or explain any departures from these principles.

Working through these issues will help meet your objectives for an Act that endures over time; is cost-effective; and best achieves its objective of improving legislative quality.

With regards to the March 2024 report-back to Cabinet, officials recommend that paper provides an update on the work to date on a new Regulatory Standards Bill and seeks agreement to a proposed timeline for its introduction.

Recommended Action

We recommend that you:

a **note** that in line with earlier discussions, officials have taken the Regulatory Standards member's Bill from 2021 as your starting point for this advice.

b **confirm** our understanding that you no longer propose to put the resulting Act to a referendum to determine whether the Act will come into force (the referendum was previously proposed as part of the 2021 Regulatory Standards Member's Bill in 2021).

Yes/no.

c **note** officials are working to ensure that the Regulatory Standards Bill will complement existing tools seeking to positively influence the quality of legislation and will attract enough broad support that its core features are likely to endure over time

Agree/disagree.

d **note** there have been a range of legislative and administrative developments since the Regulatory Responsibility Taskforce's Bill in 2009 which will have implications for the Bill's design.

e **note** there are options for increasing the likelihood that the Bill is enduring, cost-effective, and best achieves its objective, through design choices within the Bill's three primary elements.

f **note** we expect there to be financial implications and risks arising from the Bill and these will vary considerably based on the design options.

g **agree** to our proposed approach for the March 2024 report-back to Cabinet, which is to provide an update on the work to date on a new Regulatory Standards Bill and seek agreement to a proposed timeline for its introduction.

Agree/disagree.

h **note** officials need to do further analysis and agency engagement to inform more detailed advice on options and a timeline.

i **note** there are a small number of 'quick wins' in the regulatory standards space you have chosen to prioritise, which could be implemented in a shorter timeline whilst further analysis takes place for the Regulatory Standards Bill.

Kerryn Fowlie
Director

Hon David Seymour
Minister for Regulation

_____/_____/_______

Treasury Report: Regulatory Standards Bill - Initial Advice and Options

Purpose of Report

1. The 100 day plan Cabinet paper invites you "to bring back to Cabinet within the first 100 days a plan for the core components of [a] new Regulatory Standards Bill and the timeline for its introduction" (CAB-23-MIN-0468).

2. This will form part of a wider package of work to improve the quality of regulation, including reporting to Cabinet on 'the preferred approach to establishment of the new regulation agency and the approach to the disestablishment of the Productivity Commission' (CAB-23-MIN-0468).

3. The purpose of this initial report is to provide you with high level options around the core components of a Regulatory Standards Bill and advise on how it could fit within the wider legislative and administrative landscape.

4. We understand you are interested in improving the suite of levers across the Regulatory Management System (RMS) that influence legislative quality. The Regulatory Standards Bill is one such lever.

Bill Context

5. We understand that your starting point of reference for the new Regulatory Standards Bill is the member's Bill of the same name that you introduced in 2021. We understand however, that you no longer propose to put the resulting Act to a referendum to determine whether the Act will come into force.

6. The intended purpose of the new Regulatory Standards Bill is to improve the quality of primary and secondary legislation. Legislative quality has many dimensions, and there are many ways in which different aspects of legislative quality are and can be pursued. The Regulatory Standards Bill will be a key element of a suite of tools and processes seeking to positively influence the quality of legislation. Officials are working to ensure that the Regulatory Standards Bill complements and adds to the collective impact of the tools we already use to positively influence the quality of legislation.

7. On that basis, our analysis and advice can focus down on options that share the same broad characteristics as the member's Bill – that is, by:

   - setting out some principles or standards that legislation, and the process of its development, should generally be expected to meet,
   - creating mechanisms through which proposed legislation and existing legislation will be assessed against these principles or standards, and
   - creating additional mechanisms to encourage or require legislative decision-makers to explain or give attention to departures from these principles or standards.

8. Our analysis and advice relating to the new Bill will be focussed on the three components described above. However, in future advice we will also seek to identify any additional administrative supportive tools or processes that we think could reinforce the effectiveness of the Bill.

9. In considering options and the timeframes for progressing the Bill, officials are focussed on the fact that the Bill and the process for its development should seek to meet its own principles and intent, as well as follow the coalition Government's agreed decision-making principles. This will help avoid any adverse commentary or contradictions in approach. To support robust analysis of the Bill and its related administrative requirements we will draw as necessary on the subject matter expertise of the Legislation Design and Advisory Committee (LDAC), the Ministry of Justice, Parliamentary Counsel Office (PCO) and Crown Law, among others.

10. We are also conscious of the fact that the Bill should seek to attract enough broad support that its core features are likely to endure over time. The Bill is unlikely to have any meaningful impact if it does not survive a change of government. Bills like this are constitutional or quasi-constitutional in nature. For such measures, governments generally seek to attract bipartisan political support. If that support is not forthcoming through the Parliamentary process, it will need features that could allow that general support to emerge with experience, as the Fiscal Responsibility Act 1994 was ultimately able to do (after initially not achieving bipartisan support).

11. Investing time early in the policy development process will significantly reduce the potential for unintended fiscal or legal risks, or significant constitutional shifts in the relationship between Parliament, the executive and the courts. In the case of this Bill in particular, the specific details of policy choices, particularly around implementation, will heavily influence the impacts and costs of the Bill.

12. There are a range of fiscal risks associated with the Bill and financial implications will depend on final choices made about the design. At minimum we would expect there to be additional fiscal costs arising from assessing all legislation against Bill principles and from defending the Crown in court. These costs will need to be considered alongside any potential reductions in requirements made elsewhere in the wider RMS and provision may need to be made for a budget bid in association with the finalisation of policy decisions.

13. The substance of the 2021 Bill is the same as the Bill proposed by the Regulatory Responsibility Taskforce in 2009 and introduced as a government Bill in 2011. The Taskforce's report, and the analysis, public commentary and submissions that subsequently appeared, provide us with a considerable starting resource to draw upon in advising you on the Bill. Nonetheless, the Taskforce's Bill was drafted 14 years ago, and there have been a range of legislative and administrative developments since that time that we also need to take into account in informing our new advice.

Changes in context since the Taskforce's Bill was developed

14. At a minimum, the drafting of the Bill and design of the associated administrative arrangements will need to consider:

    - the production by departments of disclosure statements to accompany government Bills and amendments to Bills since 2013

        Disclosure statements were originally proposed by the Treasury as an alternative means to achieving some of the key objectives of the Regulatory Standards Bill, and currently operate as an administrative requirement set by Cabinet.

    - the passing of the Legislation Act 2019

        The Legislation Act 2019 brought together in one place most of the legislation about the making, availability and interpretation of legislation.

The Regulatory Standards Bill is also concerned with legislation and should be designed to operate seamlessly alongside the Legislation Act.

- the inclusion of a statutory regime for disclosure statements in Part 4 of the Legislation Act 2019

  The disclosure statement regime was always intended to be set in statute, and this has been provided for in the Legislation Act. The statutory regime in Part 4 goes further than the current administrative regime, and takes it closer to the Regulatory Standards Bill, by providing for the setting of legislative guidelines or standards by a government notice and requiring departments to report on any departures from those standards.

  Part 4 has not yet been brought into force. The future of Part 4 and how its provisions might interact with a Regulatory Standards Act will need to be carefully considered.

- the operation of the New Zealand Bill of Rights Act 1990, including amendments made in 2022

  Some of the principles and mechanisms set out in the 2021 Regulatory Standards Bill overlap with matters found in the Bill of Rights Act, but are not expressed in the same way, 9(2)(h) In addition, Parliamentary actions to follow declarations of inconsistency were recently added into the Bill of Rights Act.

- the progress of the New Zealand Bill of Rights (Rights to Lawfully Acquired Property) Amendment Bill

  This member's Bill, in the name of Barbara Kuriger, seeks to add property rights into the Bill of Rights Act. If it proceeds, we will need to consider the interface with related principles in the Regulatory Standards Bill. The 2021 Regulatory Standards Bill approach to property rights is different to that proposed in the Kuriger Bill.

- the good regulatory practice expectations and obligations that are increasingly appearing in New Zealand's international trade agreements

  These agreements include commitments to a range of practices like impact analysis, public consultation and periodic review of existing legislation that also appear in the 2021 Regulatory Standards Bill. We will separately provide you with more information on the nature and scope of these international commitments.

Lessons from international experience

15. The experience of other jurisdictions with any similar arrangements would be very helpful to us in assessing the likely impacts (costs, benefits and potential unintended consequences) of Regulatory Standards Bill provisions and options.

16. We need to investigate further, but at this point the only close equivalent that we know about comes from Queensland in Australia.

17. Queensland has had a Legislative Standards Act in place since 1992. The Act identifies two overarching "fundamental legislative principles" (FLPs) that are said to

underlie a parliamentary democracy based on the rule of law, which are that “legislation has sufficient regard to:

- rights and liberties of individuals, and
- the institution of Parliament”.

18. The Act sets out eleven examples of issues that relate to the rights and liberties of individuals, and others that relate to the institution of Parliament. These issues are listed out in Annex B, and have stood the test of time. Notably, because these issues are presented as examples, additional issues relating to the two FLPs can also be considered. Authoritative guidance from the Office of Queensland Parliamentary Counsel identifies a range of further issues that also apply. This guidance serves a broadly similar function to the Legislation Guidelines produced by LDAC in New Zealand.

19. The FLPs are given practical effect by requiring the inclusion of FLP issues in submissions to Cabinet on proposed legislation and providing for Parliamentary Counsel to advise Ministers, government entities and members of Parliament on the application of the FLPs. For a long time, this was also backed up by a Parliamentary Scrutiny Committee dedicated to monitoring the application of the FLPs to particular pieces of legislation.

20. A recent initial engagement with the Office of Queensland Parliamentary Counsel anecdotally suggests the FLPs have been successfully embedded into the policy and law-making process in Queensland. The Act and its processes have survived several different governments with only minor amendments. The FLP issues are widely accepted and understood.

21. We need to better understand how the Queensland regime works, seek independent views on its apparent success, and consider any important differences in institutional context, but we think the Queensland experience could hold valuable lessons for New Zealand.

Options to consider for modifying the Taskforce’s Bill

22. Options for modifying the Taskforce’s Bill exist for each of its three primary elements: the responsible regulation principles; the certification process; and the role of the courts. As part of preparing advice for you on the core components of a new Regulatory Standards Bill, we will investigate and test these options alongside the proposals in the Taskforce’s Bill. These options are not generally mutually exclusive and could be independently applied. We outline some of them below.

The responsible regulation principles

23. Previously, key issues included the selective nature of the chosen principles and that some were framed in overly broad or absolute terms that go beyond generally accepted principles of good legislative design. Both issues make it more difficult to obtain broad political and public buy-in for the Bill, and the latter makes it likely that legislation will frequently breach the principles, significantly reducing their normative force and increasing the costs of accurate certification.

24. One option for managing these issues is officials working with LDAC to review the principles to identify any changes that would bring them more into line with accepted understandings, and to identify any other important principles that might be usefully added. The LDAC guidelines and the Queensland Legislative Standards Act are likely to be useful reference points. This review could also address any unnecessary

duplication or misalignment with other legislation, perhaps through an appropriate cross-reference instead.

25. One omission from the principles in the Bill that will arise is whether there should be a principle relating to consistency with the Treaty of Waitangi. Government Bills are already required to be certified for consistency with the principles of the Treaty, and Queensland FLPs refer to the 'sufficient regard to Aboriginal tradition and Island custom'.

26. Another option for managing these issues would be to enact only a core set of generally accepted principles in the Act. Additional principles that might not have universal support but are important to a particular government could be added by way of secondary legislation, to be confirmed by a House vote. Such a mechanism is already provided for in Part 4 of the Legislation Act. The flexibility would reduce the likelihood that a different government would seek to amend or repeal the Act if it did not support a particular principle, which would make the Act more durable.

27. A separate question is whether the Taskforce's principles apply equally well to both primary and secondary legislation. The Queensland Legislative Standards Act sets out some different issues to assess for primary and secondary legislation, and our experience during the development of the disclosure statement regime suggests that primary and secondary legislation do not share the same set of legislative design issues. An option to consider, therefore, is whether the principles would be more effective if there was some tailoring of the principles for different types of legislation.

The certification process

28. The certification process in the Taskforce's Bill requires that those primarily responsible for the legislation certify its compatibility with the Bill's specified principles. This includes both Ministerial and departmental certification in the case of government Bills and for most secondary legislation. If the legislation is incompatible with the principles, the Taskforce proposed that the Minister or person otherwise responsible for the proposed legislation would need to confirm whether that incompatibility could be demonstrably justified in a free and democratic society.

29. Key considerations with the Taskforce's proposed certification process are the likely accuracy of the Ministerial and departmental chief executive certifications; the need for and effect of duplicate certifications; and the number and cost of the certifications. In addition to questions about certifier impartiality, accurate certification of compatibility and justifications for incompatibility would seem to require a level of specialist legal expertise that the certifiers are unlikely to have themselves. The certifiers will need to rely on expert advice, in which case the benefits of duplicate certification become unclear and the extra costs hard to justify. In addition, while we do not have up-to-date estimates of legislative volumes, it could be in excess of 1000 pieces of legislation every year, if all secondary legislation is included.

30. Instead of certification being a Ministerial or chief executive responsibility, one option would be to employ an independent certifying body with specialist expertise. This is the process currently used for Bill of Rights Act vetting, which applies a similar test for justified inconsistency, using experts within the Ministry of Justice or Crown Law. It is also similar to the approach taken in Queensland, where Parliamentary Counsel have the function of providing advice on the application of FLPs. This would remove the potential conflict for chief executives who must certify alongside the Minister they report to.

31. Another important question to ask is whether mandatory certification of all secondary legislation will provide value-for-money. Many of the principles will be less relevant for secondary legislation and it is also unclear how certification is expected to influence the quality of secondary legislation. Certificates for regulations to be made by Order in

Council could be provided to the Cabinet Legislation Committee, but most secondary legislation will not go to that or any other Committee.

32. Another option to reduce certification costs would be to at least simplify the certification requirement for some types of secondary legislation. For some of the principles, this could also include removing or simplifying the explanation required for incompatibility. For example, in the case of the good law-making principles, it is unclear how to assess whether incompatibility could be "demonstrably justified in a free and democratic society".

The role of the courts

33. 9(2)(h)

34. 9(2)(h)

35. Given these challenges, the Attorney-General and Minister of Justice are likely to have particular interests in the aspects of the Bill relating to the role of the courts.

36. The proposed role of the courts also includes fiscal risks, including the costs of remedial legislation to ensure Parliament's intent is given effect to, 9(2)(h) There would also be very major costs for the government to review all legislation for potentially unintended legal consequences of the interpretation direction, even with the proposed 10-year grace period, and economy-wide costs arising from the impact of uncertainty on longstanding regulatory requirements.

37. Options include removing the interpretation direction; removing the obligation to consider whether an incompatibility might be justified in a free and democratic society; or limiting the range of principles to which the obligation to consider whether an incompatibility might be justified would apply (such as not applying it to the good law-making principle).

38. Removing any provision concerning a role for the courts is also a clear option. It could be particularly attractive if the effect of removal can be offset by a more reliable and consistent certification requirement, which the use of independent experts connected to the legislative drafting process might provide (as the Queensland approach does).

Other ways to improve legislative quality

39. In addition to the Bill, there are a number of complementary ways of achieving the Bill's objective of improving legislative and regulatory quality. A number of these will be quicker to implement in the short-term and could demonstrate early progress on your ambitions.

40. From your feedback on Treasury Report T2023/2077, we understand you wish to prioritise a discussion and/or receive advice on a new RIA Cabinet circular to enable some initial improvements in the RIA system. This includes reducing uncertainty on the

requirements for discussion documents; enabling impact analysis to be provided in a more flexible way for some policy proposals; and strengthen analysis of distributional issues and wider impacts as part of rigorous cost benefit analysis.

41. We understand you're also keen to discuss and/or receive advice on the work undertaken to date on barriers to good regulatory practice.

March report-back to Cabinet

42. Our proposed approach to the March 2024 report-back to Cabinet is a paper providing an update on the work to date on a new Regulatory Standards Bill and seek agreement on a proposed timeline for its introduction.

43. Given the short timeline in the lead up to providing a Cabinet paper within the 100 day period, we recommend this approach in order to avoid significantly truncating the policy development process. This approach ensures the paper will meet its own good law-making principles, allowing sufficient time for the required analysis and consultation for a Bill of this scale and complexity. The timeline in Annex A sets out the key steps for this approach.

44. This approach would also enable greater alignment of the design of the Bill with the wider regulation portfolio. For example, the Bill could have direct or indirect implications for the functions of the new regulation agency, depending on the Bill's design and any desired administrative arrangements to support or reinforce the effectiveness of the Bill. Officials would need to undertake a significant amount of further analysis in order to flesh these out further.

45. Further work needs to take place to provide more detail on the required steps and timeline. Any unexpected complexities in the process will move the timeline out.

Next Steps

46. Officials are available to meet with you week commencing 18th December 2023 to discuss this advice. We will also provide more detailed advice in mid-January 2024.

Annex A - Proposed Timeline

<table>
<tr><th colspan="3">Proposed Timeline
Targeted departmental consultation throughout</th></tr>
<tr><th>Phase</th><th>Date</th><th>Product</th></tr>
<tr><td rowspan="5">Initial advice on options to inform 100 day Cabinet Paper</td><td>Friday 15 December</td><td>High level design options TR</td></tr>
<tr><td>19 December</td><td>Minister meeting to discuss Regulation portfolio</td></tr>
<tr><td>Mid January</td><td>Detailed design options TR</td></tr>
<tr><td>Mid Jan – early Feb</td><td>Prepare draft Cabinet paper</td></tr>
<tr><td>Late February</td><td>Seek Minister feedback on draft Cab paper</td></tr>
<tr><td colspan="3">8th March - Cabinet paper ready for Minister to take to Cabinet</td></tr>
<tr><td>Detailed design and consultation</td><td>Feb - May</td><td>Treasury to provide more detailed advice on the core components of the Bill, likely to be three reports covering:
- Principles
- Certification process
- Courts
We will provide indicative timelines on this advice at a later date.</td></tr>
<tr><td rowspan="5">Draft and consult on Cabinet Paper seeking decisions on the Bill</td><td rowspan="5">March - July</td><td>Draft RIS and Cabinet Paper (including consultation)</td></tr>
<tr><td>Cabinet paper seeking agreement plus attached RIS goes to Cabinet</td></tr>
<tr><td>[TBC] Public consultation</td></tr>
<tr><td>Revise approach based on consultation and prepare to return for additional Cabinet decisions before drafting</td></tr>
<tr><td>Any additional and final Cabinet decisions</td></tr>
<tr><td rowspan="3">PCO draft Bill
(Estimated 90 days based on average timings of a medium complexity Bill)</td><td rowspan="3">September - December</td><td>Treasury provides drafting instructions to PCO</td></tr>
<tr><td>PCO drafts multiple versions</td></tr>
<tr><td>Department analyses and comments on each version</td></tr>
<tr><td rowspan="4">Consultation and Review</td><td rowspan="4">January - February</td><td>Other departments are consulted</td></tr>
<tr><td>Send out Bill for Bill of Rights Act vetting</td></tr>
<tr><td>Ministerial consultation</td></tr>
<tr><td>Bill considered by LEG</td></tr>
<tr><td>Introduction</td><td>February</td><td>Introduction of Bill</td></tr>
</table>

Annex B - Extract from Queensland Legislative Standards Act 1992

3) Whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation—

(a) makes rights and liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review; and

(b) is consistent with principles of natural justice; and

(c) allows the delegation of administrative power only in appropriate cases and to appropriate persons; and

(d) does not reverse the onus of proof in criminal proceedings without adequate justification; and

(e) confers power to enter premises, and search for or seize documents or other property, only with a warrant issued by a judge or other judicial officer; and

(f) provides appropriate protection against self-incrimination; and

(g) does not adversely affect rights and liberties, or impose obligations, retrospectively; and

(h) does not confer immunity from proceeding or prosecution without adequate justification; and

(i) provides for the compulsory acquisition of property only with fair compensation; and

(j) has sufficient regard to Aboriginal tradition and Island custom; and

(k) is unambiguous and drafted in a sufficiently clear and precise way.

(4) Whether a Bill has sufficient regard to the institution of Parliament depends on whether, for example, the Bill—

(a) allows the delegation of legislative power only in appropriate cases and to appropriate persons; and

(b) sufficiently subjects the exercise of a delegated legislative power to the scrutiny of the Legislative Assembly; and

(c) authorises the amendment of an Act only by another Act.

(5) Whether subordinate legislation has sufficient regard to the institution of Parliament depends on whether, for example, the subordinate legislation—

(a) is within the power that, under an Act or subordinate

legislation (the authorising law), allows the subordinate legislation to be made; and

(b) is consistent with the policy objectives of the authorising law; and

(c) contains only matter appropriate to subordinate legislation; and

(d) amends statutory instruments only; and

(e) allows the subdelegation of a power delegated by an Act only—

(i) in appropriate cases and to appropriate persons; and

(ii) if authorised by an Act.