

Regulatory Responsibility Bill

Member's Bill

Explanatory note

The purpose of this Bill is to improve parliamentary laws and regulations in New Zealand by specifying principles of responsible regulatory management and by applying reporting requirements to the Crown with respect to the principles. At present, there are legal requirements for responsible fiscal management under the Fiscal Responsibility Act 1994, and reporting requirements on the consistency of Bills with certain civil and political rights under the New Zealand Bill of Rights Act 1990. There are less formal, administrative mechanisms for regulatory impact and business compliance cost assessment, including in conjunction with the introduction of Government Bills, and for internal assessment of legislation by reference to the Legislation Advisory Committee guidelines on process and content of legislation. What is lacking however, in this latter case, are legal requirements to ensure that legislation complies (and remains in compliance) with good legal principles, including rights long protected as part of the common law. Requirements of that kind may be the most important of all.

The first duty of the State is to protect the community against external threats. Its second duty is to maintain internal order so as to secure the liberty and property of the person from assault, theft, trespass and other unlawful acts.

Consistent with this second duty, the State should not pass Acts or regulations that take people's property or impair their other common law rights without due process and for a good reason. One good reason might be that the taking of property is necessary in order to achieve an essential public interest. In such cases, the issues of compliance with sound taxing principles and of payment of compensation must be addressed.

Regardless of differences over policy, Acts and regulations will be constitutionally sound and in the public interest if they respect such principles. In too many cases, the principles are not fully observed. Far too many Acts and regulations are a result of undue haste, poor quality processes and inadequate scrutiny.

The Bill will ensure that principles of responsible regulatory management are always in the minds of those responsible for legislation. That will be achieved by applying reporting obligations in relation to the principles both at the time that Acts and regulations are made and at regular intervals subsequently.

Clause 4 sets out a number of definitions for the purpose of the Bill. These include what is meant by key terms such as **public interest**, **essential public interest**, and **full compensation**.

Clause 5 provides that the Act binds the Crown.

Clause 6 sets out the principles of responsible regulatory management, which the Government must be guided by in pursuing its policy objectives. A number of principles bearing on good legal and constitutional practice that ought to be respected in the case of every Act and regulation are specified. They include taxing and compensation principles to apply whenever property is taken or other common law rights are impaired for the achievement of an essential public interest, and principles to be complied with if legislation is to enhance rather than detract from the rule of law. They also include an obligation on every agency that is responsible for an Act or regulation to produce a statement about the legislation that comments on a number of matters relating to compliance with the principles of responsible regulatory management, the need for the legislation, the availability of alternatives, and its application including any unanticipated consequences and the extent to which the legislation takes property or impairs other legal rights of particular persons or categories of persons that are transferred to, or otherwise benefit, other persons or groups. Nothing in the principles prevents the Government from proposing Acts and making regulations required to provide the Crown with necessary revenues or for other essential public interests, and the Government may depart from the principles in particular cases but only where such departure is temporary and the Minister for Economic Development provides information about the departure by notice in the *Gazette*.

Clause 7 requires that every statement prepared under section 6 must be accompanied by a statement of responsibility signed by the

responsible Minister and relevant chief executives to provide certification of relevant matters in each case concerning the preparation of the section 6 statement and compliance (or continued compliance) with the principles or certain of them.

Clause 8 gives relevant officials the power to obtain information necessary to perform functions in relation to the statement of responsibility.

Clause 9 sets out that statements under section 6 must be done at the outset (when Bills are introduced or regulations are made) and then at intervals of no more than 5 years. It also provides for the publication of statements.

Clause 10 requires the State Services Commissioner to prepare annually a regulatory management report containing an assessment of statements done under section 6 together with the statements of responsibility. The Minister responsible for the State Services must present a copy of the report to the House of Representatives.

Clause 11 provides in effect that nothing in the Bill provides a basis for review by the courts of matters that are intended to apply only as processes applying to Government for which it is to be accountable to Parliament.

Rodney Hide

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The Parliament of New Zealand enacts as follows:

1 Title

This Act is the Regulatory Responsibility Act **2006**.

2 Commencement

This Act comes into force on 1 July 2007.

3 Purpose

The purpose of this Act is to specify principles of responsible regulatory management to apply to the Government in pursuing its policy objectives and to require the Crown to report on its compliance with the principles.

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4 Interpretation

In this Act, unless the context otherwise requires,—

essential public interest means that, if the action is not taken, there would be a major reduction in the public interest

full compensation means compensation that leaves a person whose property is taken or other rights are impaired no worse off than if the forced taking or impairment had not occurred and, where the taking or impairment creates a financial surplus for the public interest, includes a proportionate share of that surplus

impaired means deprived in whole or in part; and **impairment** has a corresponding meaning

necessary means otherwise impossible

public interest means the interest arising from an increase in the benefits that consumers and producers jointly derive in excess of the real resource costs of production as a result of greater efficiency; but does not include a mere transfer of benefits from one producer to another or between consumers and producers

responsible Minister means the Minister of the Crown with responsibility for the agency that is responsible for the administration of the Act or regulation concerned

take means deprive in whole or in part; and **taken** and **taking** have corresponding meanings.

5 Act binds the Crown

This Act binds the Crown.

6 Principles of responsible regulatory management

(1) Subject to **subsection (5)** and **section 11**, the Government must, in pursuing its policy objectives, be guided by the principles of responsible regulatory management specified in **subsection (2)**.

(2) The principles of responsible regulatory management are—

- (a) the maintenance, in accordance with **section 9**, by every agency that is responsible for an Act or a regulation of a statement that meets the requirements of **subsection (3)**;
- (b) that Acts and regulations do not diminish, or have the effect of diminishing, personal security, liberty, and, except as subject to this Act, freedom of contract and the right to property;

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- (c) that Acts and regulations preserve and respect causes of action at common law that have provided long-standing protection against harm caused by strangers, and avoid the introduction of new harms or the expansion of existing harms: 5
 - (d) that Acts and regulations—
 - (i) do not unnecessarily limit; and
 - (ii) where applicable, enlarge— individual choice and freedom of action, and the scope for voluntary co-operation: 10
 - (e) that reallocation by Act or regulation of legal rights without consent is justified only where it is necessary to do so for the achievement of an essential public interest and in compliance with the following principles:
 - (i) no delegation from Parliament of the power to levy taxes: 15
 - (ii) taxes are not to be levied and property is not to be taken except with the consent of the affected taxpayers or property owners or their elected representatives: 20
 - (iii) full compensation for persons whose property is taken or other rights under common law are impaired in the public interest, whether with or without their consent:
 - (iv) such compensation is to be payable by the new legal owners of the property or other rights concerned or, if the Government takes the property or assumes the rights, by those in whose interests the taking or assumption occurred: 25
 - (v) the net benefits arising from a forced exchange are to be shared proportionally among those who are parties to that exchange: 30
 - (f) that Acts and regulations enhance the rule of law, and in particular—
 - (i) are generally of prospective, not retrospective, effect: 35
 - (ii) avoid imprecision and complexity that limits the ability of citizens to understand and comply with the law:
 - (iii) avoid uncertainty as to whether actions are lawful: 40

- (iv) provide that the exercise of delegated administrative and executive powers, including in relation to discretion to set user charges, to attach conditions to permits or consents, or to change the use of assets in the public sector, is carried out in accordance with good legal principle and is subject to judicial review: 5
 - (v) respect the principle that everyone, including the Government and its agencies, is subject to the law: 10
 - (vi) respect the principle of equality under the law, to which end legislation is to be general and abstract and is not to confer rights or benefits on particular categories of persons per se whether on the basis of gender, race, creed, religion, time, place, or otherwise. 15
- (3) The statement to which **subsection (2)(a)** refers must deal with the following matters:
- (a) indicate whether there is a continuing need for the Act or regulation and, if so, identify in specific terms, and with reference to underlying causes rather than symptoms, the problems that it addresses: 20
 - (b) specify the national interest regulatory objective of the Act or regulation at a level of generality that does not prejudice the justification for the Act or regulation and indicate whether that objective entails better enforcement of the legal rights that would otherwise exist or reallocation of those rights: 25
 - (c) set out the view of the agency that is responsible for the administration of the Act or regulation on whether the Act or regulation is necessary for the achievement of an essential public interest: 30
 - (d) assess how alternative arrangements, including reliance on the common law alone, would be likely to evolve in the absence of the Act or regulation and make explicit in such assessment the assumptions as to future changes in information, circumstances, or technologies that could reduce or eliminate the need for the legislation: 35
 - (e) identify any undesired side effects or unanticipated consequences of the Act or regulation and compare such outcome with that resulting from reliance on common law and alternative legislation: 40

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- (f) identify the factors that are critical for preferring the Act or regulation to alternatives of no legislation or other legislation:
- (g) in any case where a purpose of the Act or regulation is the resolution of a legal dispute about the allocation of legal rights, summarise any legal advice involved and indicate— 5
- (i) whether the matter is still open to resolution through court decision or other non-legislative avenues in any respect; and 10
- (ii) the extent of any liability of the Crown arising from the Act or regulation:
- (h) identify any persons or categories of persons whose property is taken or other legal rights impaired by the Act or regulation: 15
- (i) identify the persons or categories of persons who obtain legal rights as a result of the Act or regulation and, where the Crown is the new holder of the rights, identify the persons or categories of persons in whose interests the Crown is to hold, or continue to hold, the rights: 20
- (j) identify the efforts made, or that still could be made, to obtain the consent of persons referred to in **paragraph (h)**, and indicate the existing degree of consent:
- (k) identify means for requiring persons referred to in **paragraph (i)** to compensate persons referred to in **paragraph (h)** so that all parties to the forced exchange are better off, and evaluate the feasibility of such means: 25
- (l) specify the cost to the Crown of compensation referred to in **paragraph (k)**, including in the event that compensation by the persons referred to in **paragraph (i)** who are the beneficiaries of the rights is not payable by reason of high transaction costs: 30
- (m) set out the evidence that the benefits to the beneficiaries referred to in **paragraph (l)** exceed the costs to the persons referred to in **paragraph (h)**: 35
- (n) indicate whether the net benefits from a forced exchange pursuant to an Act or regulation are shared proportionally amongst the parties thereto:
- (o) provide an estimate of the quantum of any departure from the principle referred to in **paragraph (n)** and identify 40

- the persons or categories of persons who gain and lose as a result of such departure:
- (p) set out the evidence (if any) that those who lose from the departure referred to in **paragraph (o)** have consented thereto: 5
 - (q) identify any provisions of the Act or regulation that, in relation to rights that have been reallocated by it, impair freedom of contract and property rights and provide justification, or continued justification, for such provisions: 10
 - (r) specify a future date at which the Act or regulation will be reviewed to determine if its continuation is warranted:
 - (s) assess the conformity of the Act or regulation with principles in **subsection (2)** not otherwise specified in this subsection. 15
- (4) Nothing in **subsection (2)** prevents the Government from proposing Acts and making regulations that are required to provide the Crown with necessary revenues or for other essential public interests. 20
- (5) The Government may, with respect to any specified Act or regulation, depart from the principles of responsible regulatory management specified in **subsection (2)**, but when the Government does so—
- (a) any such departure must be temporary; and 25
 - (b) the Minister for Economic Development must, by notice in the *Gazette*, specify—
 - (i) the reasons for the Government's departure from those principles; and
 - (ii) the approach the Government intends to take to return to those principles; and 30
 - (iii) the period of time that the Government intends to take to return to those principles.
- 7 Statement of responsibility**
- (1) Every statement prepared under **section 6(2)(a)** must be accompanied by a statement of responsibility signed by— 35
- (a) the responsible Minister; and
 - (b) the chief executive of the agency that is responsible for the administration of the Act or regulation; and

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- (c) the chief executive of the Ministry of Economic Development (or, where he or she is also the chief executive under **paragraph (b)**, the Solicitor-General); and
- (d) the Secretary of Justice (or, where he or she is also the chief executive under **paragraph (b)**, the Solicitor-General). 5
- (2) The purpose of the responsible Minister signing the statement of responsibility is to certify that—
- (a) in the Minister’s view any restrictions imposed by an Act or regulation on freedom of contract and property rights are necessary for the achievement of an essential public interest; and 10
- (b) the Minister has given no instructions (other than those disclosed in the statement of responsibility) to the agency that is responsible for the administration of the Act or regulation concerning the matters specified in **section 6(3)**; and 15
- (c) the Minister is satisfied that enough has been done—
- (i) to obtain the consent of persons or categories of persons whose property is taken or other legal rights impaired by the Act or regulation; and 20
- (ii) to provide such persons with full compensation.
- (3) The purpose of the chief executive of the agency that is responsible for the administration of the Act or regulation signing the statement of responsibility is to certify— 25
- (a) that all ministerial instructions relevant to the preparation of the statement of responsibility have been acted upon by the agency; and
- (b) that in the chief executive’s view the statement made by the agency under **section 6(2)(a)** complies with the requirements set out in **section 6(3)** and meets all relevant professional standards; and 30
- (c) whether the Act or regulation has reduced uncertainty as to the lawfulness of actions, has conferred benefits on persons who are the beneficiaries of property that was taken or other legal rights that were impaired that exceed the costs imposed on the persons whose property was taken or rights were impaired, and is (and remains) necessary for the achievement of an essential public interest. 35 40

- (4) The purpose of the chief executive of the Ministry of Economic Development (or Solicitor-General) signing the statement of responsibility is to certify—
- (a) that the statement made by the agency under **section 6(2)(a)** meets all relevant professional standards in its analysis of regulatory matters; and 5
 - (b) whether the Act or regulation served to tax one group of persons for the benefit of another group without according with principles of full compensation and proportionate sharing of surpluses. 10
- (5) The purpose of the Secretary of Justice (or Solicitor-General) signing the statement of responsibility is to certify that the statement made by the agency under **section 6(2)(a)** meets all relevant professional standards in its analysis of legal matters.
- 8 Power to obtain information 15**
- (1) This section applies to the chief executive of the Ministry of Economic Development, the Secretary of Justice, and the Solicitor-General.
- (2) An official to whom this section applies may from time to time request an agency to supply to him or her such information as he or she considers necessary to fulfil the functions imposed on the official under **section 7**. 20
- (3) Any request made under **subsection (2)** may specify the date by which, and the manner in which, the information requested is to be provided. 25
- (4) A request under **subsection (2)** must be made in writing and the agency concerned must comply with the request.
- 9 Process applying to statements**
- (1) Every statement to which **section 6(2)(a)** applies must be—
- (a) made available,— 30
 - (i) in the case of an Act that was a Government Bill, on the introduction of the Bill into the House of Representatives; or
 - (ii) in the case of any other Act, as soon as practicable after the introduction of the Bill; or 35
 - (iii) in the case of a regulation, on its making; and
 - (b) reviewed, revised, and reissued in every such case at intervals of no more than 5 years.

- (2) Every such statement must be published on the Internet by the agency concerned.

10 State sector responsible regulatory management report

- (1) The State Services Commissioner must prepare each year a regulatory management report that contains an assessment of the statements made in the previous year under **section 6(2)(a)**, together with the statements of responsibility made under **section 7**, and an assessment of the extent to which the statements comply with this Act. 5
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- (2) The Minister responsible for the State Services must, as soon as practicable after the publication of every such report, present a copy of the report to the House of Representatives.

11 No judicial review

An Act or regulation, a statement, decision or any other action of the Government, a Minister, an agency, an official, or any other person under this Act, and the principles of responsible regulatory management and their application or non-application whether in whole or in part, and whether in general or in any particular case, must not be questioned, reviewed, or restrained by or on an application for judicial review or other process or proceeding in any court. 15
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