

REGULATORY IMPACT STATEMENT

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

Agency Disclosure Statement

This Regulatory Impact Statement (RIS) has been prepared by the Treasury. It analyses some regulatory options for encouraging better quality legislation.

Limits on the Options Analysed

In order to simplify and focus the analysis, this RIS does not consider:

- the way in which legislation is administered and enforced, or how regulatory agencies are governed or held accountable.

Although these can be important determinants of regulatory outcomes, they are distinct from the question of legislative quality per se.

- options that do not involve some legislative response. Non-legislative proposals are included in the options only where they closely support a legislative proposal.

The focus on legislative options is not ideal but reflects: the systematic weaknesses seen in all administrative measures; legislation's potential to offer something more; and our view that a legislative response is more of a complement than an alternative to administrative rules and processes.

- legislative options that would involve significant constitutional change (like a more comprehensive written constitution, a second Parliamentary chamber, or a longer Parliamentary term) or would extend the range of personal rights protected by statute (like those in the NZ Bill of Rights Act or Human Rights Act).

Such changes would almost certainly impact on legislative outcomes, perhaps more than the options considered in this RIS, but are better debated in a policy forum explicitly designed to consider the wider issues involved. While we think that limiting our analysis in this way is reasonable in the current policy context, we acknowledge that this may limit what can be realistically achieved, as many of New Zealand's legislative quality problems may be exacerbated by its particular constitutional make-up.

Limitations of the Analysis Undertaken

The nature and rigour of the analysis of options is affected by the need to rely on speculative judgement about the nature and size of the potential impacts because:

- we have no reliable way to predict the dynamic effects of rules that encourage, but cannot force, changes in the attitudes, behaviour and capabilities of politicians and public officials; and
- there is little international experience with similar legislation and/or in similar institutional settings for us to draw upon (though available legislative parallels are discussed where relevant).

Consistency with Matters in the Government Statement on Regulation

None of the options considered in this RIS are likely to have a direct effect on business costs, existing property rights or market competition, but some options:

- would impact on the relationship between the executive, legislative and judicial branches of the government and, where they involve a new role for the courts, may be thought to alter the balance between the roles of the three branches;
- could reinforce or alternatively alter the application of some well-established legal principles, through their codification in specific form in legislation.
- could, in theory, be progressed without legislation. The case for legislation then rests on an argument that it is more likely to encourage desirable behavioural change than if pursued through administrative rules or Standing Orders.

Interactions with other Legislation and Policy Initiatives

Aspects of some options are similar or closely related to aspects of the New Zealand Bill of Rights Act, or the Legislation Bill currently before the House. Any legislative proposals should be designed to provide a good fit with these two pieces of legislation.

The 2-year Regulatory Reform Project recently commissioned by the New Zealand Law Foundation will also consider some of the same issues as this RIS, and ideally would inform any proposed legislative change. The project will analyse a range of regulatory reform issues including existing legal and regulatory management frameworks and institutions.

Further Policy Work Required

The proposal to provide for more targeted select committee scrutiny in relation to legislative quality matters (part of Option 5: the Treasury's preferred option) would require additional policy work. As described in our analysis of that option, there are a number of different ways in which more targeted select committee scrutiny could be achieved. If interest is shown in this aspect of Option 5 we would work closely with other government agencies and the Clerk of the House of Representatives to develop this proposal further.

Any legislative changes are likely to require some modest changes to existing administrative rules and processes, such as Cabinet's RIA requirements, to ensure effective integration.

Jonathan Ayto
Principal Advisor,
Regulatory Quality Team,
The Treasury

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Executive Summary

- Legislative quality matters, because of the volume and ubiquity of legislation and the significant consequences for businesses and individuals of getting it wrong;
- The quality of New Zealand regulation rates well in international surveys but current legislative development, scrutiny and quality assurance arrangements have obvious limitations and domestic opinion suggests it could be much better;
- Two challenges appear to underlie and explain most problems experienced:
 - the difficulty and growing complexity of regulatory tasks; and
 - the incentives, pressures and biases that operate on politicians, officials and private interests to push for legislation, despite the risks and costs.
- Using legislation to promote legislative quality has both pros and cons. It provides a profile and educative effect that equivalent administrative measures can't match, but it is also less flexible, harder to fix or amend, and brings with it the potential involvement of the courts, which can have unexpected results;
- Any initiative (legislative or otherwise) to promote legislative quality is likely to have limited actual impact unless it leads to a new behavioural norm. This requires that it gain a level of broad political or public acceptance, which is difficult to predict, and has some perceived consequences for non-compliance.
- Two key issues in any decision to proceed are the risk of unintended outcomes and the ability to reduce the costs if the benefits turn out to be limited.

Legislative Option	Need for or advantage of using legislation	Potential to induce change in behaviour	Risk of unintended outcomes	Ability to get costs down if benefits low
Certification against Principles with possible Court monitoring (Taskforce's Bill) – pp.13-17	Needed to provide for court role	Low	High	Limited
Certification against Principles with possible Court monitoring (modified Taskforce Bill) – pp.18-19	Needed to provide for court role	Moderate	Moderate	Moderate
Reporting on the Government's Regulatory Commitments – pp.20-21	Optional but no clear advantage	N/A*	N/A*	N/A*
Formalising the Provision of Regulatory Impact Analysis – pp.22-23	Optional but no clear advantage	N/A*	N/A*	N/A*
Disclosure of Key Matters with Stronger Review by Parliament (Treasury Preference) – pp.24-28	Mostly optional but advantage on balance	Moderate	Low	Good

* Where using legislation confers no obvious advantage, no further assessment has been made

Context: The Report of the Regulatory Responsibility Taskforce

1. This Regulatory Impact Statement (RIS) is prompted by the need to analyse and respond to the recommendations of the Regulatory Responsibility Taskforce report of 30 September 2009.
2. The Taskforce's recommended Regulatory Responsibility Bill is the latest version of a legislative idea that has been around since the late 1990s, inspired in part by the example of the Fiscal Responsibility Act. Behind this enduring idea is concern about the quality of new and existing legislation. The Explanatory Note of the 2006 Bill puts it like this:

"In too many cases, [good legal] principles are not fully observed. Far too many Acts and regulations are a result of undue haste, poor quality processes and inadequate scrutiny."

Scope of Analysis: The Rules Applying to the Process of Developing Legislation

3. Since the concern is the quality of New Zealand legislation, this RIS needs to examine the formal and informal rules that apply to the development of legislation. This includes both executive policy-making and parliamentary scrutiny processes that lead to the creation, amendment or repeal of legislation.
4. In this RIS, legislation is broadly defined. Legislation made by local government is excluded, but it covers both:
 - primary legislation (Acts), made by Parliament; and
 - delegated legislation (regulations, rules, orders etc), made by Order in Council, a Minister or a government agency under the authority of an Act.

Why Legislative Quality Matters

5. The quality of legislation deserves close attention. Both the scope for problems to arise, and the consequences of getting it wrong, are considerable because:
 - the law makes significant demands on us – it determines what we must and cannot do, and may create severe sanctions for failure to comply;
 - legislation is the dominant source of our law, and the work of our courts is dominated by questions of statutory interpretation and the application of statutes in specific instances¹;
 - the stock of legislation is significant, and affects most aspects of daily life. Excluding amending legislation and Imperial Acts, New Zealand has around 780 primary Acts, around 3,365 statutory regulations, and an unknown but even larger number of tertiary instruments;
 - the rate of legislative change is significant. Each year, New Zealand creates or amends around 105 Acts and 405 statutory regulations, representing anywhere between 6,000 and 9,000 pages of new legislation;
 - legislation significantly affects the environment in which economic actors participate, so can affect economic growth.

What Does Legislative Quality Mean?

Practical difficulties with the concept:

A key economic expectation of a piece of legislation is that it can deliver the greatest positive net benefit of the practical options available for addressing an identified policy problem. But in addition to the inevitable measurement issues, there are two practical problems with equating the quality of a piece of legislation with its outcomes:

- it doesn't distinguish between poor legislation, poor implementation and bad luck; and
- people inevitably have different views on matters like the importance and desirability of the outcomes sought or realised, and the appropriateness of the balance struck in the piece of legislation between competing values and interests.

Nonetheless, in general, legislation that delivers on its objectives is likely to be "better" than legislation that does not.

Generic attributes commonly associated with the idea of good legislation

There may be no definitive measures of good legislation, but there are some generic attributes or rules of thumb that many people associate with the idea of good legislation and believe can significantly reduce the potential for poor legislative outcomes. These include:

Attributes consistent with established legal or rule of law principles, such as

- respect for individual dignity, autonomy and liberties;
- respect for vested rights (property);
- protections against the arbitrary use of power;
- providing equal treatment under the law; and
- avoiding retrospective effect.

Attributes enhancing understanding of, and compliance with, the law, such as

- readily available, easy to navigate, and written in plain language;
- unambiguous, free of errors and conflicts, and providing for all relevant matters;
- treating like matters in like ways;
- being consistent with the rest of NZ law and NZ's international obligations; and
- reasonably enduring and infrequently amended.

Attributes underpinning the perceived legitimacy of legislative action, such as

- a convincing case for legislative action, with clearly identified policy goals;
- limiting action to only what is needed to deliver an effective, fair and efficient outcome;
- matters of policy or principle are decided by Parliament directly;
- a fair and open process, with reasonable opportunities and timeframes for consultation;
- subsequent monitoring of goal achievement, and of potential unintended outcomes.

The importance of a good legislative process

The value of good process, in particular, is easily underestimated. As Professor Jeremy Waldron has said:

*"... there is such a degree of substantive disagreement among us about the merits of particular proposals that any claim that law makes on our respect and our compliance is going to have to be rooted in the fairness and openness of the democratic process by which it was made."*²

Does New Zealand have a Problem with Legislative Quality?

6. New Zealand lacks its own indicators of legislative quality, but the best international surveys available suggest that New Zealand does not have fundamental problems with legislative quality when compared with other OECD countries. These survey results need to be treated with caution, given the methodological and data issues involved, but:
 - New Zealand rates well in terms of issues like the strength of property rights³, regulatory quality, and adherence to the rule of law⁴; and
 - New Zealand is top of the OECD for the ease of doing business⁵ and below the OECD mean for the restrictiveness of product market regulation.⁶
7. Despite this, informed domestic opinion consistently suggests that legislation could be much better than it is. For example:
 - our politicians hear regular and consistent complaints from businesses and their representative organisations that the cumulative burden of regulation, and the amount of change, is very difficult to cope with;
 - those who commented or made submissions on the original or revised Regulatory Responsibility Bills generally agreed that legislation can and should be better, including those, like the Legislation Advisory Committee, that did not support the Bill;
 - we found that those who work regularly with legislation can readily identify:
 - many examples of legislation that has not met its intended objective, has had significant unintended consequences; and/or clearly lacks some of the key attributes of good legislation identified above; and/or
 - significant problems with the effectiveness of existing legislative scrutiny and quality assurance arrangements.

Problems with the Performance of Existing Quality Assurance Arrangements

8. Without debating their merits, we note that New Zealand lacks some of the formal constitutional checks and balances often found in other jurisdictions, like:
 - a substantive written constitution, which gives a greater role to the courts;
 - a second Parliamentary chamber; and
 - a Parliament that is more independent of the Executive.
9. This means that New Zealand requires other scrutiny and quality assurance arrangements to be pretty robust, as there are fewer backstop mechanisms to help catch problems that might otherwise slip through. Unfortunately, that is not what we seem to find. The diagram below identifies some key limitations of the existing set of arrangements.

Existing System		Key Limitations of Existing Arrangements
Policy development phase	<p>Policy idea (priority set in reg. plan)</p> <p>PIRA provided to determine application of the RIA regime</p> <p>Policy analysis (incl. reference to LAC guidelines)</p> <p>Policy consultation with agencies, LDC and affected parties</p> <p>RIS prep (incl. choice of preferred option)</p>	<ul style="list-style-type: none"> Regulatory planning is not particularly strategic or co-ordinated. Policy analysis capability is not very deep. Guidance on making good legislation exists but is little read due to its length and breadth. Tight policy timeframes are the norm, constraining the quality of analysis able to be provided to the portfolio Minister and Cabinet. Portfolio Ministers often decide to act or to narrow the policy choices before the issues and options have been analysed or tested. LDC has been little used of late, and is blocked from a proactive role. RISs are often produced too late, so become a compliance exercise. Only half of the significant regulatory proposals considered by Cabinet since Nov 2008 had RISs that met expected standards.
Cabinet and drafting phase	<p>Cabinet paper (incl. agency consultation and formal RIS QA)</p> <p>Officials committee</p> <p>Cabinet committee</p> <p>Cabinet sign-off</p> <p>Drafting instructions and PCO drafting</p> <p>BoRA vetting and LEG review</p>	<ul style="list-style-type: none"> Formal agency consultation, including quality assurance of analysis, is often too short and late to get and address considered feedback. Officials committees may flag quality issues, but there is no effective gate-keeping done on the need for, or standards of, Cabinet papers. Cabinet committees deal with large numbers of papers and members have little time to read and fully consider all the material provided. PCO drafting supports clear, consistent legislation but it must work within its policy instructions and it doesn't draft tertiary legislation. Outside the BoRA vet, independent or external scrutiny of draft legislation is limited. LEG papers are largely a tick-box exercise and LEG does not operate as a substantive check on legislative quality.
Parliamentary phase	<p>Bill introduced, RIS published, and A-G s.7 report on BoRA</p> <p>Public submissions</p> <p>Poss. Regs Review Cttee scrutiny</p> <p>Subject select Committee scrutiny</p> <p>Parliamentary debate</p> <p>Legislation enacted or made & published</p>	<ul style="list-style-type: none"> House time is in high demand, so governments try to get Bills through as fast as they can, including occasional resort to urgency. The set debates are brief, and often reflect set party positions. Committee stage debate is now taken part-by-part, with Bills drafted in as few parts as possible, limiting depth of scrutiny and debate. Referral to select committee and a call for public submissions is the norm, but relies on analytical support from the responsible agency and scrutiny often takes a partisan form. Advice on legislative standards (s.7 BoRA reports, LAC submissions, RRC comment) has had only mixed success in changing Bills. Governments can and do make significant amendments by SOP, bypassing RIS requirements, BoRA vetting, public submissions and sometimes select committee scrutiny.
Post enactment/review	<p>Regs Review Cttee reviews new regs, hears reg complaints</p> <p>Courts interpret legislation and review vires of regs</p> <p>Departments scan and review legislation they administer</p>	<ul style="list-style-type: none"> RRC's review of regulations does not consider the policy merits. Disallowance is rarely sought and has only been successful once. Judicial review applies only to delegated legislation, only tests if it falls within the empowering clause, can be expensive, and has a very uncertain payoff even if successful. In contrast to government spending, there is no formal or systematic approach to monitoring, measuring, reporting and auditing the cost and performance of existing legislation. Legislative scanning is still in its infancy, with agencies reluctant to commit resources without obvious prospects of political attention.

Could we get Existing Arrangements to Perform Significantly Better?

10. The case for new requirements rests in part on a conclusion that changes to existing arrangements won't substantially improve legislative quality. The Taskforce indicated it was satisfied on this, though did not really explain why.
11. At first glance, the Taskforce view looks hasty. There is clearly limited effort being put into many existing processes – indeed some, like LEG consideration and parliamentary debates, have become too streamlined to be able to promote legislative quality. If so, perhaps even a modest lift in resourcing and effort could considerably improve the effectiveness of current arrangements.
12. Experience suggests, however, that the low effort and streamlined processes are the natural result of a lack of demand for meaningful legislative scrutiny, and will not be easily overcome. Scrutiny processes get streamlined because:
 - those promoting legislation think their proposal is either good or necessary and want to see it progressed as quickly as possible;
 - those providing scrutiny rarely see their hard work being used or valued;
 - if it is infrequently used or valued, effort declines;
 - when effort declines, the actual and perceived merit of the scrutiny reduces further, and reinforces the argument for streamlining the scrutiny process.
13. A closer look at specific arrangements also supports a conclusion that plausible improvements are unlikely to make a significant difference to legislative quality.
14. For example, New Zealand has had some form of Cabinet-mandated regulatory impact analysis (RIA) requirements, including provision of regulatory impact statements (RIS), since 1998. In practice, RIA thinking and RIS preparation have tended to be more of an afterthought and compliance exercise.
15. Treasury's view is that recent changes to the RIA requirements have led to some modest improvements in the quality of analysis presented in RISs. Significant improvements, however, seem highly unlikely based on experience with RIA in other OECD countries. Even in jurisdictions where RIA is well-established, researchers find significant non-compliance with expected standards and processes, and limited influence on actual regulatory decisions.⁷
16. Another example is New Zealand Bill of Rights Act (BoRA) vetting, which has statutory backing. Section 7 of that Act requires the Attorney-General to alert the House to any provision of a Bill that appears to be inconsistent with BoRA's rights and freedoms. The risk of a section 7 report does seem to encourage officials to address many potential BoRA issues before a Bill is introduced. Nonetheless, section 7 reports are occasionally presented to the House.
17. Concerns about the operation of section 7 include that the Attorney-General may not assiduously report all potential inconsistencies in government Bills, and the government's ability to bypass the obligation by making post-introduction changes to Bills.⁸ Nonetheless, the evidence suggests that addressing these concerns would not significantly affect regulatory outcomes because almost all government Bills receiving a section 7 report have still been enacted by Parliament without any change to the apparently inconsistent provisions.⁹

Why our Existing Arrangements Struggle to be Effective

18. One criticism of the Taskforce's report is that it fails to provide a sound, evidence-based explanation of what causes bad law, to justify its recommendations.¹⁰ To be fair to the Taskforce, it was not asked to do so. Nor does it claim to tackle the full range of issues with legislative quality.
19. We think bad law can be explained, though providing evidence is difficult. We start by noting that the problems with legislative quality don't seem to be concentrated in any particular dimension or type of legislation, or associated with any particular arrangement or process. They seem to occur across the board, which suggests to us that there are deeper, underlying factors at work.
20. In our view, two fundamental challenges underlie and can explain many of the problems with legislative quality and current arrangements. These are:
 - the difficulty and growing complexity of the regulatory task in a modern liberal democracy; and
 - the incentives, pressures and human biases that operate on politicians, officials and private interests to push for legislation, to push for it to be made quickly, and to downplay or ignore the risks of poor legislative outcomes.

The complexity of regulatory tasks

21. Producing good legislation is difficult: the nature of the problem is not always immediately clear; the potential solutions may be untried and the results hard to predict; and the devil is often in the detail. It requires multi-disciplinary analysis that co-opts and co-ordinates a range of policy, legal and operational expertise.
22. Furthermore, regulatory decision-making is becoming increasingly complex, and reliance on generalist knowledge, common sense and gut instinct is not enough to secure good legislation, because of:
 - growing constraints on NZ's regulatory sovereignty, due to global integration and more mobile resources and threats;
 - rapid technological advances, which raise new policy challenges and require specialist assessment (e.g. designer organisms, medical devices);
 - the unexpected interdependencies and connections between different phenomena (e.g. the effect of CFCs on the ozone layer);
 - the systematic biases that affect people's judgements and choices (e.g. status quo bias); and
 - the expanding areas of human behaviour or well-being that governments are seeking to influence by legislative means (e.g. obesity).

Incentives, pressures and human biases

23. The pressures on politicians are enormous. In his recent book, former State Services Commissioner Mark Prebble describes politicians as bound by "the iron

rule of political contest” – a rule so strong and constant that it dominates both policy and ideology.¹¹ In crude form this has been expressed as:

- the opposition is intent on replacing the government;
- the government is intent on staying in power; and
- MPs want to get re-elected.

24. The need to win elections leads politicians and their parties to develop a very good understanding of the factors that drive public opinion. Media exposure is “political oxygen”, mainstream media analyse the politics and not the policy of an issue, and the media require instant reactions and ready sound bites. Consequently, Ministers feel the pressure to:

- respond quickly and decisively to the latest risk, accident or misdeed;
- commit to concrete action, even without evidence that the action will address the problem, or that benefits are likely to exceed costs;
- stick to a political commitment once made; and
- deliver on the commitment as soon as possible.

25. In the case of legislation, the pressure to deliver quickly is exacerbated by two factors – pressure to deliver results within a short three-year Parliamentary term and pressure to minimise the call made on precious House time.

26. The incentive issues are not just confined to Ministers:

- MPs have limited incentives to carefully scrutinise and improve proposed legislation, as it does not bring them media attention;
- Government MPs who hope to be Ministers won’t readily risk disfavour by providing strong independent scrutiny or insisting on good process;
- Public servants are often reluctant to give advice that Ministers don’t want to hear, because of their duty of loyalty to the government and their desire not be dragged into the political contest if the advice becomes public;
- Agencies tend to work in policy silos – they lack a whole-of-government perspective and are reluctant to put resources into playing a wider role;
- Private interests are often willing to lobby for regulation that will benefit their interests at the expense of others; and
- Anyone that promoted a particular piece of legislation has few incentives to look for and publicly report evidence that it isn’t working as intended.

27. There are also a range of reasons why regulatory decision-makers tend to downplay or ignore the risks of poor legislative outcomes:

- they do not usually bear the direct costs of poor legislation;
- the costs of poor legislation are often hidden or hard to estimate because they are widely dispersed or take the form of future opportunities lost;

- momentum – once a Minister or agency has invested time and effort in taking a proposal through the policy process and perhaps securing necessary political or interest group support, it can be very hard to stop;
- optimism bias – we all overestimate our decision-making capabilities and underestimate the potential for things to go wrong; and
- confirmation bias – we all give more weight to evidence that supports our view, and less weight to evidence that runs counter to our view.

Objectives and Assessment Criteria

28. The analysis above suggests that: legislative quality is important; many people are concerned about legislative quality; the concerns are not confined to any particular type of legislation or dimension of quality; and existing arrangements for developing legislation are not particularly good at ensuring quality.
29. We conclude there is a case for considering new measures to promote legislative quality, but also that there are significant challenges to overcome if they are to fare any better than existing arrangements.
30. We suggest the key objectives for any additional measures for promoting legislative quality should be to promote one or more of the following:
 - **the delivery of better policy analysis and advice into the decision-making process on potential legislative changes** (because major problems with legislation originate in choices made at the policy phase and it is a lot harder to get agreement to significant policy changes later on);
 - **the translation of policy into legislation that conforms to generally accepted attributes of good legislation** (because these attributes reflect key values that support individual rights and respect for the law); and
 - **more systematic identification and prioritisation of problems or potential improvements in the existing stock of legislation** (because we don't always get legislation right first time, legislation can become less effective or redundant over time as the policy environment changes, and assessing the cost and performance of legislation is a neglected and under-resourced function compared with assessing government spending).
31. Our main assessment criteria are the expected benefits, costs, and risks of any proposed option. We think the key issues here are likely to be:
 - the strength of the incentives created, as the benefits will mainly come from the ability to induce behavioural changes among the key participants; and
 - the potential to control risks and costs if the benefits turn out to be limited in practice, as behavioural change is both difficult to induce and predict.
32. Other subsidiary indicators are:
 - the range and volume of legislation covered, as quality concerns are not limited to any particular type of legislation;

- potential impacts on the constitutional relationship between the legislature and the judiciary, to avoid the risk of back-door constitutional change;
- compatibility with, and reinforcement for, current arrangements for the development of legislation, so it can operate as an integrated system; and
- compatibility with different regulatory philosophies and frameworks, because broad political and public buy-in is required for enduring success.

Legislative Options for Improving Legislative Quality

33. We have limited the options considered to those that involve some use of legislation. This is not ideal, but is necessary to simplify and focus the analysis while still testing the claim that legislative backing can make a difference. For example, not all our objectives are easily targeted with generic legislation. However, legislation does not need to provide a complete answer. Another risk is that we support a legislative option when a non-legislative option would perform just as well, or better. To reduce this risk, we assess the necessity of legislation for each option and, if not essential, the pros and cons of a legislative approach.

34. We consider five legislative options, with associated supporting arrangements:

- **Option 1: The Taskforce's proposed Bill**

This Bill encourages those that develop legislation to consider whether it meets specified principles of good legislation, through certification of compatibility, and allowing this compatibility to be tested in court.¹²

- **Option 2: A modified version of the Taskforce's Bill**

This modification addresses concerns with some specific provisions in the Taskforce's Bill, but retains the same fundamental approach.

- **Option 3: Reporting on the gov't's regulatory commitments**

Drawing some inspiration from the Fiscal Responsibility Act, this Bill would require a government to periodically set out what it means by, and what it will do to deliver, good quality legislation, and require a subsequent report on compliance with those intentions.

- **Option 4: Formalising the provision of Regulatory Impact Analysis**

Modelled on options presented to the Commerce select committee in 2008, this Bill would formalise the current regulatory impact analysis requirements and perhaps also the status of the LAC guidelines.

- **Option 5: Strengthening Parliamentary review (Treasury's preference)**

Drawing inspiration from Queensland's Legislative Standards Act, this Bill would formalise and expand the requirement for, and content of, an explanatory note accompanying legislation, and provide increased administrative and analytical support for Parliamentary scrutiny of legislation.

Option 1: The Taskforce's proposed Bill

Policy development phase

Existing System

Policy idea (priority set in reg. plan)

PIRA provided to determine application of the RIA regime

Policy analysis (incl. use of LAC guidelines)

Policy consultation with agencies, LDC and affected parties

RIS prep (incl. choice of preferred option)

Cabinet and drafting phase

Cabinet paper (incl. agency consultation and formal RIS QA)

Officials committee

Cabinet committee

Cabinet sign-off

Drafting instructions and PCO drafting

BoRA vetting and LEG review

Parliamentary phase

Bill introduced, RIS published, and poss. A-G report on BoRA

Public submissions

Poss. Regs Review Cttee scrutiny

Subject select Committee scrutiny

Parliamentary debate

Legislation enacted or made & published

Post enactment review

Regs Review Cttee reviews new regs, hears reg complaints

Courts interpret legislation and review vires of regs

Departments scan and review legislation they administer

Key Legislative Elements

1. Specify a set of principles of "responsible regulation" with which legislation is generally expected to be compatible, which include:

- consistency with aspects of the rule of law
- not diminishing personal liberty, freedom or rights to property except to protect the liberties, freedoms and rights of others
- not taking or impairing property unless in the public interest and compensation is paid, and if doable, paid by the beneficiaries
- conditions on imposing taxes and charges
- preserving the role of the courts, including review on merits
- consistency with characteristics of good law-making (including consultation, proper evaluation, and benefits exceeding costs)

2. Require the Minister and agency responsible for a piece of new legislation to sign and publish a certificate stating whether the legislation is compatible with the principles;

and if not

the Minister (or sometimes the agency responsible) must state whether the incompatibility can be "demonstrably justified in a free and democratic society", and give reasons

3. Authorise the courts to declare that a legislative provision is incompatible with the principles (except most of the good law-making principles), but:

- the courts cannot strike down, injunct or award damages
- the courts must consider whether any potential inconsistency is justified in a free and democratic society
- declarations of incompatibility can be sought for new legislation immediately, and for all legislation after 10 years

4. Direct the courts to prefer interpretations of legislation that are compatible with the principles. Initially this will affect only new legislation, but will include all legislation after 10 years

5. Require public entities to publish on the internet a list of the legislation they administer

6. Expect public entities to regularly review the legislation they administer for compatibility with the principles, and report the results in their annual report

Suggested Supporting Arrangements

Amend Standing Orders to:

7. Extend the Regulations Review Committee's specialist legislative scrutiny role to include review of all Bills against the principles
8. Ask select committees to address compatibility with the principles when they report back to the House on a Bill

Analysis of Option 1: The Taskforce's proposed Bill

The Case for Legislation

Legislation is essential to authorise the involvement of the courts - both to declare legislation to be incompatible with the principles, and to prefer interpretations compatible with the principles

Expected Effects of Setting out Principles

Principles offer a useful point of reference and a normative benchmark for assessing and debating the quality of a piece of legislation. Setting principles out in legislation raises their profile by providing formal Parliamentary endorsement of their form and importance, and will get them more attention.

Most attention will go on those principles that can be judged from the content of a piece of legislation. The policy analysis and process ("good law-making") principles will continue to be hard to verify.

The main risks in legislating principles are oversimplifying and rigidifying what are often complex and evolving ideas, incorporating principles that do not have wide support, and creating an imbalance by including some important principles and not others. Critiques of the Taskforce's principles suggest that these risks have been realised.¹³ Our analysis suggests that some principles (eg the rule of law principle, the good law-making principles) are on the right track, but others are too strict distillations of more flexible guidelines gathered from other sources (e.g. the property rights principle, the liberties principle, the merit review principle). Furthermore, the principles do not recognise the benefits of aligning NZ regulation with international norms, or coordination with trading partners.

Some areas of legislation might even be negatively affected by compliance with the principles. For example, other agencies have suggested that the result might be a business environment that unduly favours incumbents over new market entrants if governments refrain from making any regulation that impairs private property rights. This environment could weaken competition and market efficiency.

Expected Effects of the Certification Requirement

The impact of certification will depend a lot on the degree to which people agree with the principles and start to see this as the way to look at legislative quality. Unfortunately, we think the positive impact of certification is likely to be muted because:

- Experience with NZBoRA shows that Ministers are willing to promote legislation, and Parliament will normally pass that legislation unchanged, even when clearly informed of incompatibility.¹⁴
- Ministers and officials will feel less incentive to avoid incompatibilities when:
 - some principles (e.g. the liberties and merits review principles) are likely to be frequently breached, so incompatibility will be routine;
 - some principles (e.g. the liberties and property rights principles) are not well-established legal principles, and appear to lack broad buy-in; and
 - many principles read as technical issues (e.g. the rule of law and role of courts principles), so won't naturally attract much public or media attention.
- Officials may wish to certify accurately, but will be uncomfortable about doing so if their conclusions differ from their Minister's, who must also certify. While officials do not have to justify an incompatibility in these circumstances, there is still plenty of room for argument on initial incompatibility assessment, especially in relation to the "good law-making" principles.
- It is hard for others to check the veracity of compliance with the "good law-making" principles.

Certification by officials will only be done consistently well if reasonable time is allowed for it and the work is undertaken by legal and policy experts, as occurs with BoRA vetting. The legal concepts involved, and the need to consider how the courts might interpret them, will make it highly desirable to use lawyers trained for the task. These skills do not exist in most policy teams.

With expert certifiers, and perhaps 1600 certificates required each year (100 Acts x2, 400 regulations, and maybe 1000 tertiary instruments), certification may become divorced from policy development, and a standardised approach and wording could well emerge to minimise risk, effort, and cost.

The costs of certification, while not huge, will not be trivial, particularly at the beginning. Departmental feedback suggests competent certification of a substantive piece of legislation against the Taskforce's principles would take considerably more time, on average, than BoRA vetting (at ~16 hrs per vet), and far more certificates are required. We think total costs might be in the order of \$3-4m a year, although some other agencies think costs might be higher.

Expected Effects of Court Declarations of Incompatibility

We are not sure how this will play out. Our best guess is that court declarations, or the threat of them, will have little effect on legislative behaviours and outcomes. Court declarations of incompatibility have a strong impact on lawmakers in the UK because they indicate a breach of its international human rights obligations, but this won't be the case in NZ.

Further, we think Ministerial incentives to certify compatibility accurately or consider the free and democratic society justification carefully will be limited because:

- the possibility of a contrary court declaration is at least 2 years away, and may never occur;
- claims of compatibility with the "good law-making" principles cannot be easily challenged just by looking at the proposed legislation, and courts have no jurisdiction to assess those principles.

If declarations are frequently sought as part of judicial review proceedings (likely in the early years), and the first incompatibilities declared are not particularly egregious, then politicians will not come under much pressure to respond to them.

Conversely, if declarations are rare, perhaps because the court sets a high hurdle for exercising the jurisdiction, a declaration may attract media and political attention but Ministerial incentives will be more influenced by the very low probability of an adverse declaration. Such attention may then prompt a Ministerial review and action, but that is not the main incentive function of the declaration.

Advice from Crown Law suggests the Crown's costs of defending applications for declarations could be quite significant in the first few years, given the potential frequency of applications, the lack of NZ and overseas precedents, and the potential need for expert witnesses.

Although we consider that the incentive effects of the declaration procedure on lawmakers are likely to be low, the declaration procedure could still create uncertainty in the business environment. The prospect that legislation may be challenged in court, even if the ultimate remedy has no legal effect, raises uncertainty as to whether the law will remain stable or will be amended. This uncertainty is compounded by the fact that it is difficult to predict how the courts will interpret the principles.

Expected Effects of the Interpretive Direction

While apparently intended to "enliven" the existing judicial review jurisdiction, we think the interpretive direction is highly risky and could have significant unintended effects. In particular:

- a new interpretive direction for the courts will inevitably increase uncertainty about the meaning of legislation until enough jurisprudence builds up around it.
- as some principles and terminology are novel and unorthodox, the law could change in unexpected ways, and may give rise to unexpected remedies, as New Zealand found with a similar interpretive direction in the NZBoRA. For example, the property rights principle could lead to compensation being awarded in respect of government actions where the government had no intention of paying compensation
- it is not clear what it would mean to interpret the law in line with the good law-making principles

We think the principles will provide considerable scope for raising interpretation issues in legal arguments, with implications for court costs.

Expected Effects of the other proposed arrangements

We think the remaining Taskforce proposals (for agencies to list and periodically review existing legislation and to expand the terms of reference of Parliamentary committees) could have some modest benefits and don't appear to present major risks.

Analysis of the Subsidiary Indicators: The Taskforce's proposed Bill

Range of legislation covered

- Comprehensive - the Taskforce's proposals would apply to all primary and delegated legislation

Impact on current constitutional relationships

- The proposed new roles for the courts have some precedent in the NZ Bill of Rights Act, but this proposal is a significant further step beyond the traditional limits of the courts' constitutional role in New Zealand, and beyond their traditional areas of expertise.
- Parliamentary sovereignty is preserved, but this proposal invites the courts to participate in public debate on the merits of legislation, and exercise more influence over the meaning of legislation.

The fit with current arrangements for developing legislation

- The good law-making principles have the potential to reinforce Cabinet's RIA requirements, though integration with the certification obligation may suggest some changes to the RIA regime.
- The requirement for a register of legislation and the expectation that agencies will regularly review their legislation against the principles would reinforce the new legislation scanning requirement.
- However, the Taskforce's principles sometimes differ from, or go beyond, accepted legal and legislative norms (e.g. the takings, liberties, and charging principles), or are presented in far less conditional terms than their treatment in the LAC guidelines (e.g. the merits principle).
- The proposals do not sit comfortably alongside the NZ Bill of Rights Act regime. Some principles (e.g. personal liberties and property rights) are given the flavour of rights and would be better addressed through the NZBoRA regime. Similarly, some mechanisms (e.g. the interpretive direction, and the justification for incompatibility) seem far better suited to the NZBoRA regime.

Compatibility with different regulatory philosophies and frameworks

- The mix of principles selected (e.g. including property rights, taxes and charges, but missing the principles of the Treaty of Waitangi and NZ's international obligations) and their strong normative formulation, are likely barriers to broader acceptance.

Overall assessment of Option 1: The Taskforce's proposed Bill

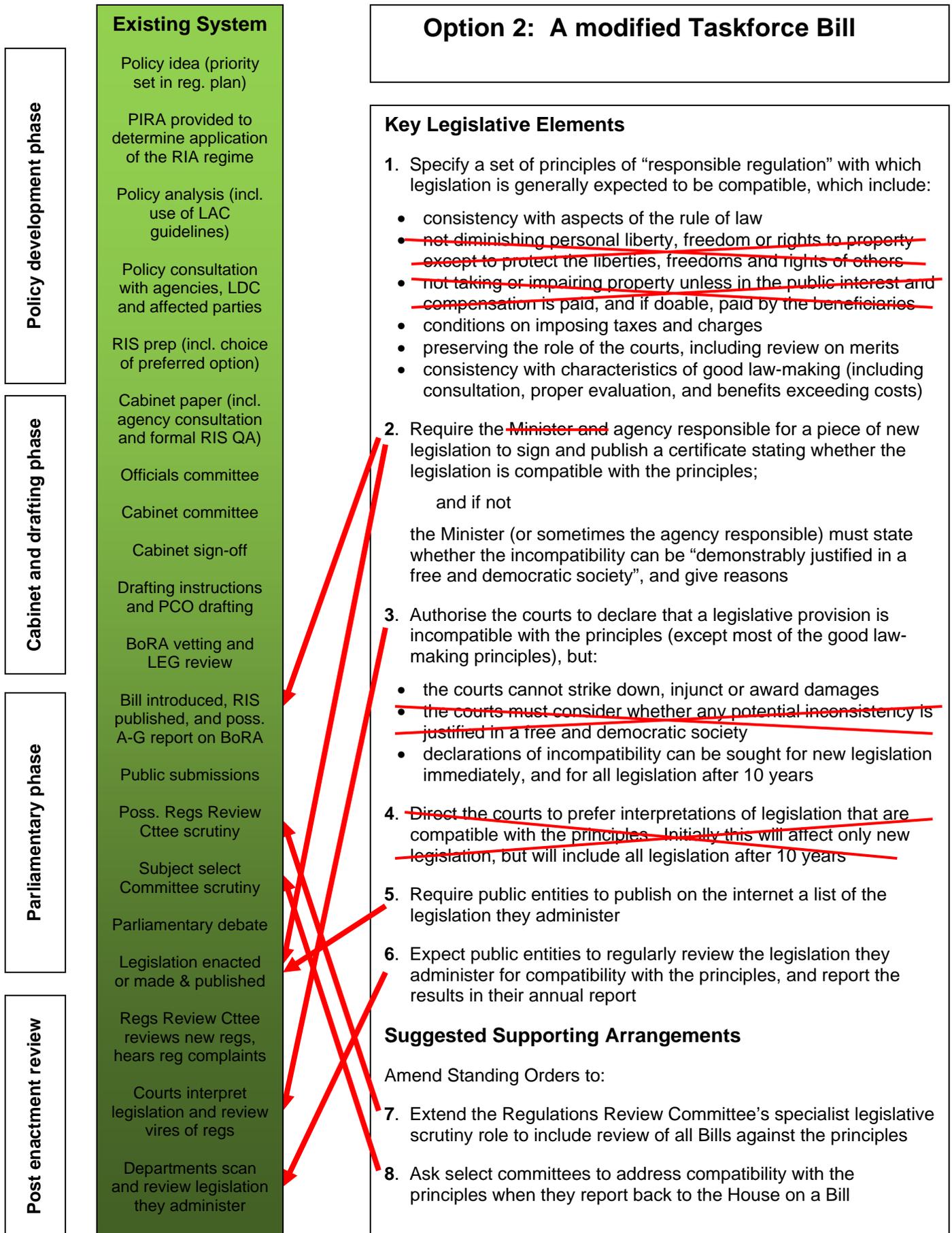
The fit with our key objectives

In terms of our key objectives, the certification of principles and role of the courts primarily targets the translation of policy into good legislation;

However, the inclusion of good law-making principles also encourages some attention to the policy process. Requiring agencies to maintain a register of legislation they administer, and the expectation that agencies will regularly review the compatibility of their legislation with the principles and report annually on the results will also encourage more attention to the stock of legislation.

General Conclusion

We do not support the Taskforce's proposed Bill. We doubt the chosen principles can attract the broad-based support necessary to induce enduring behavioural changes, and compliance costs could exceed benefits. The interpretive direction presents a particular risk of unintended outcomes.



Overall Assessment of Option 2: The modified Taskforce's Bill

The Main Changes from the Taskforce's Bill

This option retains the core of the Taskforce's proposed Bill, but is modified to try and address some particular concerns with detailed provisions of the Bill. The main modifications are indicated by crossed out text in the table above, where feasible, but they include:

- Removing the proposed liberties principle, as it does not reflect a well-established legal principle and a lot of legislation will be incompatible with it;
- Removing the proposed property rights principle, as it does not accurately reflect the legal principle relating to compensation for expropriation, and the question of rights to property would be better addressed, if warranted, in the New Zealand Bill of Rights Act;
- Rewording other principles to better reflect established exceptions or to align them more closely with other legislative references or administrative requirements, like the RIA regime;
- Changing the certification requirement so only chief executives would have to certify compatibility, as the chief executive will normally have the better information, incentives and skills to certify reliably, and removing the potential for open disagreement with the Minister should improve the likelihood that the chief executive will certify reliably;
- Providing for a range of minor and technical legislative instruments to be exempt from certification where it would add little or no value, to keep certification manageable and more cost-effective;
- Removing the obligation on the courts to consider whether an incompatibility might be justified in a free and democratic society, in order to limit the courts intrusion into questions of political justification;
- Completely removing the interpretive direction to the courts, in order to reduce the risk and limit the uncertainty associated with a new interpretation requirement.

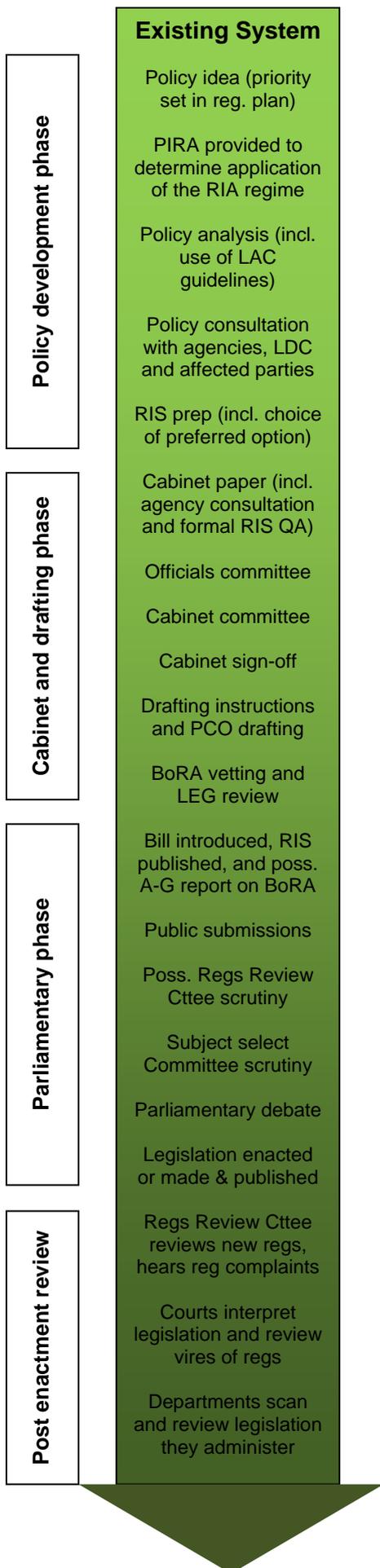
General Conclusion

It is not worth repeating here the detailed analysis done for Option 1 - the Taskforce's proposal. The likely effects of the modified Bill should be reasonably predictable from looking at the changes above.

Overall, we think this modified Bill would be preferable to the Taskforce's proposed Bill. The changes would significantly reduce the sharpest risks of unintended consequences associated with the Bill, though perhaps at the expense of losing some of the force that court involvement could bring.

A more orthodox set of principles will make it easier to get and maintain wider buy-in. Certification will become a little easier, and fewer certificates will reduce unnecessary bureaucracy. Court costs should be lower.

Nonetheless, some potential problems and risks remain, particularly in relation to setting out principles in legislation as firm rules. Simplifying and codifying principles from the common law and LAC guidelines can change their meaning in unpredictable ways, and could easily find their way into judicial interpretation, with unexpected results. We do not think the modified Taskforce Bill is the best legislative option available.



Option 3: A Bill for Reporting on the Government's Regulatory Commitments

Key Legislative Elements

1. Soon after the start of each Parliamentary term, the government would be required to table in the House a statement of its regulatory strategy, setting out:
 - the principles and processes it will promote and use to deliver and maintain high quality legislation
 - how it intends to assess its performance against these commitments
2. The legislation could identify some specific matters on which the government must express a view in the statement, such as:
 - the type of analysis it will undertake before deciding to legislate
 - the approach it will take to consultation with the public on legislative proposals
 - the approach it will take to reviewing and maintaining the quality of the stock of existing legislation.
3. Towards the end of the Parliamentary term, an independent expert body would be required to report to the House on the performance of the regulatory management system,
 - this could include but would not be limited to the performance commitments made by the government in its last statement

Suggested Supporting Arrangements

None

Analysis of Option 3: Reporting on the Government's Regulatory Commitments

The Case for Legislation

Legislation is not essential. The government can and has voluntarily produced and published a statement of regulatory intentions (Government Statement on Regulation, 17 August 2009), and the government can commission an independent review of the performance of the regulatory management system.

Legislating for a statement and a subsequent review could encourage the government:

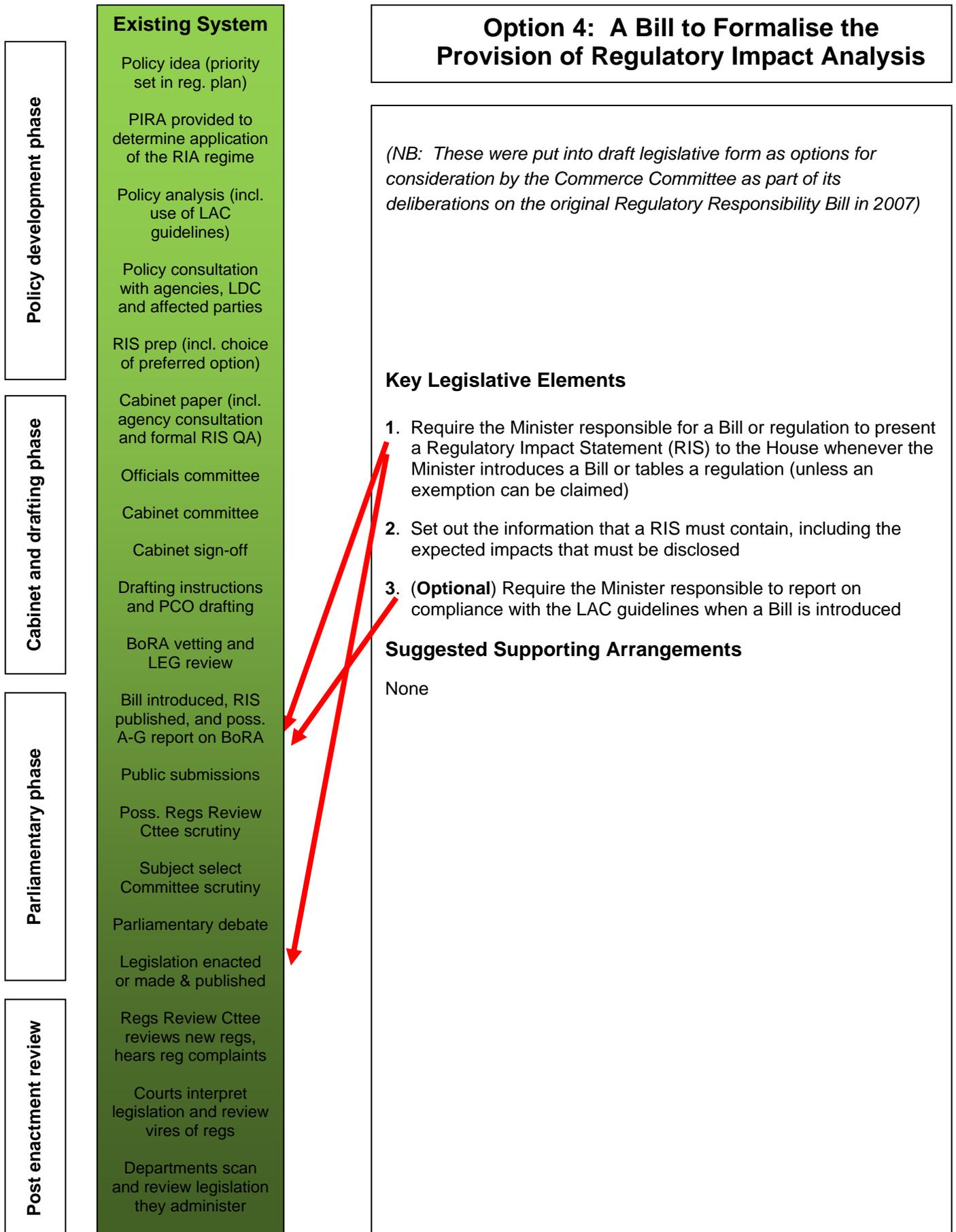
- to give more explicit thought and attention to the question of regulatory quality; and
- limit the number of departures from its commitments related to regulatory quality.

However, some of the difficulties of trying to legislate for a statement and subsequent review are

- the lack of widely accepted, measurable dimensions of regulatory quality
- the great difficulty of clearly indicating what sort of statement is required, what sort of matters should or need to be covered in the statement, and how to ensure or encourage a government to make some concrete and measurable commitments in it.
- The difficult trade-offs in determining the timing of the reports – too close to the start of a Parliamentary term and a government won't have had time to develop and agree a meaningful strategy, but too much of a gap and Ministers will be taking significant regulatory decisions without the statement to help set the tone.
- the consequent high risk that a government may be able to set out a statement in such vague and general terms that it is essentially meaningless as a guide, reference point or discipline.

General Conclusion

We do not support a Bill to require reporting on the government's regulatory commitments. It is not clear that legislation here would provide any benefits over and above its administrative equivalent.



Overall Assessment of Option 4: Formalising the Provision of RIA

The Case for Legislation

Legislation is not essential. Compliance with the RIA regime and the LAC guidelines are existing Cabinet reporting requirements.

The goal here would be to increase the transparency of decision-making and enhance the ability of the House and the public to scrutinise Bills and regulations.

The potential advantages of legislating for these disclosures are that this will:

- promote greater awareness of the features of a good regulatory analysis;
- reduce the likelihood of these existing administrative requirements being bypassed, and
- increase the likelihood that the work will be done to a better standard because it is more widely viewed as an essential element of good regulatory practice.

The disadvantages of legislating for these disclosures are that:

- codifying the RIA regime makes it much harder for the regime to evolve and respond to changing needs and experience. There have been a number of significant changes to the form of the RIA regime in New Zealand since it was first adopted. This is consistent with overseas experience.
- the LAC guidelines are not expressed in the form of clear rules or standards that allow for practical certification of compliance, and would give them a legal status that they were never designed to have.

Even if these problems could be overcome, we think legislating for the RIA regime and the LAC guidelines would be of limited benefit in enhancing legislative quality. It might reduce the number of legislative initiatives that bypass the RIA regime, but the far greater problem is the poor quality of analysis contained in the RIS and the willingness to certify compliance with the LAC guidelines without much awareness of their content.

Unfortunately, we can't legislate for high quality RIA or competent certification. Putting these requirements in legislation would not increase the negative consequences of doing it badly. The incentives to do the work to a high standard would remain muted.

General conclusion

We do not support a Bill to formalise the provision of regulatory impact analysis or use of the LAC guidelines. The risks of putting this in legislation are greater than the potential benefits.

Option 5: (Treasury's Preferred Option) Strengthening Parliamentary Review

Key Legislative Elements

1. Require the Minister responsible for a Bill, SOP, or regulations to present an explanatory note to the House that:
 - provides brief background information about the legislation
 - red flags any features of the legislation that indicate that careful scrutiny may be warranted, and justifies those features
2. The matters needing brief disclosure might include:
 - the function, expected effects, and need for the legislation
 - whether the legislation has been vetted for consistency with human rights legislation, privacy legislation, Treaty principles and NZ's international obligations, and with what conclusion
 - what public consultation has occurred
 - whether a RIS was prepared, and where it can be accessed
3. The matters needing to be flagged, and possibly justified, for Bills and SOPs (they would be different for regulations) might include whether it:
 - adversely affects rights or imposes obligations retrospectively
 - takes or impairs private property without compensation
 - authorises charging for any function or service where the charge could be set at a level above the cost
 - seeks to oust or restrict access to judicial review
 - authorises administrative decisions affecting rights and interests without full right of appeal
 - confers criminal or civil immunity on any person
 - authorises the making of delegated legislation that would amend an Act, or grant exemptions from an Act or regulation.
4. Require the Attorney-General to commission an independent, 5-yearly report on the performance of existing executive and parliamentary processes for developing legislation.

Key Changes to Parliamentary Processes

5. Emphasise Parliament's responsibilities as a gatekeeper of legislative quality by:
 - establishing a legislative quality select committee; or
 - requiring subject select committees to report to the House on a number of legislative quality criteria.
6. Give Parliament more analytical support for its function of considering legislative quality issues by:
 - increasing the specialist resources available to select committees in scrutinising legislative quality; or
 - establishing a new Officer of Parliament to consider legislative quality matters and support select committees.

Suggested Supporting Arrangements

7. Greater release of exposure drafts of legislation for consultation.
8. Reinvent LEG as a more substantive test of the quality of draft legislation, supported by LEG papers that explicitly include:
 - updated estimates of the costs and benefits claimed when key policy decisions were taken, based on the draft legislation
 - information on what, if any, scenario testing has been done
 - assessment from relevant expert agencies of Crown legal risk, business cost and competition impacts, and compliance with key legislative principles and NZ's international obligations etc.

Existing System

Policy idea (priority set in reg. plan)

PIRA provided to determine application of the RIA regime

Policy analysis (incl. use of LAC guidelines)

Policy consultation with agencies, LDC and affected parties

RIS prep (incl. choice of preferred option)

Cabinet paper (incl. agency consultation and formal RIS QA)

Officials committee

Cabinet committee

Cabinet sign-off

Drafting instructions and PCO drafting

BoRA vetting and LEG review

Bill introduced, RIS published, and poss A-G report on BoRA

Public submissions

Poss. Regs Review Ctee scrutiny

Subject select Committee scrutiny

Parliamentary debate

Legislation enacted or made & published

Regs Review Ctee reviews new regs, hears reg complaints

Courts interpret legislation and review vires of regs

Departments scan and review legislation they administer

Policy development phase

Cabinet and drafting phase

Parliamentary phase

Post enactment review

Analysis of Option 5: Strengthening Parliamentary Review of Legislation

The Case for Legislation

Legislation is essential only if a new Officer of Parliament is established, which is one possible way of increasing the level of support available to select committees to help them consider the legislative quality aspects of bills they examine. The requirement for and content of an explanatory note could instead be set out in Standing Orders, as it is now, or by voluntary Cabinet agreement. Similarly, the requirement for an independent 5-yearly report commissioned by the Attorney-General could be either in legislation or in Cabinet rules. In relation to the explanatory note proposal:

- legislation has the advantage of a much greater profile with both the public and the public service, and is perhaps a more credible commitment because, unlike Standing Orders, it cannot be suspended by a simple motion of Parliament with little or no notice and fanfare.
- legislation has the disadvantage that it may be harder to fix any unanticipated problems, may be less flexible if usual legislative processes are set aside or foreshortened, and there is always the possibility the courts will find an unexpected role. However, the risk of the courts getting involved here seems low.
- the current obligation to provide an explanatory note sits in Standing Orders but there is plenty of precedent for Parliament using legislation to require disclosure from the Executive.
- use of Standing Orders requires the support of all political parties in Parliament and, as a result, may increase the likelihood of achieving enduring culture changes.

On balance, we consider that the advantages of setting out new requirements for explanatory notes outweigh the risks, which we believe can be managed. However, we note that the Clerk of the House of Representatives is strongly of the view that parliamentary procedure should be established by the House in Standing Orders rather than in statute.

Expected Effects of the Explanatory Note Requirement

In a similar way to setting out principles in legislation, setting out matters to be disclosed and explained in an explanatory note raises their profile by providing formal Parliamentary endorsement of their importance to producing good legislation. It means those matters will get more attention, at least in the drafting process and in scrutiny by the House.

Whether it will have much of an impact depends on the degree of general support for the idea that the matters to be disclosed are important, and worthy of careful scrutiny. Like the Taskforce's proposal, it does not constrain executive or parliamentary action.

- One advantage of the explanatory note approach to disclosure (compared to the Taskforce's) is that it won't irritate those who think the norm implied by the wording of a principle is inaccurate or wrong. Here they only need to agree that the issue is important and warrants careful attention. By drawing extensively on the LAC guidelines, broad Parliamentary buy-in seems more likely.
- A possible disadvantage is that it doesn't give the same emphasis to the policy justification and process as the Taskforce proposal, but this was an area where we think even the Taskforce proposal would struggle to get traction.
- Regardless, it does not guarantee that Ministers and officials will pay close attention to these issues or adopt an orthodox line in legislation they promote. Experience with s.7 of NZBoRA shows that Ministers and Parliament are not always concerned about departing from expected practice. Most of the questions to be addressed are technical matters and won't usually attract much public or media attention, so the political discipline provided may still be quite modest.

The proposal that government Supplementary Order Papers (SOPs) should also have an explanatory note recognises the reality that significant changes can be made to Bills late in the Parliamentary process and the House should have information to help assess their effect.

The new explanatory note will contain more information than at present, and more (but not all) legislation will be required to have such a note. Inevitably this will increase the costs of preparing legislation. We expect that PCO will assist agencies to ensure the questions are accurately answered, and the cost of completing an explanatory note should be lower than completing the Taskforce's proposed certificate because it takes a less formally legal approach.

Expected effects of emphasising Parliament's responsibility for legislative quality and increasing the analytical support available to the House

Parliament is in many ways the natural gatekeeper of legislative quality issues. Currently, select committees may focus on legislative quality aspects of bills if they wish, but are not explicitly asked or required to do so. Though PCO and the Office of the Clerk already support the legislative work of the House, and the LAC may raise legislative quality concerns, legislative quality issues seldom receive close scrutiny in the House. To encourage more in-depth legislative quality scrutiny, we propose that Parliament be given a more explicit mandate to examine legislative quality issues and also that it be given increased analytical support in doing so. We expect a more explicit mandate to examine legislative quality issues, together with increased analytical support to do so, will noticeably increase the amount of attention given to these issues by most select committees and this in turn will lead some policy-makers to give a bit more thought to legislative quality during the policy and bill drafting process,

We have considered two ways in which Parliament could be given a more explicit mandate to consider legislative quality issues:

1. *Establish a specialist legislative quality select committee:* The specialist committee could be an expanded RRC or it could be a new, independent committee. Either way, the specialist committee would report to subject select committees, rather than reporting to the House directly. This option would also require additional resourcing to the Office of the Clerk, to enable it to support the specialist committee. Given time and resource constraints, the specialist committee would be unable to report on all bills, and would need to restrict itself to those that raise significant issues.
2. *Require select committees to report to the House on legislative quality issues in Standing Orders:* Standing Orders could direct subject select committees to consider particular legislative quality issues when reporting to the House on bills. The particular issues could tie in with the explanatory note requirement – that is, they could consider whether the bill has gone through appropriate QA procedures and whether it is consistent with various legal principles.

Select committees (or a new specialist select committee) will need additional support for this enhanced role. This support could be provided by:

1. *Additional resources to select committees:* this is the most straightforward way of increasing support to select committees. The Office of the Clerk already provides advice on legislative quality matters. Increasing the resources available to select committees to receive specialist independent advice on the quality of legislation would enable committees to consider such matters as part of their routine business.
2. *Establish a new Officer of Parliament with responsibility for legislative quality:* the idea here is to provide the House with the sort of expert, independent oversight on legislation that the Auditor-General provides on government spending (suitably adapted to the different logic of legislation). A new Officer of Parliament would require legislation to establish it, unlike the other options discussed here. An Officer of Parliament is perhaps more likely to attract the attention of the public, and therefore increase the demand for legislative quality, than less dramatic measures. But establishing a new body involves more risks and costs than improving on existing bodies. Like the Auditor-General, the Officer of Parliament could have a broader role than simply supporting select committees, and could, for example, report to the House on how well regulatory agencies are

monitoring the effectiveness of the legislation they administer.

If interest is shown in the option of enhancing the role that select committees play in supervising regulatory quality, we will work with interested government agencies and the Office of the Clerk to come to a recommendation on how best to do so.

Expected Effects of the independent 5-yearly report

A periodic stocktake of the effectiveness of existing rules and processes in delivering good quality legislation provides a public prompt for the government and Parliament to consider whether any changes to their existing processes are desirable, in light of recent legislative trends, to meet future demands on the system.

The advantage of doing this as a complete and independent review is that it encourages a look at how the different elements of the system work (or don't work) together, and highlights the competing demands and trade-offs that need to be made. It also allows the possibility of reaching agreement on some co-ordinated change, which may yield gains that would not emerge from the usual ad hoc changes by different groups that control different parts of the system.

The big risk is that such a review fails to attract government or Parliamentary attention, due to bad timing, lack of buy-in, or entrenched differences between interested parties. Wide consultation on the terms of reference may help, but there will always be a risk that nothing much happens as a result. It may also be hard to find the sort of experts needed to undertake a credible, independent review. Costs might be in the order of \$0.5m every five years.

Expected Effects of the proposed reinvention of LEG

This proposal is very closely integrated with the proposed explanatory note requirement. The reinvented LEG would be asked to ensure that all the actions and information necessary to complete the proposed explanatory note have been delivered. And since the devil is in the detail, it is also an opportunity for Ministers to satisfy themselves that updated estimates of benefits and costs still support the original case made for legislation, and that officials have tested its workability

The size of the required shift in mindset and operational role is substantial, however, both for Ministers and officials. LEG has not provided a substantive check on the quality of draft legislation for many years, and never to this level. It needs to be seen as a completely new committee.

Inevitably, this more substantive scrutiny of draft legislation means more time, and more resources, before legislation can be introduced or made. Additional costs are unclear, but together with greater use of consultation on exposure drafts of legislation, the goal is to reduce the costs of later House scrutiny, any rework, and implementation. But the incentives are muted and without Ministerial recognition that effective legislation requires higher standards, it would be difficult to make this stick.

Analysis of the Subsidiary Indicators: Strengthening Parliamentary Review

Range of legislation covered

- The explanatory note proposals would apply to all Bills, and to significant delegated legislation (we doubt it is warranted or meaningful for some types of delegated legislative instruments).
- The range of legislation scrutinised by the House will not change, ie bills and disallowable instruments.

Impact on current constitutional relationships

- Current constitutional relationships are maintained, and Parliamentary scrutiny of the Executive is enhanced. The courts have no explicit role and we think it highly unlikely that the courts would find themselves a new role under these legislative proposals.

The fit with current arrangements for developing legislation

- The proposals are a generally good fit with existing arrangements, though a number of small changes would be useful to aid integration.
- Ministers and agencies would need to think of proposed legislation as following a much clearer two stage approval process – first, key policy decisions to authorise progress to drafting, and then final policy approval to confirm the policy as expressed in the draft legislation is fit for purpose.

Compatibility with different regulatory philosophies and frameworks

- By avoiding simplistic principles, and by highlighting key issues discussed in the LAC guidelines, these proposals should be compatible with different regulatory philosophies.

Overall assessment of Option 5: Strengthening Parliamentary Review

The fit with our key objectives

Like the Taskforce proposal, the explanatory note initiative, increased support for select committees to consider legislative quality issues, and the independent 5-yearly review would primarily target the translation of policy into good legislation.

Strengthening LEG scrutiny may also provide some support for better policy analysis, and any provision for someone to report to the House on how well regulatory agencies are monitoring the effectiveness of the legislation they administer should increase attention to the stock of legislation.

General Conclusion

This is Treasury's preferred legislative option. We think the proposed approach to disclosure has the best prospect of gaining broad buy-in from politicians and officials, and is therefore more likely to be enduring. We think the more timely and certain scrutiny provided by explicit select committee consideration of legislative quality issues, will provide as good if not better incentives than a possible declaration by the courts, and without the risks and costs that come with giving an explicit role to the courts. It is appropriate for Parliament to continue to be the ultimate watchdog for regulatory quality.

Like the Taskforce's Bill, our preferred option operates by increasing disclosure and scrutiny of legislative quality features. The option strengthens our existing system and uses some aspects of it in new ways. Improvements in legislative quality could therefore be relatively modest but we think the opportunities outweigh the risks and the risks here (such as LEG still not providing a real check on quality) are more manageable if they arise.

Conclusions and Recommendations

35. Legislation has a status, profile and educative effect that equivalent administrative measures or Standing Orders can't quite match. But it is also more formal, less adaptable to varying circumstances, harder to fix or amend in response to problems or changing needs, and brings with it the potential involvement of the courts, with sometimes unpredictable results.
36. For promoting legislative quality there are limits to what we can expect from a legislative initiative. It is very hard to use legislation to target the quality of policy development and legislative review because the quality of these processes is not readily observed or verifiable by outsiders. It can only encourage behavioural change, but the pressures, incentives and biases acting on Ministers and officials that lead to poor legislation are strong. Unless it somehow catalyses a new behavioural norm, the gains in legislative quality will probably be modest.
37. That may still be more than enough to justify a legislative initiative, given the significant impacts that poor legislation can have. The big question marks are really the risk of unintended outcomes, and the ability to manage costs if benefits turn out to be far less than hoped. These are the reasons we do not recommend adopting Option 1 – the Taskforce's proposed Bill. The likely approach and effect of court involvement is impossible to predict and we think the interpretive direction creates a particular risk of unintended outcomes.
38. We think Option 5, which seeks to strengthen Parliamentary review of legislation without bringing in the courts, is the best available legislative option. There is some precedent for the explanatory note proposal in the Queensland Legislative Standards Act, and we think it avoids some of the key problems identified with the Taskforce's proposed principles. Encouraging more systematic Parliamentary scrutiny of legislative quality would address an obvious anomaly in the amount of attention given to reporting on government spending relative to reporting on legislation. Emphasising Parliament's role as legislative quality gatekeeper is also squarely in line with constitutional norms, and is unlikely to lead to unpredictable and unintended consequences. As a result, we think the opportunities presented by this option outweigh the risks.

Consultation

Public Comment on the Taskforce Report

39. The Taskforce's report and proposed Bill became public in late October 2009. It attracted support from some business groups (e.g. NZ Business Roundtable, Federated Farmers) and criticism from some legislative experts and academic commentators (see, in particular, the papers from an Institute of Policy Studies symposium¹⁵ in February 2010).

Public Submissions on the Taskforce's proposed Bill

40. In late June 2010, the Minister for Regulatory Reform invited public submissions on the Taskforce's proposed Bill, with questions that sought views on specific aspects of the Bill, its likely effects, and any possible improvements.¹⁶

41. 31 submissions were received. Almost all submitters felt that New Zealand has a problem with legislative quality, but there were strong differences in views about the proposed Bill itself. In general, businesses and business organisations were strongly in support of the Bill or an amended version, suggesting it would provide more incentives for review and amendment of legislation, better conversations between agencies and Ministers, and more transparency and accountability.
42. In contrast, non-business submitters generally did not support the Bill, suggesting it would lead to little behavioural change, difficulties certifying against the chosen principles, a substantial cost burden on agencies, increased litigation, changes to the relationship between the courts and Parliament, and greater tension between Ministers and chief executives.

Public Consultation on the Other Options

43. There has been no public consultation on the other options presented in this RIS, although the Commerce Committee looked at an alternative Bill along the lines of Option 4 when it reviewed the Regulatory Responsibility Bill in 2007 and 2008.

Expert Forums

44. In July 2010 Treasury convened three forums of interested experts, including some Taskforce members, to discuss questions prompted by the Taskforce's report, to help inform Treasury's advice. The forums discussed the nature of the problems with legislative quality and with current arrangements, the pros and cons of legislating for principles, certification and court involvement, and possible alternatives. While participants had a variety of views and no formal consensus was attempted, the forum discussions have informed the analysis in this RIS.

Public Sector Consultation

45. In late 2009 Treasury discussed the Taskforce's proposed Bill with departments having a strong interest in legislative quality (Crown Law, Justice, MED, PCO, DPMC) and with the Legislation Design Committee. They articulated a consistent set of concerns, including that some principles are not broadly accepted or well understood, obvious missing principles, the cost and practicalities of certification, significant litigation risks and costs, and the limited expertise of the courts.
46. In the second half of 2010, Treasury sought informal advice and feedback as it developed its analysis from a small group of public servants with significant legislative experience drawn from these and other departments.
47. Treasury has also formally consulted departments on the analysis, conclusions and recommendations in this RIS, which was updated with their feedback.

Implementation

48. For the Taskforce's proposed Bill, some lead-in time would be required for the:
 - development of government guidance on how to interpret the various principles and the permitted justification for incompatibility, and how to certify to minimise the Crown's litigation risks; and

- identification and training of those who will review draft legislation against the principles and advise the Chief executive and Minister on certification.
49. For Treasury’s preferred option, considerable cross-agency work would be required to consider how best to enhance select committee responsibility for legislative quality issues, but the explanatory note disclosure requirements could come into effect earlier than that.

Monitoring, Evaluation and Review

50. The Taskforce has recommended that the operation of their proposed Bill, if enacted, be formally reviewed at 5-yearly intervals to determine whether its purposes are being met and whether amendments or other measures are required to improve legislative quality. We support this approach.
51. Treasury’s preferred option, however, would take this a little further. It recommends a legislative requirement for an independent report every 5 years on the effectiveness of the whole system for delivering good quality legislation – not just of the proposed new piece of legislation. This report would be tabled in the House.

Endnotes

¹ Hon Justice John McGrath, “Why good legislation matters: a Judge’s view”, Paper for a Legislation Advisory Committee seminar, September 2009.

² Jeremy Waldron, “Parliamentary Recklessness: Why we need to legislate more carefully”, Lecture given at the Maxim Institute, October 2008.

³ The Heritage Foundation, 2010 Index of Economic Freedom

⁴ World Bank Worldwide Governance Indicators, <http://info.worldbank.org/governance/wgi/>

⁵ World Bank Doing Business 2011, <http://doingbusiness.org/>

⁶ OECD Indicators of Product Market Regulation 2008, <http://www.oecd.org>

⁷ See, for example: Mark Harrison, “Assessing the Impact of Regulatory Impact Assessments”, *Agenda*, Vol.16 No.3 (2009); Scott Jacobs, “Current Trends in Regulatory Impact Analysis: The Challenges of Mainstreaming RIA into Policy-making”, Jacobs and Associates (2006); Colin Kirkpatrick and David Parker, “Regulatory impact assessment: an overview” in “Regulatory Impact Assessment: Towards Better Regulation?”, Edward Elgar (2007)

⁸ E.g. Nilay Patel, “Strengthening Section 7 of the New Zealand Bill of Rights Act”, *Australasian Parliamentary Review*, Vol.22(2) (2007)

⁹ Andrew Geddis, “The Comparative Irrelevance of the New Zealand Bill of Rights Act 1990 to Legislative Practice” 23 *NZULR* (2009)

¹⁰ E.g. Chye-Ching Huang, Opinion piece in The Independent Financial Review, 11 March 2010

¹¹ Mark Prebble, "With Respect: Parliamentarians, officials, and judges too", Institute of Policy Studies (2010). The concept of the "iron rule of political contest" is attributed to Andrew Ladley

¹² Full details can be found in the Taskforce report, which can be accessed at <http://www.treasury.govt.nz/economy/regulation/rrb/taskforcereport>

¹³ George Tanner, "How Does the Proposed Regulatory Responsibility Bill Measure Up Against the Principles?: Changing the Role of the Parliament and the Courts", Institute of Policy Studies, Policy Quarterly, Vol.6 No.2 of May 2010
Richard Ekins, "Regulatory Responsibility?", New Zealand Law Journal, February 2010, and "Reckless Lawmaking", New Zealand Law Journal, May 2010

¹⁴ Andrew Geddis – refer endnote 9

¹⁵ Institute of Policy Studies, Policy Quarterly, Vol.6, No.2 of May 2010.
<http://ips.ac.nz/publications/publications/show/297>

¹⁶ <http://www.treasury.govt.nz/economy/regulation/rrb>