



LEGISLATION ADVISORY COMMITTEE

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The Chair
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THE REGULATORY STANDARDS BILL

Introduction

1. This submission is made by the Legislation Advisory Committee (LAC).
2. The LAC was established to provide advice to the Government on good legislative practice, legislative proposals, and public law issues. The LAC has produced and updates the Legislation Advisory Committee Guidelines: Guidelines on the Process and Content of Legislation (LAC Guidelines) as appropriate benchmarks for legislation. The LAC Guidelines have been adopted by Cabinet.
3. The terms of reference of the LAC include:
 - (a) to scrutinise and make submissions to the appropriate body on aspects of Bills introduced into Parliament that affect public law or raise public law issues:
 - (b) to help improve the quality of law-making by attempting to ensure that legislation gives clear effect to government policy, ensuring that legislative proposals conform with the LAC Guidelines, and discouraging the promotion of unnecessary legislation.

4. The LAC does not support this Bill, for the following reasons.

The Proposal

- 5 The Regulatory Standards Bill (RSB) sets out “principles of responsible regulation” (clause 7), which would apply to all legislation in New Zealand, including regulations and tertiary regulations. It does so in response to what its proponents perceive to be a need to invigilate our Parliamentary system but without undermining the authority of that institution. As such the measure, if enacted, would be one of the greatest constitutional importance, and impact very distinctly on the governance of this country.

How the Bill would operate

- 6 The promoters of the RSB take the New Zealand Bill of Rights Act as a model for its design. That is, a set of principles are set out, against which legislation is to be measured. The prospective legislation has to be “compatible” with those principles – in itself a difficult yardstick – and ultimately the higher New Zealand courts would be required to make a declaration to that effect, if such incompatibility is identified.

The LAC concerns

- 7 The Legislation Advisory Committee (unanimously) does not support this Bill. In its view it is misconceived, wrong in constitutional principle, and would be largely unworkable in practice, as well as adding unwarranted economic expense to the governance of New Zealand and vast scope for increased litigation through the Courts. The Committee does, however, recognise the present need for improved Parliamentary governance in New Zealand. So in this submission we will give short reasons for our central concerns over this Bill, but also suggest ways in which the concerns over the broader governance issues could be advanced.

(a) *A flawed model*

- 8 This proposal would add a collateral kind of Bill of Rights to New Zealand law. This is quite wrong in principle. It would also be thoroughly confusing to citizens. There should be only one Bill of Rights Act and it should contain what are considered to be the fundamental values of this country. To have two statutes dealing with related or overriding rights makes no sense at all, and can only give rise to deep confusion and very real downstream problems. Any legislated statement of fundamental values and principles for our nation would need widespread support from the citizenry after considerable consultation. It is quite possible that further and different values and principles would be suggested – for example, protection of the environment, intergenerational equity, the Treaty of Waitangi, or social and economic rights. At this point there is room for doubt whether the juridifying of all these incommensurable values and enabling litigation about them would represent any real advance over current arrangements where the weighing of such values is a matter for settlement through the political process.

(b) *Consequential distortion of the present constitutional order*

9 Once the fundamental model is appreciated, it becomes apparent that it completely distorts the existing democratic constitutional order in New Zealand in several ways, all of which are undesirable: it undercuts ministerial responsibility; politicises chief executives through the somewhat problematic certification process; and thrusts the courts (rather than Parliament) into reviewing the reasonableness of all legislation. Furthermore, the Bill would bring the courts into areas of law-making that are not within their province and for which they lack institutional competence, requiring them to adjudicate on choices made by democratically elected governments on complex social and economic issues and the allocation of resources to address them.

(c) *The content of the proposed principles is problematic*

10 The content of the proposed principles is highly debateable. Further, the Bill does not observe its own (apparent) central principles; itself a graphic example of the whole problem. The Bill attempts to define good law-making by reference to a set of simple principles and it does this through open textured language (eg. the undefined term "impairment") which may well be far too general and very difficult to apply in practice. As all persons associated with legislation know, legislating is a complex business. Furthermore this Bill would require all legislation to come into compliance within 10 years; a task which is patently unrealistic and unachievable given the size and scope of the present New Zealand statute book.

(d) *Economic costs*

11 As the Treasury RIS clearly demonstrates, the costs of the whole endeavour would be very substantial. A whole new process layer would be added to the governance and legislation process. Further, collateral legal attacks on legislation can fairly be assumed to be likely. That would create real uncertainty; and add the direct costs of such litigation, and the indirect costs of further delays in the legislative process.

(e) *Better alternatives*

12 Given widespread agreement that central governance in New Zealand must be improved, there are viable and sensible alternatives available to Parliament instead of this Bill.

13 In the short term, Parliament can take greater control of the passage of legislation, and particularly necessary and often uncontroversial legislation, by reform of its own internal processes and amendment of the standing orders of Parliament.

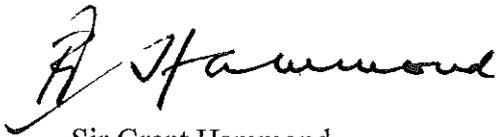
14 Second, there could be greater awareness and adherence to the LAC's guidelines with respect to the process for and content of legislation.

15 In the middle to longer term, the general issue of achieving better quality legislation is of constitutional significance. This is not a narrow issue and

overlaps into such questions as the term of Parliament, a possible second chamber, and how to achieve the putting into place of resources and the time to ensure a more careful deliberative process that is less dependent on the vagaries of pure politics. These latter sorts of issues could be referred to the recently created Constitutional Review Committee.

Conclusion

1. This Bill should not be supported.
2. The LAC would like to be heard on its submission.



Sir Grant Hammond
Chairman, Legislation Advisory Committee