

Regulatory institutions and practices

June 2014



The Productivity Commission was asked to develop guidance on how to improve the design of new regulatory regimes and make system-wide recommendations to improve the operation of existing regimes in New Zealand. The aim of the inquiry is to improve the performance of our regulatory system, leading to more effective regulation.

The Commission released an issues paper (August 2013) and a draft report (March 2014), has considered 104 submissions; met with 113 interested parties; and surveyed 1,526 businesses.

Why good regulation matters

Regulation is a fact of life. It affects the food we eat, the houses we live in, the goods and services we buy and sell, and our ability to earn a living. Regulation plays an important role in guarding New Zealanders from harm, protecting our rights, and ensuring that markets work fairly and efficiently. However, when regulation is badly designed or implemented, it can fail to provide these protections or place unnecessary burdens on personal freedoms and business efficiency. Poor regulation leads to pressure for more regulation.

The regulatory system is large and complex

New Zealand has a large and complex regulatory system, with as many as 200 different regimes, a large number of regulatory agencies, and more than 10,000 people employed in administering regulation. It is a major piece of government infrastructure, and is as significant as the tax and spending systems in terms of its impact on the lives of New Zealanders.

Quality checks are under strain

New Zealand has a number of processes and institutions to test whether a new regulation is needed and well-designed. However, many of these checks are under-resourced or are not having the impact they should.

Parliament's Regulations Review Committee, which reviews regulations and can recommend their cancellation, has seen its membership drop over the past 15 years and needs more staff. Until recently, the Law Commission has reviewed bills to ensure they comply with principles of good legislation. Their reviews in 2013 found that more than half of the bills introduced to Parliament had significant problems. However, the Law Commission has had to curtail these activities, citing declining funding. There are also questions about the quality of regulatory policy analysis. These essential quality checks need to be revitalised.

New Zealand regulation struggles to keep up with change...

Regulation in New Zealand can easily become obsolete and fail to keep up with technology or public expectations. Almost two-thirds of regulator chief executives surveyed by the Commission reported that agencies often work with legislation that is outdated or not fit-for-purpose. As a result, regulators can be hamstrung, unable to respond to emerging problems or imposing unnecessary costs.

A key reason for this lack of flexibility is New Zealand's heavy reliance on primary legislation (Acts of Parliament). New Zealand appears to produce more laws than countries such as the United Kingdom, and puts more detailed material in statutes. Parliamentary time is scarce, which means that it can be hard to deal with outdated legislation. In other countries, legislatures delegate more rule-making powers, allowing faster responses to emerging issues. There is scope in New Zealand to delegate more rule-making powers, provided these powers are appropriately defined and controlled.

...and more progress could be made on keeping the stock up-to-date

New Zealand has a large and growing stock of regulation. On average, 100-150 Acts and about 350 Legislative Instruments have been passed each year since the mid-1990s. The large stock makes it difficult for ministers and officials to know whether specific regimes are still needed, or are delivering the outcomes that were originally intended. A vigorous and well-focused review programme could help remove unnecessary and inefficient regulation, and fix holes in regimes.

The Government has introduced a suite of initiatives to improve the review and evaluation of regimes, but New Zealand does not use a number of techniques that have been shown overseas to offer high payoffs for low effort. It is important that departments focus their efforts on reviews that have the largest probable benefits. The Government needs to set a clearer strategy for managing the stock of regulation, with clear principles or targets to guide departments, and greater transparency from departments over how they will ensure that the regimes they administer are relevant, effective and necessary.

More attention should be paid to skills...

Effective regulation depends on skilled and capable staff. As regulatory regimes have become more sophisticated, the demands on regulatory staff have risen. Business surveys showed low levels of confidence in the skills and knowledge of regulatory staff. Regulatory agencies face challenges in attracting, training and retaining key staff to meet these challenges.

Delivering better and more consistent regulatory services will require a more professionalised workforce, with training and qualifications that recognise common skillsets and clearer career paths across agencies. There are a number of initiatives already underway to promote a national framework of compliance qualifications and professional networks, but these initiatives rely on the drive and goodwill of individual regulatory leaders. The Treasury and State Services Commission (SSC) need to provide greater support, to ensure that efforts to professionalise the workforce take root across the system.

...including at the very top of regulatory organisations

Regulation in New Zealand is often implemented and enforced by arm's length bodies, such as WorkSafe and the Commerce Commission. Highly capable boards with the right mix of skills are important for the performance of these bodies, and of regulatory regimes.

Policy departments are responsible for identifying suitable candidates for appointment to regulator boards. The Commission found highly variable departmental appointment processes, including inadequate assessments of the skill needs of boards, poor planning, and patchy induction for new board members.

The Treasury and SSC play a significant role in appointments to departments and state-owned enterprises. Departments should draw on this central experience and expertise in making appointments to regulator boards. Better-run appointment processes, which properly assess and fill skills gaps on boards, will deliver better candidates and better regulator performance.

High-quality leadership is also important for developing the cultures within agencies that support effective regulation, in particular the ability of agencies to learn from their earlier mistakes and successes. Some New Zealand regulators need to work harder at building these cultures. Evidence collected through this inquiry highlighted poor internal communication within some agencies, with workers feeling unable to challenge poor practices, or not hearing a clear organisational mission from their senior managers. Previous restructures of regulatory organisations have also been disruptive, with insufficient attention paid to the cultural impacts of change or the smooth operation of regulatory functions.

Monitoring of regulators is missing the mark

Many regulatory decisions are taken by arm's length bodies, but ministers are accountable to Parliament and the public for the performance of regulatory regimes. Policy departments monitor regulators' performance to ensure that the regime's objectives are being effectively and efficiently achieved.

Under state sector legislation, the boards of regulators are accountable to ministers for their performance. Ministers need to respect the role of boards, and focus on how well boards are carrying out their duties and responsibilities. But in some cases examined by the Commission, monitoring departments were either interfering in the business of boards or were too close to the regulators.

A larger question is how well-placed policy departments are to assess the effectiveness of a regulator's practices and strategies – that is, whether they have chosen the best compliance tools and policies. The Commission heard from a number of parties that the best judges of regulatory practice are other regulators, and found these arguments persuasive.

A system of peer reviews should be established, where panels of senior regulatory leaders – such as current and former chief executives – would examine and provide feedback to regulators on their strategies. These peer reviews would be embedded within the existing Performance Improvement Framework audits, run by the SSC.

The system needs clearer leadership, and a more active centre

Getting better performance from the regulatory system will require stronger leadership from ministers and central agencies, in particular the Treasury.

The regulatory system is large and distributed across a number of departments, agencies and ministerial portfolios. This devolved model generally makes sense. Individual departments and agencies have the knowledge needed to run specific regimes. But, if the model is to work at its best, there needs to be greater oversight and direction from the centre.

Three roles for the centre are particularly important. The first is supervision. Good regulation depends on individual departments carrying out their responsibilities to robustly test the quality of proposals for new rules, ensure that current rules are still needed and up-to-date, and keep a watching eye on the performance of arm's length bodies. The centre needs to ensure that departments carry out these responsibilities fully and thoroughly.

The second role is coordination. There are a number of areas where cooperation between agencies would lead to better services, or where a number of agencies face similar problems. The centre can help identify areas of common benefit, and resolve shared problems.

Finally, with limited resources and Parliamentary time, someone needs to set goals and priorities for the system as a whole. The recent introduction of a regulatory reform minister has helped bring some attention to regulatory issues in the public sector, but this role needs to be strengthened and better supported by the Treasury.

Regulatory ministers need to be senior members of Cabinet, so that they have the authority and information necessary to drive change. The role and responsibilities for the minister need to be clarified and published. Treasury's role in monitoring the regulatory system and advising the minister on policy and priorities needs to be expanded, better-resourced and more prominent.

The full version of the report, *Regulatory Institutions and Practices*, is available at www.productivity.govt.nz.

The **New Zealand Productivity Commission** – an independent Crown entity – conducts in-depth inquiries on topics selected by the Government, carries out productivity-related research, and promotes understanding of productivity issues.