

Questions arising from the Regulatory Responsibility Bill

Hon Rodney Hide
Minister for Regulatory Reform

June 2010

New Zealand Government

QUESTIONS ARISING FROM THE REGULATORY RESPONSIBILITY BILL PREPARED BY THE REGULATORY RESPONSIBILITY TASKFORCE

New Zealand has a problem with both the volume of regulation it passes and the quality of that regulation. Over time Parliament and executive government have made changes to regulatory decision-making processes and institutions in attempts to improve regulatory quality. Examples of these changes include the establishment of the Regulations Review Committee, the Regulations Disallowance Act 1989, and the Legislation Advisory Committee. The current government has also strengthened Regulatory Impact Analysis requirements for regulatory proposals going to Cabinet.

These measures do not appear to have stemmed the tide of regulation however. If anything, the volume of regulation seems to be increasing: between 2000 and 2009, over 68,000 pages of regulation were passed, a significant increase from the previous decade and the decade before that. The problem is not just one of volume; it is also one of regulatory quality. People will have different views on what makes for good regulation, but there are indications that other countries are managing regulatory quality better than New Zealand. For example, our ranking in the OECD Product Market Regulation charts has dropped from 4th in 1998 to 12th in 2007. In order to achieve its goal of catching up to Australia by 2025, New Zealand must substantially lift the quality of its regulation. The Government set out its expectations of itself and its agencies in its August 2009 Statement on Regulation, in which it committed to producing better and less regulation.

A Regulatory Responsibility Bill

I consider that our current regulatory quality measures will never be enough on their own to achieve or sustain the kind of improvements that New Zealand needs. To this end, in 2006 I introduced a Regulatory Responsibility Bill as a private member's bill. Parliament's Commerce Committee examined that Bill and received a number of submissions from individuals and organisations who agreed that New Zealand's regulatory processes needed to improve. Accordingly, the Commerce Committee recommended that a taskforce be set up to consider the questions the Bill raised and to develop a legislative or Standing Orders option, or both, to improve regulatory review and decision-making processes.

The work of the Regulatory Responsibility Taskforce

As part of the National-ACT Confidence and Supply Agreement in 2008, the Government set up a taskforce to assess the Regulatory Responsibility Bill, consider what amendments and supporting arrangements might be desirable, and produce a draft bill. The Regulatory Responsibility Taskforce was set up in April 2009 and reported back in September 2009 with a new draft bill and some supporting recommendations. A copy of the Bill and accompanying report is available at <http://www.treasury.govt.nz/economy/regulation/rrb>. By producing its Bill, the Taskforce has advanced the debate on regulatory quality and lifted it to a higher level of analytical rigor.

The Government did not ask the Taskforce to consult publicly on its draft Bill. The issues the Bill deals with, however, are too important to be debated only by politicians and officials. This Bill is of major importance to the proper functioning of government,

so inevitably questions arise that are best aired in a public forum. Accordingly, I am releasing a series of questions, to be read alongside the Taskforce's Bill, on which I am seeking the views of New Zealanders.

Since the Government released the Taskforce's Bill and the accompanying report in October 2009, there has been some limited debate about the substance of the Bill, including critiques of the form and likely effects of some specific provisions. I wish to open the wider issues the Bill raises up to debate and hear what New Zealanders – who are the people affected by poor regulation – have to say about the quality of our regulation and the Taskforce's Bill. I would like to see a public debate that includes consideration of the drivers of poor quality regulation and how these can be more effectively tackled. Furthermore, it is possible that many of the criticisms of the Bill are due to misunderstandings of its effects, and I hope that this public submission process will help resolve those.

The Government has not yet made any decisions on the future of the Regulatory Responsibility Bill, and is looking to this consultation process to inform its thinking. Public submissions on the draft Bill are open until 27 August 2010. Please send submissions to:

REGULATORY QUALITY TEAM
The Treasury, PO Box 3724, Wellington 6140
Or by email to: regulation@treasury.govt.nz

A handwritten signature in blue ink, appearing to read "Rodney Hide".

Hon Rodney Hide
Minister for Regulatory Reform

POINTS ON WHICH I AM SEEKING PUBLIC SUBMISSIONS:

The need for a Regulatory Responsibility Bill

The Explanatory Note to the Regulatory Responsibility Bill I introduced in 2006 argues that:

"In too many cases, [good legal] principles are not fully observed. Far too many Acts and regulations are a result of undue haste, poor quality processes and inadequate scrutiny."

The submissions received by the Commerce Committee, which examined the original bill, suggested that this view is one that is shared by a number of New Zealanders, including many people opposed to the Bill.

In proposing a revised Regulatory Responsibility Bill, the Taskforce indicated that not only was it satisfied that New Zealand could and should have less legislation and better legislation, but also that existing constitutional and operational frameworks cannot be expected to deliver these outcomes without significant changes.

Questions:

- a. Do you agree that the quality of legislation (Acts, statutory regulations, tertiary legislation) in New Zealand is often not as good as it could or should be? If so, what do you see as the main problems with quality, and the main causes of those problems? If not, please explain the reasons for your view.

- b. Do you agree that existing parliamentary and administrative processes are unlikely to be sufficient to encourage substantial improvements in the quality of legislation? Please explain the reasons for your view.

The nature and scope of the Bill

The Taskforce's Regulatory Responsibility Bill applies to all legislation (Acts, statutory regulations, and tertiary legislation) except that made by local government. The Taskforce sought to identify a set of general principles to which all legislation should normally conform. These principles included both characteristics of good law and characteristics of good law-making. Due to practical considerations, the Taskforce identified a simplified and streamlined set of principles that draw heavily from fundamental common law principles enumerated in the Legislative Advisory Committee Guidelines¹ and existing Cabinet requirements.

Questions:

- a. Do you agree that systematic testing of legislation against a set of established principles will help improve regulatory quality?
- b. What is your view on the range and appropriateness of the principles identified by the Taskforce?
- c. If you would favour additions or changes to these principles, what would they be and why?
- d. The Taskforce considered that all levels of legislation (ie primary, secondary, and tertiary) should be tested against a set of principles. What levels of legislation do you think would benefit from such testing?

¹ See: <http://www2.justice.govt.nz/lac/>

The effectiveness and impact of the Bill

The Taskforce's Regulatory Responsibility Bill aims to create incentive structures that encourage lawmakers to produce good law. However, nothing in the Taskforce's Bill overrides the sovereignty of Parliament or allows the courts to strike down legislation. Alongside the primary incentive structure, the Taskforce recommended that guidelines for officials be put in place, along with supporting administrative arrangements to ensure that compliance is competent, thorough, and not simply proforma. The primary incentive structure set up by the Bill has three elements:

- ▶ A benchmarking mechanism, which sets out the standard that should be met in order to ensure regulatory quality. The Taskforce's Bill sets out Principles of Responsible Regulation that all legislation (Acts, statutory regulations, tertiary legislation) should be tested against.
- ▶ A transparency mechanism, by which it is clear whether specific pieces of legislation meet the benchmark, and if not, why not. The Taskforce's Bill provides that Ministers and Chief Executives responsible for legislation must certify as to that legislation's compliance with the Principles of Responsible Regulation. Legislation may depart from the principles of responsible regulation if doing so is "justified in a free and democratic society". If the Government wishes to use this exemption it must state that it is doing so during the certification process. Accordingly, the Government is free to pass legislation that departs from the principles, but it must declare what it is doing openly.
- ▶ A monitoring mechanism, which allows an agency with the requisite expertise to determine independently whether legislation certified to be compliant with the benchmark is in fact compliant. The Taskforce considered that, on balance, the courts were better able to fill this role than alternative independent agencies. The Taskforce's proposed Bill provides that individuals may seek a declaration from the courts that a particular piece of legislation is incompatible with the Principles of Responsible Regulation. The Taskforce viewed the courts as an appropriate monitor in part because courts in the United Kingdom grant declarations of incompatibility under the Human Rights Act 1998 (UK), and some have argued that New Zealand courts might develop a similar role under the New Zealand Bill of Rights Act 1990. A declaration of incompatibility under the Taskforce's Bill has no effect on the validity of legislation and the courts cannot award compensation. Declarations are intended to provide political incentives for lawmakers to ensure that legislation complies with the Principles of Responsible Regulation or, in cases where legislation does not comply, to be transparent about that non-compliance.

Questions:

- a. Do you agree that stronger benchmarking, transparency and monitoring mechanisms will improve the quality of New Zealand's legislation? Are there other mechanisms that you consider would be superior? Please explain the reasons for your view.
- b. What are the likely effects of the principles/certification/declaration of incompatibility incentive structure?
- c. What are the likely effects of the requirement that Ministers and Chief Executives responsible for legislation certify as to its compliance with the Principles of Responsible Regulation, including the likely effects on the relationship between Ministers and government officials?
- d. Are the courts the best external body to assess the consistency of legislation with the principles set out in the Taskforce's Bill? If not, what other bodies might fulfil this role?
- e. What are the likely effects of giving the courts, or your preferred alternative agency if you have one, a role in assessing whether legislation is compatible with a set of legislative principles?
- f. Under the Bill, a court's exercise of the declaration of incompatibility procedure does not affect the validity of the legislation at issue. Nevertheless, some commentators suggest that the Bill will alter the relationship between Parliament and the courts, particularly given that the courts must take into account whether any breach of the principles is "justified in a free and democratic society" when deciding whether to make a declaration of incompatibility.
 - ▶ Do you think that such suggestions are accurate?
 - ▶ If so, do you think that the potential benefits of improving the quality of legislation in New Zealand are such that such alterations to the relationship between Parliament and the courts are justified?
 - ▶ Could the Bill be improved in this respect?
- g. The Bill directs the courts to prefer interpretations of legislation that are consistent with the principles (initially only in respect of new legislation, but applying to all legislation after 10 years). The New Zealand Bill of Rights Act contains a similar provision. What do you think the likely effects of this provision would be on the body of New Zealand law?

Clarifications on the Regulatory Responsibility Bill and potential alternative mechanisms

Questions:

- a. Are there are any other aspects of the Regulatory Responsibility Bill that you consider could be clarified or improved?
- b. The Taskforce's Regulatory Responsibility Bill suggests one set of measures for improving regulatory quality in New Zealand. Given your answers to the questions outlined above, can you think of any possible measures not suggested by the Taskforce that might help improve regulatory quality? These measures may be supplementary to the Taskforce's suggestions or in place of some or all of them. Please explain the reasons for your views.
- c. Are there any other points that you wish to raise that have not already been discussed in your submission?