Comments on the Proposed Regulatory Standards Bill – Discussion Document

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Introduction

1. This paper comments on the merits or otherwise of the proposed Regulatory Standards Bill, as foreshadowed in the Discussion Document (Ministry for Regulation, 2024a). The Executive Summary provides a short overview of my main concerns. Following this, the paper briefly discusses the historical background to the Discussion Document. It then outlines in greater detail the reasons why the proposed legislation is neither needed nor desirable. In that regard, particular attention is given to the proposed principles of responsible regulation (also referred to as 'standards of good regulation').

2. I have not sought to answer all the questions posed in the Discussion Document. Nor have I provided itemized answers. Nevertheless, the analysis which follows does, I hope, respond adequately and appropriately to the multiple issues raised by the drafters of the Discussion Document.

3. I have deliberately focused on the central problems and drawbacks associated with the proposed Bill. Accordingly, I have given much less attention to those aspects of the Bill which may have merit (e.g. the suggested measures to enhance the current policy framework for regulatory stewardship).

Executive summary

4. Despite some good intentions, the proposed Regulatory Standards Bill, as outlined in the Discussion Document (Ministry for Regulation, 2024a), should not be enacted. It suffers from many (but not all) of the serious flaws which dogged previous versions of the Bill over recent decades, and which contributed to these versions being repeatedly and conclusively rejected by decision-makers. While some of the several dozen principles and administrative requirements proposed for inclusion in the Bill have merit, many others do not; and some are open to strong philosophical, constitutional, and practical objections. Moreover, there is no guarantee that any benefits generated by the proposed legislation will outweigh the additional costs that will be imposed on our policy-making system. Accordingly, the current proposal should be shelved; nor should any similar proposal be advanced in the future.

5. The key concerns with the proposed Bill, based on what is foreshadowed in the Discussion Paper, include the following:

    a. The twin propositions that countries like New Zealand should i) have 'good laws', and ii) should follow principles of 'good lawmaking' in developing and implementing these laws are commendable. As it stands, however, there is no simple or widely agreed formula for determining what constitutes a 'good law'. Nor is such a formula ever likely. What some people may regard as 'good' and thoroughly justified, others may regard as objectionable, bad, and totally unjustified (e.g. abortion laws, assisted dying laws, various law relating to taxation, employment, environmental protection, health and safety, etc.). This reflects the fact that views on the nature of the 'good', the 'good life' and the 'good society' are influenced by multiple ethical values, many of which are in conflict. Moreover, even when people agree about which values are relevant in any given policy and/or legislative context, they frequently disagree about how such values should be weighted or prioritized and/or how they should be interpreted and applied. These differences reflect competing world views and contrasting ethical frameworks. Accordingly, there is little prospect of establishing an agreed set of substantive, meaningful, and enduring principles or criteria for determining what constitutes a 'good law' and which can be applied consistently across most, if not all, areas of regulatory activity.

    b. Of course, it might be possible to reach agreement on the proposition that legislation should serve the common good, protect the public interest, or meet the requirements of justice. But this would not resolve the matter. It would simply shift the focus of debate, namely, to the question of what such terms mean. And there are multiple and competing perspectives on what constitutes the common good, the public interest, and the nature of justice – as any brief review of the relevant international literature would readily confirm.[1]

    c. Not only are there fundamental disagreements within democracies like New Zealand about substantive policy and legal matters, such as the nature of a 'good law', but there are also vigorous disagreements about procedural matters, such as the requirements for 'good lawmaking processes'. To be sure, there is probably more scope for agreement on issues of processes than on matters of substance. But that said, many procedural matters are also controversial. What exactly, for instance, does proper consultation entail? What constitutes a robust cost-benefit analysis, and should all proposed legislation be subject to such an analysis? As argued below, some of the criteria for 'good lawmaking', as proposed in the Discussion Document, are especially controversial – or at least are open to many and varied interpretations.

[1] See, for instance, https://www.rep.routledge.com/articles/thematic/public-interest/v-1; https://plato.stanford.edu/entries/common-good/

d. Ironically, and related to this, in advancing the case for the proposed Bill, the government has failed to follow several of the principles for 'good lawmaking' enunciated in the Bill, namely:

   i. to demonstrate that the proposed Bill is in 'the public interest';
   ii. to carefully evaluate a range of options that are 'reasonably available for addressing the issue' (i.e. the policy problem that the Bill seeks to mitigate); and
   iii. to provide a proper analysis of 'who is likely to benefit, and who is likely to suffer a detriment, from the legislation'.

   Such principles have merit. But by ignoring them, there is an added risk that any legislation of the kind proposed will not contribute to good governance and higher-quality regulation – or at least will be less effective in mitigating the policy problems in question than the available alternatives.

e. Those supporting the proposed Bill clearly intend the legislation to serve as a vehicle for imposing narrow, ideologically-motivated, constraints on the role of the state – constraints of a kind that, if applied in practice, would almost certainly undermine the pursuit of a just, inclusive, resilient, and sustainable economy and society. But there is little prospect that they would, in fact, be applied. Regardless of any Regulatory Standards Act, democratically-elected governments will continue to make decisions about (primary and secondary) legislation which reflect their electoral mandates and policy preferences. And in a democracy, that is how it should be. In any event, the Discussion Document envisages that the Minister for Regulation would have discretion under the proposed Act to determine which laws are not required to comply with the consistency provisions in the legislation. If so, such discretion, even if tightly prescribed, could render the proposed Act largely redundant in practice.

f. Several of the proposed principles of responsible regulation are highly problematic. For instance:

   i. their meaning is open to a wide range of interpretations, thus creating uncertainty and potential confusion; and/or
   ii. they are open to strong philosophical, ethical and/or practical objections (e.g. the highly restrictive grounds for constraining liberty and exercising administrative discretion, the requirement for fair compensation in relation to the taking or impairment of property, and the provisions relating to the imposition of taxes, fees, and levies).

g. The list of principles outlined in the Discussion Document does not include many principles that are relevant to good lawmaking, whether in the context of Aotearoa NZ or more generally. Among these are:

   i. the principles of te Tiriti o Waitangi

ii. the public harm principle
iii. widely accepted principles of distributive justice (e.g. meeting the basic needs of all people)
iv. protecting the right to a clean, healthy, and sustainable environment
v. protecting the interests of future generations
vi. the precautionary principle
vii. the requirement for governments to comply with their obligations in international law
viii. the requirement for elected and appointed officials to exercise the powers conferred on them in good faith, etc.

h. The proposed Bill, if implemented, is likely to impose significant additional costs on government departments and agencies in their design, implementation, and review of legislation, and may well cause substantial delays in developing new legislation and reviewing existing legislation due to the need for more thorough evaluations and consistency checks. It could also generate additional litigation, thus placing extra burdens on the courts and imposing greater costs on those affected by such legal action. It is far from clear that any benefits generated by the proposed Bill (if, indeed, there are any benefits) will outweigh the additional costs.

i. The proposed Bill, if implemented, would likely entail unnecessary duplication of the existing quality assurance processes that are designed to enhance good lawmaking, such as:

i. the requirements for Regulatory Impact Statements and disclosure statements
ii. the role of the Parliamentary Counsel Office in drafting primary and secondary legislation
iii. the scrutiny role of Parliament (including select committee processes and the opportunities for public submissions)
iv. the provisions of the Legislation Act 2019
v. the role of independent advisory bodies, such as the Legislation Design and Advisory Committee (LDAC), the Law Commission, and the Human Rights Commission, and
vi. the opportunity to seek judicial review by the courts.

j. The proposed principles and other provisions in the Bill give little attention to the application and enforcement of regulation, including the extent to which regulations are adequately and fairly enforced and whether sufficient measures are in place to minimize and avoid regulatory ‘capture’ (see Doole, et al. 2024). In so doing, the Bill fails to address several of the key reasons for poor regulation.

k. Significantly, the Ministry for Regulation, which has responsibility for overseeing the development of the proposed Bill, believes that there are better

ways to achieve the Bill's main goals – that is, cheaper and more effective ways to increase the quality and robust implementation of regulation and doing so without the risks associated with embracing the proposed principles of responsible regulation in primary legislation (see Ministry for Regulation, 2024b). Moreover, the Ministry for Regulation is by no means alone in reaching this judgement. For instance, the Treasury (in its Regulatory Impact Statement in 2011) came to the same conclusion regarding an earlier version of the proposed Bill. The other options available for enhancing the quality of regulation deserve proper analysis. One obvious option would be to make greater use of Regulatory System Amendment Bills (RSABs) (see Kudrna, 2025, forthcoming). Another would be the fuller implementation of the provisions of the Legislation Act 2019.

Background and relevant evidence

6. Most of the basic goals of the proposed Regulatory Standards Bill, as outlined in the Discussion Document (see Ministry for Regulation, 2024a), are worthy and unobjectionable. Fundamentally, they involve improving the quality of regulation (i.e. both primary and secondary legislation) in Aotearoa New Zealand through various changes to current legislative processes and the regulatory management system. The changes in question are designed, among other things, to enhance transparency and accountability, ensure the consistency of legislation with various principles, standards, or benchmarks of good regulation, provide for additional independent scrutiny of our regulatory systems (including in response to public complaints), reduce the regulatory burden on citizens and businesses, and enhance regulatory stewardship. As a result, or so it is believed, the incentives for ministers, government agencies, and Parliament to design and implement high-quality regulations (i.e. primary and secondary legislation) will be enhanced and greater efforts will be made by decision-makers and their advisers to review and update existing regulatory instruments. These improvements will, or so it is hoped, enhance various societal outcomes (e.g. greater productivity).

7. Judging by the contents of the Discussion Document, the provisions in the proposed Regulatory Standards Bill, including the principles of responsible regulation (also referred to as 'standards of good regulation'), are likely to be very similar to those contained in earlier versions of the proposed legislation. These include the Regulatory Responsibility Bill (RRB), as drafted by the Regulatory Responsibility Taskforce in 2009 (and based on an earlier version considered by Parliament's Commerce Committee in 2007-08), and the Regulatory Standards Bill (RSB) introduced into Parliament in early 2011 as a government bill by the then Minister for Regulatory Reform, Hon Rodney Hide. The RSB was virtually identical to the RRB, except for the change of name.

8. That said, the Discussion Document foreshadows that the next iteration of the RRB/RSB will be different in several important respects from its predecessors. For one thing, various changes are foreshowed to the wording of several of the proposed principles. For instance, both the 2009 and 2011 versions of the Bill proposed in

relation to the taking or impairment of property by the government that 'full compensation' should be provided to the owners of the property in question. By contrast, the Discussion Document refers to 'fair compensation'. Additionally, the Discussion Document foreshadows important changes to the 2009 and 2011 versions of the Bill with respect to such matters as the role of the courts, certification processes, the establishment of a Regulatory Standards Board, and the process for enabling people to seek an independent assessment of whether specific regulations are meeting the standards of good regulation (or the principles of responsible regulation).

9. Notwithstanding such changes, most (but certainly not all) of the objections to the 2009 and 2011 versions of the Bill appear to be equally applicable to the version foreshadowed in the Discussion Document. And most of these objections remain as compelling as they were over a decade ago. Indeed, the force of the objections to the RSB in 2011 were such that the National-led government chose not to proceed with Rodney Hide's Bill (i.e. following its scrutiny by the Commerce Commission). I note, too, that the Interim Regulatory Impact Statement prepared by government officials in October 2024 (Ministry for Regulation, 2024b) recommends against proceeding with the proposed Bill, preferring a different approach to achieving the Bill's underlying objectives. It is thus puzzling that, despite multiple long-standing concerns, the government appears intent upon introducing legislation broadly similar to the RRB and RSB.

10. The many objections are well documented (e.g. in submissions to the Commerce Committee in 2011 on the RSB, in academic journal articles, and in multiple documents prepared over the years by government officials). As it happens, many of these objections were discussed at length during a symposium organized by the Institute of Policy Studies (IPS) at Victoria University of Wellington in February 2010, with the relevant papers published subsequently in the May 2010 issue of *Policy Quarterly* (see: https://ojs.victoria.ac.nz/pq/issue/view/515/pq6-2). At the time, I was Director of the IPS and the editor of *Policy Quarterly*. Four of these papers are particularly pertinent to the current policy proposals and deserve careful consideration. I urge all those involved in the current policy processes with respect to the proposed Bill to read these papers.[2] Also relevant is a comprehensive critique of the RSB by Richard Ekins and Chye-Ching Huang, 'Reckless Lawmaking and Regulatory Responsibility', *New Zealand Law Review*, 3 (2011), pp.407-442.

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[2] Geoff Bertram, 'Deregulatory irresponsibility: Takings, Transfers and Transcendental Institutionalism' https://ojs.victoria.ac.nz/pq/article/view/4336/3838; Geoff is an economist and a Visiting Scholar at VUW; Richard Ekins, 'The Regulatory Responsibility Bill and the Constitution' (see: https://ojs.victoria.ac.nz/pq/article/view/4333/3835); Richard Ekins is now Professor of Law and Constitutional Government at the University of Oxford; Paul Rishworth, 'A second Bill of Rights for New Zealand?' (see: https://ojs.victoria.ac.nz/pq/article/view/4330); Paul is a Professor of Law at the University of Auckland; George Tanner, 'How does the proposed Regulatory Responsibility bill measure up against the principles? Changing the role of Parliament and the courts?' (see: https://ojs.victoria.ac.nz/pq/article/view/4327); George Tanner served for many years as the Chief Parliamentary Counsel in New Zealand.

The reasons why the proposed Bill should not proceed

Problem definition – what problems does the proposed Bill seek to address?

11. Some brief comments must suffice. As the Interim Regulatory Impact Statement (2024, pp.12-17) highlights, there are challenges in assessing the quality of regulation in New Zealand (and indeed elsewhere in the world). There are many potentially relevant criteria and indicators of quality; there are different ways in which these can be weighted; there are gaps in the available evidence; etc. etc. Nevertheless, based on a range of international indicators, New Zealand's regulatory performance appears to be relatively good. It is certainly not at the 'poor' or 'weak' end of the spectrum.

12. That said, there is obviously always room for improvement. But any effective strategy for that purpose requires a thorough, robust and accurate understanding of the nature of the problems that are evident, their causes, and the policy options available for addressing them (to the extent that they are amenable to addressing). Unfortunately, the Discussion Document does not provide readers with much comfort that the nature of the problems with our country's regulatory systems, including their design and implementation, are well understood. For instance, in his foreword to the Discussion Document, Hon David Seymour (the Minister for Regulation) claims that: "Most of New Zealand's problems can be traced to poor productivity, and poor productivity can be traced to poor regulations." This is an extraordinary claim. It is almost certainly false. New Zealand, like most countries, has hundreds, if not thousands, of problems – constitutional, political, social, economic, environmental, educational, health-related, natural hazard risks, global risks, and so forth. Many, if not most, of these problems have absolutely nothing to do with 'poor productivity' (however productivity is defined). Equally, while it is doubtless true that poor regulations are one of the many causes of poor productivity, they are but one cause; there are numerous other factors, some of which are within the control of governments (and their related policy frameworks), but many are outside their control.

13. The Discussion Document (along with previous reports which sought to justify the proposed RRB and RSB) identifies a series of problems with our country's regulatory approach, systems, and stock of regulations. To take a specific example. The claim is made that many laws are out of date and thus no longer fit for purpose. No doubt, this claim has validity. But why is so much legislation out of date? Presumably, a key issue relates to the resources – both political and advisory – that have been devoted to the time-consuming and onerous task of updating existing legislation, together with a tendency for governments to prioritize the drafting of new legislation (e.g. to address new and emerging societal problems). Presumably, therefore, a key part of the solution lies in increasing the resources deployed to reviewing and updating existing legislation. But will the proposed Regulatory Standards Bill affect such matters? Will it alter the structure of political incentives? More specifically, will it increase the funding available for the required activities and alter ministerial priorities? The answer to such questions is by no means self-evident. With little doubt, the proposed Bill will increase the resources required to prepare, assess, and implement new legislation – given the more demanding requirements that will be imposed on the

relevant policy/legislative processes. But there is no guarantee that the proposed Bill will encourage governments to spend more of their scarce time and funding on updating existing legislation. Indeed, if there is no change in real terms to the available departmental budgets, then greater expenditure on preparing new legislation will result in event less resources being available for assessing and enhancing the existing legislative stock.

Addressing the problems identified – the failure to follow the principles of 'good law making'

14. The Discussion Document outlines, in effect, a single solution to the problems that it has identified, namely a Regulatory Standards Act. Without question, the proposed solution is conceptually demanding, inherently complex, complicated and potentially costly to implement, and open to multiple constitutional, legal, and philosophical objections. But the Document does not outline, let alone rigorously assess, the policy options that are available to tackle the identified problems. Why not? Good policy making entails a proper options analysis, including consideration of the various costs and benefits of a range of feasible solutions.

15. To compound matters, the proposed legislation is totally inconsistent with the principles or rules for 'good law making' that it proposes – and which, if implemented, would generally be mandatory. These rules, as summarized in the Document, require careful evaluation of:

    - '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 issues concerned that is available.'

16. Note, firstly, the wording of the fourth bullet point: 'any options (including non-legislative options) that are reasonably available for addressing the issue'. The Discussion Document makes no effort to consider any options other than the proposed legislation. Why not?

17. Note, secondly, the requirement, as specified in the Document, that: 'Legislation should be expected to produce benefits that exceed the costs of the legislation to the public or persons.' Again, the Discussion Document includes no proper cost-benefit analysis. Indeed, it barely discusses the potential costs of what is proposed, whether in

the form of fiscal costs (e.g. the need for ever more detailed analysis of regulatory proposals) or the extra costs that may fall on citizens, businesses, and civil society organizations. Admittedly, the Document acknowledges that: 'as a result of this proposal, agencies *may* [my emphasis] need to dedicate greater resource to monitoring, evaluating, and reviewing their stock of legislation, which is likely to create costs for agencies.' But the Document contains no proper costings. Moreover, why use the word 'may'. Surely, there can be no question that the proposed legislation will increase the costs facing government agencies. By contrast, the Interim Regulatory Impact Statement includes a partial cost-benefit analysis of the proposed Bill – and while this is incomplete, it indicates that the Bill could impose some significant additional costs on lawmaking processes and on those involved in such processes.

18. Note, thirdly, the requirement that: 'Legislation should be the most effective, efficient, and proportionate response to the issues concerned that is available.' Yet again, there is no attempt in the Discussion Document to assess whether the proposed Bill conforms to these requirements. Is the proposed Bill, for instance, 'proportionate'? And how should this principle be interpreted and applied?

19. In short, the arguments advanced in the Discussion Document for the proposed Bill and deficient in several important respects, and certainly do not justify the proposition that the Bill (at least as currently envisaged) is in the public interest.

There are other options available to address the problems identified – and these need proper consideration

20. As many observers have noted over the past few decades, there any many other ways to enhance the quality of the country's regulatory systems and legislation. Some of these are noted in the Interim Regulatory Impact Statement. Others have been advanced by academics and civil society groups.

21. With respect to updating legislation which is no longer fit-for-purpose, one of these options that has been available since 2016-17 is to use Regulatory Systems Amendment Bills (RSABs). As explained by the Ministry for Business, Innovation, and Employment: 'An RSAB is a package of separate omnibus bills (bills that amend multiple pieces of legislation) that are treated as cognate (related) and progress through the parliamentary process together.' The aim of RSABs is 'to improve regulatory systems by ensuring that they are effective, efficient and align with best regulatory practice. The amendments in these Bills achieve this by:

    a. clarifying and updating statutory provisions in each Act amended, to better give effect to the purpose of that Act and its provisions
    b. addressing regulatory duplication, gaps, errors, and inconsistencies within and between different pieces of legislation
    c. keeping the regulatory system up to date and relevant; and

d. removing unnecessary compliance and implementation costs.'[3]

22. The use of RSABs has been increasing in recent years, and there can be no question that they have significant potential to address at least some of the concerns which have prompted the repeated proposals for a Regulatory Standards Act – and to do so relatively cheaply, efficiently, and effectively. Dr Denny Kudrna in the School of Government at Victoria University of Wellington has undertaken an excellent piece of empirical research on RSABs; this will be published in the February 2025 issue of *Policy Quarterly*.

23. In this context, it is surprising that neither the Discussion Document nor the Interim Regulatory Impact Statement discuss the potential role of RSABs, including the extent to which they could address some of the problems with our existing regulatory system.

24. Significantly, the officials who prepared the Interim Regulatory Impact Statement concluded (having considered four possible ways to address the problems identified) that the proposed Bill is not the best option.

The proposed title of the Bill

25. The proposed Bill is entitled 'The Regulatory Standards Bill'. Given this title, many people are likely to suppose that the Bill is primarily concerned with a sub-set of legislation, such as the regulation of business activity, health and safety, or environmental regulation. But in fact, the Bill is concerned with legislation is general – that is, all primary and secondary legislation – along with many aspects of lawmaking and regulatory stewardship. As such, it would be more accurate – and thus more consistent with the proposed principle for all legislation to be 'clear and accessible' – for the Bill to be called 'The Good Legislation Bill' or 'The Good Lawmaking Bill' (see the arguments advanced by Tanner, 2010).

Exemptions for consistency requirements

26. The Discussion Document envisages that the Minister for Regulation would have discretion under the proposed Act to determine which laws – both existing and new – are not required to comply with the consistency provisions in the legislation (i.e. consistency with the proposed principles of responsible regulation). It is not entirely clear from the Discussion Document whether this discretion would be instead of or additional to the inclusion of a justifiable (justified) limitations provision of the kind proposed in early versions of the legislation. Either way, however, various drawbacks are evident.

27. First, the Discussion Document outlines several criteria that could be employed to guide the Minister of Regulation in determining whether the consistency requirements

[3] https://www.mbie.govt.nz/cross-government-functions/regulatory-stewardship/regulatory-systems-amendmentbills#:~:text=Regulatory%20Systems%20Amendment%20Bills%20(RSABs,align%20with%20best%20regulatory%20practice.

apply (e.g. emergencies; legislative initiatives with only minor or technical impacts; and provisions in Treaty settlements). But however narrowly such criteria are specified, it would be difficult to constrain the Minister's discretion. And if that discretion is widely employed, the proposed Act could be rendered largely redundant. After all, whenever a government is concerned that a particular legislative provision which it favours is inconsistent with one or more of the principles of responsible regulation, the Minister for Regulation could declare that it be exempt from any consistency requirements. Admittedly, the Minister's actions could potentially be challenged in the courts, but such action is unlikely. Also, the courts will doubtless be reluctant to second-guess a Minister on matters that are largely of a policy nature.

28. Second, as noted, a Regulatory Standards Bill of the kind proposed could include a justifiable (or justified) limitations provision, such as that in the 2011 RSB (Section 7(2)):

> Any incompatibility with the principles is justified to the extent that it is reasonable and can be demonstrably justified in a free and democratic society.

Such a provision could be either additional to or instead of the proposed exemption provision. An important consideration, if a justifiable limitations provision were to be included, would its wording. In that regard, the wording in the 2011 RSB draws in part from the Section 5 of the New Zealand Bill of Rights Act 1990 (BORA). But that provision is concerned with situations where it may be justifiable to override one or more of the rights specified in the Act. Such situations will typically involve conflicts between individual rights (and freedoms) and widely endorsed collective goals or purposes (e.g. protecting national security or public health and safety). By contrast, most of the principles in the proposed Bill are not rights or freedoms. Instead, they are concerned with various procedural and substantive matters. In each case, the principles in question reflect, or are designed to protect, particular ethical values, many of which have a broad, collective or societal dimension. For instance, good lawmaking processes are designed to enhance the prospects of generating good laws – ones that will improve outcomes for the whole society (not just specific individuals). Likewise, sound regulatory stewardship will, it is hoped, ensure better implementation and enforcement of mandated regulatory frameworks, thereby enhancing various societal outcomes. Given this situation, a justifiable limitations test with wording similar to that in the BORA will be challenging to apply. This is because it will often entail judgements about the relative importance of different conceptions of the public interest (or different public interests). In other words, the test will not be whether it is reasonable to sacrifice a particular right or freedom in the public interest, but whether one aspect or conception of the public interest (e.g. ensuring that lawmaking is based on proper public consultation) is more, or less, important than another aspect or conception of the public interest (e.g. ensuring that lawmakers efficiently and effectively respond to a crisis or the development of a new technology).

Constitutional concerns

29. As with its predecessors, the proposed Bill, at least as foreshadowed in the Discussion Document, is unquestionably of constitutional significance (see Ekins, 2010; Ekins and Huang, 2011; Rishworth, 2010). An earlier version (the RSB) was described by a strong supporter as a 'regulatory constitution' (quoted in Ekins and Huang, 2011, p.8). Similarly, Paul Rishworth (2010) considered the original RRB to be a 'second Bill of Rights'. One reason for regarding the proposed RSB as constitutionally important is that it is designed, in effect, to prevent – or at least deter – legislation (both primary and secondary) from being enacted on the grounds that it is in some sense 'unconstitutional' (i.e. it is inconsistent with the principles of good lawmaking). In other words, it is intended to influence and constrain the purposes for which public power is employed.

30. Particularly concerning, legislation would be 'unconstitutional' from the perspective of the proposed Bill if it is inconsistent with a specific ideological creed or political philosophy, namely what is often referred to as 'neo-liberalism' or 'market liberalism' (if not a version of libertarianism). This is evident from the wording of some of the proposed principles of responsible regulation (see below) which are deliberately designed to constrain the grounds upon which the state can justifiably regulate human behaviour. The grounds in question (e.g. the formulations of the principle of liberty and the 'takings' provision) are extraordinarily restrictive and strongly linked to neo-liberal assumptions, values, and claims. Hence, regulations designed, for instance, to promote environmental goals, such as the protection of biodiversity or the maintenance of ecosystem health or integrity, would be inconsistent with one or more of the proposed principles of responsible regulation. Much the same would apply to legislation aimed at redistributing income and/or wealth to enhance social justice and/or alleviate poverty. Equally, legislation based on paternalistic grounds, such as that designed to prevent individuals who are psychotic from harming themselves, would be inconsistent with the proposed Bill. For such reasons, the Bill (or anything very similar) will not secure cross-party support. If enacted, therefore, it would generate ongoing political controversy and would likely be short-lived – at least in the form currently proposed or anything similar.

31. Admittedly, the proposed Bill is different from earlier versions in that it does not mandate a specific role for the courts in interpreting the proposed principles of good lawmaking. Earlier versions, for instance, provided for the courts to declare legislation 'inconsistent with the principles'. Establishing a role for the courts of this kind was designed to strengthen the incentives for governments to avoid pursuing legislative initiatives which are clearly at odds with one or more of the principles. By contrast, the Discussion Document suggests that the proposed RSB would not incorporate such provisions. Instead, the proposed approach is to establish a Regulatory Standards Board (see below) that would 'consider the consistency of regulation with the principles in response to complaints.'

32. But the absence of specific provisions relating to judicial review or declarations of inconsistency would not prevent applications to the courts (e.g. under the Judicial

Review Procedure Act 2016 or the Declaratory Judgements Act 1908).[4] After all, the proposed Bill would become an Act of Parliament. Accordingly, the courts would have, as is always the case, an authoritative role in interpretating its provisions, determining the meaning of the various principles, and assessing whether ministers have adhered to the Act's provisions and fulfilled their statutory obligations or duties (e.g. in developing new legislation). And of course, how the courts might interpret some of the proposed principles (e.g. 'every person is equal before the law') could well be different from what the drafters of the legislation may have intended.

33. From a constitutional (and, more generally, philosophical) perspective, I have four main concerns about the proposed Bill.

Bills of Rights

34. First, and briefly, to the extent the Bill seeks to **enunciate rights** that are not already incorporated into legislation, such rights – if justified – should ideally be placed in the Bill of Rights Act. To quote Paul Rishworth (2010, p.8): 'The Bill of Rights is the place for these rights. They do not belong in a list of principles for good legislation; not, at least, when there is a New Zealand Bill of Rights on the landscape.'

Liberty-limiting principles

35. Second, the **principle relating to 'liberties' is open to serious objections**. As proposed, the principle states:

> 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.

36. As many observers have noted in relation to the previous RRS and RSB, the principle relating to liberties is problematic for multiple reasons:

    a. It is not a well-established legal principle. The very broad references to 'liberty' and 'freedom of choice or action' are unusual from a constitutional perspective.

    b. As worded, there is a lack or congruence or equivalence with respect to 'personal security'; that is to say, protecting is an individual's 'personal security' is not included as a ground for limiting the liberty of another person. This is very strange.

    c. The proposed principle is potentially highly restrictive. It would be incompatible with a great deal of existing and likely future legislation. After all, numerous Acts limit or diminish a person's liberty in one way or another – and for many good reasons (see (d) and (e) below). If enacted, therefore, there

[4] That is, unless the Bill included a privative clause preventing access to the courts, which would almost certainly be undesirable.

is a risk that many current laws would be deemed inconsistent with the Regulatory Standards Act. This could contribute to considerable uncertainty and confusion.

d. As worded, the proposed principle would only permit limitations on a person's liberty 'as is necessary to provide for, or protect, any such liberty, freedom, or right of another person'. That is to say, restricting a person's liberty would only be justified if such action is necessary to prevent harm to **other people**. This constitutes one of the two main versions of the well-known 'harm principle' (i.e. it is the **private harm principle**). But the harm principle, as commonly understood, is not limited to preventing harm to **other** people (i.e. private or individual harm). It can also be employed to justify laws designed to prevent harm to the public, communities or the nation, such as harm to public institutions, arrangements and practices that are deemed to be in 'the public interest'. This constitutes the **public harm principle**. For example, laws against contempt of court are widely employed internationally, as are laws against tax evasion, smuggling or desecrating gravesites. But such laws are not designed to prevent harm to **specific individuals**. Rather, their aim is to prevent harm to public institutions that serve or protect the public interest – for instance, because these institutions perform important, if not vital, public functions and facilitate the pursuit of widely accepted public purposes.

e. Aside from the private and public versions of harm principle, there are many other well-established 'liberty-limiting' principles that provide (at least in certain circumstances) justifiable grounds for the use of state coercion. One of these principles is to **prevent people from harming themselves** (rather than other people). Such a principles is reflected in the Mental Health (Compulsory Assessment and Treatment) Act 1992. Another principle, also of a paternalistic nature, is concerned with requiring **people to do things for their own good** (e.g. wearing seat belts when travelling in vehicles and wearing helmets when riding bicycles). Yet another liberty-limiting principle focuses on protecting critical environmental 'goods' from being damaged or degraded by people (e.g. protecting endangered species, distinctive landscapes, and unique ecosystems). Similarly, it will often be justified to limit liberty to enable collective goals to be pursued, such as reducing the risks to lives and property posed by natural hazards, or enabling the funding of public goods, such as national defence and security.

37. In short, the current version of the principle relating to liberties is fundamentally flawed. It seeks to impose highly restrictive limits on what regulatory measures governments can justify. Any attempt to adhere to such limitations would require a massive rewrite – and indeed the abandonment – of a vast number of existing laws. Presumably, this is precisely what (at least some of) the Bill's advocates intend. But such an approach has nothing to commend it. No democracy has ever embraced such an approach, nor is one ever likely to do so. Not only is the principle, as formulated, open to serious moral and philosophical objections, but also its full implementation

would likely render it impossible to maintain a stable, well-ordered, properly functioning democracy. This is because many of the functions that governments need to undertake to enable the efficient and effective operation of markets and provide essential public services require limitations on individual rights; yet most of these limitations would be deemed unjustifiable.

38. Admittedly, if the proposed legislation included a justifiable limitations provision, then presumably some functions that governments need to undertake in the public interest, but which would violate the highly restrictive liberties principle, might nevertheless be deemed acceptable on the grounds that they are 'demonstrably justified in a free and democratic society'. But if it is necessary to employ the justifiable limitations provision repeatedly to justify many existing and new laws, this would surely suggest that there is something fundamentally wrong with the proposed liberties principle.

Property rights, regulatory takings, and fair compensation

39. Third, equally forceful and compelling objections can be levelled against the proposed principle regarding the **taking or impairment of property**. The proposed version of the 'takings' principle is as follows:

> '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.'

40. Note that the proposed wording is very similar to that embraced within the previous RRB and the RSB, except that 'fair compensation' has replaced 'full compensation', 'good justification' has replaced 'the public interest', and the word 'and' has been deleted from the end of each of the first two bullet points. I presume that the deletion of 'and' is not designed to change the meaning of the earlier RSB. Hence, I assume that it is intended that the requirements of all three bullet points must be met if 'the consent of the owner' is not forthcoming. Merely satisfying one or two of the three requirements would thus be insufficient.

41. Plainly, the goal of the proposed principle is to provide a strong defence of property rights – and hence the existing pattern of private ownership in the country and all the associated rights. No doubt, there are many good economic and social reasons for placing significant weight on the protection of private property – and for providing compensation if private property is acquired by the state for various public purposes (e.g. the construction of dams, roads, public utilities, etc.). But, as many commentators have pointed out, there are numerous problems with the wording and intentions of the proposed principle (see Bertram, 2010; Ekins, 2010; Ekins and Huang, 2011). Arguably, too, the whole approach is inconsistent with the approach to

property rights taken in New Zealand over much of its history, as reflected, for instance, in Section 85 of the Resource Management Act (see France-Hudson, 2024).

42. In brief, the main concerns include:

    a. The proposed principle leaves key words undefined – namely, 'property', 'taking', 'impairment', 'fair compensation', 'benefit', and 'good justification' – thereby creating not only legal uncertainty, but deep challenges for policy analysts. Admittedly, some of the uncertainty may be resolved, or at least reduced, by the proposal for the Ministry for Regulation to produce guidelines on how to interpret and apply the principles. But given the philosophically questionable and ideologically-motivated nature of several proposed principles, including the takings provision, there is a risk that the proposed guidelines will be employed to help entrench thoroughly dubious dogma.

    b. The proposed principle constitutes an unorthodox legal principle, especially regarding the requirement to provide compensation for 'impairment' (and not only expropriation) of property rights. It would, according to Ekins and Huang (2011, p.12) establish 'a very strong doctrine of regulatory takings that is foreign to our constitution … the New Zealand constitution does not recognise a generic doctrine of regulatory takings'.

    c. Attempting to apply the principle, as drafted, could cause all manner of practical and political problems. For one thing, depending on how various words are interpreted, it could greatly increase the fiscal costs of new regulatory measures – especially those which involve the 'impairment' of properties rights. To illustrate: new environmental regulations designed to reduce environmental harm are likely to impair the use rights of the affected property owners (to the extent that there are any such 'rights' – see France-Hudson, 2024). These owners would, in turn, be entitled to 'fair compensation'. And presumably, since the affected property owners are unlikely to be the main beneficiaries of the new regulations, it would fall on others (very likely ratepayers and/or taxpayers) to provide the required compensation. In effect, the principle of 'polluter pays' would be replaced with the principle of 'non-polluters pay'. The moral basis for such an approach is highly problematic. It would be like compensating slave owners for the loss of their 'property' (i.e. their slaves), rather than compensating the slaves for their loss of basic rights and the appalling treatment they have endured. (I realize that slave owners have sometimes been compensated in the past (e.g. by the British government in the 1830s), but that does not make such an approach morally justifiable.)

    d. Aside from this, in many situations it will be hard to determine what would constitute 'fair compensation' and who the relevant 'beneficiaries' are – and thus who should pay the compensation in question. Consider the problems associated with the projected multi-metre rise in the sea level over the coming

centuries. Arguably, it will be the interests of public health and safely to move vast numbers of people (and related structures) out of harm's way and to do so pre-emptive on a precautionary basis.[5] Suppose, in this context, that the government chose to impose new land use regulations designed to prevent people in locations faced with an imminent threat of inundation from continuing to live in dwellings on their at-risk properties. Almost certainly, this would constitute an impairment. Hence, in accordance with the provisions of the proposed Bill, such an impairment (unless voluntarily consented to) would require 'fair compensation'. But what would be 'fair' in this context? And fair to whom (owners, ratepayers, taxpayers, future generations, etc.)? Presumably, the property owners who are no longer permitted to live in their homes will argue that it is only fair for them to be compensated. And since they are, in effect, losing their homes, they should receive compensation equivalent to the value of their dwellings (and perhaps also their land). But how should their dwellings be valued? Would it be fair to use their market value? Bear in mind that this may be very low – even more so if said properties are uninsurable and inundation is, indeed, imminent. The proposed takings principle will not help policymakers resolve such matters as it provides no guidance on the meaning of 'fair'. And, as is obvious from the literatures on distributive justice, compensatory justice, and restorative justice, there is no shortage of principles of fairness.

e. Next, consider the question of the beneficiaries: who will benefit – and benefit most – from the government's proposed regulatory intervention? Arguably, the main beneficiaries are: a) those who, as a result, will be kept safe from flooding and the related risks to their health and safety (i.e. the affected property owners); and b) those who will no longer need to place their lives at risk if called up on rescue people from flooded homes (i.e. the first responders). On this basis, the takings principle, if applied as drafted, would require those who are being displaced from their homes to compensate themselves for the loss of their use rights. But this would be nonsensical. What this conclusion highlights, among other things, is that the real world is complex and multifaceted. Hence, while simple all-encompassing principles may seem highly attractive (at least at first sight), in practice they are often hard to operationalize and can generate unintended and undesirable outcomes.

[5] For detailed analyses of the issues surrounding compensation for property losses associated with the impacts of climate change and possible policy responses, see the various reports of the Environmental Defence Society as part of its project on climate change adaptation (see: https://eds.org.nz/our-work/policy/projects/climate-change-adaptation/), and the Report of the Expert Working Group on Managed Retreat (see: https://environment.govt.nz/publications/report-of-the-expert-working-group-on-managed-retreat-a-proposed-system-for-te-hekenga-rauora/).

Taxes, fees and levies

43. The proposed principle relating to taxes, fees and levies is equally problematic. As outlined in the Discussion Document, it reads:

    - '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.'

44. There are several serious problems with the proposed wording of this principle (or, rather, set of principles). One of these is determining what is 'reasonable'. In many cases it is extremely difficult to assess the benefits and costs (or risks) of government interventions, or determine the extent, severity and monetary value of the positive and negative externalities associated with particular human activities. Much depends on the available information (which is often inadequate), the assumptions that underpin the analysis, the chosen discount rate, how non-market impacts are quantified and monetized, and so forth. Take, for instance, the social cost of human-induced greenhouse gas emissions (GHGs), such as carbon dioxide emissions: estimates of the social cost of carbon (e.g. by governments and researchers around the world) continue to vary greatly. Hence, for some, a 'reasonable' carbon tax would be in the vicinity of US$50 a tonne; for others it would hundreds of US dollars a tonne; and for yet others it would be thousands of US dollars a tonne. Hence, simply requiring a levy on carbon (or other GHGs) to be 'reasonable' does not resolve such matters.

45. Regarding the chosen discount rate: when I joined the NZ Treasury as an 'Investigating Officer' in 1984, the public sector discount rate recommended by the Treasury was 10%. It was subsequently reduced over the following few decades on several occasions. Very recently (October 2024), it was reduced yet again. For non-commercial proposals, the recommended discount rate is now 2%, falling to 1.5% after 30 years, and 1% after 100 years.[6] Accordingly, many projects which would have been deemed 'uneconomic' and thus unwarranted (and thus 'unreasonable') in 1984, will now be economically viable.

46. Another issue concerns the meaning and policy implications of the principle enunciated in the second bullet point: what does 'a proper relation' mean? Does it

[6] See: https://www.treasury.govt.nz/information-and-services/state-sector-leadership/guidance/reporting-financial/discount-rates

require that the relationship should be roughly 100% of the costs of the efficiently produced good or service (e.g. public roads) or is a much lesser amount acceptable? There are many goods and services which are provided by central and local governments that are funded via multiple revenue streams (e.g. the costs of ACC, EQCover, roads, tertiary education, primary health care, etc.). How the proposed principle might affect such funding arrangements is very uncertain.

47. Much the same uncertainty surrounds the meaning and policy implications of the principles enunciated in the third bullet point, namely that: 'Legislation to 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 … 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'. Many levies that are currently imposed by the central government are not designed primarily – or even partly – to secure benefits for those on whom they are imposed, but rather to benefit **other people and/or the environment**. This applies, for instance, to waste disposal levies, customs levies, offender levies, forestry levies, etc. etc. Given the proposed wording of the principles embodies in the third bullet point, therefore, such levies would presumably be unreasonable and thus unjustified. Again, this highlights the philosophically narrow and ideologically-motivated nature of some of the proposed principles of regulatory responsibility, and their inherent indifference to, if not implicit rejection of, policy goals such as protecting the public interest, enhancing distributive justice, and protecting the environment. If these broader goals were to be properly recognized in a Bill of the kind envisaged, a very different set of principles would be required (see below).

The Proposal for a Regulatory Standards Board

48. The Discussion Document includes a proposal to establish a Regulatory Standards Board. This would be a statutory board, with the secretariat provided by the Ministry for Regulation. As proposed, it would be advisory in nature; it would not have decision-rights. The Board's functions would be to:

    a. assess the operation of regulatory system
    b. consider the content and design of legislation
    c. undertake reviews (both at its own behest and at the direction of the Minister for Regulation), and
    d. make recommendations for amending legislation to ensure consistency with the principles of responsible regulation.

49. Earlier versions of the proposed legislation did not provide for such a Board. Instead, they envisaged that declarations of inconsistency would be made by the courts. But establishing a separate Board to undertake such a task (along with several related functions) is of doubtful merit. First, in practice the Board is likely to duplicate the analytical work and legal advice provided by the Ministry for Regulation, Crown Law, and other government departments. In short, it will simply add to the costs of public administration. Second, as argued above, much existing and proposed

legislation is likely to be inconsistent with one or more of the proposed principles of responsible regulation – and for good reasons. Simply drawing attention to such inconsistencies is not likely to affect the political appetite for amending legislation. Further, it seems destined to cause considerable political frustration. Third, and related to this, the members of the Board will face the constant challenge of assessing important and unavoidable policy trade-offs. For instance, a proposed amendment to an existing Act might reduce the intrusiveness of the state (e.g. by eliminating strict measures to enhance public health) but only at the expense of long-term productivity (e.g. due to increased obesity, addictions, and ill-health). Alternatively, a proposed amendment might promote productivity, but only at the expense of greater state coercion. It is unclear what criteria or decision-rules the Board would be supposed to apply to address such conflicts. Nor is it clear whether ministers would support the Board's ethical judgements – and related recommendations.

What is missing from the proposed principles?

50. Given the preceding analysis, it will be evident that the proposed Regulatory Standards Bill, as outlined in the Discussion Document, is flawed in multiple respects. Many of these flaws are philosophical in nature. Above all, they reflect a desire by those promoting the Bill to impose a narrow and impoverished conception of what is a 'good' law (including what constitutes a 'good life' and a 'good society') and an associated highly restrictive conception of the proper role of the state. As argued above, this conception is grounded in the values, principles, and goals of neo-liberalism or market liberalism, if not a version of libertarianism. From this perspective, governments are only justified in enacting legislation (both primary and secondary) which impinge upon individuals' rights and freedoms for a very limited range of purposes, specifically to **prevent demonstrable harm to other individuals and/or their property**. All other grounds for state coercion, in accordance with this philosophical position, are unjustified. Yet, as explained earlier, there are many other legitimate grounds for state coercion – grounds which have been accepted by governments of widely differing political persuasions, both in Aotearoa New Zealand and elsewhere in the democratic world. These broader grounds (and their related ethical values) would need to be properly recognized and endorsed in a Regulatory Standards Bill if any such legislation were to secure multi-party support and contribute in a durable and effective way to the drafting of better laws. Moreover, it would not be adequate to rely solely on a 'justifiable limitations' provision, even if one were to be included.

51. Among the principles relevant to good lawmaking (whether in the context of Aotearoa NZ or more generally), that the proposed Bill ignores are:

    a. the principles of te Tiriti o Waitangi
    b. the public harm principle
    c. widely accepted principles of distributive justice (e.g. meeting the basic needs of all people)
    d. protecting the right to a clean, healthy, and sustainable environment
    e. protecting the interests of future generations

f. the precautionary principle
g. the requirement for governments to comply with their obligations in international law
h. the requirement for elected and appointed officials to exercise the powers conferred on them in good faith, etc.

52. Aside from this, the proposed legislation fails to address some of the major causes of regulatory failure in Aotearoa New Zealand. These include, in no order of importance:

    a. inadequate public investment in assessing the relative merits of different modes of regulation (e.g. prescriptive, performance-based, principle-based, process-based, etc.), and the related issues of institutional design and regulatory governance
    b. inadequate public investment in compliance monitoring and enforcement
    c. inadequate public investment in building the skills and capability in regulatory bodies needed to undertake robust regulatory stewardship
    d. inadequate public investment in foresight activities, information gathering and data analysis to enable sound anticipatory governance
    e. inadequate public investment in risk assessment and risk mitigation, along with related efforts to enhance economic and societal resilience and improve environmental sustainability
    f. a lack of attention to the risks of regulatory capture (see Bertram, 2021; Doole, et al, 2024).

Conclusions

53. As with earlier versions of the proposed legislation, the proposal outlined in the Discussion Document is fundamentally unsound. Most, but not all, of the objections to the earlier versions, remain valid. To quote George Tanner, in his reflections on the proposed RRB in 2010:

    > "The bill falls short of complying with many of its own principles. Its use of open-textured language leads to uncertainty of meaning. It attempts to define good law making by reference to a set of simple principles: in doing so it obscures the complexities inherent in them and creates the same lack of clarity and uncertainty that it seeks to prevent. Legislating is a complex business. The bill suggests it is not. The bill suffers from an acute lack of problem definition and does not properly identify and assess workable alternatives. Without massive additional resources, it would be impossible to make all existing legislation compliant with the principles [within any reasonable timeframe]. The bill is a disproportionate and inappropriate response to the issue it seeks to redress" (2010, p.32).

54. Finally, as noted above, there are many other ways to improve the quality of legislation and lawmaking in Aotearoa New Zealand, and these need proper attention.

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