

Regulatory Standards Bill

Government Bill

Explanatory note

General policy statement

The purpose of the Regulatory Standards Bill is to improve the quality of regulation (meaning Acts of Parliament, statutory regulations, and tertiary legislation) in New Zealand. The Bill has its origins in a private member's Bill, then known as the Regulatory Responsibility Bill, that Parliament's Commerce Committee examined in 2008. The Committee recommended that the member's Bill not be passed, but that the Government establish a high-level expert taskforce to consider options for improving regulatory review and decision-making processes, including legislative and Standing Orders options.

Following the recommendation of the Commerce Committee, the Government established the Regulatory Responsibility Taskforce in March 2009. The current Regulatory Standards Bill is the result of the work of that Taskforce.

The Regulatory Standards Bill aims to improve the quality of regulation in New Zealand by increasing the transparency of regulation-making and the accountability of regulation makers. In essence, the Bill has 3 key components. It—

- provides a benchmark for good regulation through a set of regulatory principles that all regulation should comply with; and
- provides transparency by requiring those proposing and creating regulation to certify whether the regulation is compatible with the principles; and
- provides monitoring of the certification process through a new declaratory role for the courts.

The Bill's principles apply to Acts of Parliament, regulations, and tertiary legislation (excluding regulation made by local government). The principles are distilled from sources such as the Legislative Advisory Committee (LAC) Guidelines, the common law, and Parliament's Regulations Review Committee.

The principles cover 7 key areas, including the rule of law, protection of individual liberties, protection of property rights, the imposition of taxes and charges, the role of the courts, review of administrative decisions, and good law-making processes. Any incompatibility with the principles is justified to the extent that it is reasonable and can be demonstrably justified in a free and democratic society.

The Bill provides transparency by requiring those proposing and creating regulation to certify whether the regulation is compatible with the principles, and the justification for any incompatibility. Depending on the kind of regulation, the Bill will require Ministers, chief executives, or both chief executives and Ministers, to certify compliance with the principles. This certification process ensures transparency about whether regulation is consistent with legal principle.

The Bill provides monitoring of the certification process, and accordingly incentives for accurate certification, by allowing the courts to provide declarations of incompatibility where they believe that the principles have been breached. This power is declaratory only; the courts will not have the power to strike down legislation, to issue injunctions against Parliament or the Crown, or to award damages to those adversely affected by regulation that is incompatible with the principles.

Initially, the courts will be able to make declarations only in relation to regulation made after the commencement of the Bill. After 10 years, the declaratory power extends to all regulation.

In addition to the key benchmarking, transparency, and monitoring components, the Regulatory Standards Bill directs the courts to prefer legislative interpretations that are consistent with the Bill's principles. This direction applies initially only to new regulation, but after 10 years to the existing stock of regulation as well. The Bill also requires every public entity to use its best endeavours to review all regulation that it administers regularly for compatibility with the principles. The steps entities have undertaken to review their regulation and the outcomes from this process are required to be included in the entities' annual reports.

Regulatory impact statement

The Treasury produced a regulatory impact statement on 2 February 2011 to help inform the main policy decisions taken by the Government relating to the contents of this Bill.

A copy of this regulatory impact statement can be found at—

- <http://www.treasury.govt.nz/publications/informationreleases/ris>

Clause by clause analysis

The drafting of this Bill reflects the wording of the draft Bill contained in the Report of the Regulatory Responsibility Taskforce of September 2009. Part 4 of that report contains the Taskforce's commentary on that draft Bill (<http://www.treasury.govt.nz/economy/regulation/rrb>).

Clause 1 is the Title clause.

Clause 2 is the commencement clause. The Bill comes into force 6 months after the date on which it receives the Royal assent.

Clause 3 sets out the purpose of the Bill.

Clauses 4 and 5 relate to interpretation. The legislation to which the Bill applies is defined broadly to include primary, secondary, and tertiary legislation, but does not include instruments made by local government.

Clause 6 provides that the Act binds the Crown.

Clause 7 sets out the principles of responsible regulation. In summary, the principles are that legislation should—

- be consistent with certain specified aspects of the rule of law:
- not diminish a person’s liberty, personal security, freedom of choice or action, or rights to own, use, and dispose of property, except as is necessary to provide for, or protect, any such liberty, freedom, or right of another person:
- not take or impair property without the consent of the owner unless certain criteria are satisfied (including payment of full compensation):
- not impose a tax except by or under an Act:
- not impose a charge for goods or services unless the amount of the charge is reasonable (in relation to both the likely benefits of the goods or services to the payer and the costs of efficiently providing the goods or services):
- preserve the courts’ role of authoritatively determining the meaning of legislation:
- provide a right of appeal on the merits against certain decisions affecting any liberty, freedom, or right referred to above, and should state appropriate criteria for making those decisions:
- not be made unless, to the extent practicable, the persons likely to be affected by the legislation have been consulted:
- not be made unless there has been a careful evaluation of certain matters (for example, the issues concerned, the effectiveness of the existing law, the options, the benefits, and any reasonably foreseeable adverse consequences):
- produce benefits that outweigh the costs of the legislation:
- be the most effective, efficient, and proportionate response to the issue concerned that is available.

Subclause (2) provides that an incompatibility is justified to the extent that it is reasonable and can be demonstrably justified in a free and democratic society. This is similar to the qualification that exists in section 5 of the New Zealand Bill of Rights Act 1990.

Subclause (3) confirms that the clause does not limit the New Zealand Bill of Rights Act 1990.

Clauses 8 and 9 provide that the following persons must each sign, at each of the following times, a written certificate as to compatibility of new legislation with the principles of responsible regulation:

<i>Type of legislation</i>	<i>Persons who must each sign</i>	<i>Times at which certificate must be given</i>
Government Bill	The Minister responsible for the Bill. The chief executive of the public entity that will be responsible for administering the Bill when it has been enacted.	Before the Bill is introduced to the House of Representatives. Before its third reading.
Any Bill other than a Government Bill	The member of Parliament responsible for the Bill.	Before the Bill is introduced to the House of Representatives. Before its third reading.
Any other legislation	The Minister responsible for the legislation (if a Minister is responsible). The chief executive of the public entity that will be responsible for administering the legislation when it has been made.	Before the legislation is made.

A certificate given by a chief executive is not required to state whether any incompatibility with the principles is justified if a Minister has also given a certificate.

Clause 10 requires the certificate in respect of a Bill to be presented to the House of Representatives.

Clause 11 provides that wherever an enactment can be given a meaning that is compatible with the principles (after taking account of the qualification in *clause 7(2)* relating to what is reasonable and can be demonstrably justified in a free and democratic society), that meaning is to be preferred to any other meaning. This clause will apply to legislation made before the date on which the Bill comes into force only after the tenth anniversary of that date.

Clause 12 provides that certain courts may declare legislation incompatible with the principles. This applies to legislation made before the date on which the Bill comes into force only after the tenth anniversary of that date.

Clause 13 provides that a court declaration has only a declaratory effect, and does not give rise to any substantive rights.

Clause 14 provides that the principles do not have the force of law.

Clause 15 gives the relevant Minister power to issue certain guidelines.

Clause 16 requires every public entity to regularly review all legislation that it administers for compatibility with the principles.

Clause 17 requires public entities to publish certain information on the Internet.

Hon Rodney Hide

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The Parliament of New Zealand enacts as follows:

1 Title

This Act is the Regulatory Standards Act **2011**.

2 Commencement

This Act comes into force 6 months after the date on which it receives the Royal assent. 5

Part 1
Preliminary provisions

3 Purpose

The purpose of this Act is to improve the quality of Acts of Parliament and other kinds of legislation by— 10

- (a) specifying principles of responsible regulation that are to apply to new legislation and, over time, to all legislation; and
- (b) requiring those proposing new legislation to state whether the legislation is compatible with those principles and, if not, the reasons for the incompatibility; and 15
- (c) granting courts the power to declare legislation to be incompatible with those principles.

4 Interpretation

In this Act, unless the context otherwise requires,— 20

legislation has the meaning set out in **section 5**

legislative instrument means a regulation, rule, Order in Council, bylaw, proclamation, notice, warrant, determination, authorisation, or other document that—

- (a) determines the law or alters the content of the law, rather than applying the law in a particular case; and 25
- (b) directly or indirectly affects a privilege or interest, imposes an obligation, creates a right, or varies or removes an obligation or right

principles means the principles of responsible regulation stated in **section 7(1)** 30

public entity means—

- (a) a Department within the meaning of section 2 of the State Sector Act 1988; and
- (b) an entity or office named in Schedule 1 of the Crown Entities Act 2004; and 5
- (c) the Reserve Bank of New Zealand; and
- (d) any person or body that is established by or under an Act (other than the Local Government Act 2002) if that person or body, or an officer or employee of that person or body, has functions that include the making of legislative instruments 10

public official means an officer or employee of a public entity.

5 Meaning of legislation

In this Act, unless the context otherwise requires, **legislation** means any of the following that has the force of law in New Zealand:

- (a) an Act of the Parliament of New Zealand or of the General Assembly: 15
- (b) a legislative instrument that is a regulation, or that is required to be treated as a regulation, for the purposes of the Acts and Regulations Publication Act 1989 or the Regulations (Disallowance) Act 1989:
- (c) any other legislative instrument made under an enactment by the Governor-General in Council, a Minister of the Crown, a public official, or a public entity. 20

6 Act binds the Crown

This Act binds the Crown.

Part 2

Principles of responsible regulation and their effect 25

Principles of responsible regulation

7 Principles

- (1) The principles of responsible regulation are that, except as provided in **subsection (2)**, legislation should—

Rule of law 30

- (a) be consistent with the following aspects of the rule of law:
 - (i) the law should be clear and accessible:
 - (ii) the law should not adversely affect rights and liberties, or impose obligations, retrospectively:
 - (iii) every person is equal before the law: 35

- (iv) issues of legal right and liability should be resolved by the application of law, rather than the exercise of administrative discretion:

Liberties

- (b) not diminish a person's liberty, personal security, freedom of choice or action, or rights to own, use, and dispose of property, except as is necessary to provide for, or protect, any such liberty, freedom, or right of another person: 5

Taking of property

- (c) not take or impair, or authorise the taking or impairment of, property without the consent of the owner unless— 10
- (i) the taking or impairment is necessary in the public interest; and
- (ii) full compensation for the taking or impairment is provided to the owner; and
- (iii) that compensation is provided, to the extent practicable, by or on behalf of the persons who obtain the benefit of the taking or impairment: 15

Taxes and charges

- (d) not impose, or authorise the imposition of, a tax except by or under an Act:
- (e) not impose, or authorise the imposition of, a charge for goods or services (including the exercise of a function or power) unless the amount of the charge is reasonable in relation to both— 20
- (i) the benefits that payers are likely to obtain from the goods or services; and
- (ii) the costs of efficiently providing the goods or services: 25

Role of courts

- (f) preserve the courts' role of authoritatively determining the meaning of legislation:
- (g) if the legislation authorises a Minister, public entity, or public official to make decisions that may adversely affect any liberty, freedom, or right of a kind referred to in **paragraph (b)**,— 30
- (i) provide a right of appeal on the merits against those decisions to a court or other independent body; and
- (ii) state appropriate criteria for making those decisions:

Good law-making 35

- (h) not be made unless, to the extent practicable, the persons likely to be affected by the legislation have been consulted:
- (i) not be made (or, in the case of an Act, not be introduced to the House of Representatives) unless there has been a careful evaluation of—

- (i) the issue concerned; and
 - (ii) the effectiveness of any relevant existing legislation and common law; and
 - (iii) whether the public interest requires that the issue be addressed; and 5
 - (iv) any options (including non-legislative options) that are reasonably available for addressing the issue; and
 - (v) who is likely to benefit, and who is likely to suffer a detriment, from the legislation; and
 - (vi) all potential adverse consequences of the legislation (including any potential legal liability of the Crown or any other person) that are reasonably foreseeable: 10
 - (j) produce benefits that outweigh the costs of the legislation to the public or persons:
 - (k) be the most effective, efficient, and proportionate response to the issue concerned that is available. 15
- (2) Any incompatibility with the principles is justified to the extent that it is reasonable and can be demonstrably justified in a free and democratic society.
- (3) Nothing in this section limits the New Zealand Bill of Rights Act 1990.

Certification 20

8 Certificate as to compatibility of legislation with principles

- (1) The Minister responsible for a Government Bill, and the chief executive of the public entity that will be responsible for administering the resulting Act immediately after it has been enacted, must each sign a written certificate containing the information specified in **section 9**— 25
- (a) before the Bill is introduced to the House of Representatives; and
 - (b) before the commencement of the Bill's third reading in the House of Representatives.
- (2) The member of Parliament who is in charge of a Bill (other than a Government Bill) must sign a written certificate containing the information specified in **section 9**— 30
- (a) before the Bill is introduced to the House of Representatives; and
 - (b) before the commencement of the Bill's third reading in the House of Representatives.
- (3) The Minister responsible for legislation of a kind referred to in **section 5(b) or (c)** (if a Minister is responsible), and the chief executive of the public entity that will be responsible for administering that legislation immediately after it is

made, must each sign a written certificate containing the information specified in **section 9** before that legislation is made.

- (4) Despite any other enactment, a Minister may not delegate his or her duties under this section to anyone other than a member of the Executive Council, and a chief executive may not delegate his or her duties under this section to anyone other than a person who is acting as chief executive in his or her place. 5

9 Content of certificate

- (1) A certificate signed by a person for the purpose of **section 8** must state, in the person's opinion,—
- (a) whether the legislation is compatible with each of the principles; and 10
 - (b) if not, the respects in which it is incompatible; and
 - (c) if **paragraph (b)** applies,—
 - (i) whether the incompatibility is justified under **section 7(2)**; and
 - (ii) if so, the reasons for that justification and, if not, the reasons why the legislation is proceeding despite the lack of justification. 15
- (2) **Subsection (1)(c)** does not apply to a certificate given by a chief executive of a public entity if a Minister has also given a certificate under **section 8**.

10 Certificate must be presented to House of Representatives

A certificate in respect of a Bill for the purposes of **section 8** must be presented to the House of Representatives as soon as practicable after the certificate is signed. 20

Application of principles

11 Interpretation compatible with principles to be preferred

- (1) Wherever an enactment can be given a meaning that is compatible with the principles (after taking account of **section 7(2)**), that meaning is to be preferred to any other meaning. 25
- (2) The court may, on application or its own motion, grant leave for the Solicitor-General to be joined as a party to proceedings in which **subsection (1)** may be applied.
- (3) **Subsection (1)** applies to an enactment made before the date on which this Act comes into force only after the tenth anniversary of that date. 30

Compare: 1990 No 109 s 6

12 Court may declare legislation incompatible with principles

- (1) A court may, in any proceedings, declare that a provision of any legislation is incompatible with 1 or more of the principles specified in **section 7(1)(a) to (h)** (unless the incompatibility is justified under **section 7(2)**). 35

- (2) However, a court may not make a declaration unless, before the declaration is made,—
- (a) the public entity responsible for administering the legislation concerned (if any) has been given the opportunity to provide to both the person seeking the declaration and the court a statement as to whether the legislation is incompatible with the principles; and 5
 - (b) the Solicitor-General has been given notice of, and the opportunity to be joined as a party to, the proceedings.
- (3) In this section and **section 13**,—
- court** means the High Court, the Court of Appeal, or the Supreme Court 10
- proceedings** means—
- (a) proceedings that relate only to an application for a declaration under **subsection (1)** or the Declaratory Judgments Act 1908; or
 - (b) judicial review proceedings.
- (4) **Subsection (1)** applies to legislation made before the date on which this Act 15 comes into force only after the tenth anniversary of that date.
- Compare: Human Rights Act 1998 ss 4, 5 (UK)

13 Effect of court declaration

- (1) A declaration under **section 12**—
- (a) does not affect the validity, continuing operation, or enforcement of the provision in respect of which it is given; and 20
 - (b) is not binding on the parties to the proceedings in which it is made.
- (2) A court may award costs against or in favour of any party to proceedings under **section 12**, but may not make an order for an injunction or compensation or anything else in conjunction with or in respect of— 25
- (a) a declaration under **section 12**; or
 - (b) a certificate given, or a failure to give a certificate, under **section 8**.

14 Legal effect of principles

- (1) The principles do not have the force of law (except as provided in **sections 11 to 13**). 30
- (2) No court may, in relation to any legislation (whether made before or after the commencement of this Act),—
- (a) hold any provision of the legislation to be impliedly repealed or revoked, or to be in any way invalid or ineffective; or
 - (b) decline to apply any provision of the legislation— 35

by reason only that the provision is incompatible with any of the principles or that any provision of this Act has not been complied with.

Compare: 1990 No 109 s 4

Part 3		
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15	Guidelines	
(1)	The Minister who is responsible for the administration of this Act may, by notice in the <i>Gazette</i> , issue guidelines as to any or all of the following:	
	(a) examples of the application of the principles:	
	(b) the information that should be included in explanatory notes for legislation as to the compatibility of the legislation with the principles:	10
	(c) the steps that public entities should take in order to comply with section 16(1) :	
	(d) the steps that persons and public entities should take in order to comply with section 17 .	15
(2)	The guidelines do not have the force of law.	
(3)	The Minister must ensure that the guidelines are published, at all reasonable times, on an Internet site maintained by or on behalf of the Department that is responsible for the administration of this Act.	
16	Review of legislation for compatibility with principles	20
(1)	Every public entity must use its best endeavours to regularly review all legislation that it administers for compatibility with the principles.	
(2)	Every public entity must include in each of its annual reports under the Public Finance Act 1989, the Crown Entities Act 2004, or any other Act a statement of—	25
	(a) what steps it has taken to comply with subsection (1) during the year to which the report relates; and	
	(b) the outcomes of any reviews under that subsection that it has completed during that year.	
17	Publication of information on Internet	30
(1)	Every public entity that is responsible for administering any legislation must publish a list of that legislation on the Internet.	
(2)	Every public entity that publishes, or provides to a court, information about the compatibility of legislation with the principles (whether for the purpose of section 12 , or in accordance with guidelines under section 15 , or otherwise) must ensure that the information is published on the Internet throughout the period during which the legislation is in force.	35

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- (3) However,—
- (a) information that is provided to a court is required to be published on the Internet under **subsection (2)** only after the relevant court proceedings have been finally completed; and
 - (b) **subsection (2)** does not require a public entity to publish information on the Internet if there would, under the Official Information Act 1982, be good reason for withholding the information if a request for that information to be made available were made under that Act. 5
- (4) Every person who signs a certificate under **section 8** must ensure that a copy of the certificate is published on the Internet throughout the period during which the legislation is in force. 10
- (5) Material required by this section to be published on the Internet by a public entity must be published on an Internet site maintained by or on behalf of the public entity so that it is available at all reasonable times.