



To	Hon David Seymour, Minister for Regulation		
Title	Proposed revisions to the principles in the 2021 Regulatory Standards Bill	Number	MFR2024-095
Date	14 August 2024	Priority:	Medium
Action Sought	Agree to the recommended actions	Due Date	19 August 2024
Contact Person	Pip van der Scheer, Manager	Phone	9(2)(a)
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Attachments	Yes (Annexes 1-2)	Security Level	IN CONFIDENCE

Executive summary

1. Following your meeting with officials on Tuesday 30 July, you directed us to proceed with an approach based on the principles set out in the 2021 Regulatory Standards Bill. This briefing provides you with advice on our recommended amendments to these principles.
2. Our advice assumes the use of the Responsible Regulation Statement mechanism that we proposed in our previous advice to you (MFR2024-077 refers) as the way the principles would be given effect. **9(2)(h)**
[REDACTED]
3. **9(2)(h)** we recommend amendments to the 2021 principles to ensure that the principles do not result in overly onerous or costly requirements, or requirements that are inconsistent with current law or best practice. This could create significant uncertainty and make it much more difficult for Ministers and agencies to comply with the principles – likely resulting in inconsistency becoming the norm rather than the exception over time.
4. This approach is consistent with the Regulatory Responsibility Taskforce’s intention to “provide a simplified and streamlined set of criteria that accord with and reflect broadly accepted principles of good legislation rather than novel principles.” It also recognises the developments in regulatory policy and legislative guidance since the Taskforce released its report in 2009.
5. In addition to changes to how the principles are positioned (to provide for the Responsible Regulation Statement mechanism), we propose changes to the content of the 2021 principles in three areas where we think they go much further than broadly accepted principles, referring to more onerous obligations or definite rights than is currently the case, or including some novel concepts:
 - the ‘takings’ principle (Clause 6(1)(c) of the 2021 Bill)
 - the ‘right of appeal’ principle (Clause 6(1)(g) of the 2021 Bill)
 - the ‘consultation’ principle (Clause 6(1)(h) of the 2021 Bill).



6. We also recommend:
- a number of changes to help clarify the principles or better align the wording with existing formulations of the principles in New Zealand or comparable jurisdictions
 - additions to the principles to provide for regulatory policymaking to consider the existence of market failure and to help create stronger and more specific regulatory stewardship obligations for responsible Ministers and agencies in relation to existing regulation. Annex 2 is withheld under 9(2)(h) to maintain legal professional privilege.
7. **Annex 1** provides a detailed summary of each of these recommended amendments. **Annex 2** provides updated drafting by PCO incorporating these amendments, to support your consideration of them (noting that this should be considered as interim drafting only).
8. We propose to provide you with further advice on:
- consideration of the Crown's obligations under the Treaty of Waitangi/Te Tiriti o Waitangi, given the reference to other fundamental constitutional principles
 - the role of the Attorney-General in issuing Responsible Regulation Statements, given the inclusion of principles relating to the design and content of legislation in this approach.

Recommended action

9. We recommend that you:
- a **note** that this briefing identifies recommended amendments to the principles in the 2021 Regulatory Standards Bill to better align them with broadly accepted principles and practices, while still achieving the original intent of the Regulatory Responsibility Taskforce *Noted*
- b **note** that this briefing assumes that the Responsible Regulation Statement mechanism that we proposed in our previous advice to you would be the means by which the principles are given effect *Noted*
- c **agree** to proceed on the basis of the following amendments to the 2021 principles, which are summarised in more detail in Annex 1 *Agree / Disagree*

Framing of principles

- i. amending Clause 6(1) to require 9(2)(h) [REDACTED] the principles given effect to in a Responsible Regulation Statement *Agree / Disagree*



Rule of law

- ii. amending Clause 6(1)(a) to clarify that the principle does not refer to equality of outcomes, and to add a reference to an independent judiciary *Agree / Disagree*

Liberties

- iii. amending Clause 6(1)(b) to avoid inconsistencies with the New Zealand Bill of Rights Act, and align it with the grounds under which the Regulations Review Committee may bring secondary legislation to the attention of the House *Agree / Disagree*

Taking of property

- iv. amending Clause 6(1)(c) so that it provides that taking of property without the consent of the owner should only be done if there is good justification for the taking, and fair compensation is paid *Agree / Disagree*

Taxes and charges

- v. amending Clauses 6(1)(d) and (e) to create a clearer distinction between fees and levies and to introduce a more conventional test about how they should be set *Agree / Disagree*

Role of courts

- vi. amending Clause 6(1)(f) to improve consistency with the Legislation Act and reinforce the Courts' constitutional role *Agree / Disagree*
- vii. amending Clause 6(1)(g) to remove the reference to an automatic right to a merits appeal, and bring the wording closer to that in Queensland's Legislative Standards Act *Agree / Disagree*

Good lawmaking

- viii. amending Clause 6(1)(h) to provide for situations where consultation is not useful or desirable, including where there are only minor effects *Agree / Disagree*
- ix. amending Clause 6(1)(i) to add a principle requiring identification of the problem to be addressed, including consideration of the existence of any market failure *Agree / Disagree*
- x. amending Clause 6(1)(j) to clarify that identified costs and benefits are only expected, not actual *Agree / Disagree*



- xi. amending Clause 6(1)(k) to make it consistent with a well-established test in the Legislation Guidelines

Agree / Disagree

Stewardship of existing regulatory systems

- xii. adding principles to help create stronger and more specific obligations on responsible Ministers and agencies in relation to the stewardship of regulation

Agree / Disagree

- d **note** that PCO has provided an initial draft of these amended principles for your consideration, attached as Annex 2

Noted

- e **agree** that this briefing will not be made public until proactive release of the final Cabinet paper, to ensure that you have sufficient time to consider and make decisions on the Bill.

Agree / Disagree

9(2)(a)

Pip van der Scheer

Manager

Ministry for Regulation

Date:

Hon David Seymour

Minister for Regulation

Date:



Purpose of report

10. This briefing provides advice in relation to the regulatory responsibility principles set out in the 2021 Regulatory Standards Bill, including recommended amendments.

Background and context

11. Following your meeting with officials on Tuesday 30 July, you directed us to proceed with an approach based on the principles set out in the 2021 Regulatory Standards Bill.
12. In comparison with the previous approaches proposed to you, the principles in the 2021 Bill:
 - have a narrower focus than the approach outlined in briefing MFR2024-063, in which the principles covered a comprehensive range of good legislation development practices, including the content/design of legislation and the processes for making it
 - have a broader focus than the approach outlined in briefing MFR2024-077, in which the principles only covered good regulatory policy development and regulatory stewardship practices.

Regulatory Responsibility Taskforce

13. The 2021 Bill is largely based on the recommendations of the 2009 Regulatory Responsibility Taskforce. In its report, the Taskforce noted that their recommended principles were designed to “provide a simplified and streamlined set of criteria that accord with and reflect broadly accepted principles of good legislation rather than novel principles.”¹
14. The Taskforce proposed principles in six broad categories, drawing on the Legislation Guidelines as well as other sources – however, as we have noted in previous advice, these categories do not fully cover all broadly accepted principles of good legislation (as set out in the Legislation Guidelines), with key omissions relating to the role of Parliament and Treaty principles.² We note that the Legislation Guidelines were updated in 2018 and 2021, so good lawmaking requirements have been more finely honed since 2009.
15. However, as you have indicated that you wish the regulatory responsibility principles to be based on the 2021 Bill principles, we have taken these as our starting point, and focused our advice on what the Taskforce set out as its objectives, as well as how best to address some of potential risks and issues that have been identified in relation to the 2021 principles.

Potential issues associated with the 2021 principles

16. In our previous advice, we have outlined some of the potential issues with the way the 2021 principles are drafted, including their:
 - formulation as strict tests that, in the case of some principles, would be extremely difficult to meet

¹ *Report of the Regulatory Responsibility Taskforce*, p. 10

² The Taskforce noted that the principles of responsible regulation were “not intended to be an exhaustive statement of the matters to be taken into account to produce good legislation, but rather focus primarily on the effect of legislation on existing interests and liberties and good law-making process.” (See p. 38 of the report)



- inconsistency with existing concepts or legislation in New Zealand and in overseas jurisdictions in terms of the way they are expressed
- inclusion of some significant changes to broadly accepted principles and practices – for instance in requiring global provision for merit-based appeal to the courts or providing full compensation for all impairment of property.

17. 9(2)(h)

18. We have worked with PCO to identify ways in which the 2021 principles could be amended to address the issues outlined in previous advice, while still achieving the broad objectives of the Taskforce.

Proposed amendments to the 2021 principles

19. The discussion below summarises the main amendments we recommend to the 2021 principles if they are proceeded with. More detailed advice on potential issues with each of the principles and how these could be addressed is set out in **Annex 1**. **Annex 2** provides updated drafting by PCO to reflect these proposed amendments, to support your consideration of them (noting that this should be considered as interim drafting only).

20. The discussion below assumes that the Responsible Regulation Statement mechanism that we proposed in our previous advice to you (MFR2024-077 refers) would be the means by which the principles are given effect (by setting specific obligations on responsible Ministers and agencies). 9(2)(h)

21. 9(2)(h) we recommend that the principles do not set overly onerous or costly requirements, or requirements that are inconsistent with current law or best practice (noting as above that the Taskforce’s intention was to reinforce existing broadly accepted legislative principles rather than creating novel ones). This could create significant uncertainty and make it much more difficult for Ministers and agencies to comply with the principles - likely resulting in inconsistency becoming the norm rather than the exception over time.

Changes to the stem of the principles clause

22. Clause 6(1) of the 2021 Bill introducing the principles sets a requirement that legislation ‘should’ be consistent with the principles unless inconsistency can be ‘demonstrably justified’. 9(2)(h)

23. 9(2)(h)



24. Our view is that this would still achieve the Taskforce’s objective of enshrining a range of important principles for legislative proposals in legislation when coupled with the three proposed underpinning mechanisms:
- Responsible Regulation Statements, which would set out in more detail the obligations of responsible Ministers and agencies in relation to the statutory principles.
 - a mechanism for responsible Ministers and agencies to certify consistency of new and existing regulation and disclose any departures, and for responsible Ministers to justify any departures
 - a recourse mechanism that would allow for independent consideration of the consistency of legislation.
25. We also note that positioning the principles in this way seems consistent with the intent of the Taskforce in positioning the principles as “guidelines or sign posts for good legislation.”³

Changes to the content of the principles

26. There are three areas where we recommend changes to the content of the principles to ensure that they are consistent with broadly accepted legal and policy positions, and that assessment against them would be reasonably practicable – while still achieving the broad objectives of the Taskforce.

Taking of property

27. Clause 6(1)(c) of the 2021 Bill establishes a principle that any taking or impairment of property without the consent of the owner should be done only where it is in the public interest, with full compensation for the owner provided from (wherever possible) those who obtain the benefit of the taking or impairment.
28. In our view, this principle departs from broadly accepted principles of good legislation and policymaking⁴ in four key ways.

29. 9(2)(h)



30. As well as being far broader than the current presumption in New Zealand and comparable jurisdictions, the reference to any impairment does not appear to align with what the

³ *Report of the Regulatory Responsibility Taskforce*, p. 38

⁴ The *Legislation Guidelines* set out the following guidance: “The Government should not take a person’s property without good justification. A rigorously fair procedure is required, and compensation should generally be paid. If compensation is not paid, there must be cogent policy justification (such as where the proceeds of crime or illegal goods are confiscated). The law may allow restrictions on the use of property for which compensation is not always required (such as the restrictions on the use of land under the Resource Management Act 1991).”

⁵ Noting that the Taskforce intended ‘property’ to cover “all types of real and personal property, including intangible property” (see p. 45 of the report).



Taskforce itself intended. The Taskforce considered that a protection against takings akin to the common law presumption should be enshrined in the principles.⁶ Its intention in referring to impairment was “to encompass regulatory actions which, while not amounting to a physical taking of property, **severely impair** an owner’s enjoyment of his or her bundle of property rights.”⁷ (emphasis added).

31. 9(2)(h)
[REDACTED] The Taskforce itself identified that the Australian courts, where the constitution does not refer to impairment, have nonetheless recognised that a sufficiently serious impairment will amount to a taking.⁸ Further, in Queensland, the narrower principle in the Legislative Standards Act 1992 relating to “compulsory acquisition of property” has been interpreted to at least engage the principle in a wide range of situations. This includes compensation for loss of office, changes to quarrying rights, and changes to easement rights.
32. 9(2)(h)
[REDACTED]
33. Secondly, while the use of “full compensation” is taken from the Public Works Act 1981, this relates to the acquisition of land for public works, rather than to other types of property. 9(2)(h)
[REDACTED] There are also circumstances where compensation may not be appropriate at all, as outlined in the Legislation Guidelines (e.g. in relation to the confiscation of illegal goods). 9(2)(h)
[REDACTED]
34. Thirdly, the introduction of a requirement to demonstrate that any taking is in the “public interest” is also inconsistent with current guidance – with the Legislation Guidelines referring to a less onerous need to show that there is “good justification” and “a fair process.” The Public Works Act only requires the taking of land to be “fair, sound, and reasonably necessary for achieving the objectives of the Minister or local authority” in relation to a public work. In our view, a broader requirement around “good justification,” together with relevant provisions set out in the other principles (such as the requirement

⁶ *Report of the Regulatory Responsibility Taskforce* pp. 46-7

⁷ *Report of the Regulatory Responsibility Taskforce*, p. 47

⁸ Section 51 of the Commonwealth of Australia Constitution Act provides property can be acquired ‘on just terms’ from any State or person for any purpose in respect of which the Parliament has the power to make laws.

⁹ 9(2)(h)
[REDACTED]



for assessment of costs and benefits), would still address the Taskforce’s desire to avoid legislators using “governmental power to take property for private benefit,”¹⁰ while being more consistent with current guidance and more practical to implement.

35. Finally, the requirement that compensation is paid wherever possible by those who benefit is an entirely novel approach that in our view would be practically very difficult to implement. We think the Taskforce’s underlying objective that “a hard look is taken at any legislation which takes property from one person (or a small group of persons) to benefit another group of individuals”¹¹ would be covered by requirements that good justification is given for any taking.
36. We therefore recommend that this clause be replaced with wording along the lines that taking of property without the consent of the owner should only be done if there is good justification for the taking, and fair compensation is paid.

Right of appeal

37. Clause 6(1)(g) of the 2021 Bill provides for a right of appeal in relation to the merits of decisions that may adversely affect any liberty, freedom, or right. The breadth of this formulation would likely apply to all decisions made under legislation, essentially providing for a global merits-based appeal in all cases. 9(2)(h)



38. By contrast, the Legislation Guidelines provide that a person affected by a statutory decision should have an adequate pathway to challenge that decision and, more specifically, that legislation should provide a right of appeal if the rights or interests of a particular person are affected by an administrative decision, unless there are factors that would make an appeal inappropriate. It requires that the value of an appeal must be balanced in the particular circumstances against a consideration of the potential costs, implications of delay, significance of the subject matter, competence and expertise of the decision-maker in the first instance, and the need for finality. This provides a degree of flexibility in determining the appropriate pathway and ground for an appeal relative to the type of decision being made – while still achieving the Taskforce’s broad objective of providing a check on “the erroneous (as opposed to merely improper) exercise of power”¹² in relation to the rights or interests of a particular person.
39. We therefore recommend that this clause be replaced with wording along the lines that administrative powers should be sufficiently defined and subject to appropriate review.

Consultation

40. Clause 6(1)(h) of the 2021 Bill requires that legislation not proceed unless, to the extent practicable, the persons likely to be affected by the legislation have been consulted. This clause assumes a significantly strengthened requirement 9(2)(h)

¹⁰ *Report of the Regulatory Responsibility Taskforce*, pp. 46-7

¹¹ *Report of the Regulatory Responsibility Taskforce*, p.47

¹² *Report of the Regulatory Responsibility Taskforce*, p.50



9(2)(h)

41. By contrast, the Regulatory Impact Analysis Guidance Note: *Effective Consultation for Impact Analysis* notes that, when preparing a policy proposal, “good consultation is fit for purpose and tailored to both the nature and magnitude of the proposals, and the needs of stakeholders. One size does not fit all.” This suggests that an effective principle should allow for a degree of discretion in relation to who should be consulted and when.
42. We therefore recommend amending this principle 9(2)(h)

Changes to clarify the principles or better align them with existing provisions

43. We also propose changes to the principles to help clarify them or better align them with existing formulations of the principles in New Zealand or other jurisdictions including:
- clarifying in clause 6(1)(a) (rule of law) that the principle does not create any obligations in relation to equality of outcome (as opposed to equal treatment), nor prevent any use of appropriate discretion in administrative consideration of legal rights and obligations, and include a reference to an independent judiciary to bring the principle in line with the general understanding of the key components of the rule of law
 - aligning clause 6(1)(b) (liberties) with the wording in the NZ Bill of Rights Act, and with the grounds under which the Regulations Review Committee may bring secondary legislation to the attention of the House (Standing Orders SO 327(2)(b))
 - clarifying in clause 6(1)(e) (charges) the difference between fees and levies, removing the reference to ‘charges’ and aligning the clause with the more conventional test in the Legislation Guidelines
 - aligning clause 6(d) (taxes) with the current provision in the Constitution Act 1986 for taxes to be set by an Act of Parliament
 - clarifying clause 6(1)(f) (role of courts) to improve consistency with the Legislation Act 2019 and reinforce the courts’ constitutional role
 - clarifying in the good lawmaking principles that assessment of costs and benefits prior to implementation can only identify expected, not actual costs and benefits (clause 6(1)(j)) and applying the more well-established test currently set out in the Legislation Guidelines in relation to whether legislation is needed (clause 6(1)(k)).

Potential additions to the principles

44. We have also proposed some potential additions to the 2021 principles if this approach is proceeded with, including that:
- a clause be added to the good lawmaking principles to capture your previous request for regulatory policymaking to consider the existence of market failure 9(2)(h)
 - clauses be added to help create stronger and more specific regulatory stewardship obligations for responsible Ministers and agencies in relation to existing regulation - this



could include requirements to periodically check whether legislation is still needed, remains fit for purpose, and is being implemented in the most efficient and effective way. As the Taskforce noted in its report, “consideration of legislation at the time it is created is not sufficient to achieve the purposes of the [Bill, and] regular review of the body of legislation is crucial to establishing and maintaining quality, effective and efficient legislation in a dynamic environment.”¹³ In our view, such review should include monitoring of and reporting on how regulatory systems are operating as well as the quality of existing legislation, as this is where many unnecessary costs and compliance burdens can arise.

45. The current drafting includes provision for these additional principles for your consideration.
46. One further area where we recommend additional principles be considered is in relation to the Treaty of Waitangi/Te Tiriti o Waitangi. 9(2)(h)

[REDACTED] We propose to provide you with further advice on this shortly as part of the detailed analysis referred to in MFR2024-092.

Role of Attorney-General

47. As previously advised, the Attorney-General’s role as the Senior Law Officer of the Crown, their role in relation to the New Zealand Bill of Rights Act and their responsibilities in relation to the quality of legislation means that there is a degree of overlap between the Minister for Regulation’s and the Attorney-General’s roles in relation to the Bill (MFR 2024-063 refers).
48. The inclusion of principles relating to the design and content of legislation therefore means that it would be appropriate for the Attorney-General to have joint responsibility for the issuing of Responsible Regulation Statements, and in relation to other parts of the Bill that are concerned with legislative quality. We can provide you with more specific advice on that in our next briefing.

Next steps

49. MFR2024-092 provided to your office on 6 August sets out key next steps and timeframes for work on the Bill.

¹³ *Report of the Regulatory Responsibility Taskforce*, p. 12



Annex 1: Proposed approach to refinement of the 2021 Bill principles

Annex 1: Proposed approach to refinement of 2021 Bill principles

2021 Bill principles	Potential issues	Suggested approach	Proposed drafting
<i>Framing of principles</i>			
<p>6(1) The principles of responsible regulation are that [except where inconsistency with the principles is justified to the extent that it is reasonable and can be demonstrably justified in a free and democratic society] legislation should...</p>	<p>This clause in the 2021 Bill positions the principles as strict rules to be complied with – this is inconsistent with the Legislation Guidelines, which state that statutory principles should be used to support and enable decision-making in line with the policy of the legislation, rather than to create stand-alone enforceable substantive rights or duties.</p> <p>This stem also gives the impression that the concepts outlined in the following principles are straightforward and well-settled, and therefore the principles are amenable to definitive assessments of consistency. 9(2)(h)</p>	<p>As previously outlined in MFR2024-077, we recommend changing the wording to avoid any suggestion that the principles will comprise strict legal tests in themselves but will instead involve a degree of judgement. This approach aligns with the approach in Queensland’s Legislative Standards Act 1992 (“The principles include requiring that legislation has sufficient regard to...”).</p> <p>More specific requirements to ensure consistency with the principles would then be set out in a Responsible Regulation Statement, coupled with mechanisms for transparent assessment of regulatory proposals/existing legislation against those requirements.</p> <p>We also recommend specifying that the principles are given effect to via the Responsible Regulation Statement, rather than having any independent standing to manage the risk of the courts applying the principles in unintended ways.</p>	<p>9(2)(h)</p>
<i>Rule of law</i>			
<p>Cl 6(1)(a) be consistent with the following aspects of the rule of law:</p> <p>(i) the law should be clear and accessible:</p> <p>(ii) the law should not adversely affect rights and liberties, or impose obligations, retrospectively:</p> <p>(iii) every person is equal before the law:</p> <p>(iv) issues of legal right and liability should be resolved by the application of law, rather than the exercise of administrative discretion</p>	<p>As the Legislation Design Advisory Committee (LDAC) has noted, the exact nature of the rule of law is contestable, and careful work is needed to ensure that any rule of law principles line up with settled legal understandings. The Legislation Guidelines provide a well-established starting point for thinking about the rule of law in relation to legislative design.</p> <p>In this context, in relation to the 2021 principles:</p> <ul style="list-style-type: none"> the force with which some of the principles are stated does not reflect some of the inherent uncertainties – 9(2)(h) the principle that everyone is equal before the law (cl 6(a)(iii)) is broadly open to interpretation 9(2)(h) the principle only partially covers the range of concepts associated with rule of law – the existence of an impartial, independent judiciary is a key omission 	<p>We recommend amendments to the 2021 principles to:</p> <ul style="list-style-type: none"> reflect the degree of judgement involved in applying these principles 9(2)(h) 9(2)(h) nor does it exclude any use of discretion in consideration of legal rights and obligations include a reference to an independent judiciary. 	<p>9(2)(h)</p>

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2021 Bill principles	Potential issues	Suggested approach	Proposed drafting
	<ul style="list-style-type: none"> the reference to the 'exercise of administrative discretion' is unnecessary (and potentially confusing given that some degree of discretion can be warranted or necessary in certain circumstances). 		
<i>Liberties</i>			
<p>Cl 6(1)(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:</p>	<p>The values expressed in this principle do not have settled meanings and are open to interpretation. 9(2)(h)</p> <p>[Redacted]</p> <p>[Redacted]</p> <p>The principle is also inconsistent with the way similar concepts are covered in New Zealand Bill of Rights Act 1990, potentially creating confusion.</p>	<p>In our view, a broad protection that requires careful and transparent consideration of impacts on personal rights and liberties, without setting a strict legal test is a more appropriate approach.</p> <p>Such an approach would also avoid the current inconsistencies with the New Zealand Bill of Rights Act 1990, and align with the ground under which the Regulations Review Committee may bring secondary legislation to the attention of the House (Standing Orders SO 327(2)(b)).</p>	<p>9(2)(h)</p> <p>[Redacted]</p>
<i>Taking of property</i>			
<p>Cl 6(1)(c) Not take or impair, or authorise the taking or impairment of, property without the consent of the owner unless:</p> <p>(i) the taking or impairment is necessary in the public interest; and</p> <p>(ii) full compensation for the taking or impairment is provided to the owner; and</p> <p>(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:</p>	<p>9(2)(h)</p> <p>[Redacted]</p>	<p>Consistent with other jurisdictions, we recommend that this principle be limited to a requirement to provide for fair compensation where a taking (rather than any impairment) is made, and that compensation be 'fair' rather than 'full.'</p> <p>In the context of a broad definition of property, we also recommend that this principle only provide for compensation rather than requiring a potentially onerous public interest test in relation to any taking.</p>	<p>9(2)(h)</p> <p>[Redacted]</p>

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2021 Bill principles	Potential issues	Suggested approach	Proposed drafting
<i>Taxes and charges</i>			
Cl 6(1)(d) Not impose, or authorise the imposition of, a tax except by or under an Act	This principle and the principle in paragraph (d) are already substantively covered by s 22 of the Constitution Act 1986. However, the principles use different language, which could cause uncertainty.	We recommend that either the principle be removed, or it simply refer to the current provision in the Constitution Act 1986.	9(2)(h)
Cl 6(1)(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: (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:	This principle does not clearly distinguish between provision for fees and charges (cost recovery for goods and services provided to users) versus levies (funding for regulatory functions from clubs of participants). The main issue is that it does not refer to levies. The conventional approach is that levies are imposed on clubs of system participants on the basis of the benefit the club derives from a well-performing regulatory system, or their contribution of risk that the system is required to mitigate (for example, fund managers pay a levy to fund Financial Markets Authority functions relating to governance of managed funds). In these club goods, the club derives benefits or causes cost, and so the costs of performing the function are apportioned to that club. 9(2)(h) [redacted] The conventional test in the Legislation Guidelines is that the fee must “bear a proper relationship” to the cost of providing the good or service to which it relates.	We recommend this clause be amended to create a clearer conceptual distinction between fees and levies (including reflecting that levy payers don’t benefit in the same way as those who pay fees), and to introduce a more conventional test about how they should be set. We also recommend leaving out “charges,” as this is covered by the term ‘fees’ and has the potential to cause confusion.	
<i>Role of courts</i>			
Cl 6(1)(f) Preserve the courts’ role of authoritatively determining the meaning of legislation	9(2)(h) [redacted] It is also inconsistent with the key interpretation rule in s 10 of the Legislation Act 2019.	We recommend slight amendments to the principle to improve consistency with the Legislation Act 2019 and reinforce the courts’ constitutional role.	
Cl 6(1)(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),— (i) provide a right of appeal on the merits against those decisions to a court or other independent body; and	In circumstances where there is no provision for appeals against exercise of statutory discretion (typically to a specialist administrative tribunal) judicial review is available, which concerns itself with the legal and procedural aspects of decisions rather than their merits. 9(2)(h) [redacted]	We recommend changes to remove the rights to a merits appeal in all cases, and to bring the wording closer to that in Queensland’s Legislative Standards Act.	

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2021 Bill principles	Potential issues	Suggested approach	Proposed drafting
(ii) state appropriate criteria for making those decisions			
<i>Good law-making</i>			
Cl 6(1)(h) Not be made unless, to the extent practicable, the persons likely to be affected by the legislation have been consulted	9(2)(h)	We recommend amending the principle to be more aligned with current best practice, which reflects that consultation is not necessary or appropriate in all cases, and that targeted consultation may sometimes be the best approach.	9(2)(h)
Cl 6(1)(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 (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:	N/A	Based on your previous feedback, you may wish to add wording requiring identification of the problem to be addressed, including consideration of the existence of any market failure.	9(2)(h)
Cl 6(1)(j) Produce benefits that outweigh the costs of the legislation to the public or persons	The test would be impractical to achieve given that costs and benefits can only be estimated prior to implementation.	We recommend clarifying that identified costs and benefits are only expected - noting that we are recommending further principles that enable legislation to be reviewed against this principle after that legislation has been implemented (see below).	9(2)(h)
Cl 6(1)(k) Be the most effective, efficient, and proportionate	This test is 9(2)(h) inconsistent with a	We recommend that the wording from the Legislation Guidelines is used in place of this principle.	9(2)(h)

IN-CONFIDENCE

2021 Bill principles	Potential issues	Suggested approach	Proposed drafting
response to the issue concerned that is available.	well-established test in the Legislation Guidelines that intends to achieve a similar objective (i.e. avoiding unnecessary regulation).		
<i>Stewardship of existing regulatory systems</i>			
N/A	N/A	We recommend consideration of additional principles to help create stronger and more specific obligations on responsible Ministers and agencies in relation to the stewardship of regulation. This could include requirements to periodically check whether legislation is still needed, remains fit for purpose, and is being implemented in the most efficient and effective way.	9(2)(h)



Annex 2: Updated drafting from PCO incorporating recommended amendments to 2021 Bill principles

Annex 2 is withheld under 9(2)(h) to maintain legal professional privilege.