NZCTU
Te Kauae Kaimahi

Submission to the Ministry for Regulation on:

Proposed Regulatory Standards Bill

Submitted by the New Zealand Council of Trade Unions Te Kauae Kaimahi

20 December 2024

This submission is made on behalf of the 32 unions affiliated to the New Zealand Council of Trade Unions Te Kauae Kaimahi (NZCTU). With over 340,000 union members, the NZCTU is one of the largest democratic organisations in New Zealand.

The NZCTU acknowledges Te Tiriti o Waitangi as the founding document of Aotearoa New Zealand and formally acknowledges this through Te Rūnanga o Ngā Kaimahi Māori o Aotearoa (Te Rūnanga), the Māori arm of Te Kauae Kaimahi (NZCTU), which represents approximately 60,000 Māori workers.

1. Introduction

1.1. The NZCTU does not object to improving the quality of regulation. However, the proposed Regulatory Standards Bill will not achieve this objective.

1.2. The proposed Bill, like its predecessors, is designed to reduce the quantum and reach of regulation, based on the simplistic idea that less regulation leads to better economic outcomes.

1.3. It seeks to quite inappropriately embed a set of libertarian political beliefs as standards of good lawmaking. This is fundamentally undemocratic.

1.4. It will increase the compliance cost of regulation for government agencies. This will be a drain on time and resources, negatively affecting the ability of public agencies to deliver the services New Zealanders actually require.

1.5. Finally, because it will be appointed by the sponsoring Minister, who has a publicly stated deregulatory bias, the proposed Regulatory Standards Board can be expected to function as a partisan tool.

1.6. The NZCTU recommends that no further work on the Regulatory Standards Bill should be undertaken. We support the submissions made by our affiliated unions, the PSA and NZEI.

2. The Bill lacks a compelling problem definition

2.1. The rationale for the Bill is that better regulation equals greater productivity. However, no analysis has been provided in the consultation document regarding the adequacy (or inadequacy) of New Zealand's current stock of regulation and regulatory quality assurance framework. Without this analysis, it is unclear whether the proposed Bill is addressing a real or imagined problem.

2.2. To justify the development of this Bill, it is incumbent upon the sponsoring Minister and the Ministry for Regulation to provide this analysis – i.e., to establish that there is a problem with the quality of New Zealand's regulation that is negatively impacting

productivity, and to establish that this is because of a gap in the regulatory quality assurance framework.

2.3. As noted in the consultation document, New Zealand's regulatory framework already has a number of quality assurance mechanisms for regulation. In identifying issues with the current approach, the consultation document states that "there is no one, single place to find these standards". We note that the proposed Regulatory Standards Bill will only compound this issue. The proposed Bill does not seek to bring these standards together in one place; it simply adds a grab-bag of additional "standards" to consider.

3. The principles

3.1. The proposed principles are intended to function in a similar way to the "principles of responsible fiscal management" first introduced in the Fiscal Responsibility Act 1994 and now found in section 26G of the Public Finance Act 1989. Although there is room for Ministers to depart from the section 26G principles, they have the effect of shaping public discourse on what is considered "good" fiscal policy.

3.2. It appears that the intention of the sponsoring Minister is for the proposed Regulatory Standards Bill to have a similar effect regarding what is considered "good" lawmaking. In this respect, the intention of the proposed Bill is to shape the "rules" of the regulatory "game".

3.3. Leaving aside the fact that there are already a host of standards and practices in place to ensure good lawmaking practice in New Zealand, a major problem with the approach outlined in the consultation paper – and in previous iterations of this Bill – is that some of the proposed principles reflect ideological beliefs, rather than technical standards.

3.4. Specifically, some of the proposed principles strongly reflect, and seek to embed in lawmaking, libertarian beliefs about individual property rights. These are fundamentally political claims, and seeking to embed them in a form of meta-regulation such as this is undemocratic.[1]

3.5. The attempted smuggling in of ideological beliefs as technical standards will also undermine the Bill's success, should it become law. For better or for worse, the Fiscal Responsibility Act has been successful because of a high level of bipartisan support for the fiscal management approach it laid out.[2] Given their ideological bias, many of the "principles" outlined in the proposed Regulatory Standards Bill will simply not be able to

[1] Jane Kelsey, "'Regulatory Responsibility': Embedded Neoliberalism and its Contradictions", *Policy Quarterly*, vol. 6, no. 2, 2010.

[2] For analyses of the success of the Fiscal Responsibility Act see, Derek Gill, "The Fiscal Responsibility Act 1994: The Astonishing Success of a Weak, Non-Binding Policy Instrument", in *Successful Public Policy: Lessons From Australia and New Zealand*, 2019; Robert Buckle, "A Quarter of a Century of Fiscal Responsibility: The Origins and Evolution of Fiscal Policy Governance and Institutional Arrangements in New Zealand, 1994 to 2018", *VUW Working Paper*, 2018.

achieve the level of bipartisan support necessary to make such a piece of meta-regulation work.

3.6. Below, we comment in more detail on several of the most problematic principles.

Taking of property

3.7. This principle sets prohibitive standards for the taking of property. Both "property" and "impair" are ill-defined. This means the clause may be interpreted over-broadly to cover any perceived negative impact that a regulation might have on an individual or company's portfolio of tangible and intangible property. This would include regulations that are viewed as negatively impacting an individual or company's ability to make profit. In this way, the clause echoes investor–state dispute settlement mechanisms that are found in free trade agreements internationally. In practice, such mechanisms afford private corporations' undue power to contest regulations taken by government in the public interest.

3.8. The requirement that "fair" compensation is provided to the owner would have the effect of further tilting the scales in favour of the current unequal distribution of wealth in New Zealand. Individuals and corporates with significant financial resources will use this principle (and others) to dispute policies that they view as negatively affecting their interests.

3.9. This principle would also enable the proposed Regulatory Standards Board to investigate and make determinations on the extent to which, for example, "fair" compensation has been paid. Questions such as these are properly dealt with at the political level, as they are often questions of distributive justice – about what New Zealand society deems, through the democratic process, to be fair. Naturally, what New Zealand society deems to be fair may change over time, and in response to new evidence or ways of thinking. It is therefore undemocratic to seek to fix such a determination.

Taxes, fees, levies

3.10. Bullet point one is redundant, as it simply states that existing law should be followed.

3.11. Bullet point two is problematic, as the only criteria proposed is "efficiency". Effectiveness and equity are equally important criteria to be considered when government decides to impose a fee for a good or service. Additionally, the most efficient fee may not be the most effective or equitable fee – there are usually trade-offs which require judgement calls.

3.12. Bullet point three is also highly problematic. It requires that levies can only be imposed by government if the amount is reasonable to the benefit or risks that the *class of payers* will receive/are exposed to. First of all, many levies generate wider societal benefits that do not necessarily translate directly into benefits at the individual or "class-of-player" level. Second, some levies provide no direct benefits to the class of people who pay them but are still highly desirable. For example, carbon taxes do not necessarily provide any tangible benefits to the businesses that pay them; however, they are nevertheless essential mechanisms for reducing carbon emissions.

Good law-making

3.13. Bullet point three requires that "Legislation should be expected to produce benefits that exceed the costs of the legislation to the public or persons". But public policy is often not reducible to definitive calculation of the costs and benefits, nor how those costs and benefits are apportioned. Additionally, the costs and benefits of a given regulation are not equally experienced, and whether a policy is considered beneficial is often in the eye of the beholder.

3.14. An obvious example here is that an employer may strongly *approve* of regulations that prohibit strikes by workers under certain circumstances, but may strongly *disapprove* of minimum wage regulations. On the flipside, the people who work for that employer may strongly *disapprove* of regulations that prohibit strikes by workers under certain circumstances, while they may strongly *approve* of regulations guaranteeing a minimum wage.

3.15. Another example is social welfare transfers. Narrowly, the direct financial costs of transfer payments are borne by taxpayers, of which higher-income earners contribute a proportionally larger share. The direct financial benefit of social welfare is enjoyed by the recipients of transfers, who are provided with income. There are also larger social benefits, such as minimising the many social and economic costs caused by abject poverty. Judging whether the benefits to welfare recipients and wider society exceed the costs to "taxpayers" is an unavoidably political question that must weigh, among other things, moral judgements on justice and liberty – and the trade-offs between them. It is not a merely technical question of "good lawmaking".

3.16. Bullet point four will be unworkable in practice. For most public policy issues, there is reasonable disagreement over what the most "effective, efficient, and proportionate" solution is. It is therefore often not possible to determine with certainty which solution is best. Different solutions will have different advantages and disadvantages, and will necessarily trade effectiveness, efficiency, and proportionality off against one another. Trying to impose a blanket provision that "Legislation should be the most effective, efficient, and proportionate response to the issue concerned that is available" is simply not feasible.

3.17. Additionally, if we are to take bullet point four seriously, then it should first be applied to the Regulatory Standards Bill itself. Is the proposed Bill the most "effective, efficient, and proportionate response to the issue concerned that is available"? The Ministry for Regulation's own advice suggests it is not. The Ministry advises against the proposed Bill, in part because of the high compliance burden it would create (something which makes it *inefficient*). The Ministry's preferred option is an "enhanced disclosure statement regime". The sponsoring Minister thus appears to be perpetuating the issue highlighted by Parliament's Legislation Design and Advisory Committee (and noted explicitly in the consultation document) that in New Zealand there is "a tendency towards using legislation in cases where it was not strictly required, or where it covered matters already in existing legislation". The proposed Regulatory Standards Bill is guilty on both counts.

3.18. Finally, it is worth noting that over the past year the government has shown a consistent willingness to disregard or dismiss as irrelevant the advice of officials and experts in their field when it comes to matters of public policy. The Government has also used urgency without good rationale to push through controversial legislation. Ignoring expert advice and rushing the legislative process are both recipes for poor regulation. In this respect, the Government's record of *action* is wholly inconsistent with the *stated* purpose of the proposed Bill. This only increases the sense that the proposed Bill is a cynical attempt at enabling deregulation and embedding libertarian political beliefs in New Zealand lawmaking.

Regulatory stewardship

3.19. In bullet point three, it is unclear what is meant by the term "unnecessary". Consistent with our comments above, determining whether a regulation is "necessary" or "unnecessary" usually involves a set of normative judgements. Different parties will often have quite different takes on what is necessary or unnecessary. In the current proposal, it appears that the determination of whether a regulation remains necessary will be left to the Regulatory Standards Board. This is highly concerning, given that it will be an unelected board of members nominated by the Minister for Regulation.

3.20. We firmly agree with bullet point four, that "Any regulator should have the capacity and capability to perform its functions effectively". However, as with other parts of the proposed Bill, this stated intent is completely at odds with the government's recent actions. The severe cuts to the public sector have undermined the ability of numerous regulators to perform their functions effectively. One of the most egregious examples is the cuts made to WorkSafe, the occupational health and safety regulator. Despite New Zealand's very high rates of injury and death at work, these cuts have forced WorkSafe to further withdraw its ability to proactively enforce health and safety regulations.

4. Compliance burden

4.1. As outlined in the Interim RIS, and as noted in earlier criticism of the 2011 Bill, the proposed Bill will create a large compliance burden for government agencies.[3] All Ministries and Regulators will be required to regularly review the legislation they oversee; reviews will be conducted by the proposed Regulatory Standards Board, which will lead to further work for government agencies; and work will be created for Ministers in responding to the findings of the proposed Board.

4.2. The increased compliance burden is explicitly noted in the Interim RIS and is part of the reason why the Ministry for Regulation recommends against the Regulatory Standards Bill.

4.3. The increased compliance burden that the Bill will load onto public agencies is ironic, given the sponsoring Minister's stated aversion to "red tape". More importantly, it will

[3] See the special issue of *Policy Quarterly*, vol. 6, no. 2, 2010.

redirect scarce resources away from the delivery of services that New Zealanders actually require. This is particularly concerning given the large-scale cuts that have been made to public agencies in the past year. Although we are not opposed to empowering agencies to review the regulations they are responsible for, it is essential that they are properly resourced to do so. In the context of the severe cuts that have been made to public agencies, this will manifestly not be the case.

4.4. The consultation document states that "Under the proposed approach, the Bill would only set out the high-level expectations of agencies and Ministers. [...] the Minister for Regulation would be required to issue guidelines in relation to the assessment of consistency of proposed and existing regulation". We find this suggestion highly concerning. It would afford significant power to the Minister for Regulation to influence the work agendas of other government agencies. Given the current Minister for Regulation's publicly stated deregulatory bias, it is reasonable to expect that this power would be used to interfere with areas of regulation that the Minister for Regulation is opposed to.

4.5. We are also strongly opposed to the idea that the Minister for Regulation should be empowered "to determine which types of regulation are required to comply with consistency requirements". As with other parts of the proposed Bill, this would unduly concentrate power in the hands of the Minister for Regulation. For example, it would appear to empower the Minister for Regulation to determine, for example, what kind of regulations can be passed under urgency.

5. The proposed Regulatory Standards Board

5.1. It is proposed that the Minister for Regulation would appoint the Regulatory Standards Board. Given the current Minster for Regulation's clear and publicly stated bias against regulation, it is reasonable to expect the Board will be comprised entirely of people with a deregulatory bias. This makes the proposal that the Board could initiate reviews or could conduct reviews at the direction of the Minister, dangerous. It is remarkable that a blatantly political instrument such as this is being proposed as a mechanism for promoting "good" regulation. New Zealand has a reputation for having low levels of corruption; setting up partisan boards such as this puts this reputation at risk.

6. Conclusion

6.1. The NZCTU restates its strong opposition to the proposed Bill. Not only are the proposals impractical, they also inappropriately seek to embed a libertarian worldview in Aotearoa New Zealand's constitutional settings.

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