

## Submission on the Regulatory Standards Bill

### Submitter details:

Environmental Defence Society Incorporated  
PO Box 91736  
Victoria Street West  
Auckland 1042

Attn: Shay Schlaepfer  
[shay@eds.org.nz](mailto:shay@eds.org.nz)  
09 302 2972

### Introduction

1. The Environmental Defence Society Incorporated (**EDS**) is an environmental non-government organisation focused on legal advocacy and policy research. It is dedicated to improving environmental outcomes for all New Zealanders. EDS's submission on the Regulatory Standards Bill (**Bill**) is formed through that lens.
2. EDS submitted on consultation related to a proposed Bill in January this year. That submission is enclosed as **Attachment A**. The concerns and issues raised in it remain valid, and we invite the Committee to read it along with this submission.
3. Since then, a Departmental Disclosure Statement (**Disclosure Statement**) and a Regulatory Impact Statement (**RIS**) has been published. This submission provides an overview of EDS's concerns with the Bill, drawing from our earlier submission and updated with information published since.
4. EDS opposes the Bill and asks that it be withdrawn in its entirety.

### RIS and Disclosure Statement

5. The RIS should not be ignored. Specifically, that:
  - a. The Bill is unlikely to be the most efficient approach to pursuing Cabinet's stated objectives.
  - b. If the Bill proceeds, regulating in the public interest may be more costly, with an uncertain impact on the underlying behavioural incentives and on the information problems that drive poor regulatory outcomes.
  - c. The additional requirement of consistency reviews has significant estimated costs and potential for crowding out other regulatory maintenance and stewardship activity.

- d. The Ministry for Regulation prefers alternative approaches to the Bill.
6. The Disclosure Statement also sends a powerful message. The Quality Assurance Panel (which consists of members from the Ministry for Regulation, Ministry of Justice, Ministry for Business, Innovation and Employment and the Treasury) concludes that the Bill only “partially meets” the quality assurance criteria. Further, if the Bill was to proceed, the Panel states that more consideration will need to be given to implementation issues, funding and the risks identified in the RIS.

#### **EDS’s core concerns**

**7. The Bill’s principles are deeply flawed:**

- a. The principles in the Bill prioritise individual liberties and private property rights over collective interests like environmental protection.
  - b. The principles are ideologically biased, incomplete, ambiguous, and exclude Te Tiriti o Waitangi considerations.
  - c. They do not align with international best practices for regulatory development, which emphasise evidence-based, balanced decision-making.
  - d. The principles risk undermining the precautionary principle and could impose financial burdens by requiring compensation when private property rights are affected.
8. There has been some debate about whether principle 8(c)(ii), relating to the taking of property, would enable a legal claim for compensation. Irrespective of whether it would or not, the principle will bear significant pressure on lawmakers to apply a takings approach to regulation.
9. In the context of the environment, this would likely have a chilling effect on environmental regulation and result in significant confusion and litigation.

**10. Excessive, unchecked Ministerial powers:**

- a. The Minister for Regulation would have too much control, including:
  - i. Issuing guidance on interpreting the principles.
  - ii. Deciding which regulations are exempt.
  - iii. Appointing the Regulatory Standards Board.
  - iv. Directing when and how regulatory reviews are conducted.
- b. These powers lack appropriate checks and balances and risk politically driven decision-making.

**11. The Bill conflicts with existing measures:**

- a. Overlaps with and would undermine existing and soon-to-be-implemented regulatory quality systems, including:

- i. Part 4 of the Legislation Act 2019 (which already includes statutory disclosure requirements).
  - ii. Cabinet’s Regulatory Impact Analysis system.
  - iii. The Legislation Design and Advisory Committee Guidelines.
- b. Introduces significant additional compliance costs without clear benefits and risks crowding out regulatory stewardship activities that agencies already struggle to resource.

**12. The Bill would fail its own principles:**

- a. *Inadequate consultation:* The Bill’s development did not meet its own proposed standards for transparent and meaningful consultation. The public consultation was criticised as rushed and too short.
- b. *Insufficient cost-benefit analysis:* The Bill imposes significant regulatory and fiscal burdens without robust evidence that it will improve regulatory quality or deliver net benefits – a core principle it seeks to uphold.
- c. *Selective exemptions:* The Bill allows the Minister to exempt entire classes of legislation from consistency assessments without independent oversight, which undermines the principle of consistency and transparency.
- d. *Failure to demonstrate necessity:* The RIS explicitly states that the existing Regulatory Management System is already improving and that the Bill’s heavy-handed legislative solution is neither the most efficient nor the most effective path forward.
- e. *Potential constitutional conflict:* The Bill concentrates power in ways that may contradict its own principle of checks and balances in law-making.

**Conclusion**

- 13. For the reasons listed, and expanded upon in its submission enclosed, EDS submits that the Bill should not proceed.

**Attachment A – EDS Submission on the Proposed Regulatory Standards Bill**

## **Submission on the Proposed Regulatory Standards Bill**

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Environmental Defence Society Incorporated  
PO Box 91736  
Victoria Street West  
Auckland 1042

Attn: Shay Schlaepfer / John Commissaris  
[shay@eds.org.nz](mailto:shay@eds.org.nz) / [john@eds.org.nz](mailto:john@eds.org.nz)  
09 302 2972

### **Introduction**

1. The Environmental Defence Society Incorporated (**EDS**) is an environmental non-government organisation focused on legal advocacy and policy research. It is dedicated to improving environmental outcomes for all New Zealanders. EDS's submission on the Proposed Regulatory Standards Bill (**Proposed Bill**) is formed through that lens.

### **Summary of submission**

2. EDS considers regulation to be an important tool to protect the natural environment while enabling communities to thrive. To be effective, regulations and regulatory processes should be strategic, transparent, proportionate, based on evidence, and maintained and updated as needed. Improving regulatory efficacy is supported.
3. The outline of the Proposed Bill does not address key factors that can undermine regulatory efficacy in Aotearoa New Zealand. Rather, like its predecessors, the Proposed Bill entrenches a set of selective and subjective 'principles of responsible regulation' (**Principles**) that have the potential to make things significantly worse.
4. EDS opposes the Proposed Bill for three key reasons:
  - a. The Principles are flawed. They are driven by contentious ideology, leave significant gaps and fail to acknowledge fundamental and internationally recognised tenets of good regulatory decision-making.
  - b. The powers vested in the Minister for Regulation are excessive and inappropriate.
  - c. The Proposed Bill cuts across existing and soon-to-be-implemented frameworks, including Part 4 of the Legislation Act 2019, adding significant costs without a detailed assessment of any associated benefits.

5. Overall, the Proposed Bill represents a powerful constitutional shift that undermines collective interests, environmental protection and Te Tiriti o Waitangi / Treaty of Waitangi.

### **Proposed Bill**

6. The Proposed Bill seeks to address concerns about New Zealand's current regulatory oversight arrangements and to improve the quality of regulation.

### *Genesis*

7. The idea of a Regulatory Standards Bill was first proposed in 2006 when the Regulatory Responsibility Bill was introduced as a private member's Bill. It did not pass its first reading.
8. In 2009, the Government established the Regulatory Responsibility Taskforce to consider what should be in a Regulatory Standards Bill. The Taskforce's Bill formed the basis of the Regulatory Standards Bill that was introduced in 2011 and again in 2021. Neither progressed at the time.
9. A Regulatory Standards Bill has therefore been rejected by three different Parliaments. The Proposed Bill forms part of the National-Act Coalition Agreement and appears to have majority support.

### *Substance*

10. The Proposed Bill sets out Principles "against which new regulatory proposals or existing regulation could be assessed."<sup>1</sup> The Principles would be broad and expressed at a high level, and the Minister for Regulation would be required to produce guidelines that would set out in more detail how the Principles should be interpreted and applied.
11. With some additions, they are based on the 2009 Regulatory Responsibility Taskforce's recommended principles as set out in the 2021 Regulatory Standards Bill. New principles focus on the review and maintenance of existing regulation to "clarify and strengthen the legislative stewardship requirements that are already set out in s 12 of the Public Service Act 2020; and require responsible agencies to develop and publicly report against plans to review their stock of legislation."<sup>2</sup>
12. Agencies would be required to ensure that new regulatory proposals are assessed for consistency with relevant principles, and any inconsistencies identified. Where inconsistency is identified, the proposal could be amended, or the responsible Minister could make a statement justifying the inconsistency. Ministers and agencies would also be required to maintain, review and update existing regulation. Where inconsistency is identified, the agency could commit to amending the regulation within a specified timeframe or the responsible Minister could make a statement justifying them.
13. The Proposed Bill would also enable people to seek independent assessment of whether regulation meets standards (the **recourse mechanism**). Unlike the 2021 Bill, which provided a role for the courts, the Proposed Bill sets up a Regulatory Standards Board to consider the consistency of regulation with the Principles in response to complaints. The Board would also be able to undertake reviews at its own behest, or at the direction of the Minister for Regulation.<sup>3</sup> If

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<sup>1</sup> Ministry for Regulation *Have your say on the proposed Regulatory Standards Bill* (November 2024) at 20

<sup>2</sup> Ministry for Regulation *Have your say on the proposed Regulatory Standards Bill* (November 2024) at 34

<sup>3</sup> Ministry for Regulation *Have your say on the proposed Regulatory Standards Bill* (November 2024) at 31

the Board finds any inconsistency with the principles, the responsible Minister would be required to respond to that finding, including justifying any decision not to address identified inconsistencies.

14. The Proposed Bill also gives the Minister for Regulation and the Ministry for Regulation some powers to help carry out its regulatory review responsibilities, including:<sup>4</sup>
  - a. The Minister for Regulation can initiate regulatory reviews and set terms of reference for them.
  - b. The Chief Executive of the Ministry for Regulation can require information to be provided on request, to support the effective and efficient conduct of reviews.
  - c. The Ministry for Regulation must produce a regular report for the Minister for Regulation to present to Parliament assessing the overall performance of the Regulatory Management System, including a broad assessment of the consistency of regulation against the Principles.
  - d. The Ministry for Regulation can require provision of information from agencies to support this regular report.
15. New Zealand currently has regulatory guidance (e.g. the Government Expectations for Good Regulatory Practice<sup>5</sup> and the Legislation Design and Advisory Committee (**LDAC**) Legislation Guidelines<sup>6</sup>). As such, there would be “a degree of overlap between the proposed new arrangements for assessing consistency, and some of the existing [and soon-to-be-implemented] arrangements for promoting the quality of regulation”.<sup>7</sup>

### Improving regulatory efficacy

16. In EDS’s experience, and as noted by The Treasury and various commentators in relation to previous versions of the Bill,<sup>8</sup> several factors can undermine regulatory efficacy in Aotearoa New Zealand. Political commitments based on coalition agreements or ideology can lead to inflexible policy development, a failure to properly identify a ‘problem definition’ and consider solutions, and decision-making not based on evidence. Rushed policy deadlines can lead to inadequate consultation and deficient Regulatory Impact Statements (**RIS**) and cost-benefit assessments, reducing the likelihood of regulation achieving intended outcomes while increasing the risks of unintended consequences for people and the environment.<sup>9</sup>
17. The Proposed Bill does not address these issues and cannot be heralded as a solution to regulatory deficiencies in Aotearoa New Zealand. As noted by The Treasury in the RIS to the 2011 Regulatory Standards Bill, “[i]t is very hard to use legislation to target the quality of policy

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<sup>4</sup> Ministry for Regulation *Have your say on the proposed Regulatory Standards Bill* (November 2024) at 35-36

<sup>5</sup> Government Expectations for Good Regulatory Practice, April 2017; and Legislation Design and Advisory Committee ‘Legislation Guidelines’, 2021 Edition

<sup>6</sup> Ministry for Regulation *Have your say on the proposed Regulatory Standards Bill* (November 2024) at 28

<sup>7</sup> Ministry for Regulation *Have your say on the proposed Regulatory Standards Bill* (November 2024) at 20

<sup>8</sup> Professor Jane Kelsey “Supplementary submission to the Commerce Committee on the Regulatory Standards Bill 2011” (27 August 2010) at 1; Dr Richard Ekins and Chye-Ching Huang “Submission to the Commerce Committee on the Regulatory Standards Bill 2011(16 August 2011); and The Treasury *Regulatory Impact Statement: Regulating for Better Regulation – What is the potential of a Regulatory Responsibility Act* (2 February 2011)

<sup>9</sup> For example, repeal of the 2023 Natural and Built Environment and Spatial Planning Acts, delaying implementation of biodiversity policy, and amendments to the Resource Management Act 1991 to extend the duration of aquaculture permits.

development and legislative review”.<sup>10</sup> Rather, legislation “can only encourage behavioural change, but the pressures, incentives and biases acting on Ministers and officials that lead to poor legislation are strong. ... These are the reasons we do not recommend adopting ... [the] proposed Bill.”<sup>11</sup>

18. These concerns (and others addressed below) are reiterated throughout the interim Regulatory Impact Statement for the Proposed Bill (iRIS),<sup>12</sup> and in agency feedback received to date.<sup>13</sup> EDS agrees with these concerns. EDS could support improved regulatory stewardship provided the costs are appropriately managed and the guidelines against which regulation is assessed are independent, balanced, comprehensive and workable.

## Flawed Principles

19. The Principles in the Proposed Bill largely mirror previous iterations of the Bill. Many of the criticisms applying to those earlier versions remain relevant here.<sup>14</sup>

### *Driven by ideology*

- a. The Principles prioritise the protection of individual liberties and private property while failing to recognise equally important collective interests, including a healthy and thriving environment. The Principles are at odds with existing regulatory systems that protect and enhance these interests.<sup>15</sup>

### *Contentious*

- b. Proponents of the Proposed Bill claim it will implement broadly accepted Principles of good law-making,<sup>16</sup> but extensive academic literature debunks the idea that principles for assessing regulatory quality are neutral even when they purport to be.<sup>17</sup> By definition, principles contain value judgements of varying degrees and are subject to debate and interpretation.<sup>18</sup> The notion that the Principles are orthodox, or indeed widely accepted, is

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<sup>10</sup> The Treasury *Regulatory Impact Statement: Regulating for Better Regulation – What is the potential of a Regulatory Responsibility Act* (2 February 2011) at 29

<sup>11</sup> The Treasury *Regulatory Impact Statement: Regulating for Better Regulation – What is the potential of a Regulatory Responsibility Act* (2 February 2011) at 29

<sup>12</sup> Ministry for Regulation *Interim Regulatory Impact Statement: Legislating to improve transparency of the quality of regulation* (October 2024) at 3-5, 14-15, 18, 27-29 and 31-34

<sup>13</sup> Cabinet Paper “Approval to consult on a proposed approach to the Regulatory Standards Bill” (November 2024) CAB-24-SUB-0437, Annex 5: Summary of substantive agency feedback

<sup>14</sup> Commerce Committee *Regulatory Standards Bill Report of the Commerce Committee* 277-1 (8 May 2015); Legislation Advisory Committee “Submission to the Commerce Committee on the Regulatory Standards Bill 2011” (28 August 2011) at 2-3; Jane Kelsey “‘Regulatory Responsibility’: Embedded Neoliberalism and its Contradictions” (2010) 6(2) *Policy Quarterly* 36- 41; and Richard Ekins “The Regulatory Responsibility Bill and the Constitution” (2010) 6(2) *Policy Quarterly* 9-13

<sup>15</sup> For example, regulations seeking to limit pollution, protect indigenous biodiversity values on private land, or allocate fishing quotas

<sup>16</sup> Regulatory Responsibility Taskforce *Report of the Regulatory Responsibility Taskforce* (commissioned report, September 2009) at [1.12]; and Ministry for Regulation *Have your say on the proposed Regulatory Standards Bill* (November 2024) at 17

<sup>17</sup> Professor Jane Kelsey “Supplementary submission of to the Commerce Committee on the Regulatory Standards Bill 2011” (27 August 2010) at 2

<sup>18</sup> Ministry of Economic Development *Regulatory Responsibility Bill, Submissions Analysis on Legislative Options* (24 March 2008) MED005 available at [https://www.parliament.nz/resource/en-NZ/48SCCOSCAdvicefA2898\\_A9279/766404962a5a5882b2f2c2c4567fd7fa8ec3e02c](https://www.parliament.nz/resource/en-NZ/48SCCOSCAdvicefA2898_A9279/766404962a5a5882b2f2c2c4567fd7fa8ec3e02c); and Professor Jonathan Boston ONZM “Submission to the Ministry for Regulation on the proposed Regulatory Standards Bill 2024 (16 December 2024) at [5(a)]



false.<sup>19</sup> Unlike rights affirmed in the New Zealand Bill of Rights Act 1990 (**NZBORA**), the Principles are broad, ambiguous, and subjective, and it is not clear how or why they have been selected (and others omitted).<sup>20</sup>

#### *Selective and incomplete*

- c. The Principles do not cover all the principles set out in the LDAC Legislation Guidelines and would not cover all the rights set out in the NZBORA.<sup>21</sup> The Principles also explicitly exclude recognition of Te Tiriti o Waitangi / Treaty of Waitangi.<sup>22</sup>
- d. The Human Rights Commission accepted in its submission on the 2011 Regulatory Standards Bill that the principles are not intended to be an exhaustive statement of everything that should be considered in producing good legislation. However, the Commission noted that the way in which the Bill was drafted could mean its principles became the “definitive statement of what constitutes good legislation with the result that other equally important matters ... not explicitly referred to in the Bill are considered less important.”<sup>23</sup> The same risk applies to the Principles in the Proposed Bill.

#### *Inconsistent with international practices*

- e. Comparable jurisdictions do not legislate principles of good regulation. In Canada, regulatory decision-making is guided by a Cabinet Directive on Regulation.<sup>24</sup> The UK follows the Better Regulation Framework,<sup>25</sup> and the European Union has the European Commission’s ‘Better Regulation Guidelines’ (**Guidelines**).<sup>26</sup> These approaches materially differ from the Principles in the Proposed Bill because:
  - i. They acknowledge the importance of assessing economic, social and environmental impacts of regulation from the “point of view of society as a whole”,<sup>27</sup> which the Principles do not.
  - ii. They emphasise the importance of proportionality and eliminating unnecessary burdens, but this is appropriately balanced with other relevant matters, which the Principles do not.<sup>28</sup>

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<sup>19</sup> Richard Ekins and Chye Huang “Reckless Lawmaking and Regulatory Responsibility” (2011) New Zealand Law Review 3 407-442; and as noted in the interim RIS at pp 8, the “novel wording” of the principles was one of the reasons why Parliament’s Commerce Committee recommended that the Bill not be passed on two separate occasions.

<sup>20</sup> Hon Rachel Brooking, Regulatory Standards Bill – First Reading, 4 August 2021; Regulations Review Committee *Regulatory Standards Bill* (advice to the Commerce Committee, 15 September 2011) at 2; Legislation Advisory Committee “Submission to the Commerce Committee on the Regulatory Standards Bill 2011” (28 August 2011) at 3; and George Tanner (2010) How Does the Proposed Regulatory Responsibility Bill Measure Up Against the Principles? Changing the Role of Parliament and the Courts, Policy Quarterly 6(2)

<sup>21</sup> New Zealand Bill of Rights Act 1990

<sup>22</sup> EDS agrees with the concerns raised on this matter in commentary on previous versions of the Proposed Bill and as set out in the Preliminary Treaty Impact Analysis for the proposed Regulatory Standards Bill

<sup>23</sup> Human Rights Commission “Submission to the Commerce Committee on the Regulatory Standards Bill 2011 (18 August 2011) at [4.2]

<sup>24</sup> Government of Canada “Cabinet Directive on Regulation”, guiding principles available at <https://www.canada.ca/en/government/system/laws/developing-improving-federal-regulations/requirements-developing-managing-reviewing-regulations/guidelines-tools/cabinet-directive-regulation.html>

<sup>25</sup> Department for Business & Trade “Better Regulation Framework guidance” (September 2023)

<sup>26</sup> European Commission “Better Regulation Guidelines” (November 2021)

<sup>27</sup> European Commission “Better Regulation Guidelines” (November 2021) at 5 and 34

<sup>28</sup> For example, taking an ‘evidence-based approach’ and stronger emphasis on encouraging participation from interested parties

- iii. They specifically require policy decisions to be informed by the best available evidence. The Principles do not encourage or provide for evidence-based decision-making.<sup>29</sup> While the Proposed Bill's principle of 'good law-making' promotes careful evaluation of the issue, the effectiveness of existing regulation and any reasonable options, there is no guidance on how that evaluation should take place.
- iv. The Guidelines emphasise that "all interested parties, be they experts or individuals or groups affected by EU laws and regulation, should be able to contribute to policymaking by expressing their views and providing relevant data".<sup>30</sup> Conversely, in relation to stakeholder consultation, the Principles highlight the importance of "consulting, to the extent practicable, persons that the Government considers will be substantially affected".

*At risk of creating unintended consequences*

- f. For example, the focus on protecting individual rights and liberties minimises the extent to which the precautionary principle can be applied in regulatory decision-making. This could lead to a reactive approach that is not effective nor efficient in managing the environment or protecting the interests of future generations.<sup>31</sup> Further, where private property rights are impaired, the Principles would require compensation to be provided.<sup>32</sup> This could come at significant financial costs while disincentivising regulatory intervention where the public stands to benefit.

**Inappropriate powers afforded to the Minister for Regulation**

- 20. The power vested in the Minister for Regulation is inappropriate and may lead to unbalanced implementation of the Proposed Bill. The following powers are particularly concerning:

*Power to issue guidance on the meaning and application of the Principles<sup>33</sup>*

- a. As noted in the iRIS, the impact of the Proposed Bill will "depend on the way that its provisions are implemented".<sup>34</sup> The current Minister for Regulation has very strong, and not widely supported, ideological views. There is a high risk that guidelines issued by him will further reinforce the flawed nature of the Principles and lead to adverse outcomes for communities and the environment.
- b. The most obvious and well-traversed example is the principle in the Proposed Bill that all persons to be treated equally before the law. It is unclear whether this principle requires substantive or procedural equality, or both.<sup>35</sup> This principle gives rise to the question of whether the Proposed Bill would enable regulation that addresses significant social issues by providing for bespoke treatment for certain communities. It is unconstitutional for the

<sup>29</sup> European Commission "Better Regulation Guidelines" (November 2021) at 3

<sup>30</sup> European Commission "Better Regulation Guidelines" (November 2021) at 6

<sup>31</sup> EDS notes that even the Public Finance Act 1989 includes reference to the effects on future generations in its 'principles of responsible fiscal management' (s 26G(g))

<sup>32</sup> Proposed principle 'Taking of property'

<sup>33</sup> Ministry for Regulation *Have your say on the proposed Regulatory Standards Bill* (November 2024) at 20

<sup>34</sup> iRIS at 4

<sup>35</sup> Richard Ekins "The Regulatory Responsibility Bill and the Constitution" (2010) 6(2) Policy Quarterly 9-13 at 10

Minister for Regulation to be afforded the power to guide determinations of such complexity and constitutional import.<sup>36</sup>

- c. It is similarly inappropriate for the Minister to have sole responsibility for guiding the degree to which compensation will need to be provided when property rights are impaired, or the scale and nature of information required to be provided by regulators to demonstrate the ‘necessity’ of regulation to limit liberties.

*Power to decide which regulations are exempt from compliance<sup>37</sup>*

- d. The Minister for Regulation is not independent from the Government. The lack of transparency or any checks and balances on this power risks bad regulation being exempt simply because the government of the day wishes it to be so. Indeed, there is likely to be pressure on the Minister to exempt certain priority regulations or workstreams such as those set out in a government’s 100-day action plan.<sup>38</sup> This will not support the objective of achieving better regulation.

*Power to appoint the Board and instruct when it should undertake reviews<sup>39</sup>*

- e. EDS does not support the proposed Regulatory Standards Board and prefers Option 2, strengthening recourse mechanisms within Parliament, identified in the iRIS.<sup>40</sup> Specifically, a new Parliamentary Officer role may be appropriate because it would offer a higher degree of independence both from the Executive and the Ministry itself.
- f. If a Regulatory Standards Board is pursued, it must be independently appointed and consist of members with mandatory areas of expertise including public law, environmental management, and tikanga. The Board’s role should be restricted to administering the recourse mechanism and it should not have the power to undertake reviews on its own behest and/or on the direction of the Minister for Regulation.<sup>41</sup>

*Power to determine how and when agency-led regulatory reviews take place<sup>42</sup>*

- g. The Minister for Regulation should not be given the power to decide when or how regulatory reviews should be done. Affected ministries or agencies should lead the design of any regulatory review because they understand the nuance and specific circumstances relevant to the regulatory system. A Parliamentary Officer or an independent Board could assist with this process.

*Power to initiate regulatory reviews and set terms of reference for them<sup>43</sup>*

- h. It is unclear how the Minister for Regulation could be expected to effectively review and hold government to account on regulatory efficacy when it is not independent of the government. There is likely to be pressure on the Minister to overlook certain existing

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<sup>36</sup> Human Rights Commission “Submission to the Commerce Committee on the Regulatory Standards Bill 2011 (18 August 2011) at [5.3]

<sup>37</sup> Ministry for Regulation *Have your say on the proposed Regulatory Standards Bill* (November 2024) at 27

<sup>38</sup> Hon Lianne Dalziel, *Regulatory Standards Bill – First Reading*, 2011

<sup>39</sup> Ministry for Regulation *Have your say on the proposed Regulatory Standards Bill* (November 2024) at 31

<sup>40</sup> iRIS at 38

<sup>41</sup> Ministry for Regulation *Have your say on the proposed Regulatory Standards Bill* (November 2024) at 31

<sup>42</sup> Ministry for Regulation *Have your say on the proposed Regulatory Standards Bill* (November 2024) at 35

<sup>43</sup> Ministry for Regulation *Have your say on the proposed Regulatory Standards Bill* (November 2024) at 35

regulations that align with the government's precommitments and/or position. The terms of reference for such reviews should be developed by affected ministries or agencies.

### **Existing and impending measures addressing regulatory efficacy**

21. Part 4 of the Legislation Act 2019 is set to come into force on 24 March 2026.<sup>44</sup> It will implement requirements for lawmakers to release disclosure statements outlining how proposed law complies with legislative guidelines or standards, which will be issued jointly by the Attorney-General and responsible Minister and ratified in the House.<sup>45</sup> The guidelines or standards must be identified in a notice, which must also specify the information that must be included regarding departures from the legislative guidelines or standards.
22. The Proposed Bill will cut across this Part 4 process, as well as existing guidelines<sup>46</sup> and rights,<sup>47</sup> adding significant burdens and costs to ministries and agencies without proper assessment of any associated benefits or alternative (non-regulatory) options.<sup>48</sup> These concerns are highlighted in the iRIS and feedback received to date.<sup>49</sup>
23. In the iRIS, the Ministry for Regulation considers that the disclosure regime under Part 4 “will achieve many of the same benefits for increasing regulatory quality without generating the same risks as including principles in primary legislation.”<sup>50</sup> As such, the Ministry prefers the mechanism in Part 4 over the Proposed Bill because it offers greater flexibility compared to legislated principles, and because the guidelines will face greater scrutiny in their promulgation. In other words, the guidelines are more likely to be representative of the full range of matters relevant to making good regulation and are more likely to garner broad support and buy-in across the political spectrum.<sup>51</sup>
24. Implementing the Proposed Bill would require Part 4 to be repealed without it ever being tested. That would be inappropriate considering Part 4 of the Legislation Act passed with cross-party support and the Proposed Bill does not have multi-party support across the Parliament.
25. For these reasons, EDS prefers Part 4 of the Legislation Act to be implemented and opposes the Proposed Bill. It is more appropriate for principles of responsible regulation to be issued as guidelines (as is the case in other jurisdictions) than in statute. Further, the Attorney-General's involvement in issuing the guidelines, and the requirement that they be ratified in the House, are important checks and balances on Ministerial power which are missing in the Proposed Bill.<sup>52</sup>

### **Recommended changes if the Proposed Bill is to progress**

26. Without derogating from its position that the Proposed Bill should not proceed, if the Proposed Bill is to progress, EDS recommends that:

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<sup>44</sup> Legislation Act 2019, Part 4 and s 2

<sup>45</sup> Legislation Act 2019, s 107 and 108

<sup>46</sup> Issued by the Legislation Design and Advisory Committee

<sup>47</sup> Affirmed in the New Zealand Bill of Rights Act 1990

<sup>48</sup> As discussed in the First Reading on the Regulatory Standards Bill (2021), 4 August 2021; and Professor Jonathan Boston ONZM “Submission to the Ministry for Regulation on the proposed Regulatory Standards Bill 2024 (16 December 2024) at [5.a.]

<sup>49</sup> Cabinet Paper “Approval to consult on a proposed approach to the Regulatory Standards Bill” (November 2024) CAB-24-SUB-0437, Annex 5: Summary of substantive agency feedback; iRIS at 18; and see for example the alternatives set out in the submission of Dr Richard Ekins and Chye-Ching Huang on the Regulatory Standards Bill 2011(16 August 2011) 158

<sup>50</sup> iRIS at 30

<sup>51</sup> iRIS at 30

<sup>52</sup> Legislation Act 2019, s 107(2) and s 108

- The Principles should include clear guidance on how private and public interests (including a healthy environment and stable climate) can be balanced in regulatory decision-making
- The Principles should reinforce and promote the value of good-faith consultation
- The Principles should specifically prioritise and promote evidence-based decision-making and adopt a precautionary approach where the evidence is uncertain, unknown, or little understood.
- The Principles should recognise and promote tikanga and Te Tiriti o Waitangi / Treaty of Waitangi approaches to regulatory decision-making
- A Parliamentary Commissioner should be appointed to independently manage the recourse mechanism, and the Minister or Ministry for Regulation should not have powers to direct its approach to, or involvement in, regulatory reviews. The Commissioner's reports must not be binding.
- Guidelines on interpreting and applying the Principles should be issued jointly by the Attorney-General and the newly appointed Parliamentary Commissioner, in consultation with ministries and agencies, and ratified in the House
- To minimise costs and encourage compliance, guidelines on the implementation of regulatory stewardship principles must be developed in collaboration with agencies and enable flexibility to respond to specific circumstances
- Aspects of the Principles that the law should be clear and accessible and that the independence and impartiality of the judiciary is protected should be retained.

## Conclusion

27. EDS opposes the Proposed Bill as it does not address the fundamental issues undermining regulatory efficacy in Aotearoa New Zealand. Rather, the Proposed Bill implements a set of ideological and selective principles that do not appropriately recognise public interests, Te Tiriti / Treaty, evidence-based decision-making, or good faith consultation.
28. Excessive concentration of power in the hands of the Minister for Regulation is inappropriate, and a more independent oversight process, such as the creation of a Parliamentary Commissioner to manage regulatory reviews, is preferred.
29. Ultimately, EDS prefers the implementation, strengthening and possible streamlining of existing and pending measures, including Part 4 of the Legislation Act 2019, as a more flexible and effective approach for improving regulatory quality.