

Regarding the Regulatory Standards Bill

Submission to the Finance and Expenditure Committee

June 2025



What is Taituarā?

"The lesson is not that regulation is not good or bad, but that bad regulation is bad."

Niall Ferguson¹

Taituarā — Local Government Professionals Aotearoa (Taituarā) thanks the Finance and Expenditure Committee for the opportunity to submit in respect of the Regulatory Standards Bill ('the Bill').

'Taituarā' is Aotearoa New Zealand's leading membership network for professionals working in and for local government. As an independent, apolitical organisation, Taituarā works proactively on the professional, technical, and practical aspects of policy, legislative, and regulatory change. Active, genuine, and early engagement with Taituarā ensures the Government gets the best advice to make its policies work effectively and ultimately results in quality policy, legislation, and implementation.

Local government is one of the more regulated sectors of the economy. The local government sector is subject to around 150 pieces of legislation that directly place some obligation, power, or duty on individual councils.

This includes the legislation that applies to other economic agents - the Companies Act, tax, and employment legislation. But it also includes a plethora of system legislation (the troika of the Local Government Act, the Rating Act, and the Local Electoral Act), and functional legislation (such as the Building Act and the Land Transport Management Act),

In its 2014 inquiry report *Local Government Regulation* the Productivity Commission noted that the so-called local government regulatory problem was in fact a central government problem. Any steps that can be taken to improve the quality of regulations are therefore 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.

Local government should be clearly excluded from the coverage of the Bill.

Some aspects of the Bill appear to apply to local government in that all secondary legislation is covered by the obligation to prepare consistency statements and get these reviewed.

¹ Ferguson (2012), *The Great Degeneration: How Institutions Decay and Economies Die*.

The Local Government Act establishes that the local government bylaws are secondary legislation and therefore arguably fall within scope of the Bill. It is not entirely clear what the intent was as the Bill refers to 'secondary legislation' in some places and 'secondary legislation subject to the scrutiny of Parliament' in others. We also observe that bylaws and other regulations may be brought before the Regulations Review Committee so therefore can be said to be subject to Parliamentary scrutiny.

We submit that the requirements on local authorities when making regulations are far more stringent than is the case with central government. Some of the clause eight principles are drawn from the Bill of Rights. Bylaws cannot be inconsistent with the Bill of Rights Act – and can be struck down by the Courts if they are. Additionally 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 specify particular processes.

The Courts have frequently held that local government 'is not in high policy terms, the alter ego of central government'. A failure at any of these steps will see a bylaw overturned on judicial review.

By comparison, a Ministerial direction not to prepare a regulatory impact statement or preparing a deficient RIS is, at most, worthy of a note in the documentation that accompanies the Bill.

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.

We submit that the extension to local government would be legislative 'overkill' – local government is already held to higher procedural and analytical standard than central government.

We further add, that extending this requirement to local government, blurs the accountability of local government to its community. In short the review process provides an unelected central government body with the authority to comment and

critique the policy decisions of a local authority without being involved in the policy or engagement processes through which the decision has been made. The findings of the Board, while having no direct authority, might also be used as evidence in any action seeking to overturn a bylaw.

We submit that clause 14 should be amended to expressly exclude secondary legislation made by local government. This would tailor the exclusion specifically to the requirements that apply to local government.

Recommendation: Scope

- 1. That the Regulatory Standards Bill be amended to clarify it does not extend to the local government sector.**

Individual liberties and property rights are important principles but must be leavened with wider considerations of public interest.

Regulation, like tax, is a necessary condition to living in an organised society. Regulation is intended to protect and support individual liberties and property rights of all. To that extent regulators take a broader view including economic, social, and environmental benefits – for example, competition law exists to mitigate the economic impact of monopoly provision. Protection of existing interests needs to be balanced against the interests of future generations as for example occurs in the Climate Change Response Act. If that cannot be achieved, the principles should be removed from the Bill altogether.

The wider impacts of regulation must be factored into any guiding set of principles. The public interest is not merely a reason to intervene (cl.8(j)(iii)), but also a strong consideration in the outcomes that regulation seeks to deliver. We join with Te Uru Kahika and some health sector submitters in calling for the inclusion of public interest as a principle in its own right.

Te Uru Kahika noted that *“Public interest should encompass both collective value (e.g. waterways that are suitable for swimming) and intrinsic value (e.g. biodiversity and the protection of threatened species). While individual property and freedoms are fundamental, they are not the only things that communities value. Weighing the public interest will always be nuanced and respond to social preferences. But the fundamental premise — that there are public goods upon which society is founded — should not be omitted or relegated to secondary consideration in a Bill as wide-ranging as this”*. We

agree and note that the weighting of public interest is and should be, exercised through the democratic process.

Recommendation: Public Interest

2, That the Regulatory Standards Bill be amended to include consideration of the public interest as a principle alongside those set out in clause eight.

Parliament needs to carefully consider how far the 'regulatory takings' principle might be taken.

Clause 8(c) is the Bill's equivalent of the so-called regulatory takings provisions i.e. any regulator making intervention that impairs property (the term used in the Bill) should compensate the owner for the impairment. We submit that this raises pragmatic and policy issues that would impede good regulation.

It has long been the case that the physical acquisition of land deemed necessary to support provision of a public work is compensable. This is the core purpose of the Public Works Act 1981 and its predecessors. The boundaries of the acquisition of land has been tested more recently in the context of managed retreat either after a disaster (such as the acquisition of the red zoned properties post the Canterbury earthquake) and in anticipation of future natural hazard risk.

On the other hand New Zealand historically has been characterised by high levels of government management of natural resources. Notable examples of this include the nationalisation of petroleum in 1937, geothermal resources in 1952–1953 and the expropriation of development rights in natural water in 1967. To our knowledge, no compensation was made in respect of those.

It is unclear what the term 'property' applies to. On the one hand it may mean land and building as per the Public Works Act. But if "property" extends beyond land to encompass permits, profits, or existing use rights, a change in any of which might impact future income streams² and therefore property values, then regulators might find themselves liable for any intervention that impacts upon their bottom line. To take some examples, a polluter might use this clause to claim that they should be compensated in the event of a change in their consent etc. And if compensated in this way, where is the incentive to avoid or mitigate pollution.

² Economic theory tells us all things being equal, the value of a property is equal to the net present value of the future income streams derived from the land. Any factor that leads to a loss of income from the land leads to a lower property value (i.e. impairment).

We observe that the United States experience with this type of regulatory takings clause has been to trigger an upsurge in case law around what impairment is. We invite the Committee to consider whether this is desirable.

Recommendation: Compensation

3. That clauses 8(c)(ii) and (iii) be deleted from the Bill

The Bill is silent on Te Tiriti.

We make several recommendations for additions to the legislation.

The first is that there is one significant aspect specific to the New Zealand context that has been consciously omitted. We refer to the omission of te Tiriti from the Bill.

Our submission on the (defunct) Principles of the Treaty of Waitangi Bill established that local authorities have obligations under te Tiriti. Specifically

“Article Two recognises both shared authority over resources and taonga and the rights of Māori to contribute to council decisions, including representation in the governance process. This is one of the major pathways through which local authorities have responsibilities to Māori to give effect to te Tiriti.

While not signatories to te Tiriti, the decisions that local authorities make can easily impact on the Crown’s obligations to Māori. Local authorities must be cognisant of these principles and identify the impacts that their decisions will have.

Additionally, there are some activities where local authorities are acting as delivery agents on behalf of the Crown. Many of the regulatory services involve exercise of some function on behalf of the Crown, some public health activities are also provided on a similar basis.”

The omission of te Tiriti from the Bill therefore concerns us, especially as this is a piece of legislation that goes directly to the processes through which other legislation is made.

The absence of a principle relating to te Tiriti from such legislation is that decision-makers exercising decision-making powers under this Bill would not be expressly required to consider te Tiriti. This extends to Ministers and officials in designing legislation; Ministers and Chief Executives when making consistency assessments; and the Board in reviewing consistency assessments or the stock of existing legislation.

Of course, the Bill does not expressly preclude decision-makers from considering te Tiriti. And there is the backstop of the precedent of Cabinet processes and guidelines such as the legislation guidelines and Cabinet Office circulars, that all guide/encourage decision-makers and act consistently with Crown obligations.

But central government custom and practice will never 'trump' legislation – and the exclusion of te Tiriti from this legislation creates uncertainty and ground for challenge. This uncertainty is likely to create additional costs over and above current arrangements in of itself.

We conclude this section by observing that it was less than helpful for so much of the Treaty Impact Assessment on this proposed legislation to have been withheld under the Official Information Act.

Recommendation: A Te Tiriti Principle

4. That the Bill be amended to add a principle that relates to te Tiriti and the regulatory system, that would require regulators to have regard to the principles of Te Tiriti when designing and administering regulations.

The Bill should direct Ministers and regulatory agencies to proactively plan for implementation needs.

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 inconsistent. It tends to command less attention at Ministerial level and (surprisingly) at senior management level and can be crowded out by issues of the day.

There are instances where central government has worked with the regulated sector on training and implementation needs. The present water reforms provide 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 too commonly implementation needs are overlooked or left for others. A range of commentators cite the lack of national guidance and resources as factors that have worked against the successful implementation of the Resource Management Act 1991.

Implementation is as ‘mission-critical’ as the right problem definition. Ministers and regulators need the right incentives to give it due attention – quality implementation of policy should be an expectation elevated to the status of a principle.

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!

Recommendations: An Implementation Principle

- 5. That the Bill be amended by adding a further principle to those identified as principles of good law-making that would read**
“regulators should develop a plan for the implementation of any legislative proposal before legislation is submitted for Parliamentary consideration”.

Effective regulatory stewardship should also be a principle.

The Bill is right to place obligations for good regulatory stewardship on Chief Executives. We concur with Treasury’s view that regulatory systems are community assets but need regular ongoing care and maintenance. Regulations have a life cycle, and can date rapidly due to technological, societal, and economic change. The result is that government agencies must be proactive and collaborative in their stewardship.

To take a small, but topical example (as it is local election year). The Local Government Member’s Interests Act disqualifies any person with contracts with a local authority of more than \$25,000 in any year from being an elected member of a local authority. That amount has not been reviewed since 1981 – and is now worth at least \$300,000 in today’s terms.

It is appropriate that the Bill places Chief Executives under obligations to ensure their agencies are exercising legislative stewardship. 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.

Statutory provision for evaluation is rare. We can recall two examples in local government law in the last thirty years. The (repealed) Water Services Entities Act 2002 provided for a both interim review of governance and accountability of water service entities after five years; and a comprehensive review after ten.

The Local Government Act 2002 included an operational review after five years. That review was assigned to the Local Government Commission. It included the impact of the greater level of empowerment provided in the Act (this still exists) and the effectiveness of the planning, consultation, and accountability provisions. Even this was hurriedly inserted into legislation at the last-minute following a near-revolt by one of the Government's support parties.

But this requires Ministers to be aware of their agencies' obligations and ensure they have time and space to monitor, evaluate, and do the non-headline grabbing amendments. On its own, clause 15 leaves this as solely the responsibility of the Public Service.

Ministers should be keeping the need to plan for regulatory stewardship in the back of their minds as regulations are progressed. In our view, that could be achieved by adding a further principle to those grouped under the heading Good Law Making.

Recommendations: Regulatory Stewardship

6. That clause eight be amended by including a further principle that "regulators should provide for the monitoring and evaluation of the regulations that they are accountable for" and "regulations should specify a process for their review and amendment".

The principles around consultation are adequate but need further statutory support.

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 improve.

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

A 2024 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.”

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.

Consultation has been elevated to a principle of good law-making. The Bill 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 beginning (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. Principle (i) should refer to engagement rather than consultation.

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. This 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 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.
- 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).

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.

Ministers should disclose what engagement has been undertaken with non-government agencies in their Cabinet papers and provide a synopsis of the feedback. Alternatively Ministers should ‘own’ their decisions not to engage by disclosing these decisions and their reasons why.

The appointment of a Board needs more legislative guardrails.

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.

We note that there is currently no obligation on the Minister to appoint people with any particular skill or knowledge sets, only the very generic 'have the skills and knowledge etc'.

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. If the obligations on local government are to stand, then the independent Board must also have expertise in local government and its operating environment

Recommendations: Regulatory Standards Board

That:

- 7. 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**
- 8. that the Regulatory Standards Bill specifies 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.**

The state of the system briefings should align with the Parliamentary term.

Clause 16 requires the Chief Executive of the administering agency to prepare a four yearly report on the state of the regulatory system for the responsible Minister, and that the Minister give it to Parliament.

Our question with this requirement was its frequency. It seems to us that there is an accountability to Ministers and to Parliament that should align with the term i.e. a report once each term of Parliament. These requirements would then align with the horizon of statements of intent, long-term insights briefings and the like. The prudent Chief Executive would align the reporting with a point in the middle year(s) of the electoral cycle.

Recommendation: State of the System Briefings

- 9. That the references to 'four years' in clause 16 be amended to 'three years' to align the preparation of state of the regulatory system briefings to the electoral cycle.**



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