

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.

The Productivity Commission Inquiry Report on Regulatory Institutions and Practices

What was the Commission asked to do, and why?

The concern: More can be done to improve the design and operation of regulatory regimes, as indicated by the recent need to develop new or amended regulatory regimes and regulators for areas where regulation had failed to achieve its intended outcomes.

The terms of reference: Develop recommendations to improve the design of new regulatory regimes and make system-wide improvements to the operation of existing regimes in NZ, taking account of key features or characteristics of NZ's regulatory environment, but without conducting a review of individual regulators, specific regulations or the objectives of regimes.

- Develop a high level map of regulatory regimes and regulators across central government, and develop a set of thematic groupings which can be used to broadly categorise regulatory regimes by their objectives, roles or functions.
- Outline and explain key factors which act as incentives or barriers to regulatory regimes and regulators producing the outcomes stated in legislation.
- Develop guidance to inform the design and establishment of new regulatory regimes and regulatory institutions, and the allocation of new regulatory functions to existing institutions.
- Develop system-wide recommendations on how to improve the operation of regulatory regimes over time.
- Specifically consider how improvements can be made to the monitoring of regulator performance across central government.

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. parliamentary processes or the regulatory policy development process).

In Treasury's view, the report presents a reasonably compelling picture of system-wide problems (see next slide)

.... but is less convincing in its recommended solutions, and lacks any obvious "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 over-simplify 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.

The Productivity Commission Inquiry Report on Regulatory Institutions and Practices

What is 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 (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."

Evidence Cited 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, political journalist

"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 McVeagh (Law firm)

"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

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

Better Regulatory Institutions and Practices – Key Findings/Recommendations

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 require a more professionalised workforce, with better training and career paths for the 10-14,000 people working in NZ regulatory roles.
- Central agencies should emphasise workforce capability in regulator performance reviews.
- Regulators require more sophisticated guidance on implementing risk-based and “really responsive” compliance and enforcement strategies.
- The government 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 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 policy advice is important for effective regulatory outcomes.
- MoUs and exemption powers can play an important role in managing regulatory overlaps.
- Moving functions to departmental agencies risks compromising regulator independence.
- The centre should support departments to manage 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 government should encourage greater use of exposure drafts before Bills are introduced.
- It should also review the inconsistent allocation of material between primary & delegated legislation, and consider greater use of delegated legislation, subject to stronger controls.

Strengthened regulator monitoring and oversight

- Monitoring practice can be improved through greater staff stability, greater links to policy, 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.
- Cost recovery practice can be improved by more rigorous requirements for fee & levy changes, better performance reporting, more regular reviews of practices, and refreshed guidance.

A Better Regulatory Management System – Key Findings/Recommendations

System-wide regulatory review

- The NZ government does not use many of the approaches to system-wide evaluation of regulatory regimes used in other countries (e.g. red tape targets, sun-setting, 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 to include strategies for keeping their regimes up to date
 - review departmental progress within 3 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 legislative instruments.
- 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 (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).

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

We recommend a formal government response, but note it is not a requirement

All Productivity Commission reports to date have been followed by the production and publication of a formal government response, though there is no statutory, Standing Order or Cabinet obligation to do so, and no set time frame for responding either (unlike with select committee or Law Commission reports). We recommend a formal response.

The government response is usually published on the website of the government department that leads the development of the response – Treasury in this case. It is usually accompanied by a Ministerial press release. The Productivity Commission is likely to include a link to both the government response and press release on their own website.

You share this responsibility with the Minister of Finance, but we recommend you also involve the Attorney-General

The responsibility for developing the government response for sign-off by Cabinet rests jointly with you, as Minister for Regulatory Reform, and the Minister of Finance, as the two referring Ministers for the inquiry. However, we recommend you also directly involve the Attorney-General in deciding aspects of the government response, as some recommendations in the current report have important role and resourcing implications for bodies in the Attorney-General's portfolio, such as PCO and the Legislation Advisory Committee.

Timing of government response

As already noted, we think the report has limitations as a blueprint for change because it contains no real discussion of the likely impacts, costs or prioritisation of the various recommended actions. In addition, only some of the improvements in regulatory processes and practices proposed by the Commission are represented in the formal recommendations. The recommendations are limited to products or actions that should be taken by the centre to support and complement suggested improvements in regulatory practice by individual agencies which are outlined in the findings. In addition, the findings tend to be less specific than the recommendations and therefore require additional consideration of the best way forward.

Rather than delaying the response until all issues raised by the Productivity Commission are fully considered, we think the best approach is to respond earlier as this will provide some flexibility in both the timing and precise nature of the final government actions. We envisage the response would provide a narrative on the government's response to the key themes of the report and its broad regulatory strategy, as well as individual recommendation by recommendation responses (albeit in some cases the response would point to further consideration being necessary).

We think the potential benefits of taking more time to respond are limited since:

- giving effect to the range of recommendations contained in the report is likely to take a number of years in any case
- longer-term system improvements will inevitably need to be adjusted in response to other developments in the interim so we don't gain by locking-in proposed actions early, and
- it seems unlikely that significant additional resources would be made available to allow early delivery of multiple system improvements.

Responding to the Report: Key decisions requiring Ministerial attention

Central oversight responsibilities and strategy for the System

To clarify and strengthen central leadership of the regulatory management system, the Commission recommends that the government:

- Publish its objectives and strategy for the regulatory management system, and report regularly on progress
- Publish its strategy for improving the management of the stock of regulation, and describe how success will be measured
- Publish the responsibilities of the “Minister for Regulatory Management”
- Expand the Treasury team supporting the Minister, operating with a published charter, its own website and authority to identify itself as a separate unit in Treasury.

We propose that the government broadly agree with the first three recommendations and:

- publicly set out on the Treasury website, our strategy for the development of the regulatory management system, and the oversight roles of the Minister and Treasury
- look for opportunities to expand the information available on system performance.

We do not recommend a change to Treasury’s existing mandate/arrangements

We suggest our oversight roles reflect our existing mandate, rather than the expanded mandate proposed by the Commission and do not see benefits in a different organisational form for the regulatory oversight function.

- We consider that the proposed provision of intellectual leadership for regulatory practice 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 a group of regulatory leaders is currently trying to develop.

Regulators agree with this approach, although how this network will operate and be funded are still being worked through. There is likely to be a need for both formal endorsement and some resource support from the centre to get this initiative moving.

Proposed strategy for the RMS – built around regulatory stewardship

We suggest that the published strategy is consistent with our BIM advice and would indicate:

- the centrality of the **Regulatory stewardship expectations** agreed by Cabinet in 2013
- our preference for regulator-led initiatives to improve the capability and performance of regulators and regulatory practice
- a shift away from adding new system requirements and toward lifting the performance and integration of the key existing system requirements, such as RIA
- a greater Treasury focus on engagement, support and partnership with key regulatory agencies and leaders, and on ensuring system developments are aligned with other state sector system initiatives, such as PIF reviews and Four-year Plans.

Proposals impinging on the Attorney-General’s responsibilities

To improve the development, flexibility, presentation and accessibility of legislation, the Commission recommends that the government:

- commission a review of:
 - processes for producing and vetting legislative proposals and draft legislation
 - the respective roles of the Parliamentary Counsel Office, the Law Commission, the Legislation Advisory Committee and the Legislation Design Committee
 - relevant parliamentary processes
- set a general expectation that exposure drafts will be published and consulted on before significant legislation is introduced into Parliament
- review the inconsistent allocation of material between primary and delegated legislation and consider greater use of delegated legislation, subject to stronger controls
- expand the NZ legislation website to provide a complete source of Other instruments.

While we are still working with PCO and Justice on the response there appears to be broad agreement on the following:

- turn the existing Legislation Advisory Committee into a smaller Legislation Design Committee with public sector members to allow the Committee to get involved earlier in the legislative design process, as currently being considered by the Attorney-General
- give the new Legislation Design Committee a key function to advise on the appropriate allocation of material between primary and various types of delegated legislation
- consider the enhanced role that PCO might be able to play in promoting the quality and accessibility of the statute book in light of its recent PIF review findings
- address the possible expansion of the NZ Legislation website as part of the government response to a recent Regulations Review Committee report on disallowable instruments
- develop some guidance for Ministers and officials on the kinds of legislation and circumstances in which it might be useful to publish and consult on an exposure draft
- reconsider the need for a system-wide review of legislative processes once the impact of current and proposed developments (including those above) become a bit clearer
- draw the recommended review of relevant parliamentary processes to attention of the Standing Orders Committee, as such a review should be Parliament’s responsibility.

... but note possible resource implications for PCO

The unpublished PIF review report for the Parliamentary Counsel Office suggests there is scope for PCO to take on a more proactive stewardship role relating to the quality and presentation of NZ statute law, which we would generally support.

However, we note that this and several other potential developments of PCO’s role (e.g. expansion of the legislation website, admin support for the proposed Legislation Design Committee) will have resource implications for the Office and may require additional budget resources.

Responding to the Report: Key decisions requiring Ministerial attention

Departmental regulatory management strategies and performance

To support the effective management of the stock of regulation, the Commission recommends that the government:

- publish the regulatory system reports prepared by departments
- require departments to articulate their strategies for keeping their regimes up to date
- within 3 years, commission a review of each department's progress and seek advice on whether a legislative framework or new mechanism is needed for managing the regulatory stock
- ask Treasury to collect more information, as the system evolves, about the outputs and outcomes of departmental regulatory management systems.

We propose that the government:

- agree to set an expectation that agencies will make publicly available information about their strategies and systems for meeting their regulatory stewardship expectations (which includes managing their regulatory stock)
- disagree that it is necessary to commission a review of each agency's progress in keeping its regimes up to date, but indicate that Treasury will continue to monitor departmental progress in discharging their regulatory stewardship expectations.

Improving regulator appointment processes

To improve processes for the appointment of board members with the required skills and experiences, the Commission recommends that:

- the centre should actively support departments in managing appointments and reappointments to regulatory Crown entities, particularly in analysing the knowledge, skills and experiences required on the board
- agencies be required to consult the centre before submitting papers to Cabinet recommending appointments to regulatory Crown entities
- SSC and Treasury should review the effectiveness of more active support for regulator board appointments and advise on extending this to non-regulatory board appointments.

We propose that the government indicate:

- it agrees Board performance is important for organisational performance and government will consider steps to ensure a capable and diverse cohort of potential appointees but it does not support a separate approach for appointments to regulatory agencies.

Cost recovery arrangements for regulators

To improve the governance and accountability arrangements applying to cost recovery for regulatory functions, the Commission recommends that the government:

- publish its cost recovery policy, including outlining its policy objectives and setting out guiding principles
- encourage Treasury and the Auditor-General to review their respective guidelines for setting fees and charges in the public sector to ensure they reflect current views on when and how to implement cost recovery, and are consistent and clear on coverage
- require agencies proposing new or amended fees for regulatory functions to publish a statement outlining the reasons for the proposal, their legal authorisation, the expected effects, the consultation undertaken, and the process for monitoring and review
- ensure cost recovery arrangements are reviewed periodically to ensure they remain justifiable in principle, efficient and effective
- consider whether agencies that set fees or levies can access adequate advice, and experience from other agencies.

We propose that the government agree:

- that Treasury review its current cost recovery guidance and consider how it might address the matters raised by the Commission as part of that review; including providing entities with clearer expectations on implementing decision-making processes, liaising with the OAG to address any inconsistencies and ensure that the scope of the guidance is clear and considering any lessons from the Australian review of its cost recovery guidelines, and
- to investigate how to reinforce the existing expectation that agencies publish background information about their fee or levy changes.