The Treasury

Productivity Commission Report on Regulatory Institutions and Practices Information Release

Release Document

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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.

Regulatory Institutions and Practices: What does the Productivity Commission propose?

There are two core parts to the Commission's report

Better Regulatory Institutions and Practices – Key Points

Better regulator culture, capability and practice

- Clarifying how regulators are expected to perform and reshaping their views of success are important to addressing a culture of institutional risk-aversion within some regulators

- More sophisticated regulatory regimes and approaches require a more professionalised regulatory workforce, with better training and career paths for the 10-14,000 people working in NZ regulatory roles

- Central agencies should increase the emphasis on workforce capability in regulator performance reviews

- Regulators require more sophisticated guidance on implementing risk-based and "really responsive" compliance and enforcement strategies

- The Govt should provide partial direct funding of regulator networks and establish an intellectual leadership role in the area of regulatory practice

Effective consultation and engagement

- Effective engagement builds trust and promotes confidence that regulatory decisions are robust, but inquiry participants raised concerns about the engagement practices of some regulators

- Regulators should outline and consult on how they will give effect to a regime's objectives

Better regulator governance and design

- Regulator involvement in strategic policy advice is important for effective regulatory outcomes

- MoUs and exemption powers can play an important role in managing regulatory overlaps

- Moving regulatory functions to departmental agencies risks compromising regulator independence

- The centre should actively support departments in managing appointments to regulatory Crown entities

- All regulators should publish information about their regulatory decision-making processes

Greater use of exposure drafts and delegated legislation

- The Govt should encourage greater use of exposure drafts before significant Bills are introduced

- A review should address the inconsistent allocation of material between primary & delegated legislation

- Greater use of delegated legislation, subject to stronger controls, could help to future-proof regimes

More robust approaches to funding regulators

- Cost recovery practice can be improved through more rigorous requirements for fee and levy changes, better performance reporting, more regular reviews of cost recovery practices, and refreshed guidance

Strengthened regulator monitoring and oversight

- Monitoring practice can be improved through greater stability in monitoring staff, greater links to policy staff, a more risk-based monitoring approach, and more attention to regulator strategies and practices

- The SSC should identify current and former regulator leaders to join PIF review teams and to assist in developing regulator-specific questions

A Better Regulatory Management System – Key Points

System-wide regulatory review

- The NZ government does not use many of the approaches to system-wide evaluation of regulatory regimes that are used in other countries (such as red tape targets, sun-setting, periodic stock-takes)

- The government should:
  - publish its strategy for improving the management of the stock of regulation
  - publish the regulatory system reports prepared by departments
  - require departmental SOIs in include strategies for keeping their regulatory regimes up to date
  - Review departmental progress within three years and consider need for new mechanisms

- The Treasury should set out some principles to encourage departments to focus effort on reviews with the largest potential benefits, set up an ongoing process to identify areas requiring attention, and specify targets to reinforce that focus

Information to understand and manage the system

- The NZ Legislation website should be expanded to include all instruments of a legislative nature

- Central agencies should monitor the performance of the regulatory system as a whole, and the Treasury should collect more information about the outputs and outcomes of departmental regulatory management systems

- System-wide standardised reporting is unlikely to be the most effective tool for identifying risks or performance issues, as it will not reflect the diversity among regulatory regimes

Strengthening oversight institutions

- The government should commission reviews of:
  - processes for promoting the quality of regulatory proposals and draft legislation
  - the respective roles of PCO, the Law Commission, the LAC and the Legislation Design Committee
  - relevant parliamentary processes

- The (ideally senior) Minister responsible for regulatory management should have clearly identified responsibilities and should publish the government's objectives and work programme for the regulatory system.

- The 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.

- The Government should locate the proposed role for providing intellectual leadership on regulatory practice issues within the Treasury
  (N.B. this proposed role includes disseminating information on current regulatory topics, coordinating development of professional development pathways and qualifications, identifying common capability gaps and strategies to fill them, developing good practice guidance, coordinating study tours and visits by experts, and leading regulator forums)

The Productivity Commission Inquiry Report on Regulatory Institutions and Practices

What's the Commission's Case for System Change?

Commission Views on the Overall 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 (eg, 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. "

Evidence Cited by the Commission that Points to System-wide Issues

"Two-thirds of regulator chief executives reported they had to work with legislation that is outdated or not fit-for- purpose"

"More than half of all Bills reviewed by the Law Commission in 2013 had significant problems"

"In 2009-2014, NZ produced almost four times more statutes than the UK"

"Only 10% of the businesses surveyed believed that regulatory requirements in NZ were rarely or never contradictory or incompatible with each other"

"Only 23% of the 1,526 businesses surveyed agreed or strongly agreed that regulatory staff are skilled and knowledgeable, and [only] 25% agreed or strongly agreed that regulators understand the issues facing your organisation"

"Fewer than ¼ of central government regulatory workers agree that the management systems in this organisation encourage people to challenge poor practice"

"Fewer than ¼ of regulatory chief executives agree that formal monitoring of regulatory functions by other agencies improves the quality of regulation"

Some External Reactions to the Final Report

"The Productivity Commission report is a dismaying read of a fragmented follow-up since 2009, misplaced resources, fuzzy focus, poor communication, disruptive restructures, inadequate quality and quantity of staff and over-detailed primary legislation" **Colin James**

"I bet this report will be in the 'set and forget' category. All sounds good but next to none will be implemented." **Online comment on interest.co.nz**

"The Commission kicks off with a statement that sums up the way we've often felt around the office: "regulation is the poor cousin of government". Nuances in the report will be revealed over time (it runs to 540 pages), but it is clear that there is some heavy lifting to be done in the area." **Webb Henderson (Law firm)**

"On its face, the Report might be criticised for lacking teeth in its recommendations, particularly given the depth and breadth of the problems it identifies. However, such criticism would miss the real point of and opportunity provided by the Report" **Russell McV**

"The PSA supports the Productivity Commission's recommendation that Treasury and the SSC need to provide greater support for training and qualifications for staff. This report is a welcome contribution, and we look forward to working with Government to act on its findings." **Richard Wagstaff, PSA**

"Recommendations to improve the quality of regulation are important and should be heeded. New Zealand is passing hundreds of laws and regulations every year, ... [b]ut the machinery to manage this rapidly growing stock of regulation is lacking. We need better systems to get more simplicity, consistency and transparency." **Phil O'Reilly, Business NZ**

The nature of the Final Report: why it offers an opportunity but has limitations as a blueprint for change

A very big report .... 525 pages, 152 findings, 44 recommendations.

.... that contains a diverse range of material 14 issues chapters on subjects ranging from decision review, and the Treaty of Waitangi in regulatory design and practice, to role clarity, and approaches to funding regulators.

.... though some topics were out of scope (e.g. reviews of individual regulators/regimes) **or not covered** (e.g. reviews of parliamentary processes or the regulatory policy development process - though it calls for both).

In RQT'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 .

- It provides no high-level map or thematic groupings to categorise regulators/regimes (as requested) – arguing (plausibly) this would be likely to oversimplify regimes and lead to inaccurate or inappropriate conclusions. However, that argument also implies there may be limits to the areas in which central agencies can usefully apply generic regulatory tools and common regulatory standards or expectations across regulators and regimes.

- Suggested ideas for improvements in regulatory practices are generally left as report findings, with report recommendations confined to identifying possible supporting products or actions by the centre. There is no real discussion of what sort of impact we might reasonably expect the actions to have if implemented, or what approach to implementation might offer the best chance of success or maximum impact.

- There is no costing of the report's many proposed improvements (beyond suggesting ~10 extra FTEs for Treasury) – just a statement that the Commission believes the costs are low in relation to the benefits achievable.

- There is no discussion of which actions might matter most or should be given priority - only that the first step should be to clarify roles of the senior Minister and provide strengthened central agency support.

Responding to the Report: Where do we see the main opportunities?

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?
Regulatory Management System Central Oversight (RQT lead)	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 • What is the appropriate scope of central oversight of, & support for, the regulatory management system? • Should there be an explicit government regulatory strategy & what would it address?	• 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 • 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 • 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
Legislation Design and Process (RQT, PCO lead)	This self-contained work-stream is worth progressing early because it will have some visibility and other developments/pressures make the timing opportune • Can we increase the expert legislative design input prior to drafting? • Should we promote/expect exposure drafts in some (which?) situations? • 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?	• 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 • 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 • 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
Regulatory Review, Planning & Prioritisation (RQT lead)	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 • What would assist departments to identify & prioritise areas for review? • What would assist agencies to progress priorities for review or reform, including regulatory maintenance? • What would assist departments in developing evaluation capability? • What sort of monitoring & reporting should there be of agency strategies for keeping their regimes up to date?	• Agree that there is a need to improve the management of the existing stock – a central element of the regulatory stewardship expectations • 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 • 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
Regulator Funding Issues (FSSM lead)	Not high priority except Cabinet had already asked Tsy to report on fee disciplines • Can we make changes to fee-setting processes that would provide better assurance to Ministers and other parties that levels are fair and reasonable?	• The issues with cost recovery, to the extent they exist, are not specific to regulator funding • Build on work currently being undertaken on fee-setting processes in FSSM
Designing Regulators (SSC lead)	Significant new work not an immediate priority. Context-specific features in regulatory design will also make useful generic guidance difficult to prepare • What issues need to be considered when designing/reviewing a regulator?	• 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 & management
Monitoring & Reporting on Regulator or Regime Performance (SSC, and Tsy?)	Important but very challenging issues, not easy to fix. High turnover and limited guidance/ information/senior level interest is hampering current performance. • How do we lift the practice of monitoring of regulators outside of PIF reviews? • How do we want agencies to report on regulatory performance to inform monitoring practice?	• New SSC guidance will address some generic issues identified in the Report • 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 • Watch MBIE development of regime SOIs/charters with interest, with a view to apply more widely
Good Practice for Regulators (to be regulator-led?)	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. • What is the best model for leading regulator practice , including getting buy-in from regulatory leaders not currently participating in a network?	• Building networks and communities of practice likely to be a better approach than central leadership • Work already under way in regulator community with NZQA on the development of regulatory compliance qualifications • 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

Responding to the Report: What are the options, implications and opportunities for the Centre?

1. RQT's Working Assumptions

Treasury should continue to **have the main central oversight role** for regulatory management (the Report agrees)

RQT's work programme, and the government response, need not be limited to subject matter or proposals in the Report

Our existing **core regulatory system requirements** and expectations **are still appropriate** and add value – e.g. regulatory stewardship, RIA requirements, agency regulatory system reports (the Report gives implicit support)

It is **impractical** for RQT to develop and maintain a good understanding of the institutional arrangements and regulatory environment for all regulatory regimes, but Tsy policy teams should have a fair understanding of key regimes

Regulatory stewardship expectations are and will remain the foundation of the government's de facto regulatory strategy

The regulatory management system needs to be designed to **align with and support other state sector systems** initiatives (e.g. BPS, the Policy Project) ...... and vice versa! RQT and other central agency system teams need to:

- keep talking to and collaborate with each other
- share a vision that has **regulatory management fully integrated into our wider state sector model**.

The regulatory management system is a classic example of a **complex system**, which means the dynamics and impacts of proposed system changes are almost impossible to predict – we need to **apply an evolutionary, learning approach**

2. The Scope of Treasury's Mandate

We think **the roles agreed by Cabinet in 2008** for strategic oversight and coordination of the government's regulatory quality assurance systems will **allow the Treasury to provide much of the central support promoted by the Report.**

However, **the proposed provision of intellectual leadership for regulatory practice** sits outside Treasury's current mandate. But we think this **is not a good role for Treasury** (or any central agency) - due to lack of relevant experience or frequent engagement with front line regulators.
- Instead, we propose this occurs through **a practitioner-led network,** which is **given both formal endorsement and some resource support from the centre** (in line with the proposed funding framework for cross-agency initiatives).
- Consistent with this vision, 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.

3. Opportunities/Implications for the Treasury

Within the resources agreed by OLAG in March 2014, RQT believes it can:
- maintain ongoing support for current regulatory tools/processes
- collaborate with other central agency system teams to increase integration of regulatory and other state sector management processes and tools
- periodically collaborate with Tsy policy teams to help develop a view on the performance and opportunities for improvement in key regulatory regimes
- review and provide comment on any discussion of agency regulatory priorities in the latest version of departmental 4 Year plans
- liaise in a limited way with the proposed regulatory practice network
- support further modest improvements to processes used to support good regulatory policy and legislative design (see leg design/process work-stream)
- help develop and co-ordinate a more prioritised approach to regulatory review & planning – if Ministers are willing to support it (as proposed in our review, planning and prioritisation work-stream).

With some additional (2-3 FTE ?) surge resources over 2 years, RQT could also put some proper effort into promoting agency practices that support a regulatory stewardship approach through:
- ongoing engagement with the key regulatory policy agencies on their individual regulatory system reports and associated action plans
- further refinement of the initial regulatory stewardship expectations (as envisaged when introduced), including the possible development of expectations that differ slightly between policy agencies and regulators
- promotion of the "really responsive, risk-based" regulatory approach
- development of guidance on ensuring implementation issues are properly considered in the development of regulatory proposals, and on tools that can be used to test the robustness of draft legislation
- working with departments to help develop and promote monitoring and reporting arrangements properly tailored for application to regulatory agencies, including possible creation of a support network for monitors of regulatory agencies (the current MAGNet group is too weak, limited)
- investigating and promoting systematic reporting that can support a regular dialogue on the performance of significant regulatory regimes (such as the regime SOIs/charters now being trialled by MBIE).

With additional (2 FTE ?) ongoing resources after 2 years, RQT could also:
- monitor the enhanced expectations, and maintain the relationships and tools that will be developed from the surge work above
- form a closer partnership with the regulator practice network, including on guidance they provide on regulator design, capability and best practice issues
- maintain a further expanded web presence for regulatory management
- resource the survey work and analysis necessary to allow Treasury to report periodically on the performance of the regulatory system.

With or without additional resources for RQT, we would like OLAG support to develop as soon as possible a clearer profile for RQT, RIAT and regulatory management issues generally, via:
- **a published charter,** explaining our central oversight roles
- **a higher profile web presence** that brings together all the key information, guidance and expectations that agencies and interested externals should be able to easily find and access (this would **require some support from CASS** to reorganise and add material under a new level 1 heading on the Tsy website).

4. Implications for Central Agency processes

Lifting the performance of the regulatory management system needs closer alignment of initiatives between the central agencies than has previously 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 concept of stewardship** as employed by the central agencies in different subject areas.

A designated regulatory reform Minister is not unhelpful, but reporting to a senior Minister is most important overall. The **PM's letter** could be used to draw attention to the Minister's regulatory oversight role (even if a designated regulatory portfolio did not exist).

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 the legislative bid requirements and process**.
- The creation of a small **Legislative Minister's group** (including any Minister for regulatory reform) might, like the Budget Ministers, assist in the prioritisation process.

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.

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 .