

Submission

by

**THE
NEW ZEALAND
INITIATIVE**

to the Finance and Expenditure Committee

on the

Regulatory Standards Bill

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1. INTRODUCTION AND SUMMARY

- 1.1 This submission on the Regulatory Standards Bill is made by The New Zealand Initiative (the Initiative), a Wellington-based think tank supported primarily by major New Zealand businesses. In combination, our members employ more than 150,000 people.
- 1.2 The Initiative undertakes research that contributes to developing sound public policies in New Zealand. We advocate for the creation of a competitive, open and dynamic economy and a free, prosperous, fair and cohesive society.
- 1.3 The Initiative's members span the breadth of the New Zealand economy; transparent and accountable governance is essential for economic prosperity and public trust. The views expressed in this submission are those of the author rather than the New Zealand Initiative's members.
- 1.4 The Regulatory Standards Bill represents an important step towards improving the quality of regulation in New Zealand. By establishing clear principles of responsible regulation and requiring transparency in legislative development, the Bill addresses longstanding concerns about regulatory quality that have contributed to significant national challenges.
- 1.5 The Initiative strongly supports the Bill's objectives of enhancing transparency and accountability in law-making. However, we identify several critical areas requiring attention to ensure the Bill achieves its intended purposes effectively.
- 1.6 The New Zealand Initiative submits that the Bill should proceed, subject to the following recommendations:
- The composition of the Regulatory Standards Board must prioritise legal expertise to ensure credible and robust assessments of legislative consistency with the principles
 - Clear and comprehensive guidance must be developed for government agencies on applying the principles of responsible regulation, particularly regarding property rights and compensation
 - The Bill's principles must be carefully integrated with existing regulatory frameworks, particularly the Resource Management Act, to ensure coherence across the regulatory system
 - A public interest test should be incorporated for instances of property takings
 - Compensation should aim to make the person whose legal rights have been taken or impaired no worse off than if this had not been done. In this sense it should be "full" rather than "fair" compensation.
 - Additional safeguards should be included to strengthen rule of law protections
 - The framework should be extended to local government regulation in future
 - Implementation timelines should allow adequate time for developing guidance materials and establishing the Board before consistency assessment requirements commence
 - The non-binding nature of the Board's recommendations should be retained to preserve Parliamentary sovereignty while ensuring transparency

2. THE CASE FOR REGULATORY STANDARDS

The Regulatory Quality Challenge

- 2.1 New Zealand faces persistent challenges arising from poor-quality regulation. In part, regulatory failures are responsible for high housing costs, inadequate infrastructure development and declining productivity. The current system provides weak incentives for rigorous analysis of proposed laws and insufficient transparency about regulatory trade-offs.
- 2.2 The Initiative has long advocated for systematic improvements to regulatory quality. Our Senior Fellow, Dr Bryce Wilkinson, first articulated the need for tighter regulatory standards in his 2001 report “Constraining Government Regulation”. The persistence of ill-considered and sometimes rushed regulations over the subsequent two decades demonstrates the need for a more structured approach.
- 2.3 The Bill addresses these challenges by establishing clear principles against which all legislation must be assessed. These principles – covering the rule of law, property rights, good law-making processes and cost-benefit analysis – are not novel or radical.¹ They represent fundamental elements of good governance that have evolved over centuries of legal tradition, from Magna Carta through to modern democratic practice.

Learning from the Fiscal Responsibility Act

- 2.4 The Regulatory Standards Bill is informed by the successful Fiscal Responsibility Act (now incorporated into the Public Finance Act). That framework brought discipline and transparency to fiscal management without putting future governments into a fiscal straitjacket.² It established principles and reporting requirements that improved fiscal outcomes through transparency rather than rigid rules.
- 2.5 Just as the Fiscal Responsibility Act improved fiscal transparency, and thereby discipline, the Regulatory Standards Bill can use greater transparency to improve regulatory discipline. Both frameworks recognise that transparency and systematic analysis lead to better decisions without compromising democratic flexibility.
- 2.6 Crucially, the Bill does not prevent Parliament from departing from these principles at will. Instead, it requires Ministers to better inform Parliament about these matters. This transparency approach fully respects Parliamentary sovereignty. It ensures that both Parliament and the general public are better informed about these fundamental matters before Bills are enacted.

3. CRITICAL SUCCESS FACTORS

Board Composition and Legal Expertise

- 3.1 The effectiveness of the Regulatory Standards Board will depend fundamentally on its composition. The Board’s assessments of legislative consistency with the principles must

¹ Some argue that the Bill’s statement of these principles has some novel elements. For example, they remove the ambiguity in some other statements concerning whether property is more than land and whether the compensation principle applies to partial takings, impairments, or injurious affection. The greater clarity should be seen as a virtue. After all, when the status quo is not working well, something different is needed.

² It allows departures from prudent levels of debt, as determined by the incumbent government, but it does require that these departures be time limited.

command respect across the political spectrum and withstand scrutiny from legal professionals.

- 3.2 The Initiative strongly recommends that Board appointments prioritise individuals with substantial legal expertise, particularly in constitutional law, statutory interpretation, law and economics, and regulatory design. Expertise in economics is also essential, both in the literature of the economics of regulation and in the assessment of costs and benefits to those likely to be affected. Without such expertise, the Board's determinations risk being dismissed as ideologically motivated or technically flawed.
- 3.3 We suggest the appointment process should involve consultation with the legal profession, including the New Zealand Law Society and academic institutions. This would help ensure appointees possess the necessary skills and credibility.
- 3.4 The Board should include members with more general perspectives and backgrounds to ensure balanced consideration of regulatory impacts across different sectors and communities. However, legal expertise must remain the primary qualification criterion.

Guidance for Government Agencies

- 3.5 The principles of responsible regulation require interpretation and application in varied contexts. Government agencies need clear, practical guidance on how to assess consistency with these principles and prepare meaningful Consistency Accountability Statements.
- 3.6 The Initiative recommends that comprehensive guidance be developed before the consistency assessment requirements commence. This guidance should address:
- How to interpret each principle in practice, with examples from different regulatory contexts
 - The level of analysis required for different types of legislation
 - How to assess and document trade-offs between competing principles
 - Standards for cost-benefit analysis, including the determination of the best of the forgone alternatives, how to assess of who benefits and who loses taking incidence shifting into account, the treatment of non-monetary costs and benefits including technological externalities, environmental and otherwise.³
 - Specific guidance on the "taking of property" principle, including what constitutes impairment, injurious affection or partial takings⁴ and when compensation should be considered.
 - How the principles apply to secondary legislation, including regulations and other legislative instruments
- 3.7 Practical examples would strengthen understanding. For instance, the tests of proportionality, net benefit, the distribution of net benefits and thereby the issue of compensation could be illustrated by application to any of the following three types of proposals:

³ Of course, none of this is novel. Guides in CBA exist in many OECD member countries, including New Zealand.

⁴ For the purposes of this submission, these all just different words for the same thing.

- Building standards that restrict currently legal property use but enhance safety;
- Environmental regulations that block otherwise legal activities in order to protect waterways;
- Health and safety rules that block currently legal activities;
- Noise control rules that restrict all equally for the mutual benefit of all.
- In contrast, regulations that better enforce existing law would not need to be assessed against the compensation principle as no property rights are taken or impaired.

3.8 The Minister for Regulation and the Attorney-General are jointly responsible for this guidance. The Ministry for Regulation must find top quality expertise in these matters to help its Minister develop this guidance. That development process should seek ‘buy-in’ along the way from the relevant outside experts. Once developed, instructional courses about how to determine if a measure infringes on a principle are likely to be necessary for experts in government agencies. The guidance should be updated as experience develops with the new framework.

Integration with Existing Frameworks

3.9 New Zealand already has various regulatory standards and frameworks, including the Legislation Design and Advisory Committee Guidelines and requirements under the Resource Management Act. The Regulatory Standards Bill must integrate coherently with these existing frameworks.⁵

3.10 Of particular importance is the relationship with property rights provisions in other legislation. The replacement Bills for the Resource Management Act are intended to have a property rights focus. The essential issue in this context is likely to be the issue of compensation for infringements on land use. (These are examples of partial takings in US legal terminology or “injurious affection” in the terminology in New Zealand’s Public Works Act). The Initiative recommends explicit guidance on how the Bill’s property rights principles interact with RMA processes and other sector-specific regimes.

3.11 We also recommend clarifying the relationship between the Regulatory Standards Board and existing oversight bodies. Clear delineation of roles will prevent duplication and ensure efficient use of public resources.

4. RESPONDING TO THE LEGISLATION DESIGN AND ADVISORY COMMITTEE

4.1 The Legislation Design and Advisory Committee has argued that the Bill is unnecessary, to the extent that it restates constraints and principles.⁶ We respectfully disagree with this assessment. It is necessary for the purposes of the Bill to give prominence to the principles that are most specific to regulatory quality. The LDAC is clear that despite its guidelines, that it surely regards as satisfactory, “there is much that can and should be done to improve regulatory quality”.⁷ We concur.

4.2 A particularly glaring deficiency in the LDAC guidelines is the lack of clarity in its compensation principle. To what extent does its principle cover injurious affection and who should pay and in what circumstances? How should the compensation principle of leaving someone no worse

⁵ Part 5 of the 2009 Taskforce’s report addressed the need for supporting arrangements.

⁶ See the first bullet point in paragraph 6.

⁷ Ibid, para 3.

off than before the injurious affection apply to the replacement legislation for the RMA? And who should pay that compensation if the benefits are going disproportionately to an identified group that is not taxpayers at large?

- 4.3 The answer is that the Legislation Guidelines neglect all these considerations. In the case of a group that wants, for example, private land planted in native trees rather than exotic trees, in principle that group can have what it wants without government intervention if it buys the land from a willing seller. That would be a 'win-win' transaction; otherwise, it would not occur. The compensation principles in the Bill preserve this win-win possibility.
- 4.4 The LDAC's paper questions this generic, approach as novel, a significant departure from New Zealand and international practice, difficult to implement, and potentially very costly to the Crown. Yet it is of the essence to everyday voluntary property transactions. All the principle is saying that when government sees the need to force the same exchange there is no need in principle to make any party to it worse off. The LDAC appears to have no recognition that New Zealand's problem of unaffordable housing results in good part from a system that does not confront NIMBYISM with the cost to the community of the forgone housing developments.
- 4.5 The LDAC paper does not entertain the possibility that its current guidelines are insufficiently specific. Novel may be necessary if change is necessary. The LDAC paper does not demonstrate that it is taking the housing affordability problem, of the infrastructure capacity problems seriously. The Bill's more explicit principles and its requirement that Parliament be better informed by Consistency Accountability Statements increase executive government's accountability.
- 4.6 The statutory framework elevates these principles from administrative guidance to a matter of public record and parliamentary scrutiny. This elevation is appropriate given the fundamental nature of the principals involved.
- 4.7 Moreover, the establishment of an independent Board to review consistency provides an external check that does not exist under current arrangements. This independent scrutiny, combined with public reporting, creates stronger incentives for compliance than voluntary guidelines.

5. SPECIFIC RECOMMENDATIONS FOR STRENGTHENING THE BILL

Public Interest Test for Property Takings

- 5.1 The Initiative recommends incorporating an explicit public interest test for instances where regulation takes or impairs property.⁸ While the current principles require "good justification", a more structured test would provide clearer guidance.
- 5.2 This test should require demonstration that:
- The taking serves a legitimate public purpose
 - Less restrictive alternatives have been considered
 - The public benefit substantially outweighs the private cost

⁸ The Ministry for Regulation has a useful definition of the public interest.

- Compensation arrangements are full⁹ and proportionate

Strengthening Rule of Law Safeguards

- 5.3 While the Bill includes rule of law principles, these could be strengthened. We recommend explicit provisions addressing:

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- Clarity requirements for legislation, including avoiding excessive delegation
- Protection against retrospective changes that adversely affect existing rights
- Requirements for accessible publication of all legislative instruments
- Safeguards against arbitrary administrative discretion

Role of the Courts

- 5.4 The Bill preserves the courts' constitutional role of ascertaining the meaning of legislation. In Subpart 5, it is explicit that it does not confer or impose legal rights or obligations or affect the validity of any law or regulation.
- 5.5 Fears remain in authoritative legal circles that activist courts could yet use the principles in unexpected and possibly irreversible ways. It is not clear that the courts could not do that Bill or no Bill given the number of principles already in the statute book and the principles already endorsed in Cabinet guidelines. Parliament arguably should be considering this problem independently of the RSB. But perhaps more could be done to strengthen subpart 5 in this respect.

Extension to Local Government

- 5.6 The current Bill excludes local government regulation. Given that much regulation affecting daily life occurs at the local level, we recommend that work be done on the case for extending the framework to local authorities in the future.
- 5.7 Perhaps the Bill could include provision for such extension once the framework is established at the central government level. Local government regulation often has significant impacts on property rights and economic activity, making transparency equally important at this level.

6. ADDRESSING COMMON CONCERNS

The "Ideological Agenda" Criticism

- 6.1 Critics have characterised the Bill as imposing a narrow ideological agenda. This criticism fundamentally misunderstands both the Bill's content and operation. The principles in the Legislation Guidelines and in the Bill reflect long-standing English common law traditions that predate any modern political ideology. They are fundamental to a free and democratic society.
- 6.2 The protection of property rights, requirements for due process and expectations of cost-benefit analysis are not partisan positions. They are basic requirements for good governance accepted across the political spectrum in democratic nations.

⁹ "Fair" compensation is undesirably vague and litigious. "Full compensation" is that which leaves the person whose legal rights have been taken or impaired – in the public interest – no worse off. This principle is consistent the long-standing Legislation Guidelines.

Treaty of Waitangi Concerns

- 6.3 Some critics argue the Bill fails to adequately recognise Treaty of Waitangi considerations. This criticism misunderstands the Bill's operation. The principles of responsible regulation do not override Treaty obligations – they operate at a higher level of generality that applies to all races, genders, and nationalities. The New Zealand Bill of Rights Act does not mention the Treaty of Waitangi either.
- 6.4 The Bill's requirements for consultation, careful evaluation of impacts and consideration of affected parties naturally incorporate Treaty considerations where relevant. Agencies must still comply with Treaty obligations when developing legislation. The Bill simply adds transparency to this process.
- 6.5 The principle of equality before the law does not preclude targeted measures to address specific needs or historical injustices. It requires that such measures be transparently justified, which enhances rather than undermines democratic accountability.

The “Chilling Effect” Argument

- 6.6 Concerns about a “chilling effect” on necessary regulation are overstated. By clarifying expectations and requiring systematic analysis, the Bill should actually facilitate well-designed regulation that can withstand scrutiny.
- 6.7 Good regulation – regulation that genuinely serves the public interest and is proportionate to the problem addressed – has nothing to fear from transparency. The Bill may discourage poor-quality, knee-jerk regulation, but this would be a positive outcome.
- 6.8 International experience shows that countries with strong regulatory quality frameworks, including robust property rights protection, maintain effective environmental, health and safety regulation. Transparency enables rather than prevents good regulation.

Environmental and Public Health Impacts

- 6.9 Concerns about impacts on environmental protection or public health regulation are similarly misplaced. Public health measure (such as mandatory reporting of infectious disease) that impose the same requirements on all for a greater expected benefit to all will pass the net benefit test. Such measures compensate all in kind rather than in cash.
- 6.10 Consider tobacco packaging regulation that deprives customers of marketing information: the Bill would require the responsible Minister to justify such a measure to Parliament and the public and provide a net benefit assessment of the net health and other benefits. Parliament can have a better informed debate, and nothing in the Bill stops it from proceeding as it sees most fit.
- 6.11 A Minister sponsoring environmental regulations protecting water quality or limiting emissions would similarly inform Parliamentary debate. Again, the Bill does not dictate Parliament's decision, either on the propose or on compensation.

Secondary Legislation

- 6.12 The Bill appropriately applies to secondary legislation, not just primary Acts. Much significant regulation occurs through regulations, orders and other instruments. Applying consistency requirements here is crucial for comprehensive regulatory improvement.

- 6.13 Agencies making secondary legislation will need support to meet these requirements. The guidance framework we recommend above becomes even more critical for the numerous agencies involved in making delegated legislation.

7. IMPLEMENTATION PATHWAY

- 7.1 Successful implementation requires careful sequencing. We recommend:
- Immediate commencement of work on guidance materials; that is needed, Bill or no Bill
 - Preparation and delivery of training courses for officials who will need to be able to apply that guidance
 - A pilot phase where key agencies test the consistency assessment process
 - Expedited work to establish the Regulatory Standards Board given the quality of expertise it needs to attract and its potential for improving the guidance
 - Full commencement of consistency requirements from 1 July 2026, allowing six months for guidance development and testing
- 7.2 The Ministry for Regulation should report to Parliament on implementation progress, including early lessons from consistency assessments and any need for refinements to guidance or processes.
- 7.3 Regular review of the framework's operation will be important. We suggest a formal review after three years to assess whether the Bill is achieving its objectives and identify any necessary adjustments.

8. CONCLUSION

- 8.1 The Regulatory Standards Bill represents a modest but important reform. It does not revolutionise New Zealand's constitutional arrangements or impose rigid constraints on Parliament. Instead, it introduces transparency and discipline to regulatory development, following the successful model of fiscal responsibility legislation.
- 8.2 The Initiative strongly supports the Bill's passage, subject to careful attention to the critical areas we have identified: Board composition, agency guidance, framework integration and the specific enhancements we recommend.
- 8.3 With these elements properly addressed, the Bill can contribute to better regulatory outcomes for all New Zealanders. It will not prevent necessary regulation but will ensure such regulation is transparent, justified and well-designed.
- 8.4 We appreciate the opportunity to submit on this important legislation and would welcome the opportunity to appear before the Committee to elaborate on our submission.

ENDS