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Ministry for Regulation  
Wellington

By email: [RSBconsultation@regulation.govt.nz](mailto:RSBconsultation@regulation.govt.nz)

## Feedback on the proposed Regulatory Standards Bill

### 1 Introduction

1.1 The New Zealand Law Society Te Kāhui Ture o Aotearoa (**Law Society**) welcomes the opportunity to provide feedback on the Ministry for Regulation’s discussion document about the proposed Regulatory Standards Bill (**Discussion Document**).

1.2 This submission has been prepared with input from the Law Society’s Public Law Committee and Human Rights and Privacy Committee, as well as its Professional Standards Team.<sup>1</sup>

### 2 General comments

2.1 The Law Society supports the aspiration to improve law-making processes and to improve the quality and effectiveness of legislation and other forms of regulation.

2.2 However, the Law Society continues to hold significant concerns with this latest proposal for legislation in the form of a proposed Regulatory Standards Bill (**proposed Bill**), notwithstanding the changes that have been made to previous iterations.<sup>2</sup>

2.3 In the Law Society’s view, it is striking that a policy process purporting to promote good law-making and high-quality regulation should fail to meet the proposal’s own standards. In this regard:

- (a) **Inadequate consultation:** The proposal is being consulted on in relative haste, with the consultation period occurring over the Christmas/New Year period.
- (b) **Problem definition:** The proposal in the Discussion Document continues to suffer from a lack of adequate problem definition.
- (c) **Options analysis:** The interim RIS is an example of analysis constrained by Ministerial preference, with the non-legislative options excluded from its scope

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<sup>1</sup> More information about these committees is available on the Law Society’s website: <https://www.lawsociety.org.nz/branches-sections-and-groups/law-reform-committees/>.

<sup>2</sup> The Law Society has previously made submissions on the 2010 Treasury discussion paper and to the Select Committee considering the Regulatory Standards Bill introduced as a Government bill in 2011.

and the starting point for the development of legislation directed by the Minister to be the Minister's previous member's bill introduced to the House in 2021.<sup>3</sup>

- (d) **Unnecessary legislative content:** The proposed principles needlessly restate legal rules or legal principles that apply in any event, as discussed further at [4.2] below.
- (e) **Ineffective legislative content:** The proposed principles are not self-executing and will not compel outcomes. At base, the proposed principles merely create a language for policy arguments for those who might be motivated to invoke the procedures of the proposed Regulatory Standards Board. The Board itself appears to be a low-cost forum for relitigating policy battles, with no real consequences for any adverse conclusions. The Board's functions do not appear to be a solution for the hypothesised problem that proposed Bill purports to address.

2.4 In the Law Society's view, it is incongruous for the proposed Bill to contain the expressions regarding the liberties of the person, personal security, and property. They are matters that were carefully considered but omitted from the New Zealand Bill of Rights Act 1990 (**Bill of Rights Act**) during the course of its drafting. It would be unusual to introduce such important concepts as "standards" in a Regulatory Standards Bill, as discussed further in [4.3] to [4.4].

2.5 The Law Society also considers that the proposed Bill is incongruous for what it does not contain. It excludes matters such as environmental concerns, New Zealand's international obligations, and the Treaty of Waitangi.

### 3 New Zealand's current regulatory oversight arrangements (questions 6 to 11)

#### *Q6. What are your overall views on the quality of New Zealand's regulation?*

3.1 This question highlights a continued problem with the various proposals that have been made for a Regulatory Standards Bill—a lack of clarity about what is meant by "quality" and the absence of an adequate problem definition.

3.2 Overall, our observation is that the quality of New Zealand's legislation and other regulation is variable, in different ways and for a range of reasons. For example:

- (a) Some regulation is poorly drafted or involves poor design, resulting in poor implementation of a sound policy choice and unintended consequences. Often this is a result of the haste with which the regulation is progressed and made.
- (b) Some regulation reflects a poor policy choice (as a consequence of poor problem definition, poor selection of policy response, costs imposed by the regulation exceeding benefits produced, poor prioritisation of limited government resources, etc). Again, this is often a result of the haste with which the regulation is progressed and made.
- (c) Some regulation offends against higher order constitutional principles.

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<sup>3</sup> Ministry for Regulation *Interim Regulatory Impact Statement: Legislating to improve transparency of the quality of regulation* (30 October 2024) at pages 3-4.

(d) Some regulation is outdated or no longer fit-for-purpose.

3.3 When addressing regulatory quality and the quality of law-making, the desired social, economic and environmental goals of governments are not typically characterised as questions of quality. These goals are often value-laden and highly contested. Disagreements between reasonable people acting in good faith about what social, economic or environmental goals should be enacted in legislation is a central feature of democratic politics. The “quality” of a given legislative or regulatory proposal in the sense of its merits is appropriately resolved through a fair and transparent democratic process.

*Q7. What are your overall views on the current arrangements in place to promote high quality regulation?*

3.4 The Law Society considers that current arrangements to promote good quality legislation and regulation could be materially improved.

3.5 The Discussion Document highlights the fact that requirements and guidance for good legislative and regulatory design are located in different places. However, placement of the proposed principles in the proposed Bill does not provide a response to these issues and in fact appears to compound them.

3.6 The Law Society agrees that more needs to be done in terms of ongoing review and maintenance of the existing stock of legislation and regulatory systems. In the first instance, this could be best addressed by non-legislative measures that set expectations for departmental or agency chief executives and provide them with the resources to meet them. The Law Society acknowledges that a current strategic priority of the Ministry for Regulation is partnering to deliver improvements in existing regulation.<sup>4</sup>

*Q8. Do you ever use RISs to find out information about proposed government regulation? If so, how helpful do you find RISs in helping you make an assessment about the quality of the proposed regulation?*

3.7 The Law Society routinely consults RISs. They are an important transparency tool:

(a) They provide analysis of the proposal, which the Law Society takes into account in its considerations and comments in making law reform submissions.

(b) They further show (in addition to what is evident from the face of the proposed Bill or Discussion Document) whether the policy-making process has been conducted well.

3.8 The Law Society agrees with the observation in the Discussion Document that performance in relation to RIS requirements is patchy.<sup>5</sup>

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<sup>4</sup> See <https://www.regulation.govt.nz/about-us/our-role/>.

<sup>5</sup> At page 16.

*Q9. Do you ever use disclosure statements to find out information about a Bill? If so, how helpful do you find disclosure statements in helping you make an assessment about the quality of the Bill?*

- 3.9 The Law Society also routinely consults disclosure statements. They are useful for background information to the proposal, they reveal whether important constitutional considerations have been considered, and they help demonstrate the quality or otherwise of the policy-making process.

*Q10. What are your views about the effectiveness of the regulatory oversight arrangements currently in place?*

- 3.10 Similar to the current arrangements to promote good quality legislation or regulation, regulatory oversight arrangements are currently distributed across multiple agencies, are relatively informal, and have limited accountability mechanisms. They could be materially improved. However, the proposed Bill does not provide an effective response to these issues.
- 3.11 The Law Society observes that some current regulatory oversight arrangements are relatively new (notably, the functions of the Ministry for Regulation) and accordingly it is difficult to comment on their effectiveness at this time.
- 3.12 The Law Society also observes that the proposal for a new Bill is being advanced before the provisions of Part 4 of the Legislation Act 2019 come into force. The disclosure regime in Part 4 of that Act is the ultimate result of the introduction of the earlier Regulatory Standards Bill into the House in 2011, the preferred option of Treasury in its RIS on the 2011 Bill,<sup>6</sup> and follows select committee consideration of the then proposed legislation.

*Q11. What are your views on setting out requirements for regulatory quality in legislation? Are there any alternatives that you think should be considered?*

- 3.13 The Law Society does not consider that a case has been made out for setting out regulatory quality requirements in legislation. Legislation mandating regulatory quality requirements will only be effective if it changes the behaviour of the people to whom the law is addressed.
- 3.14 The principles of good law-making and requirements and guidance for good legislative and regulatory design are well understood, and are already contained in the Legislation Design and Advisory Committee's (**LDAC**) *Legislation Guidelines* and Cabinet's *Impact Analysis Requirements*. To the extent that these matters are not achieved in practice, this is an institutional problem that needs to be responded to through institutional measures.
- 3.15 Good law-making is ultimately the outcome of a good electoral system, a good political culture, and the employment of a well-educated and properly resourced professional civil service. Each of these can be furthered without new legislation and it is not clear what legislation could or would contribute to achieving them. Certainly, the measures intended in the proposed Bill as currently articulated in the Discussion Document do not provide the means for their attainment.

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<sup>6</sup> Treasury *Regulating for better legislation – what is the potential of a Regulatory Responsibility Act?* (2 February 2011) at pages 24-26.

#### 4 Setting standards for good regulation (questions 12 to 16)

- 4.1 The Law Society opposes legislating the specific principles in the Discussion Document in the proposed Bill and regards the approach as fundamentally misconceived.
- 4.2 First, the principles in the Discussion Document needlessly restates legal rules or legal principles that apply in any event:
- (a) The principles relating to “Taxes, fees and levies” are redundant. These are already the subject of section 22 of the Constitution Act 1986 or are well-established features of legislative design.
  - (b) The principles on the “Rule of Law” and the “Role of Courts” oversimplify and restate foundational values in a context that will trivialise them. The proposal places basic tenets of our democracy in a “Regulatory Standards Bill”, in a mechanism that contemplates discounting or disregarding them so long as doing so is accompanied by the requisite certification. Recourse is confined to complaining to a statutory board with no ability to provide a meaningful remedy.
  - (c) LDAC’s *Legislation Guidelines* and Cabinet’s *Impact Analysis Requirements* already contain the “Good law-making” principles. As already explained, to the extent that these matters are not achieved in practice, this is an institutional problem that needs to be responded to through institutional measures.
- 4.3 Second, in the Law Society’s view, it is incongruous for the proposed Bill to contain the expressions regarding the liberties of the person, personal security, and property. These are essentially a restatement of the Fifth and Fourteenth Amendments to the United States Constitution and section 7 of the Canadian Charter of Rights and Freedoms. These liberties were carefully considered and then deliberately omitted from the Bill of Rights Act during the course of its drafting. The Ministry of Justice is currently consulting on whether section 8 of the Act (the right to life) should be amended by adding “security of the person” (a recommendation of the Royal Commission of Inquiry into Historical Abuse in State Care and in the Care of Faith-based Institutions).
- 4.4 Against this background, it is unusual to introduce such important concepts as “standards” in a Regulatory Standards Bill and they are not appropriately progressed in this context. They are not discrete or ‘low-consequence’ principles that can be incorporated into legislation without serious consideration being given to the constitutional implications of codification. If these liberties are to be enacted as part of our law of fundamental values at all, then they belong in a Bill of Rights. Debate about their enactment should happen in a transparently constitutional setting.
- 4.5 Third, the Law Society considers that the proposed Bill is incongruous for what it does not contain. The proposed Bill purports to embody abstract aspirations for good legislation and regulation but only includes principles about “liberties” and “property”, and omits standard matters such as environmental concerns, New Zealand’s international obligations, and the Treaty of Waitangi.

## 5 Showing whether regulation meets standards

*Q17. Do you agree that there are insufficient processes in place to assess the quality of new and existing regulation in New Zealand? If so, which parts of the process do you think need to be improved?*

5.1 As explained above, the Law Society considers there are issues with the distribution of design precepts and oversight arrangements across multiple agencies, the relative informality of the arrangements, and the limited accountability mechanisms in place. The quality of new legislation or regulation could be materially improved by a more structured and systematic approach to these questions.

5.2 We note again that the Law Society agrees more needs to be done in terms of ongoing review and maintenance of the existing stock of legislation and regulatory systems.

*Q18. Do you think that the new consistency checks proposed by the Regulatory Standards Bill will improve the quality of regulation? Why or why not?*

5.3 This question also serves to highlight the lack of clarity surrounding the proposed Regulatory Standards Bill about what is meant by “quality” and the absence of an adequate problem definition.

5.4 The Law Society does not consider that the proposed new consistency checks will improve the quality of legislation or regulation, as “quality” in this context is typically conceived. As explained, the principles of good law-making and requirements and guidance for good legislative and regulatory design are already well understood. To the extent that these matters are not achieved in practice, this is an institutional problem that needs to be responded to through institutional measures.

5.5 Recent policy development practices indicate that existing processes to produce quality legislation are not always followed (including because of Ministerial directions to proceed with particular proposals in a particular manner). A recent analysis has found, for example, that:<sup>7</sup>

- (a) Time constraints and Ministerial directions have impacted officials’ abilities to properly analyse policy problems and canvass options to address those problems, as well as to undertake wider consultation on what is policy proposals.
- (b) Policy proposals have been developed despite a lack of supporting data or evidence, or despite the existence of data which does not support what is being proposed.
- (c) Policy proposals are being progressed without adequate consultation with external experts, communities and Māori communities.

5.6 The proposed principles will not address these concerns, particularly if Ministers are to have the ability to proceed with a policy proposal notwithstanding any inconsistency with the proposed principles.<sup>8</sup> Where a proposal is a matter of political preference or

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<sup>7</sup> Fox Meyer and Laura Walters “Official concerns about haste and dearth of evidence in Govt’s first year” *Newsroom* (online ed, 27 November 2024).

<sup>8</sup> Pages 25-26 of the Discussion Document state that the Minister could simply “make a statement justifying why they are proceeding with the proposal despite these inconsistencies”.

urgency, the proposed principles are unlikely to improve the quality of any resulting legislation or regulation.

- 5.7 Additionally, the Law Society observes that the proposed certification regime is problematic in the following respects:
- (a) The process oversimplifies complex normative concepts and turns them into hard-edged legal propositions with a contrived scope and meaning.
  - (b) It creates a perverse imbalance in the law-making process by including some foundational constitutional principles or important principles of legislative design and leaving out others.
  - (c) Chief executive involvement in the certification process undermines New Zealand's constitutional arrangements that value and protect the political neutrality of civil servants.

*Q19. Do you have any suggested changes to the consistency mechanisms proposed in this discussion document?*

- 5.8 The Law Society does not support the consistency mechanism contemplated in the Discussion Document.

*Q20. Which types of regulation (if any) do you think should be exempt from the consistency requirements proposed by the Regulatory Standards Bill (for example, regulation that only has minor impacts on businesses, individuals, and not for-profit entities, legislation that corrects previous drafting errors, or legislation made under a declared state of emergency)?*

- 5.9 As above, the Law Society does not support the consistency mechanism contemplated in the Discussion Document.

## 6 Enabling people to seek independent assessment of whether regulation meets standards (questions 22 to 25)

- 6.1 The Law Society does not support the creation of a new structure or organisation specifically for the purpose of considering complaints about the quality of regulation (particularly with the lack of clarity in the Discussion Document about what is meant by "quality" regulation). In the Law Society's view, an organisation of this kind will inevitably become a forum for relitigating policy disagreements with little prospect of delivering meaningful outcomes.

- 6.2 As explained above, the Law Society considers that there are issues with the distribution of design precepts and oversight arrangements across multiple agencies, the relative informality of the arrangements, and the limited extent of accountability mechanisms. The Law Society's view is that resources are much better directed at undertaking more structured and systematic approach to these questions.



7 Supporting the Ministry for Regulation to have oversight of regulatory performance

*Q26. Do you support the proposals in this section for strengthened regulatory stewardship expectations on agencies to be set out in a Bill?*

7.1 The Law Society agrees that more needs to be done in terms of ongoing review and maintenance of the existing stock of legislation and regulatory systems. However, the Law Society does not support the approach proposed in the Discussion Document.

7.2 As already explained, the Law Society considers that strengthened regulatory stewardship could be best addressed in the first instance by non-legislative measures that set expectations for departmental or agency chief executives and provide them with the resources to meet them.

*Q27. Do you agree that there may be some situations where a power for the Chief Executive of the Ministry for Regulation to obtain information will be required to help decide whether a regulatory review is warranted and to inform regulatory reviews?*

7.3 The Law Society does not consider a case has been made out for information-gathering powers for the purpose of regulatory reviews at this stage.

7.4 We acknowledge that a statutory power to require information could facilitate and expedite the Ministry's regulatory review process, particularly where departments and agencies fail to either work co-operatively, or where there are challenges in providing information voluntarily (for example, because of concerns that sharing information will breach confidentiality, privilege, or obligations under the Privacy Act 2020 or other legislation).

7.5 However, the Discussion Document contains little information about the purpose and the scope of these regulatory reviews, the types of information which could be required under the proposed powers, and the reasons as to why entities may not provide such information in a timely manner. It is also unclear whether these regulatory reviews will help address the issues identified in [3.2], [3.10], [3.15], and [5.5] above, which, in our view, currently contribute to poor regulation in New Zealand.

7.6 Without proper consideration of these issues, there is a risk that the power outlined in the Discussion Document could result in overreach. This is particularly so given the relatively recent establishment of the Ministry, the absence of an adequately defined and objectively established problem with the Ministry's current information gathering abilities (noting the Ministry is already able to – and does – undertake regulatory reviews without these proposed additional powers),<sup>9</sup> and the contemplated application of those powers to non-public sector agencies and private entities.

7.7 If the purpose and scope of the Ministry's regulatory reviews are subsequently clearly defined in statute, statutory information gathering powers – alongside procedural protections on the exercise of those powers, as well as appropriate constraints on the types of information which may be requested using those powers – may be desirable.

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<sup>9</sup> See <https://www.regulation.govt.nz/regulatory-reviews/about-regulatory-reviews/>.



Further consideration would be required as to the implications and scope of such an information gathering power.

*Q28. Do you agree that the proposed information gathering powers are justified for the purpose of informing regulatory reviews? Do you think the powers should apply to all the types of entities listed above, or only some?*

7.8 As above, the Law Society does not consider a case has been made out for information-gathering powers for the purpose of regulatory reviews at this stage.

*Q29. Do you think the information gathering powers are broad enough to enable the Ministry for Regulation to undertake regulatory reviews effectively and efficiently?*

7.9 As above, the Law Society does not consider a case has been made out for information-gathering powers for the purpose of regulatory reviews at this stage.

*Q30. Do you think any safeguards or procedures should be applied to limit how the information gathering powers are used by the Ministry for Regulation? What safeguards do you think should be put in place?*

7.10 As above, the Law Society does not consider a case has been made out for information-gathering powers for the purpose of regulatory reviews at this stage. If powers were to be introduced as contemplated at [7.7] above, safeguards would be essential to ensure those powers are exercised reasonably, and only where necessary. In addition to existing statutory restrictions on the sharing of information (recognised in the Discussion Document),<sup>10</sup> there would need to be proportionality provisions and an independent objection mechanism.

*Q31. Do you support the proposals in this section in relation to the Ministry for Regulation's broad oversight role?*

7.11 No.

*Q32. Are there any other measures you think a Bill should contain to support the quality of regulation?*

7.12 The Law Society has nothing further to add to the matters canvassed above.

8 Other comments

*Q33. Do you think the overall proposal will be effective in raising the quality of regulation in New Zealand?*

8.1 No, for the reasons already given.

*Q34. Do you think there are other provisions that should be included in the Bill. If so, what would they be?*

8.2 These matters are canvassed above.

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<sup>10</sup> At page 35.

*Q35. Would you prefer any alternative options to the Bill, including non-legislative options?*

8.3 Yes. The Law Society considers it is vital that non-legislative options are considered if work on this subject is to continue, and these options should not be excluded from the project's scope. Additional resourcing for agencies and departments would also assist, for example, with enabling organisations to follow good policy development processes and produce better RISs and disclosure statements, and strengthening their stewardship functions.

## 9 Next steps

9.1 We hope this feedback is useful. Please feel free to get in touch with me via the Law Society's Senior Law Reform & Advocacy Advisor, Nilu Ariyaratne ([Nilu.Ariyaratne@lawsociety.org.nz](mailto:Nilu.Ariyaratne@lawsociety.org.nz)), if you have any questions, or wish to discuss this feedback further.

Nāku noa, nā



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