



To	Hon David Seymour, Minister for Regulation		
Title	Further advice on the components of a Regulatory Standards Bill	Number	MFR2024-104
Date	13 September 2024	Priority:	Medium
Action Sought	Agree to the recommended actions	Due Date	18 September 2024
Contact Person	Pip van der Scheer, Manager	Phone	9(2)(a)
Contact Person	Elisa Eckford, Principal Advisor	Phone	9(2)(a)
Attachments	Yes (Annexes 1 and 2)	Security Level	IN CONFIDENCE

Executive summary

1. This briefing provides you with further advice on the components of a Regulatory Standards Bill following your recent decisions on the principles of responsible regulation.
2. Proposed updated drafting on the framing of the principles, and how they will be given effect to, is attached as **Annex 1**. As directed, this drafting:
 - is based on the principles in the 2021 Bill, incorporating some of the recommended amendments in MFR 2024-095 and retaining the 2021 Bill wording in other cases
 - replaces the proposed Regulatory Responsibility Statements (RRSs) with non-statutory guidance that would cover most of what the RRSs were proposed to cover. As previously advised (MFR2024-063 refers), the inclusion of principles relating to legislative design results in an overlap with the Attorney-General's responsibilities. We therefore recommend that the guidance be issued jointly by the Minister for Regulation and the Attorney-General (noting that this shared responsibility similarly applies to other components of the Bill).
3. The revised drafting also makes consequential changes to the introductory wording for each principle.
4. 9(2)(h)
5. In the light of your decisions on the principles, we have given further consideration to how responsible Ministers and agencies could be required to assess and report on the consistency of new regulatory proposals and existing regulation with the principles.
6. The broad approach we propose is that assessments of consistency are undertaken at three different stages that map broadly to the coverage of the three types of principles currently proposed:



- Prior to Ministers seeking Cabinet decisions, proposals could be assessed for consistency primarily against the good law-making principles 9(2)(h) and Ministers could affirm that they have seen this assessment and wish to proceed with the proposal (and justify any inconsistency).
 - Prior to its introduction, proposed legislation could be assessed for consistency primarily against the legislative design principles 9(2)(h) and any relevant good law-making principles, and Ministers could affirm that they have seen this assessment and wish to proceed with the proposal (and justify any inconsistency).
 - When agencies undertake reviews of existing regulation (in line with forward plans for review required by proposed new expectations in the Bill) they would include an assessment of consistency of that regulation with the principles (focusing on the regulatory stewardship principles 9(2)(h) and any other relevant principles), and Ministers could affirm that they had seen the review (and justify situations where they do not propose to seek to address any inconsistency).
7. One benefit of this approach is that it would more clearly require proposals to be assessed for consistency with the principles during their development, rather than being a checkpoint immediately before introduction of legislation. It could also allow for Cabinet Committees (including LEG) to have fuller information available to them on a regulatory proposal or a Bill, including identification and justification of any inconsistency.
8. We have previously recommended that, as an alternative to the declaratory role of the Courts provided for in the 2021 Bill, a Regulatory Standards Board could be established to consider complaints about regulation that is inconsistent with the principles. We have previously advised on some of the characteristics and functions such a Board could have – including having a degree of independence, considering complaints about existing legislation/regulatory systems, having some discretion as to what to consider, avoiding duplicating existing mechanisms, delivering non-binding recommendatory findings, and offering a relatively low-cost, agile way to consider and respond to complaints quickly.
9. Following your decisions on the principles, we have given more thought to the broad objectives of the Board in light of the Regulatory Responsibility Taskforce’s report, what a Board should focus on, and the nature of considerations it should make. We have also discussed the proposal with Jack Hodder, as requested by your office.
10. Key considerations in relation to a Regulatory Standards Board include:
- its broad objectives – noting in particular that a Board focused on the consistency of existing regulation could help to fill a current gap in relation to ex post evaluation of regulation, which is a traditionally weak area for New Zealand’s Regulatory Management System
 - whether the Board should be tasked with considering complaints in relation to all of the principles, or whether it should focus only on some of them – noting the need to avoid unduly limiting the Board’s focus, while not creating situations where it would be practically difficult for the Board to consider a complaint
 - how the Board would apply the principles in relation to a complaint – including whether it would undertake first principles assessments, focus on the quality of the analysis or



assessments the agency carried out, or simply check that agencies had followed the right procedures

- whether the Board would undertake substantial investigations and hold formal hearings, or operate ‘on the papers’ (i.e. on the basis of written rather than oral evidence)
 - the nature of the Board’s findings, including where it may not have sufficient information to make an assessment without undertaking substantial investigation, how these findings would be published, and what response the responsible Minister should make to the findings
 - whether it is a statutory or non-statutory Board – noting that, based on previous conversations with you, we think a statutory board would best align with your objectives of an independent and visible board that would have a high degree of influence on regulatory quality.
11. Once we have confirmed your views on the proposed approach above, we can consider further key design choices on the nature and the composition of the Board, and the implications of these choices on likely costs. We have estimated that the cost of a Board could be around \$1.8m per annum (including Board fees and a secretariat function), based on the Board making 20 findings a year and being categorised as a Group 4, Level 1 body under the Fees Framework Cabinet circular CO (22) 2. However, the Public Service Commission – Te Kawa Mataaho has advised that this figure could be overly conservative given the required skills and experience of the Board members and the type of work they would be carrying out. There could also be significant costs for agencies in providing information to support the Board’s considerations.
12. Based on the recommended approach outlined in this paper, along with your previous decisions and our previous advice, we have prepared updated draft A3s to support consultation with your Ministerial colleagues (**Annex 2**).
13. Following Ministerial consultation, we will proceed with developing further advice, including on:
- the detailed design for the consistency mechanisms, including how they map to current RIA processes, and the current disclosure statement regime under Part 4 of the Legislation Act
 - the detailed design of a Regulatory Standards Board
 - implementation costs for implementing the Bill, including the costs of setting up and operation of a Board, and the costs involved in establishing new consistency mechanisms (including the costs of agencies and Ministers complying with these and other aspects of the Bill).



Recommended action

We recommend that you:

- a **note** that the updated drafting attached as Annex 1 captures your decisions to date:
 - i. on the content of the principles
 - ii. in relation to the replacement of the proposed Regulatory Responsibility Statement (RRS) with non-statutory guidance

Noted

Implications for the framing of the principles and how they are applied

- b **agree** that this non-statutory guidance should be required to cover:
 - i. further information on how the principles should be interpreted and applied
 - ii. what steps agencies and Ministers should take 9(2)(h) [REDACTED] and any processes they will follow
 - iii. the information that should be provided when assessing the consistency of regulation or justifying any inconsistency
 - iv. requirements for publication of any information generated through these processes
- c **agree** that this guidance must be issued jointly by the Minister for Regulation with the Attorney-General
- d **agree** that the Bill should provide a power for the Minister for Regulation and the Attorney-General to jointly issue a form of direction in relation to which regulatory proposals are required to comply with consistency requirements

Agree / Disagree

Agree / Disagree

Agree / Disagree

Consistency mechanisms

- e **agree** to a broad approach involving assessment of consistency with the principles:
 - i. prior to a Minister seeking Cabinet decisions (primarily against the good law-making principles)

Agree / Disagree



- ii. prior to introduction of a Bill (primarily against the legislative design principles and potentially relevant good law-making principles)
 - iii. when any existing regulation is reviewed against the regulatory stewardship principles as part of requirements for agencies to regularly review and update their regulation.
- f **agree** that, at each of these stages, the responsible Minister(s) would be required to justify any continuing inconsistency of the regulation with the principles *Agree / Disagree*
- g **agree** that all the information generated through assessments of consistency would be published (subject to the provisions of the Official Information and Privacy Acts) *Agree / Disagree*

Recourse mechanisms

- h **confirm** our working assumptions that, as an alternative to the courts, a Regulatory Standards Board would:
 - i. have a degree of independence from agencies and Ministers, and make its findings public *Agree / Disagree*
 - ii. consider complaints about existing legislation/regulatory systems rather than new regulatory proposals *Agree / Disagree*
 - iii. have some discretion on whether to consider complaints *Agree / Disagree*
 - iv. not duplicate existing recourse mechanisms or complaints processes and not consider regulatory decisions made by Ministers/agencies in individual cases or funding decisions *Agree / Disagree*
 - v. consider the broader operation of regulatory systems - i.e. not just look at the legislation *Agree / Disagree*
 - vi. deliver non-binding, recommendatory findings *Agree / Disagree*
 - vii. offer a relatively low-cost, agile way to consider and respond to complaints quickly. *Agree / Disagree*



- i **agree** that a Board should:
- i. have sufficient discretion to determine which principles it should consider in relation to a complaint *Agree / Disagree*
 - ii. consider whether assessments against the principle(s) in question made by responsible agencies are based on sound reasoning and sufficient evidence or, where assessments aren't available, whether the available information adequately demonstrates consistency *Agree / Disagree*
 - iii. be able to also undertake reviews at its own behest or at the direction of the Minister for Regulation or Attorney-General *Agree / Disagree*
 - iv. operate 'on the papers' (i.e. on the basis of written rather than oral evidence) and on the basis of reasonably available information *Agree / Disagree*
 - v. after considering an issue, provide a short report setting out its view on whether the available information shows that the regulation is consistent with the principle(s) in question, and/or recommending that the responsible agency undertakes a review of the whole, or particular aspects, of that regulatory system to address any potential inconsistencies *Agree / Disagree*
- j **agree** that, following the Board completing its review:
- i. its report should be published with as much supporting information as possible (subject to the provisions of the Official Information and Privacy Acts) *Agree / Disagree*
 - ii. the responsible Minister be invited or required to publicly respond to any finding of the Board *Agree / Disagree*
- k **agree** that the Board should be a statutory Board *Agree / Disagree*

A3s for Ministerial consultation

- l **agree** that the following provisions, recommended in previous advice to you, should be included in the Bill:
- i. a broad duty for agencies in relation to regular review, maintenance and improvement of the legislation they administer *Agree / Disagree*



- | | | |
|------|--|-------------------------|
| ii. | a more specific duty for responsible agencies to develop and publicly report against plans to review their stock of legislation (including assessing its consistency with the principles) | <i>Agree / Disagree</i> |
|
 | | |
| iii. | a power for the Minister for Regulation and the Attorney-General to set requirements or issue whole-of-government directions to government agencies in relation to how they fulfil this more specific duty (e.g. the timing of plans and reports and what they must contain) | <i>Agree / Disagree</i> |
|
 | | |
| iv. | a requirement for the Ministry for Regulation to produce a regular report to Parliament assessing the overall performance of the Regulatory Management System, including a broad assessment of consistency of regulation against the principles (similar to an audit function) | <i>Agree / Disagree</i> |
|
 | | |
| v. | a power for the Ministry for Regulation to require provision of information from agencies to support this regular report (similar to provisions in the Public Finance Act 1989) | <i>Agree / Disagree</i> |

Next steps

- | | | |
|------|--|--------------|
| m | note that, following your consideration of this briefing, we will: | |
|
 | | |
| i. | make any final updates to the attached A3s for consultation with your Ministerial colleagues (Annex 2) | <i>Noted</i> |
|
 | | |
| ii. | proceed with developing further advice, including: | |
| | <ul style="list-style-type: none">• the detailed design for the consistency mechanisms, including how they fit with current thinking on RIA processes, and the current disclosure statement regime under Part 4 of the Legislation Act• the detailed design of a Regulatory Standards Board• implementation costs for implementing the Bill, including the costs of setting up and operation of a Board, and the costs involved in establishing new consistency mechanisms | <i>Noted</i> |



Proactive release recommendation

- n **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

14. This briefing provides you with further advice on the components of a Regulatory Standards Bill following your recent decisions on the principles of responsible regulation, including:
- the framing of the principles, and how they will be given effect to - reflected in updated drafting from PCO as **Annex 1**
 - mechanisms to transparently assess the consistency of new legislative proposals and existing regulation with regulatory responsibility principles (consistency mechanisms)
 - mechanisms to enable independent consideration of the consistency of existing regulation, primarily in response to stakeholder concerns (recourse mechanisms).
15. It also attaches updated draft A3s to support consultation with your Ministerial colleagues based on the recommended approach outlined in this paper, along with your previous decisions (**Annex 2**).

Background

16. On 14 August, we provided you with advice on recommended amendments and additions to the principles of responsible regulation set out in the 2021 Bill to ensure that they were consistent with current law or best practice, and were practical to implement (MFR 2024-095 refers).
17. Following your consideration of that briefing, you have directed us to incorporate some of those recommended amendments and additions to the principles, while retaining the 2021 wording in other cases. PCO has updated its initial drafting to reflect your decisions – this is attached as **Annex 1** to this paper. Note that all references in this briefing are to this revised drafting.

Implications for the framing of the principles and how they are applied

18. We understand that:
- you do not want the application of the principles to be limited via the application of Regulatory Responsibility Statements as we previously proposed
 - 9(2)(h) [REDACTED]
19. PCO has reflected this formulation in the initial drafting attached as Annex 1, noting that there are also some consequential changes to the introductory wording of each principle as a result.



20. 9(2)(h) [REDACTED]
21. As discussed with your office, we would still recommend that the legislation provides for non-statutory guidance to be issued to support application of the principles, similar to the guidelines provided for in clause 14 of the 2021 Bill. We also understand that you want it to be a requirement that this guidance be issued (i.e. *must* rather than the current wording of *may*).
22. As previously advised (MFR2024-063 refers), the inclusion of principles relating to legislative design results in an overlap with the Attorney-General's responsibilities¹. We therefore recommend that the guidance be issued jointly by the Minister for Regulation and the Attorney-General.
23. We propose that this guidance be required to include:
- further information on how the principles should be interpreted and applied – for instance, that consultation with population agencies does not constitute consultation with representatives of regulated parties (cl 2(1)(i)) and that a merit-based review should be encouraged wherever appropriate (cl 2(1)(h))
 - what steps agencies and Ministers should take to ensure 9(2)(h) [REDACTED] and any processes they will follow (for example, because a Cabinet Circular will require them to follow them)
 - the information that should be provided when assessing the consistency of regulation or justifying any inconsistency
 - requirements for publication of any information generated through these processes.
24. This guidance could be updated, amended or supplemented as necessary.
25. This would encompass most of what RRSs were proposed to cover (MFR2024-077 refers). However, one further thing that RRSs were intended to provide for was an ability for Ministers to determine how the principles would apply to particular regulatory proposals, including which proposals the consistency mechanisms would not apply to, or temporarily not apply to. 9(2)(h) [REDACTED]. The ability to exclude the application of mechanisms to certain proposals will also be important to ensure new arrangements align with RIA requirements – in particular, the grounds for RIA exemptions as set out in CO (20) (2).

¹ This includes the Attorney-General's role as the senior Law Officer of the Crown, along with their specific responsibilities in relation to the New Zealand Bill of Rights Act 1990 and the functions of PCO as set out in the Legislation Act 2019, which have the purpose of promoting high-quality legislation for New Zealand that is easy to find, use and understand.



26. To cover this off, we recommend that the Bill provides a power for the Minister for Regulation and the Attorney-General to be able to jointly issue a form of direction to determine which regulatory proposals are required to comply with the consistency requirements (similar to notices under Part 4 of the Legislation Act 2019). The risk that this direction could be used to soften expectations of compliance could be managed through a requirement to present any such direction to the House, along with a clear justification for it. The power could be further limited by requiring the direction to be approved by the House (as notices under Part 4 are intended to be) or it could simply be subject to judicial review.

Consistency mechanisms

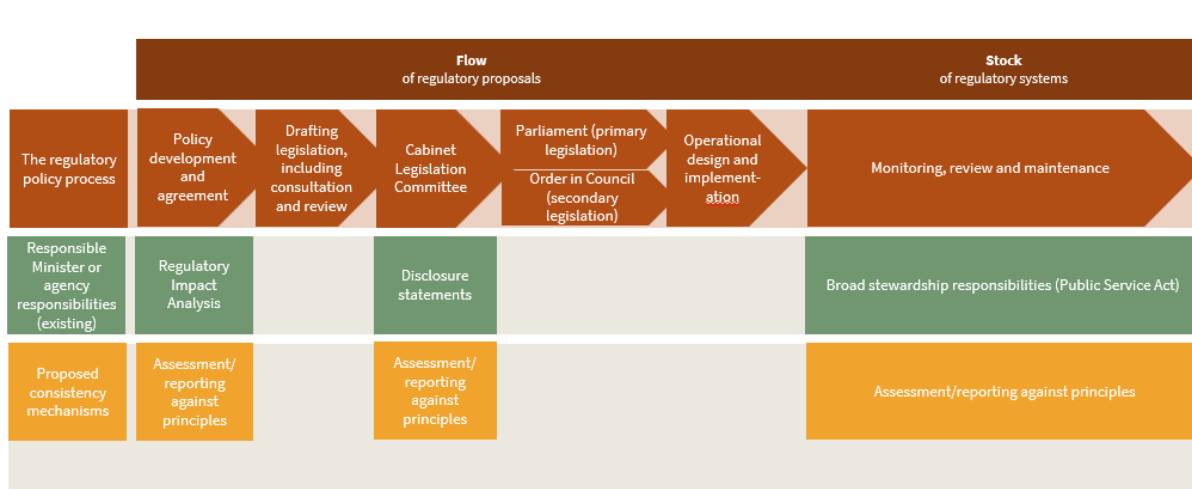
27. In previous advice on consistency mechanisms, we recommended that, in line with the 2021 Bill, agencies should be required to transparently assess the consistency of both new regulatory proposals and existing regulation for which they are responsible.
28. We have also recommended that Ministers should be responsible for publicly justifying any inconsistencies in both the legislative proposals they decide to proceed with, and existing regulation that they do not propose seeking to amend.
29. We have now given further consideration to how responsible Ministers and agencies could be required to assess and report on consistency with the principles, in the light of your decisions on what those principles would comprise. Building on our previous advice, we propose that this include:
- assessment of proposed legislation or existing regulation for consistency with the principles and identification of any inconsistencies
 - an explanation by the responsible Minister of why a regulatory proposal is proceeding, or an existing regulation is remaining unchanged, where inconsistencies have been identified through the above assessment
 - public reporting of all the information (including any supporting information) above to provide necessary public transparency.
30. The guidance discussed in paragraphs 22 to 25 above would set out requirements in relation to each of the above.

Timing

31. The 2021 Bill focused on assessing the consistency of proposed new legislation:
- before the Bill is introduced to the House of Representatives
 - before the commencement of the Bill's third reading in the House of Representatives.
32. The 2021 Bill also required every public entity to regularly review all legislation that it administers for consistency with the principles, and report on the findings.
33. In our view, assessments of consistency will be most effective if undertaken at three different stages that map to the coverage of the three types of principles currently proposed:



- the good law-making principles 9(2)(h) focus primarily on what steps agencies should take to develop robust regulatory policy, and should be considered prior to Cabinet decisions (and throughout subsequent decisions on policy matters)
 - legislative design principles 9(2)(h) focus primarily on best practice legislative design, and should be considered prior to legislation being introduced (noting that they also contain principles relevant to policy development e.g. retrospectivity)
 - regulatory stewardship principles 9(2)(h) focus primarily on good stewardship of regulation by agencies, and should be considered at the monitoring/review stage of the cycle.
34. We note that there is a degree of crossover between the principles, so we would not recommend specifying in the Bill exactly which principles should apply at each of those stages. However, taking this approach in practice could look something like the following:
- Prior to a Minister seeking Cabinet decisions, proposals are assessed for consistency primarily against the good law-making principles (and relevant legislative design principles), and Ministers affirm that they have seen this assessment and wish to proceed with the proposal (and justify any inconsistency).
 - Prior to its introduction or being made, proposed legislation is assessed for consistency primarily against the legislative design principles (and relevant good law-making principles), and Ministers affirm that they have seen this assessment and wish to proceed with the proposal (and justify any inconsistency).
 - When agencies undertake reviews of existing regulation in line with forward plans for review required by proposed new expectations in the Bill, they would include an assessment of consistency of that regulation with the principles (focusing on the regulatory stewardship principles and any other relevant principles), and Ministers affirm that they have seen the review (and justify situations where they do not propose to seek to address any inconsistency).
35. The benefit of this approach is that it would more clearly require proposals to be assessed for consistency with the principles during their development, rather than being a checkpoint immediately before introduction or making of legislation. It could also allow for Cabinet Committees (including LEG) to have fuller information available to them on a regulatory proposal or a Bill, including declaration of and justification for any inconsistency.
36. The figure below summarises how this process might look (with the location of the proposed consistency mechanisms in yellow).



37. Applying the regulatory stewardship principles to the existing stock of regulation will help ensure that existing regulation is subject to the same scrutiny as new regulatory proposals (this also aligns with the current approach to fiscal management where baseline funding is also subject to increasing scrutiny, not just new spending proposals).
38. As noted above, there would be an expectation that all information generated through these processes would be published.
39. If you agree with this broad approach, we will need to do some further detailed design work on how the process would work in practice, including how it fits with current thinking on RIA processes, and the provisions for disclosure statements under Part 4 of the Legislation Act 2019.

Recourse mechanisms

40. We have previously recommended that, as an alternative to the declaratory role of the courts provided for in the 2021 Bill, a Regulatory Standards Board could be established to consider complaints about regulation alleged to be inconsistent with the principles. As previously discussed with you (reflected primarily in MFR2024-063) we have started with a number of assumptions that it would be useful to confirm:
 - *The Board would have a degree of independence from agencies and Ministers, and make its findings public.* Our view is that a perception of independence from Ministers and agencies will be important in building public trust and confidence in its findings, as will the transparency of the process. Publication of findings is also a fundamental part of creating an incentive effect on Ministers and agencies to ensure regulation is consistent with principles.
 - *The Board would consider complaints about existing legislation/regulatory systems rather than new regulatory proposals,* consistent with the approach taken in the 2021 Bill. Allowing complaints to be made and a Board to consider inconsistency while regulatory proposals are being developed is likely to unduly impede the policy and law-making process, and would cut across existing mechanisms such as RIA and select committees. There is the option of involving the Board in RIA QA (similar to the role of



the UK's Regulatory Policy Committee²), however, our view is that, at this stage, the Board would likely have a greater impact bolstering New Zealand's relatively weak ex post review processes.

- *The Board would have some discretion on whether to consider complaints.* As previously advised, we think giving the Board some discretion on whether to consider complaints will be important to ensure that the Board is focused on the issues where it will add the most value, can consider issues quickly, and does not duplicate the role of other functions in the Ministry (such as the regulatory reviews) or elsewhere. If the Board has more limited discretion i.e. is required to hear all complaints not considered vexatious or trivial, or not covered by another recourse mechanism, there is a risk that there will be significant backlog of issues, or funding and resourcing challenges. The Board could also potentially have the ability to decline to consider a complaint where it does not consider that a complainant is sufficiently affected by an inconsistency³ (although we would want to ensure representative groups such as peak bodies could still have complaints considered). To ensure transparency in what the Board is choosing to focus on, we recommend that the Board could be required to regularly report on all the complaints it has received.
- *The Board would not duplicate existing recourse mechanisms or complaints processes and it would not consider regulatory decisions made by Ministers/agencies in individual cases or funding decisions.* This would help to avoid situations where specific or more general recourse mechanisms are already available (e.g. judicial review, the Ombudsman or the Regulations Review Committee), or where the Board would not have the appropriate context to comment (e.g. Budget decisions). As we have previously discussed with you, we also recommend that complainants must show that they have already attempted to raise issues with the relevant agency or Minister before their complaint can be considered by the Board.
- *The Board could consider the broader operation of regulatory systems - i.e. not just look at the legislation.* We have previously advised on how many costs and issues for regulated parties arise through poor implementation of legislation and the operation of regulatory systems, rather than the legislation itself, so we think it will be important that the Board has the ability to look at this area. The proposed new regulatory stewardship principles and obligations for Ministers and agencies will support the Board's consideration of these issues.
- *The Board would deliver non-binding, recommendatory findings* – this is consistent with the role of the courts in the 2021 Bill 9(2)(h)

² The Regulatory Policy Committee is a group of independent experts, with experience in business, law and economics, appointed by the Minister. It is focused on providing independent assessment of options identification and assessment.

³ See for instance s 17(e) of the Ombudsmen Act 1975 where there are grounds to decline to consider a complaint where "the complainant does not have a sufficient personal interest in the subject matter of the complaint."

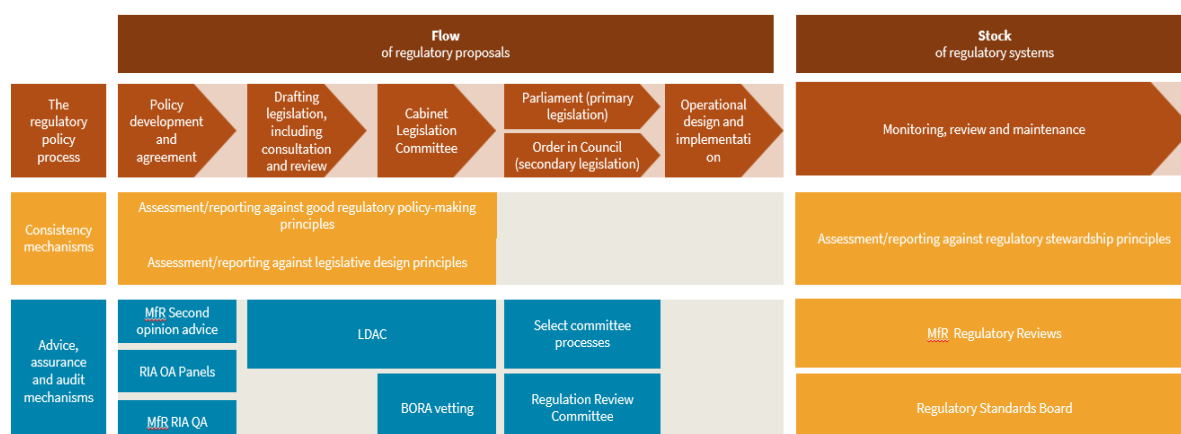


- *The Board would offer a relatively low-cost, agile way to consider and respond to complaints quickly.* As discussed with you, it will be important to create a mechanism that is cost-effective and agile. Fuller investigations can be undertaken by the responsible agencies as reviews, by the Ministry as regulatory reviews, or under the Inquiries Act 2013. For this reason, we advised that some form of Board would be a better option than a more formal structure like a new Independent Crown Entity.

41. Following your decisions on the principles, we have been giving more thought to the broad objectives of the Board in light of the Regulatory Responsibility Taskforce's report, what a Board should focus on, and the nature of considerations it should make. We have also discussed the proposal with Jack Hodder, as requested by your office.

Broad objectives

42. The Taskforce's report sets out the purpose of the declaratory role of the courts as a "mechanism to encourage and ensure compliance on the part of decisionmakers with the principles of responsible regulation" on the basis that "meaningful consequences" were needed in the event of non-compliance. The possibility that the courts could declare legislation inconsistent was seen as creating "significant political and institutional incentives on policy-makers and their advisors to carefully consider proposals against the principles, and craft better policies and legislation, in the first instance."
43. Our view is that the main benefit of a Board (in addition to provision of a relatively independent avenue for people who feel that they are impacted by regulation that does not comply with the principles to potentially have their concerns considered) would lie in its ability to provide a relatively independent quality assurance mechanism to existing regulation – helping to fill a current gap in relation to ex post evaluation of regulation, which is a traditionally weak area for New Zealand's Regulatory Management System.⁴ The figure below sets out how such a Board could supplement the proposed consistency mechanisms (proposed components of the Bill are in yellow, and existing advice, assurance and audit mechanisms are in blue).



⁴ For instance, the OECD Indicators of Regulatory Policy and Governance (iREG) survey, which assesses the operation and quality of a country's regulatory management system, gave New Zealand a score of zero for ex post evaluation methodology.



44. Over time, the Board's findings could also form a body of useful (non-statutory) guidance about application of the principles to add to Ministerial guidance, and help identify systemic issues with the quality of New Zealand's regulation.

Coverage of principles

45. A key question is whether the Board should be tasked with considering complaints on all of the principles, or whether they should focus only on some of them.
46. The principles include procedural principles (e.g. whether an agency has carried out appropriate consultation under cl 2(1)(i), or undertaken the appropriate analysis under 9(2)(h) as well as substantive principles (e.g. 9(2)(h)). If the Board is tasked with making assessments of consistency against all the principles, the Board could therefore be asked to consider whether agencies had appropriately followed the procedural principles, as well as whether the resulting regulation is consistent with the substantive principles.
47. Assessment against some of the procedural principles (in particular, the good law-making principles) is likely to be particularly difficult in relation to older pieces of legislation, where there may be little information available on, for instance, whether appropriate consultation or cost benefit analysis took place at the time. This also raises the question of whether the Board would be assessing whether an agency followed the procedure appropriately based on the expectations, or the knowledge available, at the time, or if the assessment would be against current expectations. Options for addressing these issues associated with the procedural principles include:
- the Board only considering legislation that has been previously assessed for consistency (or only looking at existing legislation after a period of time to allow for all legislation to be assessed for consistency). This is similar to the approach taken in the 2021 Bill in relation to when the courts are able to make declarations of inconsistency on existing legislation, and would mean that the information generated through assessments of consistency would be available to the Board to help them make determinations on whether agencies had acted consistently with procedural principles. However, this option would significantly restrict the Board on what it could look at and (given that it is likely to take considerably longer than the 10 years envisaged in the 2021 Bill for agencies to review all their legislation for consistency) the time delay proposed in the 2021 Bill is unlikely to solve the problem of much legislation not having been assessed for consistency
 - the Board focusing solely on the principles that agencies would be required to consider when undertaking reviews of their own regulatory systems 9(2)(h). This would fit well with the Board's role as an ex post review mechanism – however, it could prevent the Board helpfully considering some of the other principles
 - excluding from the Board's consideration those principles that relate to processes that agencies are required to follow (i.e. most of the good law-making principles). However, this could prevent the Board from making helpful comments in cases where there is evidence to show that agencies have not acted consistently with the principles (e.g. they have not consulted adequately)



- giving the Board sufficient discretion to determine whether it makes sense for them to consider consistency with a particular principle or set of principles in any situation. This could be coupled with the ability for the Board to return a view that there is not sufficient information to come to a firm view (see the discussion on the approach of the Board below).
48. Our recommendation is that the fourth of these approaches would avoid unduly limiting the Board's focus, while not creating situations where it would be practically difficult for the Board to consider a complaint.
49. Whichever choice is made above, complainants could be required to identify which principles they think that regulation is inconsistent with and why in any complaint, to help focus the Board's considerations. The Ministry could potentially also have a role in supporting complainants in this regard – similar to the support provided for health and disability complaints. However, this would have resourcing implications additional to those set out in paragraphs 67 to 69 below.

Application of the principles

50. There are then some broad choices about how the Board would apply the principles in relation to a complaint:
- It could undertake a first principles assessment of whether a piece of legislation/regulatory system is consistent with the principle(s) in question.
 - It could consider whether assessment of consistency against the principle(s) in question made by responsible agencies are based on sound reasoning and sufficient evidence or, where assessments aren't available, whether the available information adequately demonstrates consistency. It could also look at whether there has been sufficient consideration of the reasons for any justification of inconsistency.
 - It could solely focus on whether agencies and Ministers had followed correct processes and procedures set out in the guidance to show 9(2)(h) [REDACTED]
51. Our preferred option is the second of these approaches on the basis that:
- the first option would likely be a very onerous task inconsistent with quick, efficient resolution, require generation of significant new information and would likely lead to re-litigation of policy decisions
 - the third option is likely too narrow to be useful in increasing the consistency of regulation with the principles, and it would only work in practice in relation to regulation that had been assessed for consistency against the proposed principles, which means it would take a long time to have much impact.
52. 9(2)(h) [REDACTED]
53. While we envisage that the Board would largely respond to complaints, we recommend also making provision for the Board to undertake broader reviews, potentially at its own behest



or at the direction of the Minister for Regulation or Attorney-General⁵ - this could help it manage a varying workload, and help apply its expertise to systemic issues across multiple regulatory systems.

Approach to considering of complaints

54. We recommend that the Board operate 'on the papers' (i.e. on the basis of written rather than oral evidence)⁶ and on the basis of reasonably available information (e.g. RISs, disclosure statements, regulatory reviews, select committee reports and any information generated through the proposed new consistency mechanisms discussed above) rather than undertaking substantial investigations, holding formal hearings, or requiring creation of significant new information from complainants or departments. Responsible agencies could also be asked to supply any existing information they have (for instance on the operation of their regulatory system) but would not be required to create any new information. The Board should also have access to any correspondence between a complainant and the responsible agency/Minister, given our recommendation that a complainant be required to approach the responsible agency/Minister with their complaint first.
55. This approach would help to ensure that the Board provides a relatively quick, efficient response. It may also help to avoid imposing significant costs on complainants or agencies in complying with Board requirements.
56. However, even if the Board does not require significant information from agencies, there would still be a strong risk of Ministers or agencies putting substantial effort after the event into persuading the Board that their regulation is consistent with the principles. This could result in substantial additional costs both to the agencies and the Board in having to review this material. This could potentially be managed to some degree by setting administrative requirements that limit the amount of information provided – however, it would be difficult to remove this risk entirely.

Nature of findings

57. After considering a complaint or an issue, we propose that the Board would provide a short report that would, where possible, set out its view on whether the available information shows that the regulation is consistent with the principle(s) in question. However, in some cases, the Board may not feel it has sufficient information to make that assessment without undertaking a more substantial investigation – this is more likely to be the case with older legislation, 9(2)(h) [REDACTED]. In these cases, the Board could recommend that the responsible agency undertakes a review of the whole, or particular aspects, of that regulatory system to address any potential inconsistencies. The Board's report could also

⁵ See for instance s 13(3) to (5) of the Ombudsmen Act 1975, which sets out how an Ombudsman can undertake an investigation in response to a complaint, on 'his own motion', or through referral by the Prime Minister or Parliament.

⁶ See for instance s 153 of the Lawyers and Conveyancers Act 2006, where a hearing conducted under section 152(1) by a Standards Committee is 'a hearing on the papers', unless the Standards Committee otherwise directs, with parties making written rather than oral submissions.



include practical suggestions or recommendations to improve the consistency of the regulation, where appropriate.

58. Before finalisation of its report, the Board could choose to provide the complainant and the relevant Minister/agency the opportunity to comment (along the same lines as the process followed by the Ombudsman) to identify any errors or misunderstandings that could impact on the credibility of the Board's report. However, further assessment would need to be done on how this might impact on the speed of the Board's reviews and the costs involved.
59. The Board's report would be published, with as much supporting information as possible (subject to the provisions of the Official Information and Privacy Acts).
60. As previously advised, we recommend that the responsible Minister be invited or required (depending on whether the Board is statutory or non-statutory) to publicly respond to any finding of the Board. This would help to ensure that the Board's findings are given more prominence and consideration by the Executive, and lessen the risk that no further action is taken in response to them.

Design considerations

A statutory versus a non-statutory Board

61. Before proceeding to detailed design of a Board (based on your views on the issues discussed above), we will need to establish whether it should be established in terms of reference with no legislative basis, or whether it should be a statutory board, established via the Regulatory Standards Bill. Given that the Board's findings would essentially be recommendatory, either form could be made to work, and the costs are likely to be similar.
62. A non-statutory board would allow for greater flexibility for how the group operates, and would more easily enable a change in focus if circumstances or priorities change (i.e. by changing the terms of reference rather than amending legislation). While some non-statutory boards or advisory groups are temporary and focus on a particular issue, this is not always the case. For example, the National Advisory Council on the Employment of Women, is a longstanding ministerial advisory body that was established in 1967.
63. By comparison, establishing a statutory board could help to strengthen its profile and sense of permanence and independence. It would also enable its findings to have more weight – for instance, it would enable creation of a statutory requirement for Ministers to respond to the findings of a board. Under this model, board members could be appointed by the Governor-General on recommendation from relevant Ministers (likely the Minister for Regulation and the Attorney-General for the reasons discussed above).
64. Based on previous conversations with you, we think a statutory board would best align with your objectives of an independent and visible mechanism that would have a high degree of influence on regulatory quality. However, we note the Public Service Commission – Te Kawa Mataaho's (PSC's) view is that the objectives of the Board could be met through non-statutory means.

Other design decisions and indicative costs

65. 9(2)(f)(iv)



- 9(2)(f)(iv)

66. The actual costs of the Board will depend on decisions on the issues outlined in this briefing, as well as further work on the detailed design of the Board. Costs will be particularly affected by decisions about the level of discretion that the Board will have, the nature and depth of the Board's findings and assessments, and your expectations about how many complaints they should consider a year.
67. To give an initial indication, we have estimated that the cost of a Board could be around \$1.8m per annum, based on the Board making 20 findings a year and being categorised as a Group 4, Level 1 body under the Fees Framework Cabinet circular CO (22) 2. This includes the potential costs involved for the Ministry for Regulation in providing a secretariat function. However, PSC has advised that this figure could be overly conservative given the required skills and experience of the Board members and the type of work they would be carrying out.
68. As noted above, even with measures to limit the amount of information agencies would need to provide to the Board in relation to complaints, it is likely that there would still be strong incentives for agencies and Ministers to provide additional material to the Board. This could result in significant costs that we will need to do further work to estimate.

A3s for Ministerial consultation

69. Based on the approach outlined above, we have developed updated A3s for you to use in consulting your Ministerial colleagues. These are attached as **Annex 2**.
70. These A3s also reflect other proposed components of the Bill. This includes your direction in response to MFR 2024-078 that the Bill should contain provisions to support the Ministry for Regulation's regulatory reviews, specifically:
- information-gathering powers to enable the Ministry for Regulation Chief Executive to require information from state sector organisations (including Crown entities, school boards and Public Finance Act fourth schedule organisations), local government and third-party service providers to support Ministry for Regulation regulatory reviews
 - a requirement for the regulatory review report to be presented to the House, together with the government's response.
71. The A3s also currently contain other proposed components of the Bill, consistent with advice provided to you in previous briefings that the Bill should include provisions to



strengthen agencies' regulatory stewardship obligations and support the Ministry for Regulation's regulatory oversight role, specifically:

- a broad duty for agencies in relation to regular review, maintenance and improvement of the legislation they administer
- a more specific duty for responsible agencies to develop and publicly report against plans to review their stock of legislation (including assessing its consistency with the principles)
- a power for the Minister for Regulation and the Attorney-General to set requirements or issue whole-of-government directions to government agencies in relation to how they fulfil this more specific duty (e.g. the timing of plans and reports and what they must contain)
- a requirement for the Ministry for Regulation to produce a regular report to Parliament assessing the overall performance of the Regulatory Management System, including a broad assessment of consistency of regulation against the principles (similar to an audit function).
- a power for the Ministry for Regulation to require provision of information from agencies to support this regular report (similar to provisions in the Public Finance Act 1989).

72. It would be useful to confirm that you are still comfortable with these components being included in the proposed Bill.
73. Following your decisions on the recommendations in this briefing, and in relation to MFR 2024-103 on the Regulatory Standards Bill and the Treaty of Waitangi, we can make any updates and provide you with final A3s.

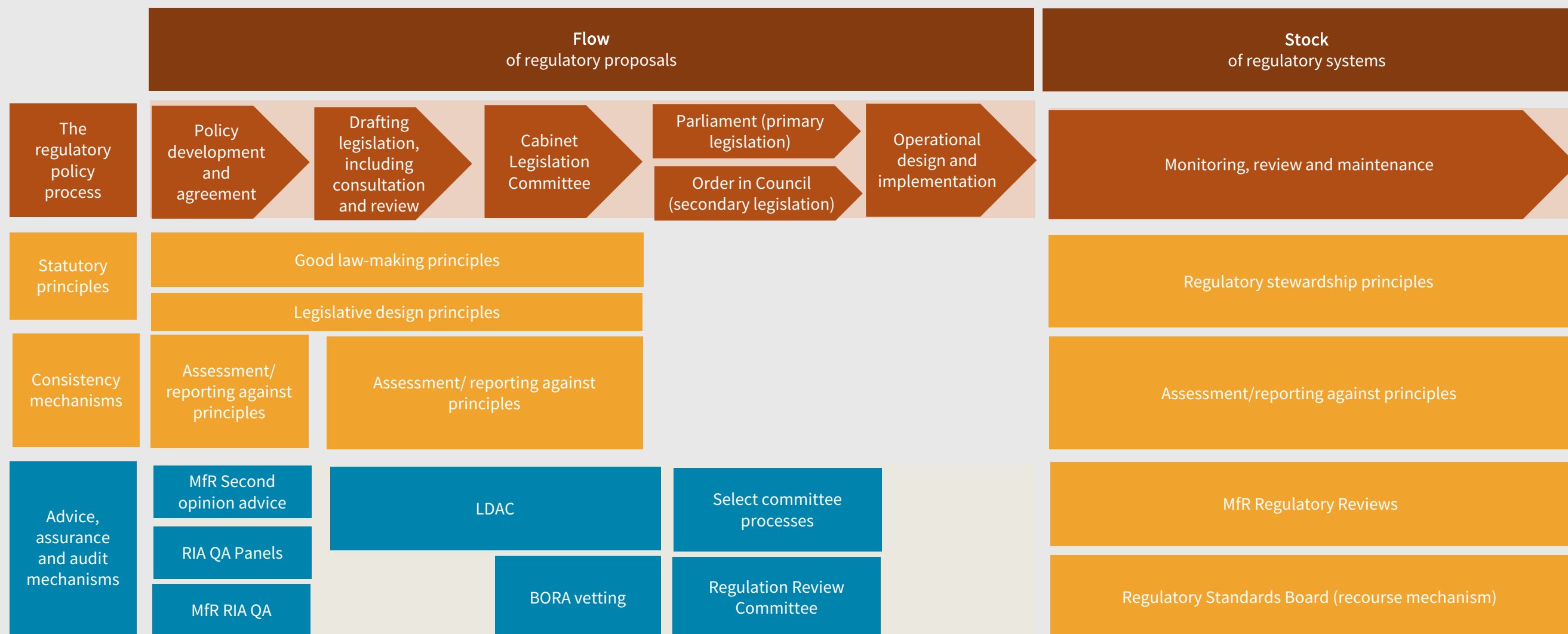
Next steps

74. Following Ministerial consultation, we will proceed with developing further advice, including:
- the detailed design for the consistency mechanisms, including how they fit with current thinking on RIA processes, and the current disclosure statement regime under Part 4 of the Legislation Act
 - the detailed design of a Regulatory Standards Board
 - implementation costs for implementing the Bill, including the costs of setting up and operation of a Board, and the costs involved in establishing new consistency mechanisms.
75. We will also shortly be providing you with updated Crown Law advice to help with your consideration of the proposed approach in this paper.

Proposal for a new Regulatory Standards Bill

The Bill aims to bring the same discipline to regulatory management as New Zealand has for fiscal management, by providing:

- a benchmark for good regulation through a set of principles of responsible regulation that all regulation should comply with (principles)
- mechanisms to transparently assess the consistency of new legislative proposals and existing regulation with regulatory responsibility principles (consistency mechanisms)
- a mechanism for independent consideration of the consistency of existing regulation, primarily in response to stakeholder concerns (a recourse mechanism)



Key: Blue boxes are existing mechanisms. Yellow boxes are components of the proposed Bill

This proposal differs from the 2021 Regulatory Standards Bill (discussed by EXP in February) in the following ways:

- Amendments to some of the 2021 principles and expansion to cover regulatory stewardship
- Removal of new interpretative role for courts, and possible alternative to the Courts' declaratory role in finding legislation inconsistent with principles
- Alignment of assessment of inconsistency with current RIA and disclosure statement arrangements
- Inclusion of powers and expectations to give effect to Ministry for Regulation's regulatory oversight role

Principles of responsible regulation

9(2)(h) These principles are largely based on the principles in the 2021 Bill, with amendments and additions to some of the principles in light of current law or best practice.

Legislative design

Rule of law

The importance of maintaining consistency with the following aspects of the rule of law:

- the law should be clear and accessible
- the law should not adversely affect rights and liberties, or impose obligations, retrospectively
- every person is equal before the law
- there should be an independent, impartial judiciary
- issues of legal right and liability should be resolved by the application of law, rather than the exercise of administrative discretion

Liberties

Legislation should not unduly 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.

Taking of property

Legislation should not take or impair, or authorise the taking or impairing of, property without the consent of the owner unless:

- there is good justification for the taking or impairment
- fair compensation for the taking or impairment is provided to the owner
- compensation is provided to the extent practicable, by or on behalf of the persons who obtain the benefit of the taking or impairment.

Taxes, fees and levies

The importance of maintaining consistency with section 22 of the Constitution Act 1986 (Parliamentary control of public finance)

Legislation should impose, or authorise the imposition of, a fee for goods or services only if the amount of the fee bears a proper relation to the costs of efficiently providing the good or service to which it relates.

Legislation should impose, or authorise the imposition of, a levy to fund an objective or a function only if the amount of the levy is reasonable in relation to both:

- the benefits that the class of payers are likely to derive, or the risks attributable to the class, in connection with the objective or function
- the costs of efficiently achieving the objective or providing the function

Role of courts

Legislation should preserve the courts' constitutional role of ascertaining the meaning of legislation.

Legislation should make rights and liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review.

Good law-making

The importance of consulting, to the extent practicable, the persons or representatives of the persons that the Government considers will be substantially affected by the legislation.

The importance of carefully evaluating:

- the issue concerned
- the effectiveness of any relevant existing legislation and common law
- whether the public interest requires that the issue be addressed
- any options (including non-legislative options) that are reasonably available for addressing the issue
- who is likely to benefit, and who is likely to suffer a detriment, from the legislation.

Legislation should be expected to produce benefits that exceed the costs of the legislation to the public or persons.

Legislation should be the most effective, efficient, and proportionate response to the issue concerned that is available.

Regulatory stewardship

- Legislation should continue to be the most effective, efficient, and proportionate response to the issue concerned that is available.
- The system should continue to be fit for purpose for the people, area, market, or other thing that is regulated
- Unnecessary regulatory burdens and undue compliance costs should be eliminated or minimised
- Any regulator should have the capacity and the capability to perform its functions effectively
- Any conflicts or adverse interactions with other regulatory systems should be eliminated or minimised
- The importance of monitoring, reviewing, and reporting on the performance of the system

Consistency mechanisms

New regulatory proposals

Principles for good law-making

Principles for legislative design

- Proposals assessed for consistency against relevant principles and any inconsistencies identified
- Ministers explain why a regulatory proposal is proceeding, or an existing regulation is remaining unchanged, where inconsistencies have been identified
- All key information and evidence published to provide transparency

Guidance issued by the Minister for Regulation and Attorney-General would cover:

- further information on how the principles should be interpreted and applied:
- what steps agencies and Ministers should take **9(2)(h)** when developing new proposals or reviewing their regulation, and any processes they must follow
 - the information that should be provided when assessing the consistency of regulation or justifying any inconsistency
 - requirements for publication of any information generated through these processes.

Bill would provide a power for the Minister for Regulation and the Attorney-General to jointly issue a form of direction in relation to which regulatory proposals are required to comply with consistency requirements

Existing regulation

Principles for regulatory stewardship

- All CEs would be required to regularly review, maintain and improve legislation administered by their agency.
- Ministers/agencies required to publicly report on plans to review their stock of legislation against the principles, along with the outcomes of reviews (including any inconsistencies identified, and proposed remedies).
- Ministers would be required to explain why any inconsistency with the principles identified via agency reviews, and not proposed to be remedied, is justified.

Type of principles

Requirements for Ministers and departments to assess and report on consistency with principles

Non statutory guidance

New powers for Minister for Regulation and Attorney-General to support these mechanisms

Recourse mechanism

The Bill would establish a mechanism to independently assess the consistency of existing regulation with the principles, mainly in response to complaints, and to report publicly on its findings

An alternative to the courts (as provided for in the 2021 Bill) is an executive mechanism like a **Regulatory Standards Board**. Such a Board could be made up of independent members, with a range of expertise. It would not duplicate existing recourse mechanisms or complaints processes, or consider regulatory decisions made by Ministers/agencies in individual cases or funding decisions. It would deliver non-binding, recommendatory findings.

A Regulatory Standards Board would:

- have sufficient discretion to determine which principles it should consider in relation to a complaint
- consider whether assessment of the regulation against the principle(s) in question are based on sound reasoning and sufficient evidence or, where no assessments have been made, whether the available information adequately demonstrates consistency
- be able to also undertake reviews at its own behest or at the direction of the Minister for Regulation or Attorney-General
- operate ‘on the papers’ (i.e. on the basis of written rather than oral evidence) and on the basis of reasonably available information
 - after considering an issue, provide a short report setting out its view on whether the available information shows that the regulation is consistent with the principle(s) in question, and/or recommending that the responsible agency undertakes a review of the whole, or particular aspects, of that regulatory system to address any potential inconsistencies.

The responsible Minister would be invited or required to publicly respond to any finding of the Board

Any option could be supported by increased Parliamentary scrutiny via new or strengthened parliamentary mechanisms. The 2009 Regulatory Responsibility Taskforce recommended changes to Standing Orders and the role of the Regulations Review Committee to strengthen parliamentary scrutiny.

Other supporting provisions

Provisions to set stronger regulatory stewardship expectations for agencies

The Bill would create:

- a duty for agencies in relation to regular review, maintenance and improvement of the legislation they administer
- a duty for responsible agencies to develop and publicly report against plans to review their stock of legislation (including assessing its consistency with the principles)
- a power for the Minister for Regulation and the Attorney-General to set requirements or issue whole-of-government directions to government agencies in relation to how they fulfil this obligation (e.g. the timing of plans and reports and what they must contain).

Provisions to support the Ministry for Regulation’s regulatory oversight role:

The Bill would provide for:

- a requirement for the Ministry for Regulation to produce a regular report to Parliament assessing the overall performance of the Regulatory Management System including a broad assessment of consistency of regulation against the principles (similar to an audit function).
- powers for the Ministry for Regulation to require provision of information from agencies to support this reporting (similar to provisions in the Public Finance Act 1989).

Statutory framework to support Ministry for Regulation regulatory reviews

The Minister for Regulation will initiate reviews and set the Terms of Reference – jointly with the responsible Minister(s) if appropriate

The Bill would then provide for:

- information-gathering powers to enable the MfR CE to require information from state sector organisations (including Crown entities, school boards and Public Finance Act fourth schedule organisations), local government and third-party service providers
- a requirement for the review report to be presented to the House, together with the government’s response

Review recommendations may specify requirements for responsible agencies to report on delivery of the review decisions, which could be agreed and enforced by the responsible Minister and Cabinet.

Why a Regulatory Standards Bill?

There are limited legislative levers in New Zealand to ensure that the content of new regulation meets clear and well-understood standards, and its policy development process follows good practices. Once enacted, there are limited mechanisms to ensure adequate governance, monitoring and care of existing regulation, which can erode its quality and fitness-for-purpose.

New Zealand scores relatively poorly for oversight/quality control and methodology in adhering to Regulatory Impact Analysis requirements, and we are well below the OECD average on ex-post evaluation of regulations (OECD iReg Survey, 2021).

In addition, very few agencies have developed formal plans for the maintenance and development of their regulatory systems (Regulatory Stewardship Survey conducted by the Treasury, 2022).

