

Chair

CABINET ECONOMIC GROWTH AND INFRASTRUCTURE COMMITTEE

**ADOPTION OF THE REGULATORY RESPONSIBILITY BILL DRAFTED BY THE
REGULATORY RESPONSIBILITY TASKFORCE**

Proposal

1. This paper proposes that Cabinet adopt the Regulatory Responsibility Bill, drafted by the Regulatory Responsibility Taskforce (the "Taskforce"), as a Government Bill.

Executive Summary

2. Poor regulatory quality is hindering New Zealand's economy, limiting investment and innovation. Decade by decade, the amount of regulation made each year in New Zealand is increasing and the quality is declining. We need to put in place institutional measures that will reverse this trend and create a culture that is more conducive to helping us introduce considered, principled regulatory measures.
3. Many of our trading partners and countries we compete with have focused on improving the quality of their regulation, with more apparent success than New Zealand. New Zealand's ranking in the OECD Product Market Regulation Indicator has fallen from 4th in 1998 to 14th in 2008. We cannot afford this slippage: Our regulation needs to be better than average to overcome the disadvantages we face from New Zealand's small size and geographic isolation. The 2025 Taskforce suggested that, on the basis of overseas research, as much as one third of the income gap with Australia could be closed with better regulatory policies.
4. The Regulatory Responsibility Bill, as proposed by the Regulatory Responsibility Taskforce, aims to provide the step change we need. This Bill introduces:
 - a. A set of legislative principles that all good regulation (being Acts of Parliament, statutory regulations, and tertiary legislation, excluding regulation made by local government) should comply with;
 - b. A requirement that Ministers and Chief Executives certify whether regulation they are responsible for complies with the principles, and if it is not compatible, to state the justification for that incompatibility;
 - c. A process by which individuals may apply to the courts for a declaration that a particular piece of regulation is incompatible with the principles. Such

a declaration does not affect the validity of the regulation. Its purpose is to send a message to Parliament and the Government that a piece of regulation is deficient in some respect and to draw public attention to that deficiency; and

- d. A number of supporting requirements, including that courts prefer legislative interpretations that are consistent with the Bill's principles, and that agencies regularly review the stock of regulation for which they are responsible for consistency with the Bill's principles.
5. The Bill provides us with a long awaited improvement in the way that we create and manage our regulation. It provides transparency in a similar way to the Public Finance Act.
6. I seek Cabinet's agreement to the adoption of the Regulatory Responsibility Bill drafted by the Taskforce as a Government Bill. The Bill has given us the opportunity to have a debate about the regulatory principles that underpin good governance. There is value in introducing the Bill as the cohesive whole that the Taskforce envisaged, although we should be open to improvements at the Select Committee stage.

Background

7. In 2008, the Commerce Select Committee reported back on the Regulatory Responsibility Bill that I introduced as a private member's bill. The Committee recommended that the Bill not be passed, and that the Government establish a "high-level expert Taskforce to consider options for improving regulatory review and decision-making processes, including legislative and Standing Orders options, but not limited to the options that were placed before [the Committee]".
8. In March 2009, Cabinet agreed to the establishment of the Regulatory Responsibility Taskforce (the "Taskforce") to assess the existing member's bill, consider what amendments and supporting arrangements might be desirable, and recommend a draft Bill (CAB Min (09) 8/5A refers). The Taskforce comprised individuals of a very high calibre, namely former Secretary to the Treasury Graham Scott (chair), Paul Baines, Hon David Caygill, Richard Clarke QC, Jack Hodder SC, Dr Don Turkington and Dr Bryce Wilkinson.
9. On 30 September 2009, the Taskforce reported back to the Minister of Finance and me, as Minister for Regulatory Reform, with its recommendations, including an alternative draft Bill. The Parliamentary Counsel Office assisted with the drafting of the Taskforce's alternative Bill (although much less than would be involved with a normally instructed Government Bill). I publicly released the report on 29 October 2009 (CAB Min (09) 38/7 refers).
10. Public submissions on the Taskforce's proposal were sought from 28 June to 27 August 2010 (CAB Min (10) 23/14 refers).
11. Also, the Government released its Statement on Regulation in August 2009 where the Government committed to better regulation and less regulation (CAB Min (09) 27/11 refers).

Comment

12. The Government's ability to use regulation to coerce people – in their businesses, in their homes, at their jobs – is an awesome power. As Ministers, we use this power regularly to ensure that people live safe lives, get treated fairly, protect and manage the environment, have a competitive and efficient economy and much more. But regulation also imposes costs. Excessive regulation can impose unnecessarily high compliance costs on businesses and individuals, deter investment, and limit innovation and competition.
13. Decade by decade, the quantity of regulation made in New Zealand is increasing. Between 2000 and 2009, over 68,000 pages of legislation were passed. This equates to creating or amending around 105 Acts and 405 regulations, every year. It is no wonder that businesses are telling us that they are drowning in red tape.
14. Many of our trading partners and countries we compete with have focused on improving the quality of their regulation, with more apparent success than New Zealand. New Zealand's ranking in the OECD Product Market Regulation Indicator has fallen from 4th in 1998 to 14th in 2008.
15. We cannot afford this slippage: our regulation needs to be better than average to overcome the disadvantages we face from New Zealand's small size and geographic isolation. If we are to attract and retain increasingly mobile skills, capital, technology and entrepreneurship and close the prosperity gap with other countries, New Zealand needs to offer a regulatory environment that is significantly better than our competitors.
16. As a Government, we committed to improving New Zealand's regulatory environment through the release of the Government Statement on Regulation in August 2009. In the statement, we agreed to –
 - a. introduce new regulation only when we are satisfied that it is required, reasonable and robust; and
 - b. review existing regulation in order to identify and remove requirements that are unnecessary, ineffective or excessively costly.
17. To date, the Government Statement has not been particularly effective. There has been little change in the quality and quantity of regulation. Many Regulatory Impact Statements have been certified as inadequate or only partially adequate. Many of them are far too long. We need a stronger framework for regulatory policy.
18. I believe experience has shown that regulatory responsibility legislation of some kind is necessary. The Government Statement said we wanted to be held accountable for regulatory decisions. The Regulatory Responsibility Bill has given us the opportunity to have a debate about the regulatory principles that underpin good governance. There is value in introducing the Bill as the cohesive whole that the Taskforce envisaged. We can consider criticisms and suggestions for improvement at the Select Committee stage. I therefore seek Cabinet's agreement to the adoption of the Regulatory Responsibility Bill drafted by the Taskforce as a Government Bill.

Taskforce's proposal

19. The Taskforce's Regulatory Responsibility Bill aims to increase the transparency of lawmaking and the accountability of law-makers. In essence, the Bill has three key components. It:
 - a. Provides a benchmark through a set of regulatory principles that all regulation should comply with;
 - b. Provides transparency by requiring those proposing and creating regulation to certify whether the regulation is compatible with the principles; and
 - c. Provides monitoring of the certification process through a new declaratory role for the courts.

Benchmark

20. The Regulatory Responsibility Bill identifies a set of principles, which are a statement of what all regulation (being Acts of Parliament, statutory regulations, and tertiary legislation, excluding regulation made by local government) should and should not be about. These principles are distilled from sources such as the Legislative Advisory Committee (LAC) Guidelines, the common law, and Parliament's Regulations Review Committee.
21. The principles cover seven key areas including the rule of law, protection of individual liberties, protection of property rights, taxes and charges, the role of the courts, review of administrative decisions, and good law making (see Appendix 2 for more detail).
22. Setting out the principles provides a clear statement to others, and to us, about our ambition for high quality regulation. They set out the key characteristics of good regulation that I believe we should be considering whenever we propose regulation.
23. These principles are guides, not binding rules. From time to time, breaches of the principles will be necessary. The Bill provides for this, allowing Parliament to pass any legislation regardless of whether it complies with the principles. All that the Bill requires is that departures from the principles are "reasonable and demonstrably justified in a free and democratic society".

Transparency

24. The Regulatory Responsibility Bill provides transparency by requiring those proposing and creating regulation to certify whether the regulation is compatible with the principles, and the justification for any incompatibility.
25. Both Chief Executives and Ministers would certify compliance with the principles and Ministers would provide the justification for any breaches. This dual certification ensures that both officials and Ministers are transparent about the process undertaken to make regulation.
26. Certification allows others to understand the impacts of proposed regulation and the trade-offs that we have had to make. We can, and do, have significant impacts on New Zealand businesses and individuals when we use our regulatory powers. It is only right that we should be open about the impacts that our proposed regulation is having and the quality of regulation that we are proposing.

Monitoring

27. The Regulatory Responsibility Bill provides monitoring of the certification process by allowing the courts to provide declarations of incompatibility where they believe that the principles have been breached. This power is declaratory only: the courts will not have the power to strike down legislation, to issue injunctions against Parliament or the Crown, or to award damages to those adversely affected by regulation that is incompatible with the principles.
28. Initially, the courts would only be able to make declarations in relation to regulation made after the commencement of the Bill. After 10 years, the declaratory power would be extended to all regulation.
29. Monitoring of the certification process incentivises officials and Ministers to certify accurately. Without meaningful consequences for non-compliance, the processes will not be complied with and will not improve regulatory quality. By providing the declaratory role for the courts, officials and Ministers will have incentives to ensure that the certifications they give to regulatory proposals are accurate.

Other parts of the Bill

30. In addition to the three key components, the Regulatory Responsibility Bill requires the courts to prefer legislative interpretations that are consistent with the Bill's principles. It also requires every public entity to use its best endeavours to regularly review all regulation that it administers for compatibility with the principles. The steps entities have undertaken to review their regulation and the outcomes from this process are required to be included in the entities' annual reports.

Overall benefits

31. This proposal provides us with better disciplines for creating and managing our regulation. It provides transparency in a similar way to the Public Finance Act. That Act imposes certain responsibilities on government spenders. It says, if you are spending public money, justify it, and be accountable for it. This Act has created a cultural shift in the way that money is spent in New Zealand and the whole mindset around public expenditure.
32. The Taskforce's Regulatory Responsibility Bill places the same responsibilities on government regulators. It says, if you are using the government's regulatory powers, justify it and be accountable for it. This transparency will result in higher quality regulation that has fewer unintended consequences, reduced compliance costs and that better achieves policy objectives.
33. Changes in the public sector will be needed to implement this proposal. If the Bill is passed, we will need to amend the Cabinet Manual requirements on Regulatory Impact Statements to bring in the focus on principles and the certification procedures. Compared with the RIS process, I would hope the implementation of the Bill would be less resource intensive, not more. But the Bill will encourage the public sector to work more effectively. We are also more likely to get regulatory proposals right the first time, saving public sector resources and House time required to fix past mistakes. If we succeed, proceedings in the courts will be few and far between: I do not see significant resource implications for courts. The potential improvements in the quality of

legislation will significantly outweigh any additional compliance costs that this Bill places on the Crown.

34. I propose that Cabinet agree to adopt the Regulatory Responsibility Bill, as proposed by the Taskforce, as a Government Bill.

Costs and risks

35. The proposal involves some costs and risks. The major costs will be to the government, as agencies and Ministers become used to the requirement to certify legislation against principles. The costs of defending applications for declarations of incompatibility could be substantial (more detail provided under "Financial Implications" below), although as noted above I think significant resource implications for the courts are unlikely.
36. The major risks relate to the uncertainties around how the courts will interpret their new role. It is difficult to predict whether or how having a legislated set of lawmaking principles will change the way the courts see their role. This unpredictability is a risk.
37. These costs and risks should be taken seriously, but they are manageable and are outweighed by the benefits of the Regulatory Responsibility Bill. The Bill contains a provision for review after five years. The Government could act earlier to amend it in the event of untoward outcomes.

Consultation

38. Public submissions on the Taskforce's proposal were sought from 28 June to 27 August 2010. While most submitters agreed that New Zealand's legislation could or should be better, submitters had mixed views on whether the Taskforce's proposal will improve regulatory quality. In general, businesses and business organisations strongly supported the Taskforce's proposal or a modified version of it. Other submitters, including some legal academics and the New Zealand Law Society, did not support the passage of the Bill. In parallel to the public consultation process, the Treasury consulted with a group of experts in the area of regulatory quality (CAB Min 23/14 refers).
39. All government departments were consulted on this paper, as the proposals contained herein have the potential to affect all areas of government. I received comments from the Ministry of Justice, Crown Law, the Department of Conservation, Inland Revenue, the Ministry of Economic Development, the Department of Labour, the Ministry of Agriculture and Forestry, Parliamentary Counsel Office, Te Puni Kōkiri, the New Zealand Customs Service, the Ministry of Education, Land Information New Zealand, the Ministry of Health, the Ministry of Defence, the Ministry of Foreign Affairs and Trade, the Ministry for the Environment, the New Zealand Defence Force, the Ministry of Transport, the State Services Commission, the Department of Internal Affairs, and the Clerk of the House of Representatives.
40. Almost all departments that commented raised serious concerns about the Bill, and many wished to record that they did not support the Bill proceeding.

Joint departmental comment

41. The Ministry of Justice, Crown Law, the Department of Conservation, Inland Revenue, the Ministry of Economic Development, the Department of Labour, the

Ministry of Agriculture and Forestry, Parliamentary Counsel Office, Te Puni Kōkiri, Land Information New Zealand, and the Ministry of Transport have endorsed the following joint comment: While we support the general aim of improving the quality of regulation, we do not think that there is a single or clear problem to be solved. Rather, as suggested by the RIS, there are various manifestations of poor regulatory quality with apparently differing causes. Against this background, we believe the costs and risks associated with the Regulatory Responsibility Bill outweigh any potential benefits. We are not convinced that it will solve the problem(s) of poor regulatory quality and consider it will create other difficulties.

42. The principles of responsible regulation in the Bill would be benchmarks against which all legislation would be assessed. They should therefore be clear, well-understood, durable and almost universally accepted. That is not the case here. Some are untested, uncertain, and bear little resemblance to the more flexible fundamental common law principles identified in the LAC Guidelines. Given that the principles go wider than those in the LAC Guidelines, the choice of certain principles over others (e.g. a principle against the taking of property is included while the principles of the Treaty of Waitangi are not) requires a more thorough analysis and justification than has been provided.
43. The novel and wide-ranging nature of the principles could mean that certifying compliance with them becomes a bar even to legitimate law-making. Almost any proposed restriction or requirement in legislation could, for example, be said to diminish a person's freedom of choice or action in some respect, thereby infringing the liberties principle. The certification process may also lead to strained relationships between Ministers and Chief Executives where each reaches a different conclusion about compliance with the principles.
44. Judges would have to prefer interpretations of legislation that were compatible with the principles, which could produce unintended consequences, such as unexpected changes in the law with retrospective application, as discussed in the RIS. The resulting uncertainty about the meaning of legislation could be significant for business and others with legislative rights and obligations.
45. The RIS outlines the expected costs for government of complying with the Bill's certification requirements. The cost of vetting the existing stock of legislation against the principles, which apply to them after ten years, would also be significant. Amending legislation to make it compliant would incur additional costs and reduce the House time available for other matters. The Crown would face increased litigation risk and costs, not only due to the need to defend applications for declarations of incompatibility but also due to the risk of other litigation becoming more protracted, particularly litigation under BoRA and judicial review proceedings.
46. The RIS prepared by the Treasury does not support the Taskforce's Bill. If Cabinet considers that additional measures are required to improve the quality of regulation, the Treasury's preferred option (Option 5) proposes a package of measures to achieve this. It does so in a way that avoids many of the issues associated with the Regulatory Responsibility Bill. However, the range of options have not been adequately tested or consulted on in the open way that would be expected in relation to potential reforms of this importance. Departments do not consider that a select committee process without more meets this expectation.

Departments are of the view, therefore, that if additional measures are to be considered, the best way to proceed would be for the Treasury to carry out an open public consultation process based on Option 5 in the RIS, reporting back to EGI by 30 June 2011.

Ministry of Justice comment on constitutional implications

47. The Ministry of Justice, supported by Crown Law, the Department of Conservation, Parliamentary Counsel Office, and the Clerk of the House of Representatives, made the following comment: The Ministry of Justice considers that the Bill is constitutionally significant as it would affect the way in which public power, including parliamentary power, is exercised. The Bill's constitutional implications have not been adequately highlighted for public consultation.
48. The Bill would shift the balance of power between the three branches of government, through requiring all legislation to be assessed for compatibility with the principles in the Bill. The courts would determine the meaning of those principles. They would also have new powers to make declarations of incompatibility and to interpret legislation to be consistent with the principles. These declarations of incompatibility could draw the courts into what are ultimately political decisions. Courts would have to adjudicate on policy choices of legislators. This has long been considered to fall outside their sphere of power and expertise, particularly given the non-elected nature of the judiciary.
49. Some of the principles appear to overlap with rights in the New Zealand Bill of Rights Act (BoRA) and the Human Rights Act 1993 (HRA). However, the interrelationship between BoRA and HRA rights and the principles is not sufficiently clear. This has implications for how each are interpreted. It could make litigation on these issues more complex. In addition there would be greater complexity and unnecessary duplication between the BoRA vetting and Bill certification processes.

Comment from Te Puni Kōkiri

50. Te Puni Kōkiri notes that the current guidelines issued by the Legislation Advisory Committee require Treaty of Waitangi issues to be taken into account. The Regulatory Responsibility Bill, however, does not include compatibility with the Treaty of Waitangi amongst its listed principles. Any principles or criteria used to assess legislation should include the Treaty of Waitangi. This is the case whether the proposal is legislative or administrative. To omit reference to the Treaty of Waitangi as a principle against which legislation is to be assessed would put the Crown at risk of breaching the Treaty.

Other departmental comments

51. Key themes from departmental consultation that are not reflected in the comments above were that:

Overall

- The need for the Bill has not been established – the safeguards around the making of New Zealand regulation are comparatively good, and the quality of New Zealand's regulation is relatively high (as evidenced by the 2010 World Bank Doing Business Survey).

- It is not clear how the Bill's proposed principles/certification/declaration structure is expected to improve the quality of New Zealand's regulation.
- The scope of the Bill (ie Acts, regulations, and tertiary legislation) is too broad and would capture much minor and technical legislation, where additional safeguards would create more costs than benefits.
- The recent changes to the Regulatory Impact Analysis regime and the introduction of scans, plans, and the regulatory review programme should be given the chance to bed in before we contemplate further changes.
- The Treasury's preferred option (Option 5) requires further work to determine whether it is likely to be effective in improving regulatory quality.

Principles

- Many of the principles, particularly the principles relating to property rights and protection of individual liberties, are unclear in application and could potentially affect a significant amount of legislation. Furthermore, the principles are likely to conflict with promises made in election manifestos.
- Legislating the principles could cause them to be given undue weight relative to other considerations in policy processes and could hold back beneficial policy.
- The unclear meaning of some of the Bill's principles and their novelty (e.g. the property rights principle), the way in which they might be interpreted and applied by the courts, and the opportunity for legal challenge by private interests could result in:
 - a. significant levels of ongoing regulatory instability and uncertainty for business and investors; and
 - b. conditions that increasingly favour incumbents over market entrants, thereby weakening competition and overall market efficiency.
- The Bill's principles do not recognise the benefits of aligning New Zealand's regulation with international norms and best practice, or coordination initiatives with our trading partners, including Australia.

Costs and risks

- The costs of reviewing legislation for compliance with the principles would be significant. Smaller departments would struggle to carry out the task effectively, and all departments would benefit from a centralised certification team within government (such as the Bill of Rights vetting team in the Ministry of Justice). The certification requirement will impose substantial time costs on Ministers and Chief Executives.
- The certification requirement in the Bill could cause tension between Ministers and Chief Executives and change the nature of that relationship over time. However, one benefit of the Bill is that it could increase the accountability of Chief Executives for the legislation they are responsible for.

- The potential benefits of declarations of incompatibility do not seem to outweigh their costs in terms of officials' and courts' time.
52. A number of departments wished to record further comments, some of which expand on the bulleted points above in more detail. These further comments are set out at Appendix 1.

Response to departmental comments

The need for legislation

53. Some departments have commented that they do not see a need for regulatory responsibility legislation, as New Zealand already has a good regulatory environment. This view contrasts with what I and the rest of the Government hear from businesses, which is that the level of regulation they are subject to is increasingly difficult to manage. It is true that we already have a number of regulatory management processes in place, but so far none have had a noticeable effect on either the quality or the quantity of regulation. I note that the Treasury's analysis in the attached Regulatory Impact Statement supports my position that existing arrangements are insufficient to ensure regulatory quality.

The principles

54. A number of departments have commented that the principles of responsible regulation in the Bill are not appropriate. These comments surprise me, as the principles are taken from the LAC Guidelines and common law sources such as Magna Carta. In that sense, they are already part of our law. It is possible that some of the principles could be better expressed, but the appropriate time for this assessment to occur is once the Bill is before a select committee. Any issues relating to the clarity and application of the principles is best dealt with there, in an open forum.

Compliance costs

55. Many departments have raised the issue of how much it will cost them to comply with the Bill. I consider that the Treasury's estimate of the costs of the Bill is too high. What the Bill is asking departments to do is to consider whether regulation, both new and existing, is consistent with legal principle. I would expect this task to be something that departments are able to carry out without significant additional costs. If I am wrong, this raises serious concerns about departmental capability and only serves to underscore the need for change in our regulatory management practices.

Role of the courts

56. Some departments have commented that the Regulatory Responsibility Bill would alter New Zealand's constitutional balance by giving the courts a mandate to inquire into policy considerations. These concerns are overstated to some extent – the line between "law" and "policy" is not as bright as some departments have suggested, and in any case courts in New Zealand have been dealing with policy concerns for years in the context of the Bill of Rights Act. Having said that, the Bill does give a new role to the courts, and to that extent brings about constitutional change. However, constitutional change in and of itself is not a bad thing, and this particular incremental change has the benefit of adding rigour and principle to the lawmaking process.

57. Treasury's assessment is included in the attached Regulatory Impact Statement (at Appendix 3). Treasury does not support the Regulatory Responsibility Bill and has developed an alternative proposal (Option 5).

Financial Implications

58. It is difficult to identify the costs associated with this proposal. Treasury preliminary analysis suggests that the certification requirements introduced are likely to cost in the order of \$3-4m a year.¹ Other costs will be associated with the declaration of incompatibility procedure, particularly for the courts and Crown Law. Cases involving declarations of incompatibility brought as supplementary to judicial review proceedings might add several hundred thousand dollars to the cost of defending each proceeding. An application brought as a stand-alone proceeding could cost around \$500,000 to defend. The total cost of the declaration of incompatibility procedure will depend on the number of declarations that are sought. Treasury's alternative proposal would also have cost implications.
59. The Bill as drafted by the Taskforce involves some fiscal risk for the Crown. As noted above, courts are directed to prefer interpretations of legislation that are consistent with the Bill's principles. Interpreting legislation consistently with the principle that adequate compensation should be paid for regulatory takings may mean reading in a right to compensation from the Crown where none was intended. Whether this provision is appropriate is an issue that can be discussed when the Bill is examined by a select committee.

Human Rights, Gender and Disability Implications

60. This paper has no human rights, gender or disability implications.

Legislative Implications

61. This proposal involves the introduction of a Regulatory Responsibility Bill, which when implemented, will affect the process for creating, amending and reviewing all primary, secondary and tertiary legislation.

Regulatory Impact Analysis

62. The Regulatory Impact Analysis (RIA) requirements apply to the proposal in this paper and a Regulatory Impact Statement has been prepared and is attached at Appendix 3.
63. The Treasury's RIS review panel has reviewed the RIS prepared by the Regulatory Quality Team in the Treasury, and has given the following assessment:

"The information and analysis summarised in the RIS partially meet the quality assurance criteria.

¹ This figure refers to the policy work necessary to certify whether new pieces of legislation comply with the principles. It does not include time spent on resolving issues that arise. It also does not take into account agency work in reviewing the stock of legislation. Analysis that the Ministry of Agriculture and Forestry has carried out independently from the Treasury suggests that this figure is likely to be on the conservative side, and that actual costs would be higher. The Ministry has recorded a comment in Appendix 1 to this paper to that effect.

The analysis is of high quality and reaches reasonable conclusions. It is as comprehensive as could be expected, given the limits on options considered (excluding non-legislative options and those legislative options that would involve significant constitutional change), the lack of experience with such legislation overseas, and the limited ability to predict how politicians and officials will react to the rules envisaged.

However, the lack of analysis of non-legislative options is in this case sufficiently important to preclude an assessment of the RIS as fully meeting the quality assurance criteria. The lack of analysis of non-legislative options is perhaps understandable given the Minister's strong focus on a legislative solution, as shown in the Cabinet paper the RIS accompanies."

64. I have considered the analysis and advice of my officials, as summarised in the attached Regulatory Impact Statement (at Appendix 3). I consider that my officials have overestimated the costs of the Bill while underestimating the benefits. The alternative Bill that they propose is substantially weaker and is not bold enough to get the improvements we need in the quality of New Zealand's legislation. I see no reason to think the Treasury's proposed solution would be particularly effective.
65. I am satisfied that the Regulatory Responsibility Bill, with any amendments that may result from the select committee process:
- a. Is required in the public interest;
 - b. Will deliver the highest net benefits of the practical options available; and
 - c. Is consistent with our commitments in the Government Statement "Better Regulation, Less Regulation".

Publicity

66. I will make an announcement at an appropriate time in my capacity as Minister for Regulatory Reform.

Recommendations

67. I recommend that the Economic Growth and Infrastructure Committee:
- a. **agree** to the adoption of the draft Regulatory Responsibility Bill proposed by the Regulatory Responsibility Taskforce as a Government Bill.
 - b. **authorise** the Minister for Regulatory Reform to take decisions on minor policy or technical issues that arise as the Bill is drafted.



Hon Rodney Hide
Minister for Regulatory Reform

Date: 2/2/11

APPENDIX ONE: DETAILED COMMENTS ARISING FROM DEPARTMENTAL CONSULTATION

Comment from the Ministry of Health

The Ministry of Health ("Health") supports initiatives which ensure the development of high quality legislation and contribute to good law-making processes. The Bill, as currently drafted, is unlikely to further those goals or improve the quality of legislation. For that reason, Health does not support the introduction of the Regulatory Responsibility Bill.

Health supports Treasury's analysis in the Regulatory Impact Statement and the reasons for its views. Health does not consider that new legislation is necessarily helpful to address concerns about legislative quality, with the overall standard of legislation more likely to be raised through ongoing improvements in the quality of policy development and regulatory analysis underpinning legislative reform. However, if a decision is made that legislation is required or appropriate, it would support Treasury's proposed option.

Comment from the Ministry of Foreign Affairs and Trade

MFAT has a particular concern that the proposed "Principles of responsible regulation" do not include a principle relating to compliance with international obligations. There are not infrequent instances where a legislative response by New Zealand is specifically mandated by our international treaty obligations. The draft Bill could see New Zealand unable to fulfil those obligations in a timely fashion or risk a court declaration that the legislation fulfilling these obligations is incompatible with the legislative principles.

For instance, United Nations Charter obligations require NZ to implement sanctions adopted by the Security Council against particular countries (such as, for example travel bans, asset freezes, or export restrictions). The legally binding nature of these sanctions requires NZ to implement them in legislation without amendment.

Another representative example is the Agreement between the Government of Australia and the Government of New Zealand concerning a Joint Food Standards System (the 'Food Treaty'). The Food Treaty establishes a joint food standards/regulation system that aims to facilitate the timely development, adoption and review of food standards appropriate for both Australia and NZ. NZ is obliged to adopt or incorporate, without amendments, any joint food standard established under the treaty. Once notified in respective Gazettes, such food standards are to take effect without undue delay. The Food Treaty also requires that neither country shall subsequently amend the food standards other than in accordance with the agreement. The draft Bill, specifically the additional certification process and the ability to challenge draft legislation as being incompatible with the expressed principles, has the potential to cause increased delay in the development and setting of joint food standards, which could be contrary to the obligations of the Food Treaty.

Comment from the Ministry of Agriculture and Forestry

The Ministry of Agriculture and Forestry (MAF) has significant concerns about the Bill, going to matters of potential unintended consequences, efficiency risks (duplication of existing processes), and significant new costs for departments administering legislation. MAF notes that much of the legislation it administers has an enabling rather than restrictive effect and that delays in tertiary instruments (such as may occur if the Bill is enacted) could have the effect of stifling business and trade opportunities. In respect to departmental costs, it is estimated that the additional cost to MAF in the biosecurity and animal welfare contexts alone (based on the volume of legislative work that will need to be undertaken in an average year) would be \$770,000. MAF is also concerned at the implications the Bill may carry for the setting of, and giving effect to Australia / New Zealand joint food standards,^[Withheld - s.6(a)]

MAF notes that legislative instruments issued by territorial authorities have wide ranging 'reach' and effect on individuals and businesses, but that the Bill appears to both include and expressly exclude territorial authorities. This is an important matter of scope that requires clarification. If the Bill proceeds, MAF suggests that consideration be given to including an exemption in the Bill for international legislative instruments and for minor technical or administrative legislative instruments, particularly those of limited consequence (as would be defined in the Bill), effect, scope, scale, purpose or duration.

Comment from the Office of the Clerk of the House of Representatives

While the Clerk of the House of Representatives considers that there is scope for improving legislative quality, she does not consider that the significant constitutional reform embodied in the Regulatory Responsibility Bill is the answer.

The Clerk agrees with the Regulatory Responsibility Taskforce that there should be stronger requirements for policy-makers to confront regulatory effects of proposals at an early stage, preferably before bills reach Parliament. The Clerk has a number of suggestions for achieving this and for improving legislative quality through adjustments to, and additional support for, the procedures of the House and select committees. The Clerk proposes to develop these ideas in conjunction with relevant Government bodies. This approach would be cost-effective, and would strengthen parliamentary scrutiny without raising the substantial constitutional implications and uncertainties that would flow from the Regulatory Responsibility Bill. Legislation is neither justified nor desirable in this instance.

Comment from the Ministry of Economic Development

Features of the Bill that lead to improvements in the processes for determining the need for and design of regulation where these are currently poor could result in positive outcomes for business, such as lower compliance costs. However, the Ministry of Economic Development (MED) considers that there is a significant risk that the Regulatory Responsibility Bill could also have a negative impact on business and the wider economy.

The lack of clarity associated with the meaning of some of the Bill's principles, the way in which they might be interpreted and applied by the courts, and opportunity for legal challenge could create a regulatory environment with significant levels of ongoing instability and uncertainty for business. Regulatory uncertainty is a key cost to

business, particularly small business, and is a significant barrier to investment and innovation.

In addition, some of the Bill's principles (e.g. the property rights principle), the opportunity for private interests to take legal action (particularly well resourced incumbents), and the possibility that the Bill will result in government's becoming slower or less willing to change the status quo could lead to conditions that increasingly favour incumbents over market entrants, thereby weakening competition and overall market efficiency.

MED is also concerned that none of the Bill's principles enable recognition of the benefits of aligning New Zealand's regulation with international norms and best practice, or coordination initiatives with our trading partners, including Australia. This creates reputational risks to New Zealand and potentially compromises our ability to forge international relationships that will facilitate innovation and promote economic endeavour.

MED considers that, from the analysis provided, it is not clear that any benefits for business and the wider economy resulting from the Bill will exceed the potential costs and risks.

Appendix 2 Regulatory Responsibility Taskforce's proposed Bill

Regulatory Responsibility Bill

Taskforce Bill

REGULATORY IMPACT STATEMENT

**REGULATING FOR BETTER LEGISLATION – WHAT IS THE POTENTIAL OF A
REGULATORY RESPONSIBILITY ACT?**