Submission

by

THE NEW ZEALAND INITIATIVE

to the Ministry for Regulation

on the

Discussion Document on the Proposed Regulatory Standards Bill

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1 INTRODUCTION AND MAIN POINTS

1.1 This submission on the Ministry for Regulation's Discussion Document on the proposed Regulatory Standards Bill is made by The New Zealand Initiative (the **Initiative**), a Wellington-based think tank supported primarily by major New Zealand businesses. In combination, our members employ more than 150,000 people.

1.2 The Initiative undertakes research that contributes to developing sound public policies in New Zealand and creating a competitive, open and dynamic economy and a free, prosperous, fair and cohesive society.

1.3 The Initiative's members span the breadth of the New Zealand economy. They all experience the effects of regulation, for better or for worse, in each of their activities. Not all regulation is bad. But poor-quality regulation can markedly reduce productivity for inadequate benefits. The views expressed in this submission are those of the author, not those of our members. [1]

1.4 This submission supports the case for such a Bill. The mixed quality of laws and regulations in New Zealand is a problem. Stronger measures to improve regulatory quality are needed. Current incentives to provide competent supportive analyses of proposed laws and regulations are too weak. Unduly high house prices and inadequate public infrastructure due to excessive delays and costs are symptoms of regulatory problems.

1.5 The Public Finance Act contains principles for limiting the government's exercise of fiscal powers. This Bill provides a principled legislated discipline to the assessment of its use of its regulatory powers. Some government objectives can be achieved through either regulatory or spending measures: for example, government can reduce the speed limit on a sharp bend in the road, or it can spend money to make the bend safer at speed. Regulation is better in some cases; spending is better in others. But greater disciplines on the exercise of spending powers than on the use of regulatory powers create an undesirable bias in favour of regulation. That bias could see a regulation imposing one billion dollars of cost on the private sector preferred to a government spending measure costing much less to achieve the same objective.

1.6 The last three decades of non-statutory attempts to improve the quality of regulatory assessments by greater analytical transparency have not prevented the current shortcomings that the Ministry for Regulation set out in pages 12-17 of its interim Regulatory Impact Statement on the Bill. The quality of regulatory assessments is mixed because the incentives to do better are too weak.

1.7 The Bill should usefully strengthen current incentives in two ways. The first is to reduce the demand for poor quality regulation by raising the potential cost to those demanding it. The second is to make it easier for Ministers to resist the remaining public demand for such laws and regulations.

1.8 Current land use regulation illustrates the first aspect. Under current laws and regulations objectors can block a housing development without having to buy the land at a price the owner is willing to accept. That purchase offer option is the non-coercive remedy for disputes over land use. The absence of this discipline means that those opposing the development are

[1] The author was a member of the 2009 Regulatory Review Taskforce that the Document mentions on page 6 and was the author of earlier versions of this initiative that informed the Taskforce's work.

not confronted with the lost value in the community of the forgone housing development.[2] That deficiency has the makings of a national housing shortage. If, however they would have to buy the land to achieve their preferred use, the price paid would confront them with its value if used for housing. The third aspect of the "Taking of Property" principle mirrors this cost-confronting virtue.[3] It potentially puts objectors who claim a personal benefit from blocking a change in land use at the risk of being required to compensate the landowner for the cost to the community of providing that personal benefit. (The fall in the market value of the land is an indicator of the lost value to the community.) This principle of confronting people with the cost to the community of providing a wanted benefit is well understood in environmental debates where terms like "polluter pays" and "user-pays" are commonplace. The principle in taxation policy debates that those who benefit should pay the tax' is from the same stable. These examples illustrate demand-limiting aspects of a compensation principle.[4]

1.9 On the second aspect, the transparency and certification measures in the Bill should also make it easier for Minsters to resist the demand for laws and regulations that are likely to make the community worse off.

1.10 Despite supporting the Bill, we regret that its effectiveness is limited if its remedies for unjustified violations of its principles are too weak to make a difference. Indeed, if they are the Bill could potentially do more harm than good by making transgressions of its key fundamental constitutional principles look of no account in the public eye. Ongoing consideration is needed to ways of giving teeth to the Bill's remedies.

1.11 This submission also identifies a number of other suggestions for improving or refining the Bill. A public interest test for takings is needed. More safeguards are needed for the application of the rule of law as long understood, and the composition and location of the Board to assess appeals needs careful consideration. Nor should the need for regulatory decisions by local authorities be overlooked.

1.12 Finally, and importantly, developments with this Bill indicate that Officials do not trust New Zealand's Supreme Court to apply fundamental legal principles in a predictable manner. This is an alarming situation, Bill or no Bill. It implies that the rule of law in New Zealand is at risk. Parliament needs to deal with this problem independently of this Bill.

1.13 The next section of this submission canvasses some suggestions for improving the Bill. In the process it commends suggestions made in a submission by Leonid Sirota, an associate professor of law at the University of Reading in the United Kingdom. Section 3 of this submission responds to some of the reasons critics have given for opposing the Bill, Section 4 gives brief answers to some of the questions posed in the Ministry's Discussion Document. The last section provides a brief conclusion.

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[2] Commonly, there are multiple objectors, reducing acquisition costs per objector. Where the argument is of a public good nature, compensation funded by taxpayers or ratepayers might be warranted depending on whether the public good aspect is national or local.

[3] Discussion Document, pp 20-21.

[4] Of course, if the benefits accrue to the public at large, tax-funded compensation is appropriate.

2 SUGGESTIONS FOR IMPROVEMENTS OR REFINEMENTS

The Rule of Law Principle

2.1 The Discussion Document's formulation of the rule of law principle appropriately focuses on traditional formal characteristics of the rule of law rather than substantive values. This focus aligns with long-accepted understandings of the rule of law and should help prevent unintended expansion of this important constitutional principle.

2.2 As documented in "Who makes the law? Reining in the Supreme Court" (The New Zealand Initiative: Wellington, 2024), there are competing conceptions of the rule of law. Under the orthodox 'thin' conception reflected in the Discussion Document, rule of law principles are limited to formal characteristics - laws being publicly accessible, predictable, stable, coherent and impartially applied. These describe what laws must have to guide conduct effectively without making judgments about their moral or substantive content.

2.3 The Bill would benefit from two modest refinements to reinforce this orthodox approach:

First, the current phrasing ("the following aspects of the rule of law") could be read as merely illustrative rather than definitive. The Bill would benefit from clearer language indicating these elements constitute a complete definition of the rule of law for its purposes.

Second, the Bill should include explicit limitations clarifying that its rule of law principle does not:

1. Create new actionable rights;
2. Affect the duty of the courts to interpret legislation in accordance with section 10 of the Legislation Act 2019; or
3. Qualify parliamentary sovereignty.

2.4 Drawing on Partridge's drafting in "Who makes the law? Reining in the Supreme Court" [op. cit. pp 20-30], these concerns could be addressed by stating that:

For the avoidance of doubt, this principle:

(a) does not give rise to actionable rights;

(b) does not require, empower or permit the courts to disregard the substantive content, wisdom, or policy of legislation;

(c) does not permit the courts to develop the common law in ways that purport to give effect to a more substantive conception of the rule of law;

(d) does not affect the duty of the courts to interpret legislation in accordance with section 10 of the Legislation Act 2019;

(e) does not diminish or qualify the principle of Parliamentary sovereignty or the power of Parliament to make or unmake any law.

2.5 These refinements would help ensure the Bill's rule of law principle operates as intended. Looking ahead, for the reasons stated by Partridge, broader constitutional reforms to strengthen New Zealand's commitment to the long-accepted understanding of the rule of law across our legal system are needed. Partridge's report offers detailed proposals in this regard. However, such reforms are beyond the scope of this Bill's important regulatory focus.

Narrowing the principled grounds for taking private property to the public interest

2.6 The version of the takings principle that is in the discussion document permits governments to take property for any 'good reason' rather than requiring that reason to be in the public interest, as was in the 2011 version of the Bill. If short-term partisan political advantage is a 'good reason', then anything goes. The original version is more principled and more meaningful.

The Bill's title

2.7 The Bill's focus is on principles for improving the quality of laws and regulations. Jack Hodder, KC and a key member of the 2009 Taskforce proposing the Bill, has suggested that a more accurate and informative title might be the "Legislative and Regulatory Principles Bill".

Professor Sirota's suggestions

2.8 Professor Sitora's suggestions for improving the proposed Bill include:

- Adding to the principles of good law making "that "rules of general application should, to the extent possible, be laid down in Acts of Parliament rather than in secondary legislation". This aims to constrain delegation of law-making powers to ministers.

- Requiring a 'more-likely-than-not' level of plausibility for declarations of consistency with the principles. Perhaps the Minister for Regulation should make the declaration in the consultation with the Attorney General as to the legal aspects.

- That the Board that is to judge complaints concerning declarations of consistency should be (a) composed of members whose terms are longer than the 3-year general election cycle, (b) have a capped membership, and (c) to have a least one third of its members legally qualified, one of whom should be chair when complaints are heard.

These suggestions have merit.

Application to local government

2.9 In the past Federated Farmers and Business New Zealand have drawn attention to ensure that local authorities are also required to address such transparency issues when regulating *to* ''promote social, economic, cultural, and environmental well-being in the present and for the future." The need for consistency across branches of government is obvious.

The naming of the regulatory board and its location

2.10 One option is that the proposed appeal authority be a parliamentary body, as is the office of the auditor general. It audits government spending. One counterpart suggestion is that the appeal authority for regulations be called the office of a regulator general.

3 RESPONSES TO SOME CRITICISMS OF THE PROPOSED Bill

The objection that poor quality regulation is in the eye of the beholder

3.1 The essence of a good system of voluntary exchange is mutual benefit. A transaction between a willing buyer and a willing seller occurs only if both perceive themselves to be better off. The mutual benefits will be greater if there is a supportive system of property rights that provides effective sanctions against trespass, theft, fraud and coercion.[5]

3.2 An important test for the quality of government regulation is whether it retains that 'win-win' feature. In principle it should. If the benefits to one party outweigh the losses to another, both parties can be made better off in principle by a compensation arrangement.[6] The Bill's principles include cost-benefit analysis for this reason.

3.3 Paternalism is a threat to the net benefit assessment process. Paternalists supplant individuals' assessments of their own well-being by the paternalists' assessment. By definition, paternalists know, depending on the issue, what the individual should be wearing, eating and drinking, what risks they should not be taking, what is their right 'work/life' balance, what they should be conserving, and how much they should be exercising. Yet regulating on this basis may affront personal autonomy.

3.4 The Legislation Guidelines, overseen by the Legislation Design and Advisory Committee, guard against this by advocating a presumption in favour of liberty.[7] It follows that a burden of proof should be applied to regulatory proposals that are paternalistic.

3.5 The more general point is that what the Legislation Guidelines list as "fundamental principles and values of New Zealand Law"[8] should not be violated except for very good reasons. There should be a presumption against violating them.

3.6 There is a counterargument that what constitutes good or bad regulation is in the eye of the beholder. This 'post-modern' viewpoint essentially denies that there is a difference between good government and bad government. Perhaps the housing shortage is a good thing in the eyes of some. Those who espouse this nihilistic view have surely given up on trying to find better arrangements for future wellbeing and prosperity.

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5 Laws against theft, nuisances and the like constrain all equally for mutual benefit. (The obligations are reciprocal, and the benefits mutual. So, for law-abiding citizens they have the desired 'win-win' characteristic.) The Commerce Act exists to curb monopolistic and cartel behaviour.

6 Cost benefit analysis, (i.e. net benefit analysis) is designed to help assess if net benefits are positive.

7 See chapter 4, Part 3. Of course this is referring to self-competent adults. State protections for children and for enfeebled adults are not paternalistic.

8 These words are in the title of chapter 4.

The objection that some of the principles are novel and ill-understood

3.7 The principles in the Bill are not as novel as is sometimes asserted. Here is the Taskforce's statement of their source and its comment on that point.

> "The principles which the Taskforce recommends draw on the LAC guidelines, the principles currently set out in the standing orders by which the RRC [Regulations Review Committee] reviews delegated legislation, and the government's own recent announcements on regulation as well as other sources. The Taskforce has sought to provide a simplified and streamlined set of criteria that accord with and reflect broadly accepted principles of good legislation rather than novel principles.[9]

3.8 It is true that the compensation aspect of the takings principle in the Bill is particularly clear about who might be liable to pay that compensation. In so doing, it is mirroring the situation that would apply if the exchange were voluntary. Clarity about potential legal liability is a virtue, not a vice. It affects incentives. Some may think that views about this are ideological in a party-political sense. This is not necessarily so. Consider the following commentary on the first reading of the Regulatory Standards Bill in 2011 by a Labour Party MP with high academic qualifications in law, Charles Chauvel:

> "Likewise, there is a principle contained in the bill around the taking of property: laws should not take or impair, or authorise the taking or impairment of, property without the consent of the owner unless there is an overriding public interest involved, full compensation for the taking is provided, and it is provided on behalf of or by the persons who obtain the benefit of the taking. Again, no one who has studied our constitution would find that surprising."[10]

3.9 It is true that this principle is at odds with the Resource Management Act's provision that explicitly denies the right to compensation for restrictions on land use that reduce its market value. But it is that provision that is novel, in the historical context that goes back to the 1688 Bill of Rights and before that to Magna Carta. The concepts of compensation for businesses losses from public works and of offsets for betterment have been in New Zealand's venerable Public Works Act from day one.[11]

3.10 It has been claimed that the terms like 'property' and 'liberty' are unclear in a legal context. However, property law exists back to Roman law and beyond. Courts tend to define it broadly.[12] So does New Zealand's Property (Relationships) Act.

3.11 As already mentioned, the Legislation Guidelines 2021 have no difficulty in setting out a presumption in favour of individual liberty. They associate it with *the principle of legality*. And of course, the case for this principle was famously made in an essay by John Stuart Mill, building on earlier material by his contemporary Scottish philosopher David Hume. Indeed, the associated principle of treating others as you would want them to treat you dates back to Confucius (500 BCE) and no doubt beyond him. These notions of the dignity of the individual,

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9 Report of the Regulatory Responsibility Taskforce, September 2009, p 10.

10 Hansard 5 July 2011, Regulatory Standards Bill — First Reading - New Zealand Parliament.

11 For much fuller historical perspective, see Jack Hodder, KC, "Public law, property rights and principles of legislative quality", NZLS Intensive, Administrative Law – the public law scene in 2011.

12 The author's 2008 report "A primer on property rights, takings and compensation" p. 7, summarises a 1990 Ministry of Justice summary of the scope on what the Courts consider to be property. The 2021 Legislation Guidelines, chapter 4, part 4 state that it includes intellectual property and other intangible property.

a broad freedom to pursue legal goals of one's own choosing and to be protected from undue coercion are fundamental for free and democratic societies.

3.12 Chauvel's overall assessment of the principles in the 2011 version of the RSB was that they are "at least on their face, principles that everyone should support."

The fear that the Bill would make it harder for governments to regulate for the public good

3.13 The Bill does not infringe parliamentary sovereignty. Parliament can pass any law it wishes to pass. Under the Bill, it just must be more open and transparent about what it is doing and why. Well-designed laws and regulations addressing public good issues (e.g. those relating to pandemics, to public works or situations giving rise to the tragedies of the commons or the anti-commons) should have little trouble passing the tests of compliance and explaining the reasons for any departures. Sunset clauses for departures should be considered, as appropriate.

3.14 Similarly, the Bill would not preclude regulation aimed at promoting environmental aims like biodiversity. To avoid violating the principles, a measure would require demonstrating that the benefits of those measures exceeded the costs, and that if this were at the expense of property owners that the principle of compensation was addressed. But a failure on either count would not stop Parliament from proceeding with the measure.

The ideological fear that the Bill is an unwanted alien neo-liberal ideology

3.15 As explained above, the principles in the Bill are an orthodox part of New Zealand's constitutional structure, derived from the longstanding bedrock of English law. In addition, the test of whether the benefits to affected members of the community exceed the costs, as they perceive them for themselves, is a mainstream, non-ideological analytical framework. The net benefit assessment that emerges from the analysis is not ideologically pre-determined. And the analysis can be independently evaluated, disputed and debated. It is not handed down from up high as untouchable.

3.16 It is true that all systems of constitutional government are based on ideas (and experience) as to what works and what does not work, what is good and what is bad. No system is free of ideology in this sense. But if recourse to ideas is wrong, the complaint has no remedy. Every alternative imposes an ideology, as thus defined.

The argument that the principles are general in nature and are incomplete

3.17 Statements of principles are general. It is the elaborations of those principles that identifies the exceptions. "Thou shalt not kill" is a biblical commandment. The principle is also a law. Exceptions are understood. Self-defence is permitted. Wartime killing is accepted.

3.18 The principles the Bill enumerates have been part of the UK constitutional structure for centuries. The exceptions in their application are embodied in case law. And the Bill provides for the Minister of Regulation to provide guidelines where needed.

3.19 The argument that they are not a complete written constitution for New Zealand is true. That was not and is not the goal. This measure has a regulatory focus. It does not have a tax and spending focus. It complements the fiscal responsibility provisions in the Public Finance Act.

3.20 But the argument that other principles of a general nature (e.g. Treaty principles) should be included in the Bill contradicts the criticism that principles of a general and controversial nature should not be in the Bill. We note that the government has announced an intention to review Treaty provisions in existing legislation. If this Bill is to be a regulatory complement to the Public Finance Act, the status of Section 45Q may be material.

4 BRIEF ANSWERS TO SOME OF THE QUESTIONS IN THE DISCUSSION DOCUMENT

4.1 The discussion document poses thirty-five numbered questions for submitters. Answers to some of those questions would take more time to examine, consider and assess than has been allowed for submissions. For this reason, this submission does not attempt to answer questions 17, 20, 23, 24, 25, 26 and 28–32.

4.2 Q33. Will the overall proposal be effective in raising the quality of regulation in New Zealand? Answer: It should help, but the current Supreme Court's application of parliamentary law has become a grave concern which the Bill does not address. Putting that to one side, its effectiveness depends on the power of the remedy for any future governments that cavalierly set aside these principles. The power or the Bill's proposed remedies is of great importance in this respect.

4.3 Q34. What other provisions might be added to the Bill? Answer: Do not add things that detract from its regulatory constitutional focus.

4.4 Q35. Preferred alternatives to the Bill? Answer: Non-legislative options are not mutually exclusive, they could be supplementary options.[13] However, non-legislative options may fail to work on the demand side of the supply and demand for poor-quality regulations. The political incentive to confer privileges on politically powerful constituencies at the expense of New Zealanders overall could still be strong.

4.5 Questions 6-11 on page 17 of the Discussion Document: Answers.
Q6. The quality of New Zealand's regulations is lower than it could be notwithstanding New Zealand's good rankings in many respects internationally.

Q7. Current arrangements have proven to be inadequate to the task of doing better.

Q8. Yes, RISs are something the Initiative always seeks when assessing a new regulatory proposal, how much they help is mixed. They frequently lack adequate problem definition or appropriate cost-benefit assessment.

Q9. Yes, disclosure statements are helpful because they flag legal constitutional concerns whereas an RIS might not.

Q10. The Initiative has documented real concerns about the quality of regulatory oversight in New Zealand, the governance of the regulators is an issue.

Q11. The legislative option should help curb the demand for poor quality laws and regulations, the efficacy of other options in this respect is relevant.

4.6 Questions 12-16 on page 23-4 of the Discussion Document: Answers.
Q12. The case against having the principles in primary legislation should not be decided solely on the basis that the Courts might interpret them wilfully under judicial review. The issue of the need to improve regulatory quality needs to be factored in. The prime purpose of the Bill

[13] See the 2009 Taskforce's additional recommendations in part 5 of its report and its summary on page 13.

is to reduce the demand and the supply of poor-quality regulation. That is the criterion that should be used.

Q 13. See section 3 above.

Q 14. Yes. Regulatory assessments should consider any effects on workable market competition.

Q 15. See section 3 above.

Q 16. See section3 above.

4.7 Questions 17-20 on page 26 of the Discussion Document: Answers. Q 18. Done well they should help reduce the demand for poor quality regulation. Q 19. No.

4.8 Questions 21-25 on page 30 of the Discussion Document: Answers. Q 21. The Initiative mainly raises issues with those in government who are directly responsible, with mixed results, as is to be expected. Q 22. Yes, there needs to be a meaningful remedy.

4.9 Questions 26-32 on page 33 of the Discussion Document: Answers. Q 26. There is a case for the power to obtain information, but to have a view on the options would take more time and analysis. Q 27. Yes.

5 CONCLUSIONS

5.1 New Zealand's laws and regulations could be and should be materially improved. Only a change in the incentives to do better is likely to improve matters materially.

5.2 The strength of the Bill is that it establishes principles for evaluating the quality of laws and regulations and processes for evaluating them against those principles. Without such principles and processes, self-serving arguments by interested parties are harder to assess, evaluate and resist.

5.3 The task of embedding the principles and process into existing mechanisms and documents and implementing this well is a worthy challenge. A meaningful remedy for departures is important. Frivolous and false declarations of consistency need to be sanctioned.