

# **The Treasury**

## **Productivity Commission Report on Regulatory Institutions and Practices Information Release**

### **Release Document**

**December 2015**

**[www.treasury.govt.nz/regulation/nzpcresponse](http://www.treasury.govt.nz/regulation/nzpcresponse)**

No information has been withheld from this release document.

In preparing this Information Release, the Treasury has considered the public interest considerations in section 9(1) of the Official Information Act.

# The Productivity Commission Inquiry Report on Regulatory Institutions and Practices

## The nature of the Final Report: why it provides an opportunity but has limitations as a plan for change

**A very big ....** 525 pages, 152 findings, 44 recommendations **... and diverse report ....** 14 issues chapters on such subjects as decision review, the Treaty of Waitangi in regulation, role clarity, and funding of regulators...  
**.... covering two core subject areas ...** Part 1 looks at the institutional features and practices of regulators/regimes, while Part 2 looks at whole-of-system regulatory management issues  
**.... though some topics were out of scope** (e.g. reviews of individual regulators/regimes) **.... or not covered** (e.g. parliamentary processes, the regulatory policy development process, international regulatory issues).  
**In Treasury’s view, the report presents a reasonably compelling picture of system-wide problems, but is less convincing in its recommended solutions, and lacks any “game-changing” ideas** and there is no real discussion of the relative priority, size of expected gains, or implementation costs of the different proposals, or what approach to implementation might offer the best chance of success or maximum impact.  
Note: The next page provides a summary of the Commission’s conclusions.

### While it is important to lift performance on all fronts, we have identified the following as the key areas of focus...

**Ministerial leadership and commitment.** We agree with the Productivity Commission that strong Ministerial leadership is necessary to improve the quality of regulation and to support regulatory agencies to fulfil their stewardship obligations. We think one of the best opportunities to achieve quick gains in the regulatory space is through better Ministerial prioritisation of policy effort and legislative focus. We are working with departments, other Central Agencies, Cabinet Office and PCO to develop a better regulatory planning and prioritisation process but strong Ministerial leadership will be necessary to achieve success.

**Improving the quality of regulatory stewardship** Treasury are looking to put a greater focus on engagement, support and partnership with key regulatory agencies to improve regulatory stewardship, both in terms of supporting agencies in their regulatory roles by identifying and promoting good practice and building our capability and understanding of practical issues associated with running a regulatory system. We are also looking to work more closely across Central agencies to understand the health of regulatory regimes and agencies, and come to a view on key priorities for regulatory reform. There are also benefits in integrating the regulatory focus into wider state sector management activity and raising stakeholder awareness of stewardship performance and improving the visibility of regulation.

**Improving the capability and performance of regulators.** We agree with the Productivity Commission that improving regulator workforce capability is crucial for regulators to be able to be flexible and adaptable and operate responsive, risk-based regulation in light of an environment that is constantly changing. However, this process will take time. The Commission acknowledges the role of communities of practice in achieving this but also calls for an intellectual leadership position to be created in the Treasury. We consider a better outcome would be achieved if this function was led by the regulator sector itself.

### Opportunities within Central Agency processes

#### PM support for Ministerial leadership

Having a designated regulatory reform Minister might be helpful, but simply reporting to a **senior lead Minister** would be the most helpful overall. The **PM’s letter** could then be used to draw attention to the Minister’s regulatory oversight role (even if a designated regulatory portfolio did not exist).

#### Advice on legislative prioritisation

There are a range of advantages in some greater prioritisation of the legislative programme (to reduce time spent developing Bills that do not advance quickly, or to promote those Bills that offer the largest potential benefits). The key regulatory agencies are strongly in favour.

- Greater prioritisation will require the support of the Leader of the House and PM, and **some tweaking of legislative bid requirements and process**.
- The creation of a small **Legislative Minister’s group** (including the Leader of the House and any Minister for regulatory reform) might, like the Budget Ministers group, assist in the prioritisation process.

#### Closer alignment of system initiatives

Lifting the performance of the regulatory management system needs closer alignment of system initiatives between the central agencies than has traditionally occurred:

- E.g. The **Policy Project led by DPMC** is a great opportunity to update our policy development expectations, tools and processes, to take better account of implementation and regulation issues in the policy design decision-making.
- E.g. There is room for **more consistent messaging around the application of the stewardship concept** as employed by the central agencies in different subject areas.
- E.g. There are opportunities to increase attention to regulatory performance through broadening or tailoring some of the **reporting requirements** that apply to regulators and regulatory policy agencies.

#### Mandating of regulator leadership

**Practitioner networks** are suggested as ways to lift capability and standards in both regulators and monitoring agencies. Formal **central agency endorsement or mandating** could really help in increasing agency participation and willingness to contribute to these networks.

#### Communicating/encouraging system improvements

There are opportunities to endorse, via **the Cabguide** or other means, a range of modest system changes that may further assist in the effective development and design of legislation, including:

- the revival of the Legislation Design Committee and/or a greater role for PCO to consider legislative design questions early in the Bill drafting process
- better guidance around more consistent and greater allocation of material to delegated legislation to allow more timely adjustment of provisions problems in the right circumstances
- encouraging greater use of exposure drafts for certain kinds of Bills or regulations to help ensure they are robust
- encouraging greater civil engagement more generally in the development and design of government policy, prompted by NZ’s membership of the Open Government Partnership .

## The content of the Final Report: The Commission's general conclusions .....

### On the state of the NZ regulatory system

"Regulation is **the Cinderella of government powers** .... When regulation fails, the effects can be severe ... But despite these risks, regulation **does not get the attention and care that it deserves.**"

"This report has reviewed the components of the system and has found **deficiencies** in each of them alongside **a surprising complacency** about how the system as a whole is performing. **Insufficient, and in some cases declining, resources** are being committed to matters of regulatory design and review. The designers and implementers of regulation face **escalating expectations, complexity, and challenge.**"

"The assessment [of how well the regulatory system is currently performing] led to four conclusions:

- The regulatory system struggles to deliver proportionate and necessary rules because of **weaknesses in the policy and RIA processes** (which were not adequately testing proposals for new regulation), heavy reliance on statute and limited Parliamentary time.
- The system does not seem to effectively prioritise its efforts, due to the **patchy implementation** of some regulatory management tools (e.g. regulatory scans and plans) and **weak central leadership**.
- Resourcing of implementation is a concern, with **inadequate capability of regulatory agencies** a contributor to regulatory failures.
- **Weak review and evaluation cultures and monitoring practices**, and the culture of some regulators, inhibit the ability of the system to identify issues and learn from experience."

### On the recommendations for system improvement

"The 44 recommendations in our final report ..... can be broadly grouped into **four main themes**.

**"The first theme is stronger ownership and leadership from the centre.** A senior Minister in Cabinet needs to be given responsibility for the regulatory system. Their job would involve identifying areas of risk in the system, setting priorities or objectives to raise its performance, and allocating tasks to achieve those objectives. To carry out this role, the Minister would need more active support from central agencies, and we recommended an expanded and more prominent role for the Treasury in regulatory policy and management.

**"The second theme is a greater focus on improving the quality of legislation.** If New Zealand is to continue basing its regulatory regimes heavily on primary legislation, it's important we get its design right. The Commission recommended a review of the quality checks and processes surrounding the preparation of laws, including RIA and external review by bodies such as the Law Commission. We also believed that more use of exposure drafts of Bills – as often occurs in Australia – would help identify and iron out problems in draft legislation. And we saw a case for looking back over existing statutes to check whether the right balance had been struck in allocating tasks and powers between primary and secondary legislation.

**"The third theme is greater professionalisation of the regulatory workforce.** A great deal of valuable effort has been put into building capability by senior regulatory leaders, but this has depended on the dedication and professionalism of individuals. Our view was that these efforts needed to be given greater support from the government, and made a permanent part of the public sector landscape. We recommended that the government clarify and strengthen its expectations on regulators to develop their staff and to work with other regulatory agencies in building their capability. Although each regulatory agency and task is different, there are a number of common activities, challenges and themes across the system. Given these commonalities, the Commission believed that there was room to appoint a 'head of profession' to provide intellectual leadership and promote good practice for the regulatory workforce.

**"And the final theme is review and evaluation.** We need more of it, and we need to put more effort into targeting the most important regimes for review. We also need to extend the scope of review and evaluation. Much regulation is implemented and enforced by arms' length bodies, but as I noted earlier, oversight and review of these organisations could be improved. We proposed that a process of peer review be set up for regulatory agencies, in which senior leaders from other regulators would assess their performance. This would also have the benefit of helping encourage a 'community of practice' amongst regulators. Finally, there needs to be greater transparency about the existing processes being used to promote better regulation."

## ... and about central leadership

### On the regulatory lead agency

The Productivity Commission Report recommends that:

- the "Minister of Regulatory Management" has an expanded role that involves taking more of a leadership role across the system and increasing the focus on strategic prioritisation
- the resourcing and status of the team supporting the Minister needs to be enhanced to reflect the Minister's increased responsibilities
- Treasury remains the appropriate location for the support agency for the Minister
- Treasury should provide support for the Minister through an expanded team, a published charter setting out its objectives and functions, its own website, and authority to identify itself as a separate unit within Treasury.
- Treasury should provide intellectual leadership in the area of regulatory practice.

## The Treasury view on the central oversight role

The thrust of the Productivity Commission report in relation to Treasury's role is consistent with its own strategy of moving to greater system leadership by placing greater focus on engagement, support and partnership with key regulatory agencies to be better placed to provide advice on:

- the performance of the regulatory management system as a whole and strategies to improve its performance
- the characteristics of a good regulatory regime and promoting good regulatory governance, and
- the performance of significant regulatory systems and associated key risks (in conjunction with Treasury sector teams and other Central agencies).

We think the **existing core regulatory system requirements and expectations are still appropriate and add value** – e.g. regulatory stewardship, RIA requirements. We also think regulatory stewardship expectations are and will remain the foundation of the government's regulatory strategy. We agree:

- **stronger Ministerial leadership would be helpful** in improving the quality of regulation
- **Treasury remains the most appropriate location** for the agency to support the Minister
- there is **value in improving the profile of regulatory management** through the development of **a regulatory strategy**, a **published charter** explaining the central oversight role and **an enhanced web presence** that brings together all the key information, guidance and expectations that agencies need.

We are not convinced that establishing the regulatory function as a separate unit in Treasury would provide any significant benefits relative to costs.

We think that **regulatory practice intellectual leadership is not a good role for Treasury** (or any central agency) due to lack of relevant experience or frequent engagement with front line regulators. A better outcome is likely through **a practitioner-led network**, which is given both formal endorsement and support from the centre. A group of regulatory leaders are in the process of developing a proposal for regulatory CEs to build stronger regulatory practice, culture, leadership and capability led by the regulatory sector itself.

Decisions about the size of the Treasury regulatory team would be made in discussion with the incoming Minister and taking into account other Ministerial/organisational priorities.



## Responding to the Report: Where do Treasury's Regulatory Quality Team see the broader opportunities for change?

RQT has identified 7 work-streams that bring together related proposals and allow incorporation of initiatives not discussed in the Report

| Work-stream   | Significance and key questions to pursue  | What is our initial view on way forward?  |
|---|---|---|
| <b>Regulatory Management System Central Oversight</b><br>(RQT lead)                     | <p>Report sees clarification of Ministerial and central support roles as essential to lifting system performance and a vital first step in responding to the challenge</p> <ul style="list-style-type: none"> <li>What is the appropriate scope of central oversight of, &amp; support for, the regulatory management system?</li> <li>Should there be an explicit government regulatory strategy &amp; what would it address?</li> </ul>   | <ul style="list-style-type: none"> <li>Treasury should continue to have the main central oversight role, made clearer by publishing a charter and a better web presence. But resourcing will affect how much and how well this is done</li> <li>The centre is not well placed to lead the development of good regulator practice – it should instead be regulator-led, but this may still require central endorsement and some resource support</li> <li>Our preferred strategy is based on promoting regulatory stewardship for regulatory policy agencies and regulators – durable gains ultimately depend on changing agency practice, culture, and systems</li> </ul> |
| <b>Legislation Design and Process</b><br>(RQT, PCO lead)                                | <p>This self-contained work-stream is worth progressing early because it will have some visibility and other developments/pressures make the timing opportune</p> <ul style="list-style-type: none"> <li>Can we increase the expert legislative design input prior to drafting?</li> <li>Should we promote/expect exposure drafts in some (which?) situations?</li> <li>Can we promote greater use of delegated legislation, in a way that Parliament would be comfortable with? Will having a register of all instruments help?</li> </ul>   | <ul style="list-style-type: none"> <li>Current reconsideration of Law Commission support for the LAC provides an opportunity to rethink the LAC's role and to reintroduce the Legislation Design Committee in a more proactive role</li> <li>Greater willingness to release exposure drafts is desirable, but we should proceed carefully as Ministers will take time to get comfortable. Starting with some delegated legislation may be helpful</li> <li>PCO has already been asked to investigate the merits of a register of legislative instruments, as recommended by the Regulations Review Committee in a recent report</li> </ul>                                |
| <b>Regulatory Review, Planning &amp; Prioritisation</b><br>(RQT lead)                   | <p>System changes, which are supported by key regulatory policy agencies are needed in this area to support regulatory stewardship. A new Govt is best time to try this</p> <ul style="list-style-type: none"> <li>What would assist departments to identify &amp; prioritise areas for review?</li> <li>What would assist agencies to progress priorities for review or reform, including regulatory maintenance?</li> <li>What would assist departments in developing evaluation capability?</li> <li>What sort of monitoring &amp; reporting should there be of agency strategies for keeping their regimes up to date?</li> </ul> | <ul style="list-style-type: none"> <li>Agree that there is a need to improve the management of the existing stock – a central element of the regulatory stewardship expectations</li> <li>Need to consider whether the PC's recommendations are the best ways RQT/the centre can assist agencies in doing this, or whether other options would be more effective</li> <li>Working already with major regulatory agencies to develop options for a more effective regulatory planning and prioritisation process, including use of the 4yP process and options for greater prioritisation of the legislative programme</li> </ul>  |
| <b>Regulator Funding Issues</b><br>(FSSM lead)  | <p>Not high priority except Cabinet had already asked Tsy to report on fee disciplines</p> <ul style="list-style-type: none"> <li>Can we make changes to fee-setting processes that would provide better assurance to Ministers and other parties that levels are fair and reasonable?</li> </ul>   | <ul style="list-style-type: none"> <li>The issues with cost recovery, to the extent they exist, are not specific to regulator funding</li> <li>Build on work currently being undertaken on fee-setting processes in FSSM</li> </ul>   |
| <b>Designing Regulators</b><br>(SSC lead)   | <p>Significant new work not an immediate priority. Context-specific features in regulatory design will also make useful generic guidance difficult to prepare</p> <ul style="list-style-type: none"> <li>What issues need to be considered when designing/reviewing a regulator?</li> </ul>   | <ul style="list-style-type: none"> <li>Can promote awareness of revised SSC guidance on managing Crown entities, which discusses some of these design issues, but not clear it addresses issues specific to regulator design &amp; management</li> </ul>  |
| <b>Monitoring &amp; Reporting on Regulator or Regime Performance</b><br>(SSC, and Tsy?) | <p>Important but very challenging issues, not easy to fix. High turnover and limited guidance/ information/senior level interest is hampering current performance.</p> <ul style="list-style-type: none"> <li>How do we lift the practice of monitoring of regulators outside of PIF reviews?</li> <li>How do we want agencies to report on regulatory performance to inform monitoring practice?</li> </ul>  | <ul style="list-style-type: none"> <li>New SSC guidance will address some generic issues identified in the Report</li> <li>Proposed extension of PIF to regulators, together with involvement of regulatory leaders in PIF review teams, may well assist. A beefed-up version of MAGNet for monitors of regulators may too</li> <li>Watch MBIE development of regime SOIs/charters with interest, with a view to apply more widely</li> </ul>   |
| <b>Good Practice for Regulators</b><br>(to be regulator-led?)                           | <p>With 10-14,000 people working in regulatory roles, a general lift in workforce capability and regulator practice has huge potential. There are also a large number of findings and recommendations relating to regulator practices, so this is potentially a large work-stream that will take many years to progress.</p> <ul style="list-style-type: none"> <li>What is the best model for leading regulator practice, including getting buy-in from regulatory leaders not currently participating in a network?</li> </ul>  | <ul style="list-style-type: none"> <li>Building networks and communities of practice likely to be a better approach than central leadership</li> <li>Work already under way in regulator community with NZQA on the development of regulatory compliance qualifications</li> <li>A group of regulatory practice leaders is working on a proposal for a collaboratively funded, sector-located, Head of Profession (or similar) resource to address issues raised in the PC report</li> </ul>  |