Taituarā
Local Government Professionals Aotearoa

Legislators Gonna Legislate

A submission in respect of
Have your say on the proposed Regulatory Standards Bill

December 2024

What is Taituarā?

Taituarā — Local Government Professionals Aotearoa (Taituarā) thanks the Ministry of Regulations (the Ministry) for the opportunity to submit in respect of *Have your say on the Proposed Regulatory Standards Bill* (the proposal).

Taituarā (formerly the NZ Society of Local Government Managers) is an incorporated society of just over 1000 members drawn from local government Chief Executives, senior managers, and council staff with significant policy or operational responsibilities. We are an apolitical organisation. Our contribution lies in our wealth of knowledge of the local government sector and of the technical, practical, and managerial implications of legislation.

Our vision is:

> *Professional local government management, leading staff and enabling communities to shape their future.*

Our primary role is to help local authorities perform their roles and responsibilities as effectively and efficiently as possible.

Central government regulatory processes need significant improvement.

"The time needed to deliver good legislation is often underestimated, This results in time pressure and can have a critical impact in multiple areas including clear identification of the policy objective, good policy development, and the processes to test and quality assure legislation to minimise the risk of errors and unintended consequences.

In particular, rushing legislation and skipping steps increase the risk that we get it wrong, and the legislation is ineffective or unworkable in practice."

Hon Judith Collins KC, Attorney-General
An excerpt from a letter sent to Cabinet colleagues in mid-2024

Local government is one of the more regulated sectors of the economy. Local government is subject all of the legislation that applies to other economic agents - the Companies Act, tax, and employment legislation.

In its 2014 inquiry report Local Government Regulation the (now defunct) Productivity Commission noted that the so-called local government regulatory problem was in fact a central government problem. Taituarā welcomes the proposal any steps that can be taken to improve the quality of regulations is welcome

We see three main areas for gain in the way that central government makes regulation. These are:

- the quality of regulatory impact analysis
- engagement, especially that with the local government sector and
- inconsistent approaches to implementation needs.

We are sceptical that the proposed Bill would have improve regulatory standards.

"It is critical to remember that judges do not make the law. Your political representatives make the law. Judges can strike down laws where they violate constitutional principle, but ultimately Parliament can override this. Basically, you get the laws you vote for."[1]

Parliament is sovereign. Within the (very) broad constraints of the constitution (much of which is convention, custom, and practice) and with a final royal assent (which, to our knowledge has never been withheld in this country), Parliament is free to legislate as it will, subject only to judicial review and some limited rights to hold certain acts incompatible with statutes such as the Bill of Rights.[2]

And because Parliament is sovereign, proper regulatory analysis, an evidence base, and good engagement are always likely to take second place to the political imperatives. As we observe on the front page of this submission Parliament is unlikely to cede any real control over their ability to legislate.

The proposed Bill would provide some principles to judge good practice against and an independent body that could provide a free and frank assessment of whether these have been met But there are no real sanctions for a failure to meet the standards, not would there ever be. The likelihood is therefore that the Board's findings and recommendations would be treated in much the same way as conclusions that a regulatory impact statement i.e. only a few submitters engage with such a finding and during the Select Committee process and those who prepare the Bill and RIS simply say "it was a Ministerial decision".

The Board may also have other roles in supporting professional development again by bringing a quasi-independent perspective. But even here, the Public Service Commission and individual departments could, and should be providing this training.

The remainder of this submission has been prepared on the assumption that some form of Regulatory Standards Bill proceeds.

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[1] NZ Bar Association 'The Government and the Law' last retrieved on 16 December 2024 from .

[2] As a case study of how effective these mechanisms are in practice consider the last such declaration i.e. that a voting age of 16 is incompatible with the Bill of Rights. Parliament received the declaration, referred it to a Select Committee, and subsequently rejects the Committee's advice. While there was at least a debate about the declaration one is left asking 'so what'.

Any Bill should <u>not</u> extend to the local government sector.

The proposal focuses mostly on the actions and decisions of Ministers and Crown agencies. We can find little that refers in any way to local government – and that is as it should be.

Local government's primary regulatory instruments are bylaws and the occasional plan or policy that has regulatory force (the District Plan under the Resource Management Act being one such example, class four venue policies under the Gaming Act being another).

We submit that the requirements on local authorities when making regulations are far more stringent than is the case with central government. For example, in addition to avoiding inconsistency with the Bill of Rights Act, bylaws under the Local Government Act must:

- demonstrate that the bylaw is the best way of resolving the problem or issue (including that the bylaw is a proportionate response to the problem or issue)
- demonstrate that the bylaw is the best form of bylaw
- undertake mandatory consultation (though there is discretion in the Local Government Act as to how consultation occurs, there is no discretion as to whether. And the choice of process is itself justiciable via judicial review. Other bylaw making powers do specify particular processes.

A failure at any of these steps will see a bylaw overturned on judicial review. The Courts have frequently held that local government 'is not in high policy terms, the alter ego of central government'.
By comparison, a Ministerial direction not to prepare a RIS or preparing a deficient RIS is, at most, worthy of a note in the documentation that accompanies the Bill. As we shall see decisions not to engage or to engage in a token way while less common than it was, is still all too frequent.

The RMA goes a step further in its procedural and analytical steps and allows for merit-based appeals i.e. the Environment Court can and does substitute its own judgement for that of a local authority.

The last attempt to legislate regulatory standards[3] did include local government. We submit that this would be 'overkill' – local government is already held to higher procedural and analytical standard than central government.

[3] This was the Regulatory Standards Bill 2021 – a Bill that we understand did not proceed past Select Committee stage.

Recommendation: Scope

1. That any Regulatory Standards Bill not extend to the local government sector.

Any Board requires a stronger degree of political separation, and a clearer statutory definition of skills.

We accept (reluctantly) that recourse to the Courts is not a viable option, and therefore an independent Board having oversight over the maintenance of regulatory standards. Injecting the Courts into this process would politicise the judiciary – akin to the Federal Court system in the United States. An independent Board provides a lower cost means to raise concerns – going through the court system would be the preserve of big business and industry/sector associations. We also observe that some industry/sector associations may be reluctant to take judicial action (going to an independent Board may be less damaging to relationships with Ministers).

The review and critique of Government regulations carries a strong element of the political. The Board and the Act itself is unlikely to have any longevity after a change of government if it is seen as overtly political.

The Ministry must consider how the maximum degree of political separation can be achieved. There are several options for doing this. One, slightly unconventional option might be to treat the Board members as Officers of Parliament (and therefore requiring support from all parties). A lower-level option might simply be to require the Minister of Regulation to consult with the leaders of all parties represented in Parliament as a part of the appointment process.

The appointment process must be an inclusive one. Whoever makes the appointment will need to seek the views of a wide range of stakeholders including business, Māori and (not least) local government.

We agree that the Board would need a mix of skills of expertise. We agree legal and economic expertise would be necessary but consider that these are insufficient on their own.

The Board as a collective needs expertise in te Ao Māori, tikanga Māori and te Tiriti. Expertise from the private sector, while useful, is not sufficient – the Board needs knowledge of the policy-making process including regulatory stewardship, implementation, and evaluation. The Board should have some access to the

perspectives of regulated sectors/industries including businesses (both big and small) and local government. These skill sets should be specified in legislation.

Recommendations: Regulatory Standards Board

That:

2. **the Ministry further consider how the proposed Regulatory Standards Board might be established with the political separation necessary to promote the longevity of the legislation and the Board**
3. **the Minister (or whichever agency is making appointments to the Board) be required to engage with representatives of the business sector, Māori, and local government**
4. **that the Regulatory Standards Bill specify that the Board needs to collectively possess skills in law; economics; regulatory stewardship, implementation, and evaluation; te Ao Māori, tikanga Māori and te Tiriti; and the perspectives of regulatory sectors/industries.**

Pockets of good engagement practice exist, but central government engagement practice is inconsistent in its existence and quality.

The local government sector, and Taituarā itself would see engagement is the most significant area for gain, and something that both the Board and the Bill itself can do something to approve.

Our observation of regulatory impact statements is that where weaknesses exists they tend to fall into two categories: deficiencies with the evidence base (which we will come to shortly) and deficiencies with, or a lack of engagement.

As we prepared this submission a Newsroom report observed that "In some cases, officials told ministers that though there had not been enough time to consult with external experts, communities and Māori communities, the select committee process would present an opportunity for that consultation to occur."[4]

Statements such as these overstate what Select Committee processes can actually accomplish. Select committee processes refine and improve Bills; they make amendments that are of a technical and practical nature. They do not, and in our view are not intended to, challenge the headline policy intent of a Bill. Where significant amendments to headline policy are made it is always the result of decisions being made at Cabinet level following political lobbying.

[4] Newsroom article "Official concerns about haste and dearth of evidence in Government's first year" downloaded from ***Click to read*** on 30 November 2024.

It is not enough for Ministers to say 'we just won an election' - people vote for parties and either for manifestos as a whole or for an individual policy. And in any case an election result cannot indicate practical or technical concerns with a policy.

The Ministry is therefore right to elevate the importance of consultation to the status of a principle for inclusion in the Bill. The Ministry might further consider looking at the principles of consultation as spelt out in section 82 of the Local Government Act 2002, if not as an expansion of this principle, then as the basis for a code of good practice.

But we would actually take this a step further. Consultation is a specific and transactional process that has acquired particular legal meaning through case law (e.g. the decision of McGechan J in *Wellington International Airport Ltd vs Air New Zealand)*.

Consultation is a two-way exchange of information. In the context most relevant to this Bill, consultation consists of a Government agency tabling a proposal, and the consulted party expressing a view.

There is a time and a place for that of course. But the best legislation comes from an earlier and wider involvement in the process back at the very beginnings (e.g., in the problem definition phase). We submit that the Regulatory Standards Bill should encourage regulators to recognise that consultation is but one tool in the toolbox and encourage approaches such as co-design. The principle at the bottom of page 22 should therefore be referring to engagement.

Relationships between central and local government play out or should play out at two levels. The two levels complement and need not duplicate each other. The first is between Ministers, Parliament and with LGNZ as the organisation that represents councils as bodies corporate. The most formal manifestation of this relationship is the annual Central/Local Government Forum that sets the general direction for the relationship and focuses on the headline 'is the general intent of this policy a good idea'.

But there is a second level to the relationship. This is between officials and focuses on how the headline policy can be made to work most effectively on the ground. Contact between officials (including between Taituarā and its working parties provides a great deal of information which better informs the consideration of options during the policy development process and makes for better implementation of policy.

From our standpoint, when central government engages successfully with the local government sector it usually has the following attributes:

- clear objectives for a proposal or a clear statement of the problem or issue at hand
- a clear statement of what the engagement is intended to achieve (for example stating that the objective is a technical input), and what elements are open to feedback and what might be a Ministerial bottom line
- engagement occurs early and throughout the policy and legislative development process
- the process allows sufficient time for dialogue between central and local government – we have received proposals for review as late as 3pm the day before papers were to be lodged
- recognition that 'how' a policy works and is implemented is critical to the success of a particular policy or piece of legislation. Techniques such as engaging on an exposure draft of legislation can be an effective means of identifying glitches (such as new provisions that do not interact well with existing provisions) and other issues that may not surface until a Bill is put into legislative language. This can help save scarce time in Select Committee and in the House
- the officials have sufficient subject knowledge both of the specifics of the proposal and of the sector. For example, officials engaging with the sector]should be aware of the local government budget cycle and the optimum timing for proposals to 'arrive on local authority desks'
- the process involves a sufficiently representative grouping within the sector. One of the behaviours we have observed is that when time is short, officials rely on one or more of Auckland Council, Wellington City Council, or Christchurch City Council as being representative of the sector as whole. These councils have the resource to devote to implementing a particular matter and often have staff who specialise in a particular area. These attributes are not shared by smaller local authorities who may differ significantly in terms of their economic, social, and environmental make-up and who may be very differently affected by proposals that find favour, or disfavour, in a metropolitan setting.
- useful information about the costs and benefits of the proposals for communities – including local authorities. Cost-benefit analysis tends to focus on the impact on businesses – not realising that a cost to a local authority is a cost on customers or residents (be they a business, household, or some other agent).

One of the most common responses we get when questioning any engagement process or timeframe is "Oh – Ministers dictate engagement". While we note that mid-tier managers are often also a source of time pressures as materials 'sit on their desk' we agree that Ministers do set the tone.

That being the case Ministers should be prepared to take more responsibility for their decisions Cabinet papers are exhaustive in their listing of the Crown agencies that have been involved in the development of the proposal and any dissenting opinion. The lack of engagement is a matter that the Board should be enabled to report upon and make recommendations.

Ministers should disclose what engagement has been undertaken with non-government agencies and a synopsis of the feedback. Alternatively Ministers should 'own' their decisions not to engage by disclosing these decisions and their reasons why. In a similar vein, the regulatory impact statements should contain an expansion on the engagement and what has been said – while the better statements do this, practice is far from consistent.

Recommendations : Engagement

That:

5. **the proposed principle covering the importance of consultation be strengthened to refer to the importance of engagement**
6. **the Bill include a series of principles of good engagement based on section 82 of the Local Government Act**
7. **Cabinet paper requirements be strengthened to require Ministers to disclose what non-Government agencies have been consulted (and if none has been undertaken why), and a synopsis of the feedback they gave**
8. **regulatory impact statements be strengthened to require a description of the engagement undertaken and what feedback has been received.**

Ministers must publicly 'own' the deficiencies in the evidence for the proposals they submit to Parliament.

"In 57 percent of cases, officials pointed to data and evidence as a problem. In some cases, this was a lack of available data or evidence, in other cases officials said the available data did not support the Government's proposed regulations or legislation."[5]

"There is limited evidence to inform the development of these proposals, and the timeframe within which the proposals have been developed has restricted the ability to assess multiple options. As a result the problem analysis and option assessment of

[5] Newsroom, "Official concerns about haste and dearth of evidence in Government's first year"

specific proposals rely on assumptions that are not or are only partially tested. The extent of uncertainties and risks are identified and discussed for each proposal.[6]"

The two epigraphs that open this section point to a problem that is both historic and potentially growing.

We are not naïve – at its best, party politics is grounded in different ways of thinking about real world problems. Ministers are entitled to bring their particular world view to an issue. But regulation based on faulty evidence can create major cost and compliance burdens and have the potential to be with us for some time. Ministers should be transparent about the factual basis (or lack thereof) of their proposals and be accountable for their decisions. The Cabinet paper is the appropriate place to do this – in these papers Ministers are exposing any issues to their Cabinet colleagues first.

Regulatory impact statements include officials comment on the evidential basis in general terms, usually at or near the front of the statement. Their ability to comment in depth on the evidence base in such a document is limited. The release of the evidence base in the same 'proactive' manner as RIS are released can aid transparency – for example evidence might support some aspects of a proposal and not others.

Recommendations

That:

9. **the proactive release of regulatory impact statements be required by a comment to publicly release the evidence on which policy proposals are based**
10. **Cabinet papers be required to include a comment from the Minister regarding the evidence used in the preparation of policy proposals, and their reasons for considering that evidence a basis to proceed**

Chief Executives must be made more accountable for the regulatory stewardship of the agencies they lead.

The Treasury notes that the "Regulatory stewardship is the governance, monitoring, and care of our regulatory systems. Regulatory systems are intended to be assets for

[6] Department of Internal Affairs (2012), *Regulatory Impact Statement: Local Government Amendment Bill*, page 1. Note that this Bill covers the change to the basic framework under which local government operates – including the exercise of regulatory functions and comes from what is an official's "disclaimer of opinion" on aspects of the package.

our communities but, like most other kinds of assets, they need regular ongoing care and maintenance if they are to deliver best value to New Zealanders."

Regulatory stewardship aims to ensure that all the different parts of a regulatory system work well together to achieve its goals, and to keep the system fit for purpose over the long term. Effective stewardship requires government agencies to be proactive and collaborative, so that regulatory systems adapt to changing circumstances in a timely way."

Departments should be considering how they exercise their responsibilities to be effective regulatory stewards of a regulatory regime at the time a new regulation is first enacted, or significantly amended.

In our observation Departments give little obvious attention to the monitoring and evaluation of legislation. Statutory provision for evaluation is rare. The one case we can recall (the so-called operational review of the Local Government Act 2002) was hurriedly inserted at the last-minute following a near-revolt by one of Government's support parties. Little monitoring information is made public.

Departments should be preparing plans for their stewardship, including their monitoring and evaluation strategies, before regulations are progressed. While not needing to be part of a regulatory impact statement, we consider that all proposals needing legislation should be accompanied by an evaluation and stewardship plan linked to the Legislative Statement that is released on introduction of a Bill. For other proposals preparation at the Cabinet paper stage is sufficient,

Section 52(d)(iii) of the Public Service Act 2020 places public service Chief Executives under an obligation to "(maintain) the currency of any legislation administered by their agency". While a little oblique, this is a reference to regulatory stewardship (though it might be amended to specifically include regulation). Our observation is that this requirement tends to get lost alongside the other requirements of s52, especially those of s52(d).

It is a cliché but 'what gets measured, gets done'. The best way to ensure that Departments give regulatory stewardship due attention that the leaders of these agencies are held accountable for delivering upon the evaluation and stewardship plans. The Ministry should refer this to the Public Service Commission to develop a performance measure or measures.

One final, possibly radical, thought regarding stewardship. Local government's powers to make bylaws are its most frequently used regulatory tool. Local authorities are required to exercise a degree of regulatory stewardship by having to review each

bylaw within ten years. Unreviewed bylaws lapse. Is there any valid reason Parliament might not do the same?

Recommendations: Regulatory Stewardship

That:

11. **all proposals involving the creation or amendment of regulation must be accompanied by an evaluation and stewardship plan. The plans would be linked to the legislative statements that must accompany legislation.**

12. **the Public Service Commission develop performance measures to hold public service Chief Executives accountable for regulatory stewardship.**

Regulators need a stronger direction to be more thoughtful and proactive in their planning for implementation needs.

Implementation is the 'sharp end; of the policy process - its where what can be viewed as a theory or hypothesis is turned into a result (of whatever sort). Even the best designed policy will not achieve optimum results if its poorly implemented.

Our observation is that central government implementation and support for others to implement legislation is 'spotty'. It tends to command less attention at Ministerial level and (surprisingly) at senior management level. Implementation can also be 'crowded out by issues of the day. The Department of Internal Affairs was to develop a range of public resources around the Local Government Act 2002 – most of this work was shelved to divert resources to a(nother) review of dog control law following a high-profile dog attack.

We can cite examples where central government has worked with the sector on training and implementation needs. The present water reforms may provide a such a case – the Department of Internal Affairs has provided (high level) guidance on service planning, a template of a plan, and is planning to deliver further guidance on the new service delivery models.

But all to commonly implementation needs are overlooked or left for others to develop. The headline example is the Resource Management Act 1991 where a diverse range of commentators (for example, the Bill's creator Sir Geoffrey Palmer and the Randerson Inquiry) cite the lack of national guidance and resources as factors that have worked against the successful implementation of that Act

We submit that implementation is as 'mission-critical' as the right problem definition. Ministers and senior public service management need the right incentives to give it due attention – quality implementation of policy should be an expectation elevated to the status of a principle.

Some years ago Taituarā developed a set of eight principles of effective implementation that set out our, and the sectors' definition of what a good process of identifying and resolving implementation needs looks like. Incorporating these, or similar into the standard expectations on policy makers will promote better overall outcomes.

The assessment of Implementation needs is often left until the later stages of the policy process and is less well-resourced than development of the policy itself. Effective regulatory implementation needs to start alongside the identification of the policy issue or opportunity and the generation of options. If there are reasons why a particular policy option cannot be implemented they need to be addressed at an early stage (for example removing a legislative barrier). If there is no practicable way to address these matters the sooner the option is ruled out of consideration the better!

At a minimum, poorly implemented regulation has a cost in time and money, both in Government and in the wider economy. Such regulation can severely impact the wider social and economic outcomes we seek as a nation. Agencies as Treasury and the Department of Prime Minister and Cabinet exercise considerable oversight of central government's regulatory performance.

Treasury scrutiny of regulatory impact statements can only be aided by requiring Ministers and Departments to formally discuss how they intend to implement, or support others to implement their regulatory proposals. We suggest that there is no need to create a further documentary requirement and that the regulatory impact statement is an appropriate place to disclose these intentions.

That might then be added to with a requirement to summarise the key aspects in the relevant Cabinet papers. It seems odd to us that a Cabinet paper requires a Minister to disclose how and when an initiative will be communicated yet says nothing about how an initiative will be implemented *as a matter of course*.

Recommendations: Implementation

That the Ministry:

13. **add a further principle to the Bill that would strength the expectations on Crown agencies to have developed a plan for implementing new legislation before enactment**
14. **note the eight principles of effective implementation contained in the Appendix and use these principles as the basis for its support and advisory work to support effective regulatory implementation**
15. **Regulatory Impact Statements requirements be strengthened to require an implementation plan for all proposals with a regulatory impact**
16. **Cabinet paper requirements be strengthened to require that proposals with a regulatory impact to include a statement setting out the key aspects of the implementation plan.**

Appendix: Eight Principles of Effective Implementation

1. ***Start early*** - officials should not turn up in the office the day after the enactment of the legislation and start thinking about what to do about implementation. While the roll-out of implementation support programmes necessarily follows enactment (which in turn follows the policy advice), the design and development of the implementation programme should start earlier. Elements of this should be concurrent with the policy and legislative processes. Indeed, it is difficult to see how a rigorous assessment of policy options can be undertaken without commencing the identification of the costs and practicalities of their being implemented.
2. ***Work with the stakeholders*** - for any legislative initiative impacting on local government there will be a range of groups with a stake in successful implementation. This includes not only the national sector organisations such as LGNZ and Taituarā but also related professional organisations, and a variety of occupational institutes and associations. Engagement with these stakeholders can do a lot towards achieving effective implementation.
3. ***A separate process*** - Taituarā notes there has been a generally increased willingness of central government to engage with local government during the process of policy development. While engagement with local government on implementation is likely to involve many of the same stakeholders, it should be set up as a separate project.
4. ***A single shared plan*** - Taituarā and other sector stakeholders will often see it as part of their role to support the implementation of the new legislation by local authorities (they may for instance have existing good practice guidance they will need to revise). If the actions of central government agencies and local government sector organisations are not co-ordinated in some way however, then there are risks that some work on some issues will be duplicated while others fall between the cracks. A single agreed common plan of action around the implementation process avoids these risks and is likely to lead to the most effective use of the available resources.
5. ***Use the proven technology*** - stakeholder organisations will generally have established and effective channels of communications with their constituents within local authorities. They may already have tools and guidance material that are widely known, recognised, and used within local authorities. Government agencies should be encouraged to use these rather than establishing competing channels and tools.

6. ***Clarity about audiences and needs*** - there are a range of audiences, spanning elected local authority members, managers, and hands on practitioners in the specific affected areas of work. Their needs and the best means of addressing them are likely to differ. For instance, we would argue that the technology developed by our Legal Compliance Programme is often a useful technology for meeting the needs of managers and practitioners, but it does not address the needs of elected members.
7. ***Linkage to the Select Committee process*** - if work on developing guidance material as part of an implementation programme is started early enough there are opportunities for this to feed back in a positive way into the Select Committee process. This reflects our experience with the development of the legal compliance programme modules. The detailed work undertaken to identify the practical means of complying with legislation sometimes highlights technical shortcomings in the legislation that is being worked on – gaps and disconnects, inconsistencies and contradictions, and areas requiring clarification. If the effort is made to start this work early, there is the opportunity for these sorts of issues to be addressed prior to enactment.
8. ***Life-cycle approach*** - once legislation is enacted there is a necessary ongoing maintenance task for the administering department. New issues may arise, areas of uncertainty or contradiction may come to light, provisions may be interpreted in unexpected ways by either practitioners or the Courts or both. The ability of a department to respond effectively and properly maintain the legislation depends on the strength of its feedback systems from users. Engaging openly with stakeholders on implementation can assist this by establishing the foundation of relationships that can ensure open information flows into the future.

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