

# **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.

**Points made at the inter-departmental discussion of the Productivity Commission's report "Regulatory Institutions and practices", Treasury, 15 September 2014**

Representatives from the following Departments were present:

MBIE	Health	Treasury
Transport	Education	SSC
Environment	DPMC	IRD
MPI	MSD	Customs
DIA	Justice	

For the purposes of discussion the meeting divided into four groups, looking at: overall regulatory management strategy; legislative design; regulatory evaluation; and regulatory practice. However, in practice similar points were made in different contexts and so have been brought together in the note that follows, along with Treasury commentary on the points raised and on our proposed ways forward.

Treasury is currently putting together a set of responses to the Productivity Commission's recommendations and will discuss these and the overall approach with the new Minister for Regulatory Reform. In the meantime, we continue to be interested in any comments or suggestions Departments may have on the points recorded below, on any other issues raised by the Commission's report or on regulatory management more generally.

**Regulatory strategy**

- Current regulatory strategy is central expectation of 'stewardship' led by agencies (as opposed to, eg, red-tape reduction). Could this be further developed:
  - more principle-based
  - expectations specific to individual regulators/systems
  - clearer accountability and reporting requirements
    - eg, a single administrative appeals tribunal?
  - identification of common elements across regimes and common approaches to measuring them
  - collect and follow up stakeholder insights
- Role of the centre: guidance rather than rules. Best judges of performance are stakeholders, not central agencies.

*Comment: Will propose to new Minister that regulatory stewardship remain at the centre of the government's regulatory strategy. The current stewardship expectations are a starting point for further discussion with regulatory agencies and may prompt suggestions for some adaptation, extension, or tailoring for different agency responsibilities or regulatory environments. This should include discussion and sharing of ideas about how agencies can best measure and report on their stewardship performance.*

**Observations on current approaches to regulatory stock management**

- Review of regulation is currently often done on an ad hoc basis, when a particular issue comes up, or in response to ministerial priorities.

- Planning is not used internally by Departments; difficult to implement, because of fast pace of developments and political requirements

*Comment: this agrees with our and the Productivity Commission's perception. We are currently undertaking a review of the regulatory planning process to develop a process that is less compliance-driven, builds on existing processes such as Four Year Plans and the Legislative bids process, and facilitates strategic discussions about regulatory priorities and tradeoffs—including identifying the resources needed to achieve them.*

### **Options identified for improving regulatory stock**

- Placing greater focus on setting up the basis for future evaluation early in the development of regulatory policy and including this in RISs. Options for assisting this included:
  - MBIE's "living systems" approach and statements of intent for regulatory systems.
  - Strengthening policy capability around evaluation and the connections between policy and evaluation teams
- Strengthening the information flows between regulators and policy agencies on the performance of the regime.
- If resourcing is a barrier to regulatory review being undertaken, then options like BPS seed funding could be considered.
- Greater sharing of expertise and experience in approaches to maintaining regulatory regimes, or creating a centre of expertise/functional lead on monitoring and evaluation.
- Increasing agency CEs' accountability for meeting the expectations.
- What guidance might be needed on judging if regulation is up to date? Role for centre in driving that process? The general view was that there was not a particular need for principles to assist in identifying areas for review as suggested by the Productivity Commission – Treasury doesn't have the detailed knowledge.

*Comment: the proposals here are generally in line with ongoing developments. We are looking to work with regulatory and other central agencies to consider options for increasing RIA training and improving current guidance on planning for implementation and evaluation in policy development process. We need to ensure that maximum cross-departmental value is gained from the different approaches for managing regulation being tried by agencies, such as MBIE Regulatory Systems Programme.*

### **Prioritisation of regulatory reform**

- There is an impact and cost on House time/ PCO/ departments/ regulators/ businesses/ public, in the decisions around the legislative programme each year – how do we make ministers and the Government aware of these impacts and costs, and keep regulatory maintenance up the agenda?
- How to prioritise across votes? Particularly problematic where there is a division of policy and implementation responsibility; the agency that is implementing a policy may see issues with the legislation but the policy agency has other higher/bigger priorities so the work doesn't get done.
- Ultimately the decisions rest with Ministers but there has to be a better way than the current 'black box' process. Is there a greater role for Treasury in the legislative prioritisation process? More formal prioritisation of legislative programme – before

ministers decide. Could we run something similar to the budget process but for legislative bids? Also need to include PCO, the Cabinet Office and the Office of the Clerk

- Need to make sure that Parliament's time is well used; it would be good if there was some flexibility in the Standing Orders in respect of consequential amendments required to make the main legislation operational.
- How does the rest of the world do it?

*Comment: we are investigating the scope for Treasury to play a brokering role in developing a prioritised list for Ministerial consideration, and also approaching Ministers to explain the current problem and its consequences. Success for this objective will depend on the level of support from Ministers for greater prioritisation of the legislative programme and policy pipeline.*

**Standardisation: regulatory policy process**

- There are differences between departments and how the process is run and how that interacts with politics and departmental priorities. The policy process is often not a linear process and can often shift throughout the development of legislation. This leads to problems with meeting the requirement for a standardised regulatory process.
- For example, whether or not it is helpful to produce an exposure draft, and when, depends on any number of factors.

*Comment: We propose to work closely with the DPMC-led "Policy Project" initiative to try to ensure that the particular challenges and realities of regulatory policy-making are appropriately recognised and integrated into the government's general policy advice expectations, practices and toolkits.*

**Standardisation: regulatory design**

- Is there a set of common features of regulatory regimes that could be developed into a common template (similar to the Crown Entities Act?) that could be used by agencies when developing or amending regulatory regimes? At the moment agencies are 'just making it up as we go along'. The quality of the legislation often depends on the experience of the policy lead and the drafter (both doing the drafting instructions and in PCO). LAC guidelines provide inadequate guidance for those developing legislation, even where they are aware of them.
- Do we need, can we develop, a more consistent and standardised approach to the allocation of regulatory material between primary, secondary and tertiary legislation?
  - There are differences in:
    - the flexibility that you can have in secondary legislation; for example, MoT has decision making delegated down to the Minister as opposed to having to go through Cabinet.
    - the development of primary and secondary legislation compared with tertiary – primary/secondary is done by PCO and tertiary is done by departments so can have a variety of different approaches, language etc.
    - departmental access to opportunities for primary legislation; for example, some departments have an annual omnibus bill; MBIE has

done a portmanteau bill of updates. This can create issues with keeping all the interested parties engaged and informed when the one issue that they are interested in is contained in with a bunch of other issues irrelevant to their operations as the bill progresses through the House.

- drivers of need for reform: some regimes are internationally influenced (food standards because of trade interests, Transport because of the multilateral regulatory structure), or need to keep up with/be proof against technological development
- Reasons for preferring secondary and even tertiary: primary legislation only gets reviewed occasionally and over the longer term – there are issues with keeping up, with the rate of technological change outpacing the rate in which we can amend legislation (nb regulators may have their own agenda in saying that the legislation is out of date and not fit for purpose). Greater use of delegated legislation can make regulation more flexible and easier to keep up to date.
- Reasons for preferring primary legislation: accessibility (generally); it is all on the legislation website in one place. Worth investigating the costs and benefits of bringing the same accessibility to other regulation?
- Another factor is the perception of higher status in primary legislation so some regulators and politicians want it in there. There is an increasing use of purpose statements being included in legislation - they have their place but it can be hard to get them right.
- Primary legislation gets more Parliamentary scrutiny, this creates resource and efficiency challenges but also provides Parliament with greater assurances that its intentions will be respected in implementation. On the third hand, often Parliamentarians are not well placed (resourced, advised) to understand the practical implications of the legislative changes they make.
- Fees:
  - There seems to be a lack of agreed principles for setting fees and charges—especially how to set them, in what level of regulation, requiring whose decision and what transparency/accountability mechanisms?
  - Where could funding sit in a fees and charges omnibus process?

*Comment: As soon as the new Cabinet has been advised, the LAC is expected to release a completely revised set of LAC Guidelines. Responding to earlier criticisms, the Guidelines have been reorganised, made significantly shorter, and are now more clearly targeted at helping policy analysts identify the issues they need to know and seek further assistance on when developing legislation. We also understand that, in light of the Productivity Commission report, the LAC is going to prioritise the development of more detailed advice on when it is appropriate to leave matters to delegated legislation, and on determining an appropriate decision-maker and appropriate safeguards for the exercise of delegated legislative powers. This is expected to be informed by discussions with regulatory policy agencies that make significant use of delegated legislation.*

*The Productivity Commission recommended that the Government publish a cost recovery statement outlining its policy objectives and setting out guiding principles. The Australian Government's cost recovery policy provides 14 prescriptive principles, however; there is concern that having a Government cost recovery statement of this sort might create too much inflexibility. Existing guidelines from the Office of the Auditor-General provide a set of*

*high-level principles (authority, efficiency, and accountability) for setting fees and charges, and go into detail what they mean for fee setting agencies.*

### **Regulator Practice**

- What is the extent of the problem? Not a lot of evidence in the Commission report showing the magnitude, scope, or urgency of the problem.
  - There does need to be a 'Regulatory practice' voice to connect policy with regulation and avoid regulation that is difficult to implement
  - Difficult (but crucially more necessary) when the underlying policy choices or regime designs are contentious, unpredictable, fragmented
  - Government focused vs. Private sector – how we explain to private sector what the regulation is trying to achieve. Need to support regulators, educate sector via law, and maintain challenge role (avoid industry capture, particularly in specialist areas)
- How to get more traction and enable the efforts of regulators themselves?
  - Potential for communities of regulatory practice.
    - Targeted training. Capabilities should be recognised, e.g. via NZQA – especially for specialist areas, operational staff
    - Recruitment process – needs more comprehensive pathway, and it should be easier to move between regulators
    - share lessons from experiences
  - How to make it happen?
    - Treasury is distant from regulatory implementation, so little to offer in substance; stronger role in enabling, brokering, sharing.
    - Club funding is a barrier to achieving the sort of better performance that relies on shared services/knowledge/expertise/stakeholder groups
    - Chief executives need to make contribution
    - Business cases need a 'sponsor' or leader. Way forward not clear for some initiatives.

*Comment: we have invited regulatory practice leaders to put together a proposal to improve regulatory practice and will bear these comments in mind when considering their ideas.*

### **Options for strengthening monitoring and evaluation of regulators**

- Issues with the joint administration of legislation where one agency is the policy agency and another has responsibility for implementation. This creates issues as one agency is imposing costs and resource implications on another. There are different models of regulators – what is the role and relationship between the actors in the system ie regular and the parent agency (are they in the agency or standalone such as a crown entity) especially when it comes to issuing guidance.
- In discussion of the Productivity Commission's recommendation of using a PIF-type process for the review of regulators, it was noted that a PIF-like process is being used for the current review of the EPA and seems to be working well.
- Governance and operation of regulatory entities: There is a challenge to get right the level of involvement that a parent agency has in the day-to-day business of a regulator.
  - Depends on frequency of how people interact and how often this is a pressing policy issue
  - How do we ensure boards are still relevant and fit for purpose?
  - Roles of Boards not clear, pros and cons of different Board options or accountability arrangements are not clear.

- Minimum competencies for Board members? More of a statutory responsibility that is common across regulators?
  - State sector guidance was useful for establishing Work-safe
- While it is important to have the right sorts of reporting with meaningful information, especially for funding decisions...
  - It is harder to capture performance with reporting and monitoring measures.
  - Depends on regulator how this should be done.
  - Quickly turns into problems with the regulatory stock (legacy issues) rather than the performance of the regulator given the limited tools
  - Unclear how to design or administer reporting mechanisms in this context. Should however be incorporated or integrated with existing mechanisms, because monitoring and reporting obligations are onerous; eg systems work, PIF, SOI/4YP

*Comment: Departmental monitors themselves are resistant to the proposition that monitoring regulators is any different from monitoring Crown Entities in general, on which there is now good guidance from SSC (and a job of work to be done ensuring that it gets used and followed). If this is right, then there may not be much of a role for RQT in this area. However, it would (if resources permit) be good to test that through empirical observation, eg comparison of a cross-section of CE Sols. We will bear this in mind as a possible future project.*

Regulatory Quality Team  
9 October 2014