
GOVERNMENT

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TOWARD REGULATORY RESPONSIBILITY



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The Prime Minister's opening statement to Parliament on 8 February 2011 signalled that the Government will introduce a Regulatory Responsibility Bill (RRB) and support its progress to Select Committee during the current Parliamentary term for public submissions and debate. As discussed below, the RRB would have important implications for stakeholders in the public policy process. It is questionable whether some of the controversial regulatory measures in recent years – such as the introduction of regulations in 2008 to specifically affect the outcome of a takeover bid for Auckland International Airport – would withstand scrutiny against the principles of responsible regulation enumerated in RRB¹.

Regulatory Responsibility Taskforce

We anticipate that the RRB, as introduced to Parliament, is likely to substantially reflect the draft bill prepared by the Regulatory Responsibility Taskforce for its September 2009 report to the Ministers of Finance and Regulatory Reform².

The Taskforce was concerned that the current set of institutional arrangements for the analysis of regulatory and legislative proposals do not constitute a sufficient safeguard against poor quality legislation. In particular, the Taskforce was concerned that undue haste, inadequate analysis, and the failure of policy-makers to explicitly confront the costs of their proposals have led to outcomes that are capricious or which do not accord with the rule of law.

Principles of responsible regulation

The Taskforce concluded that a new legislative framework is required to ensure that legislative and regulatory proposals are scrutinised against core constitutional principles. Specifically, the Taskforce proposed that Parliament should enumerate the following principles of responsible regulation:

PRINCIPLE	PROPOSED DEFINITION
Rule of law	Legislation should be consistent with the following aspects of the rule of law: <ul style="list-style-type: none">(i) the law should be clear and accessible:(ii) the law should not adversely affect rights and liberties, or impose obligations, retrospectively:(iii) every person is equal before the law:(iv) issues of legal right and liability should be resolved by the application of law, rather than the exercise of administrative discretion

Liberties Legislation should not diminish a person’s liberty, personal security, freedom of choice or action, or rights to own, use, and dispose of property, except as is necessary to provide for, or protect, any such liberty, freedom, or right of another person:

Taking of property Legislation should not take or impair, or authorise the taking or impairment of, property without the consent of the owner unless—

- (i) the taking or impairment is necessary in the public interest; and
- (ii) full compensation for the taking or impairment is provided to the owner; and
- (iii) that compensation is provided, to the extent practicable, by or on behalf of the persons who obtain the benefit of the taking or impairment:

Taxes and charges Legislation should not impose, or authorise the imposition of, a tax except by or under an Act or authorise the imposition of, a charge for goods or services (including the exercise of a function or power) unless the amount of the charge is reasonable in relation to both— (i) the benefits that payers are likely to obtain from the goods or services; and (ii) the costs of efficiently providing the goods or services:

Role of courts Legislation should preserve the courts’ role of authoritatively determining the meaning of legislation.

If the legislation authorises a Minister, a public entity, or a public official to make decisions that may adversely affect any liberty, freedom, or right of a kind referred to in [the section dealing with liberties],—

- (i) provide a right of appeal on the merits against those decisions to a court or other independent body; and
- (ii) state appropriate criteria for making those decisions:

Good law-making

Legislation should not be made unless, to the extent practicable, the persons likely to be affected by the legislation have been consulted.

Legislation should not be made (or, in the case of an Act, not be introduced to the House of Representatives) unless there has been a careful evaluation of—

- (i) the issue concerned; and
- (ii) the effectiveness of any relevant existing legislation and common law; and
- (iii) whether the public interest requires that the issue be addressed; and
- (iv) any options (including non-legislative options) that are reasonably available for addressing the issue; and
- (v) who is likely to benefit, and who is likely to suffer a detriment, from the legislation; and
- (vi) all potential adverse consequences of the legislation (including any potential legal liability of the Crown or any other person) that are reasonably foreseeable:

Legislation should produce benefits that outweigh the costs of the legislation to the public or persons.

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

The Taskforce’s draft RRB permits legislation that is inconsistent with the enumerated principles of responsible regulation, “to the extent that it is reasonable and can be demonstrably justified in a free and democratic society”. This standard is adopted from section 5 of the New Zealand Bill of Rights Act 1990, which provides for justified limitations on rights and freedoms affirmed in that legislation. The analytical framework for scrutinising legislation against this standard has been extensively developed by the New Zealand and Canadian courts under the New Zealand Bill of Rights and the Canadian Charter of Rights and Freedoms.

Accountability mechanisms

The Taskforce's draft RRB would have important implications across all three branches of government:

BRANCH OF GOVERNMENT	MECHANISMS
Parliament	<p>The Minister responsible for the Government Bill (or the sponsor of a non-Government bill) must present a signed certificate to Parliament stating whether the bill is compatible with the principles of responsible regulation or setting out the reasons that the incompatibility is justified.</p>
Executive	<p>The Minister and chief executive of a public entity responsible for administering new regulations must sign a certificate stating whether the regulation is compatible with the principles of responsible regulation or setting out the reasons that the incompatibility is justified.</p> <p>Public entities must regularly review the legislation that they administer for compatibility with the principles and must report on such reviews in their annual reports.</p>
Courts	<p>The Courts will have the power to make a declaration that legislation is incompatible with the principles of responsible regulation. This is subject to a number of safe guards (e.g., the declaration does not affect the validity, continuing operation, or enforcement of the legislation).</p> <p>Interpretations of legislation which are consistent with the principles of responsible regulation should be preferred to interpretations which are inconsistent with those principles.</p>

While the judicial power to make non-binding declaratory judgments would be new, the proposed interpretative guidance and certification requirements have parallels in sections 6 and 7 of the New Zealand Bill of Rights Act.

Safeguards

The Taskforce’s proposed RRB contains a number of limitations which curtail the scope and effect of the RRB. The RRB’s principal limitations are as follows:

SAFEGUARD	DESCRIPTION
Delayed implementation	The RRB would not affect any existing legislation until 10 years after its commencement.
Court declarations not binding	A judicial declaration that legislation is incompatible with the principles of responsible regulation would not affect the validity, continuing operation, or enforcement of the legislation and would not bind the parties to the declaratory judgment proceedings.
Principles subject to reasonable limits	Incompatibility with the principles would be justified to the extent that it is reasonable and can be demonstrably justified in a free and democratic society.
Ongoing review	The Taskforce has recommended that the RRB, if enacted, should be subject to reviews every five years to ensure to determine whether its purposes are being met and whether amendments are necessary.

Commentary

The quality of legislation and its consistency with fundamental civic values is a matter of concern for all New Zealanders. In recent years, the Government, prominent academics, business groups, and entrepreneurs have expressed concern over the quality of regulation and the hasty passage of measures which undermine important principles of good law-making³. We believe that the RRB’s expected introduction to the House is timely.

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We also believe that the members of the Taskforce have proposed a considered and thoughtful package of institutional reforms, which include significant checks and balances. In our view, the RRB deserves to be sent to Select Committee for thorough analysis and debate.

We will continue to monitor the Bill as it progresses through the House and report on further developments. Please contact your usual Bell Gully adviser if you require further information on the Bill or assistance with any submissions you propose to make in respect of it.

¹See Report of the Regulations Review, *Complaint Regarding the Overseas Amendment Investment Regulations* (September 2008).

²<http://www.treasury.govt.nz/economy/regulation/rrb/taskforcereport>. The Taskforce comprised Jack Hodder SC, Richard Clarke QC, Dr Graham Scott, the Hon David Caygill, Dr Don Turkington, Dr Bryce Wilkinson, and Paul Baines.

³See, e.g., *Government Statement on Regulation* (August 2009); Dr Bryce Wilkinson, *Constraining Government Regulation* (November 2001); Professor Jeremy Waldron “*Compared to what?*” *New Zealand Law Journal* (December 2005).

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