

A review for the Productivity Commission
of its report on
Regulatory institutions and practices

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Introduction

This is a review of the Productivity Commission's report in June 2014 on New Zealand regulatory institutions and practices (New Zealand Productivity Commission 2014b), made under a contract with the Commission. The terms of reference for my review are in Annex A. The terms of reference for the Commission's inquiry are in Annex B.

I begin as requested by the Commission with a summary assessment of the report. I then discuss some of the analysis in the report. I have focused on issues if they seem to be important in understanding and managing regulation as a system. I conclude with some observations on what happens next: how the findings and recommendations in the report can be turned into action.

In general, when I mention something where I think there could usefully be further discussion, this should not be taken as a criticism of the report itself. There are few topics on which the report does not provide at least a platform of principles on which more detailed analysis can be built.

Summary Assessment

Focus

"The relevance and materiality of the inquiry report"

The report's evidence, analysis, findings and recommendations were all material to the inquiry. The report followed its terms of reference closely, with two main exceptions: the Commission decided not to produce a high-level mapping of regulatory regimes and it concentrated mainly on regulation likely to affect economic transactions and productivity, consistent with the Commission's overall mandate. Both of these limits probably assisted the focus of the report overall.

The terms of reference limit the analysis to the regulatory system as a whole. Much of the discussion of regulatory practice is therefore at a general level but offers guidance for further more detailed work at the level of regulatory regimes and individual regulators.

Process management

"The timeliness and quality of the inquiry process"

The process seems to have been very efficiently managed, a considerable achievement given the magnitude and complexity of the inquiry. The inquiry team stuck to its initial timetable for drafts and final report and along the way managed a very wide range of inputs of evidence, expert commentary, and submissions from and discussions with stakeholders.

Quality of work

"The quality of the analysis and recommendations"

Given the complexity of the topic and the difficulty of dealing with regulation as a coherent system, the quality of the analysis was generally very good. It drew on a wide range of sources and wrestled effectively with some complex issues, particularly of institutions and culture in the regulatory system. Recommendations generally follow logically from the findings and are clear on what action is required. Many of the findings themselves give guidance on developing regulatory regimes.

Effective engagement

“How well the Commission engaged with interested parties”

The Commission received over 100 submissions and met with many interested parties. The report draws extensively on these inputs. Feedback from stakeholders on the inquiry process and the report itself has been strongly positive.

Delivery of messages

“How well the work is communicated and presented”

The report’s length, the rich evidence base and the density of its reasoning requires close reading but the structure follows well from the terms of reference and is signposted throughout. The argument is supported with a variety of tables and graphics and frequent use of examples. The report itself is helpfully supplemented by executive summaries, videos and other presentational material.

Overall quality

“The overall quality of the inquiry taking into account all factors”

This is a landmark survey of the theory and practice of regulation well focused on the New Zealand system. It will be a useful resource for future development at a system level and in particular sectors.

Impacts of report

“What happens as the result of the Commission’s work”

Generally the report has been well-received. There is some early indication that its guidance on regulatory design will be influential. It is too early to say much about the uptake of specific recommendations. A lot will depend on the government’s commitment to providing incentives and support to improvements in specific regulatory regimes and to accommodating the necessary changes in law and regulation that follow.

Despite the limits on the scope of the report, the Commission considers that its guidance “equally applies to a broader range of regulatory interventions”. Some of the discussion on accountability, rules vs discretion and professional decision-making is certainly relevant to social regulation.

Inquiry purpose and process

Terms of reference

The Commission limited its study to regulation defined as “the promulgation of rules by government accompanied by mechanisms for monitoring and enforcement” (p 31) and, in line with the Commission’s overall mission and a “pragmatic” decision to limit scope to something manageable, “regulation that is implemented where the operation of markets fails to produce behaviour or outcomes that are aligned with the public interest”, focused on market failure rationales. (Page 17). The Commission chose not to develop the high-level map called for in the TOR, on the grounds that there were too many dimensions to regulatory regimes and regulator form to make it useful. Cases and examples throughout the report give some idea of the regulatory regimes covered by this definition, but a list of at least the major regimes would have been helpful¹.

¹ Credit though for an entertaining box on page 22 – “A day in the life of a New Zealand family” – which gives an idea of how regulation affects our everyday lives.

Process

The report draws on a wide range of sources for its evidence and analysis: submissions from and meetings and roundtable discussions with interested parties; surveys of New Zealand businesses and senior managers and staff in regulatory organisations²; interviews with board members and monitoring agencies; detailed documentation of practice in regulatory agencies and four in-depth case studies. The analysis was informed by drawing widely on scholarship on regulation, risk, law and jurisprudence and organisational theory. The Commission also consulted several recognised academic authorities on these topics, who provided detailed feedback on some sections of the report. There are frequent references also to reports from government agencies and advisory bodies in other countries, particularly Australia and the United Kingdom. The report makes good use of all these sources in its presentation and analysis of evidence.

The TOR required the Commission to produce a draft report or discussion papers or both before its final report. It published an issues paper in August 2013 and a draft report in March 2014. There were 54 submissions on the issues paper and a further 50 on the draft report. The final report was published close to the deadline of 30 June 2014. The acknowledgement in the foreword gives some indication of how big a study this was – all three Commission members worked on it with a team of eight staff and several others. The result is a 500 plus page final report with several hundred further pages of supporting documentation.

Both the process and the result have been well-received, judging from the Commission's post-inquiry survey³. Most of the 100 survey respondents agreed that the recommendations "follow logically from the analysis and findings" and "provide system-wide improvements to the operation of regulatory regimes over time". Some stakeholders have said specifically that they are using the report's findings in their work on regulatory design in particular sectors. Overall most also were satisfied with the process of running the inquiry and would use the report "as a resource and reference for the future".

The Commission has gone to some lengths to ensure that these products were accessible to as wide an audience as possible, including public presentations and use of online media including slide shows and videos. The Commission also published a four-page "cut to the chase" summary of the report's findings and recommendations. The main report includes: themes and conclusions summarised in an overview at the start; summary of the main points at the start of each chapter; and "Findings" and "Recommendations" highlighted through the text and then drawn together at the end. Headings and sub-headings are used well to blaze a trail for the reader through the text. There are about 40 tables and 70 figures interspersing the text and frequent use of boxes as inline footnotes.

For all that, the main report is long and complex and requires close attention by the reader. There are two main reasons for this complexity: the heterogeneity of New Zealand regulation, both in purpose and methods; and the distributed nature of regulatory governance and management.

² The dataset of respondents analysed here was a subset of respondents to a survey organised by the Victoria University Industrial Relations Centre on behalf of the Public Service Association (Plimmer et al. 2013). The Commission advised that "440 respondents worked in 'regulatory roles', in either central or local government (300 and 140 respondents respectively)". The sample has biases which may influence its reliability but the original survey instrument was a useful and path-breaking piece of research on employee attitudes and the approach warrants wider use. It is encouraging to see that the State Services Commission 2013 survey of integrity and conduct has been extended to cover similar issues of employee attitudes. (State Services Commission (New Zealand) and Nielsen 2014).

³ New Zealand Productivity Commission 2014a

New Zealand's Regulatory System

A system has been defined as "the totality of elements in interaction with each other" (Bertalanffy 1956). There are two definitions offered in the report. The "stylised version of the regulatory system" in Figure 2.2 (page 3) defines it as a cyclical process – analogous to the conventional policy cycle – of problem identification, option development, decision, implementation and review – and is cast entirely in terms of the actions of agents of the state. The behaviour of regulated entities figures in this process only when the extent of compliance is "discovered" by the regulator. On page 31, Figure 2.3 portrays a regulated business at the centre of a "regime-specific regulatory system", where the regulator and other regulatory agencies are only two of a wide range of different pressures and incentives.

Neither of these portrayals on its own is a full definition of a regulatory system. The first graphic implies that the system is a linear process and that learning is a discrete step in the process. A lot of the analysis in the report takes a much more sophisticated view of organisational learning, both by regulator and regulated. The two main regulatory strategies discussed in Chapter 3 – responsive regulation and risk-based regulation -- both depend on predicting the behaviour of the regulated entity in relation to the objectives of regulation. Understanding the behaviour of the entity in its environment is required. The Commission gathered a good deal of evidence about the relationship between regulators and regulated but my impression is that most of it focused on the relationship between the two and much less on the other drivers of entity behaviour, although these were certainly acknowledged in the report.

The heterogeneity and distributed control of the regulatory system also affect what the Commission can usefully find and recommend – in terms of its mandate - about the system as a whole.

First, even within the scope of this inquiry, according to the Commission, New Zealand has over 200 different regulatory regimes⁴ employing more than 10,000 people. Some of these regimes may cluster into groups with similar control objectives and means of control but over the whole range of regimes it is difficult to make any finding or recommendation that would apply without qualification to all of them.

Second, the actual levers of control available to the government reflect the fact that control is widely distributed throughout the system. Much of the report is devoted, usefully, to analysing the distributed nature of governance and management of regulatory regimes. Governments rely on the Boards they appoint and the Departments that monitor the Boards; Boards rely on the Chief Executives and their subordinates; senior managers rely on the staff of their organisations to correctly assess the situations they face and make the right decisions about the actions they take; and everybody in this regulatory hierarchy has to rely on how individuals and businesses will respond to being regulated.

The distributed nature of system governance and management is intensified by two features of regulatory regimes. The first is the need for all regulatory regimes to be trusted as impartial and fair in their application, which requires relationships between Ministers, monitoring departments and regulators to be formal, transparent and

⁴ The report (p 16) offers a definition of a regulatory regime from Hood et al. 2001. A slightly extended version of this definition is: a law-based system for state control of a specific set of individual and organisational behaviours, comprising a definition of the behaviours to be controlled, a set of objectives for controlling them and the means of monitoring the behaviour and enforcing the control.

delimited; the second is the highly technical nature of a great deal of regulation which requires regulators to rely on the professionalism of staff.

Analysis of Regulation

Basic models of regulation

Chapter 3 of the report is a survey of the literature of regulation and risk management of the last three decades. There is an excellent analysis of two basic strategies of responsive regulation and risk-focused regulation. The distinction between a focus on efficient strategies for compliance and effective strategies for reducing risk is clearly made. The report then moves on logically to the synthesis and extension of these strategies in “really responsive regulation”, a term coined by Robert Baldwin and Julia Black⁵. They argue that

... to be really responsive, regulators have to be responsive not only to the compliance performance of the regulatee, but in five further ways: to the firms’ own operating and cognitive frameworks (their ‘attitudinal settings’); to the broader institutional environment of the regulatory regime; to the different logics of regulatory tools and strategies; to the regime’s own performance; and finally to changes in each of these elements.⁶

Really responsive regulation is the approach that the Commission seems to favour. This is a very general framework. Baldwin and Black themselves concede that it is “eclectic”. Most of the discussion in their 2008 article is at a high level of abstraction, and it is much easier to see how the analysis might apply when they get into the case of UK fisheries management which they studied in the mid-2000s. The usefulness of really responsive regulation as a way of understanding and improving regulation can only really be tested by applying it to reviews of existing regulatory regimes.

Guidance in the report

The Commission report is thorough on analysis of the regulator as an organisation in an institutional context. Chapters 8-13 (see below for detailed comments) give useful guidance on principles for deciding on aspects of governance, including legal powers and constraints, the basis for external review, formal and real independence from political direction, the role of the governors and funding. There is also a very useful discussion of an approach to analysis of regulator culture in Chapter 4, also discussed below. The areas where there could be further development of guidance are in the objectives of the regime, regulators’ intervention strategies and tools, assessment of the behaviour of regulated entities and assessment of regime performance.

Firstly, the discussion of the objectives of regulation could have been taken further. The report has some helpful guidance on the objectives of regulation, particularly on its focus – on inputs, processes, outputs, outcomes or broad principles. A discussion of different types of risk related to the objectives of regulation would be helpful. I was slightly concerned by the repeated use as exemplars of cases of catastrophic failure like Pike River – described as “failures of regulation”. I agree with Julia Black⁷ that we can learn a lot from these cases, partly because they expose weaknesses which otherwise may lie hidden or dormant and partly because they are an opportunity for a detailed investigation into causes, taking a systems approach⁸. But they have their problems as

⁵ A term coined by Robert Baldwin and Julia Black in Baldwin and Black 2008.

⁶ Op cit, p 61.

⁷ Black 2014

⁸ Pioneering examples in New Zealand of analyses of disastrous organisational failure from a system perspective are the classic Mahon Report on the Erebus disaster (Royal Commission 1981) and a Health and

bases for diagnosing regulatory systems. A rare event can only be described as a failure of regulation if the object of regulation was to prevent it, when it may not be cost-effective to do so. Furthermore, a lot of economic regulation is not concerned with reducing the risk of crashes or explosions but with problems of the commons, mitigation of externalities or functioning of markets. For example, arguably the loss of a fishery through a failure to regulate catches to sustainable yields is as much of a disaster as a blowout in an offshore drilling well. The approaches to regulatory management and the incentives on regulated entities to comply could perhaps be usefully be analysed in terms of the type of effects being regulated and risks being managed.

Secondly, a greater attention to the incentives on and capacity of regulated entities to comply would have been useful. Both responsive regulation – which focuses specifically on capacity to comply – and risk-focused regulation – which sees both regulator and regulated as part of a larger system – require the regulator to understand the behaviour of the regulated entity. In Baldwin and Black’s useful terminology, this behaviour manifests itself in the regulatee’s “attitudinal setting” to regulation, ranging from willing cooperation to resistance or deliberate evasion. The report discusses the behaviour of regulated entities and specifically acknowledges that they have other incentives besides regulation which influence these settings; but more guidance on analysis of their behaviour would have been helpful. This guidance could include more discussion of regulator-regulated relationships, particularly how the regulator should inform itself about the “market” in which the regulated entity operates; sources of risk in activities of the regulated entity; incentives operating on the regulated entity and the capacity and willingness of the regulated entity to comply.

Thirdly, there is limited discussion in the report of measuring regime performance. Baldwin and Black follow a common line in arguing that, while the purpose of regulation is generally to improve social and economic outcomes (including “fairness”), these dimensions are difficult to measure so that performance measures generally default to inputs or processes. The report enjoins the Treasury to expand its regulatory reporting to include outputs or outcomes but there is little discussion of how these attributes can be measured. It seems likely that defining and measuring outputs (say “compliance actions”), impacts (“industry compliance response”) or outcomes (“required change in social or economic state”) will be harder. There are the usual problems, particularly with outcomes, of latency and many-to-many relationships. As Baldwin and Black argue, accurate measurement of the output or impact of industry compliance can be difficult. An example is fisheries regulation where fraudulent reporting of catches is a continuing risk and expensive to prevent. Further, the desired outcome is sustainable yields but this requires catch-independent measures of fish stocks and population dynamics. These are influenced by factors other than effectiveness of regulatory process. The basic task would be to define a target outcome in a way which is not dependent on regulator data – e.g. the “true” burglary rate compared with offence detection and case resolution. Again, this is industry specific.

Most of the required analysis of these topics will be specific to particular regulatory regimes. There will also be no single template for reviewing these aspects of regimes. In this respect the report should be seen as one input in a stream of analysis and advice. The next steps are specific reviews of individual regulatory regimes. The choice of level of analysis will be important for these reviews. The argument in the report seems to suggest that it should be at the level of an industry, such as fishing or electricity. This level of analysis would support a review of the various government policies, including

Disability Commissioner report on a treatment failure at Christchurch Hospital (Health and Disability Commissioner 1998).

quite probably multiple regulatory regimes, that interact to affect industry behaviour; would help identify the competing incentives and pressures on specific regulated entities which influence their compliance behaviour; and would be an appropriate level for discussion of changes in these factors such as likely developments in production technology, firm concentration and markets.

Regulator culture and leadership

Chapter 4 is an innovative attempt to draw on the established organisation literature to discuss the influence of leadership and culture on regulator performance, using New Zealand cases as examples. It makes use of two quadrant models – Grid and Group (Hood 1995) and the Competing Values Framework (Cameron and Quinn 2011) – for describing organisational cultures but is also influenced by Schein’s writing (e.g. Schein 1985). An Appendix to the report proposes some questions that can be asked about regulator culture. The questions are useful but – as Schein indicates – understanding some aspects of “deep culture” probably doesn’t come out of answers to questionnaires, but rather depends on an intimate knowledge of the organisation.

From a practical point of view there are two basic questions for regulators about culture. First, recognising that there can be several sub-cultures within an organisation, does the regulator culture support or run cross-grain to the organisation’s mission? Second, can the governors of an organisation change its culture to align it better with its mission?

The conclusions seem to be that (1) culture can be diagnosed for its congruence with mission – some questions are proposed as a basis for this diagnosis; (2) reflecting Schein’s view, cultures in established organisations are very hard to change, although regulator chief executives (maybe not surprisingly) mostly think they can do it; and (3) therefore the best time to get the culture you want is when a new organisation is set up. I’m not sure how helpful this is since changes in regulatory regimes and organisations may be small relative to the stock, so that the main issue is how to improve existing regulation. But it does make sense for monitors, governors and leaders to try to understand the culture of their organisations; and all three do have instruments they can use to change the incentives on the organisation. The report quotes Gordon 1991: “...culture formulation is neither a random event nor an action dependent solely on the personalities of founding leaders or current leaders, but it is, to a significant degree, an internal reaction to external imperatives” (report page 82), which seems to make the point.

A specific instance of Gordon’s point is the tendency for both regulator and regulated to default to established processes. The report says that “The Commission has heard that in some instances the judgements of regulatory staff are heavily influenced by cultures that emphasise managing institutional risk to the regulatory body, rather than the efficient management of potential social harm.” (Page 96). The Commission suggests that “One simple explanation is that regulators are punished harshly (and publically) for their mistakes” (Page 97). This perception of risk can lead to a retreat into rules, where workers protect themselves by ensuring that they are adhering to prescribed procedures. If that point can be made about regulators it can be made with equal force about regulated entities operating in a punitive regime.

Governance and management of regulators

This section offers some specific comments on Chapters 8-13 on regulators as organisations.

Chapter 8 on role clarity offers a helpful set of principles on setting regulator functions and objectives, noting that lawmakers sometimes find it easier to leave it to regulators to balance competing objectives.

The Commission's findings on independence in Chapter 9 are very much on balance but seem to lean towards independence of regulators in most cases. Again this seems to be a consequence of the overall very wide scope and heterogeneous nature of New Zealand regulation. The findings do suggest some useful principles where independence is warranted. The findings on page 249 on choice of institutional form (9.17) and Minister-Board-management relations (9.18) are rather bland but probably reflect the realities. If they are under political pressure from an agency's decision, Ministers have the option of applying pressure indirectly on the agency to do what they require. The recommendation on machinery of government choice (No 9.5 on p 253) seems to mean little more than that people considering organisational form or consolidation of regulators should weigh up costs and benefits. The discussion following refers to the New Zealand tendency to solve all sort of problems (including political ones) by restructuring and implies that greater weight should be placed on the costs.

Chapter 10 on governance, decision rights and discretion is generally helpful for establishing some principles of governance and allocation of decision rights. It is helpful on appointments to boards and the role of boards in relation to other governors. The conclusions on Ministerial involvement on board appointments are not definitive but probably come down generally on the side of a continued place for government-appointed board members but with a role for boards themselves and officials (perhaps a central appointments unit) in selection procedures.

Chapter 11 is a thorough treatment of the topic of decision review and particularly of the role of the courts. There is a systematic treatment of the arguments raised for and against review, particularly review of the merits of a regulator's decision rather than of process and legality. However there is no clear final guidance offered to decision-makers on the question of the appropriate scope of such review or the machinery.

Chapter 12 essentially responds to widespread criticism of the structure of fees for regulatory services with some standard principles and recommendations for more consistent application and more public accountability for setting and reviewing charges.

Chapter 13 is a useful chapter defining the role of monitoring by Ministers and departments of regulatory agencies and regimes. It makes some important points, including that monitoring should be relatively formal and arm's length, confine itself to the legal, administrative and strategic framework within which the regulator exercises its powers, and refrain from meddling in or second-guessing regulatory decisions.

Managing the regulatory system

General strategy

Chapter 16 summarises the whole Commission review and the basis for its recommendations very helpfully. As indicated elsewhere, a major challenge is to define ways in which the regulatory system can be improved at a system level. How can the central organs of government get a handle on system improvements, given the high degree of heterogeneity, distributed control and technical complexity in regulatory

regimes? Table 16.1 (p 420) helpfully summarises the Commission's focus on a basic system wide strategy of incentivising and equipping regulators and agencies with oversight responsibilities to improve performance in particular regimes and principles for prioritising regulatory reform; together with some public good tasks such as information sharing and setting principles for governance and management.

Understanding the system

Chapter 15 is a discussion of ways of making sense of the regulatory system as a whole. In fact it begins by concluding that no grouping of regulators or regulatory regimes would add much to understanding of the system because there are too many dimensions to a regime for clustering at a higher level to be useful.

Similarly the discussion on developing some generic performance measures mostly confirms how difficult they are to identify. The Commission suggests (Page 419, Table 15.1) some indicators in a system of standardised reporting by regulators based on a system developed in the Australian state of Victoria. Some of these seem to be counting what you can count, such as the number of pages of law enforced, rather than what is actually a good indicator. They can be trivial, misleading or perverse and by and large should not be taken as high-stakes indicators of performance. Indeed the commission's finding (p 420) really acknowledges that "system-wide standardised reporting is unlikely to be the most effective tool for identifying risks or performance issues across the system".

There is a good summary of what ought to be monitored about the performance of the system as a whole: "its ability to provide proportionate and necessary regulation; prioritised regulatory effort; adequate resourcing of implementation; fair and effective implementation; and self-aware and adaptive regulatory organisations" (Finding 15.4 p 407). These are worthwhile objectives but not amenable to measurement; appraisal is really a matter for debate and judgement.

The Commission notes that "the Treasury has already begun this process" (ibid.). But it isn't actually clear that the information that the Treasury collects will enable it to answer some of these questions. The Treasury's current Regulatory Systems Report (Box 15.2, Page 407) is mainly information about management systems and their documentation within agencies and does not go directly to the performance of the regulatory system. The Commission recommends that "[a]s the Regulatory Systems Report (or equivalent monitoring processes) evolves, the Treasury should collect more information about the outputs and outcomes from departmental regulatory management systems" but that "[c]entral monitoring of the regulatory system's performance should be based on both a mix of information generated by departments and regulatory agencies, and data from external or independent sources." (F15.6, Page 423).

Central leadership

Consistent with its view that there are some levers for government to operate on the regulatory system the report endorses the need for overall executive responsibility for system oversight and reform, to be in the hands of a specific senior Minister supported by a central unit, probably located in the Treasury. Can this central unit provide leadership for the regulatory system as a whole?

After a discussion of some options – a Head of Profession like the Head of the Government Finance Profession or a Functional Leader for Compliance akin to the Chief Information Officer - the Commission settles for someone providing "intellectual leadership in the area of regulatory practice" (R5.4, p 132). In Chapter 16 the Commission proposes on balance that this office be located in the Treasury, which is the primary support for the Minister of Regulatory Management (R16.5, p 430). A central

support to help departments and agencies develop their capability – the obverse of holding them to account for doing so – is appropriate for the strategy proposed by the Commission.

There is still cause for scepticism about whether this sort of intellectual leadership can be provided from the centre. The main question is whether there is enough that regulators have in common for a single profession and leader to be appropriate or useful. The proposed chief regulator will, as the Commission suggests, have to be someone who commands wide respect in government and business circles. The Treasury will need to employ staff in its regulatory unit with a good understanding of regulatory system requirements, experience working with some of the main regulatory regimes and good relationships with the principal regulators and their monitoring departments. If it is to have effective oversight of a rolling programme of reviews of existing regimes, the unit may need to participate directly in the planning and monitoring of the more significant or politically salient reviews and therefore be able to call on additional expertise from time to time.

Developing capability

The report is not completely clear on the appropriate balance between centre and individual organisations for development of workforce capability. On the one hand, “most regulators share a set of core functions, and ... these functions create demand for a set of capabilities that are the foundation of regulatory practice” (page 114). On the other hand, a “range of training opportunities seem to be available but some evidence indicates that those opportunities do not meet the needs of regulatory agencies or their staff. This could be because the training is insufficiently tailored to the specific needs of regulatory agencies or that generic training in core competencies is not required of staff working in regulatory roles.” (Finding F5.6, page 122). In the main example cited of Pike River, the shortcomings identified were clearly in the mining inspectors’ knowledge of underground coal mines, not in generic principles of regulation.

In any event the Commission’s focus is at a system level including “improving guidance on regulatory practice; increasing support for professional networks; strengthening the responsibility on individual agencies to focus on their workforce capability; emphasising workforce capability in performance reviews; and promoting intellectual leadership and good regulatory practice”, leaving open the question of the appropriate balance between general and specific competencies in each regime. Maybe the appropriate balance is for regulators to have clear qualifications pathways for their staff and to include a module on generic skills of regulation. There is scope here for tertiary education institutions to provide courses on both regulatory policy and generic skills of regulation.

Review and reform

It seems likely that most change in regulatory systems will be off an existing base rather than green fields design of new regimes. Cabinet puts the responsibility onto departments for keeping regulatory regimes up to date; but most proposed changes to regimes have to be brought back to Cabinet and many require statute amendments.

As a result, a major issue is how to make best use of the scarce resource of Parliamentary and Ministerial time for these changes. Quite often departments and agencies are well aware of the need for revising law and regulations and the problem is getting the government’s attention until a regulatory failure sparks a patch-up. Periodic more basic reviews could reduce the need for later crisis responses and in the long run be a better use of the scarce resources of Parliamentary and executive time. Similarly more use of secondary or tertiary instruments and less requirement for detailed revision to statutes would help reduce the legislative bottleneck; although, particularly where

regulators have more authority to write rules themselves, the government needs to be satisfied that there are adequate provisions for review.

But somehow reviews have to be prioritised. A simple question at the regime level would be how well is the regime working? This is something that departments ought to be alive to from their monitoring role and ongoing discussions with the regulators. This reverts back to the question of who is best equipped to undertake an assessment of the performance of regulatory regimes. Arguably it is the regulators themselves at the sharp end and then departments for the policy-regulatory regime nexus but both in a contestable environment – including consultation with stakeholders.

Findings and recommendations

Any policy adviser knows that the job doesn't end when the report is completed and delivered. The next crucial step is to communicate its findings to decision-makers – and if necessary defend them - and support consideration of its recommendations. The publication of a draft report in March 2014 will have given the government and its advisers an indication of which way the Commission's thinking was going and, although the substance of the findings and recommendations changed substantially in the final report, nothing there should have come as a surprise. Looking ahead, the most important questions are how to take action on the report and who will have to move things forward.

Who will pick up the report?

For the points that require central action, the ball is clearly in the court of the Minister for Regulatory Reform, supported by the central unit in the Treasury, but also by the Ministry of Business, Innovation and Employment (MBIE), which has a large role in policy for business regulation. For the rest, departments and agencies will have to pick up the ideas in the report for how to improve regulatory regimes. The role of the centre will be to provide intellectual leadership and support where it can and to ensure that departments and agencies are discharging their responsibilities for review of their regulatory regimes.

This report is neither the beginning nor the end of a process. The Commission's review fits into a stream of policy advice and decision-making. Regulation has received a lot of attention from the current government since it took office in 2008. including the appointment of a Minister for Regulatory Reform, the 2009 Government Statement on Regulation, the Compliance Common Capability Programme's guide for compliance agencies (2011) and the government's Initial Expectations for Regulatory Stewardship (2013). The Commission notes that since the Treasury became responsible for central oversight in 2008, it has developed a number of initiatives to build a "regulatory stock management system". Beyond the general systems changes, at the level of specific economic regulatory regimes, a lot of the initiative for planning and overseeing reviews will lie with economic Ministers and their departments, such as MBIE, and the regulators themselves. But the Treasury will likely retain its central role in overseeing the development of the overall regulatory system. If the Treasury is to support the Minister in driving the changes recommended in the report, its effort will have to increase.

How will it be implemented?

The usual temptation for a policy adviser reading a report like this is to skip to the end, see what is being recommended and then read back into the report. Recommendations have to follow logically from the supporting discussion and conclusions, be clear on who is being advised to decide something and what they are being advised to do – the levers the decider can pull to get action. Generally, recommendations follow logically from the

argument. The concluding section summarising the report's findings and recommendations is helpful to show the flow of argument from findings to recommendations although readers will sometimes need to go back to the text to see how the recommendations are a logical consequence of the findings. As to whether the recommendations are specific enough for decision: in some cases this is made clear in the text of the recommendation although in others what the appropriate forum is for decision is left to the government to decide.

Some of the findings in the report are in fact recommendations: they propose that something be done, ranging from guiding principles for action to relatively specific courses of action in specific circumstances. Apparently officials are finding the guidance provided in the report useful on a day to day basis. But in some cases the findings are a lot more specific than design principles and really beg the question of what should be done, by whom and when. Examples are Findings 4.12 on cultural assessments, 7.7 on Treaty submissions, 8.4 on regulatory implementation statements, 8.10 on exemption powers, 10.9 – a stricture against appointing group representatives to Boards and several in Chapter 11 on criteria for review processes.

The Commission made a deliberate decision to confine its specific recommendations to changes at the level of the overall regulatory system. For the rest, simply suggesting some things that ought to be taken into account is quite consistent with the Commission's mandate to provide more general guidance on reform. It may be appropriate to leave it to the government's advisors to think how these proposals would be implemented but the language of these findings does leave things hanging a bit. I would want to know what the Commission had in mind for action: was it to include these "should" statements as part of guidance material or was there some more specific idea such as to establish new rules? In some cases it is clear from the supporting argument, in others further development would be required to turn the proposals into something that could be a basis for action.

So this does raise the question of the Commission's role in after-care: engaging with Ministers and officials on how the report can be implemented. The Commission has not just dropped the report on the table and walked away. Commissioners and staff have clearly put effort into presenting and explaining the findings and recommendations; but staff argued that the Commission was not resourced for a more substantial ongoing role. I would simply underline the importance of after-care and hope that the Commission will ensure that it has the capacity in future reviews to help Ministers and officials bring its proposals to fruition. It seems a shame if its ability to transfer the knowledge accumulated in the course of such an important investigation is limited by time and resources.

Conclusion

This report brings together the best of current thinking and evidence on a central function of modern governments. Despite its length and complexity, it is a valuable resource for future study of regulation. Just as important, it starts in the right place. Many reviews of regulations are built on the premise that the objective is to cut red tape and reduce costs on business. The Commission is to be commended for starting from a different place: that regulation is a necessary and beneficial government service which can be made to work better. Early indications are that the report will be useful for future government policy and practice.

References

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Annex A: Review of Regulatory Design Inquiry

Background

The deliverable is a report similar in style and structure to those produced for earlier inquiries (You have been provided previous evaluation reports prepared for the Housing Affordability Inquiry, Trans-Tasman Inquiry and Services Inquiry).

The report is intended to tie into the Commission's performance framework, as described further below. The report will subsequently be published.

This independent review is a valuable opportunity for the Commission to learn from a seasoned operator about what the Commission or the inquiry report done well or could have done better. You should feel free to speak with a few stakeholders as you see useful.

Deliverables

The deliverable is a report of your review of the Commission's inquiry report: "Regulatory institutions and practices" ("Reg report"). The review should evaluate (based mainly on the final report plus on-line appendices) the quality of the Reg report against the following performance measures:

- the right focus - the relevance and materiality of the inquiry report;
- good process management - the timeliness and quality of the inquiry process;
- high quality work - the quality of the analysis and recommendations;
- effective engagement - how well the Commission engaged with interested parties;
- clear delivery of messages - how well the work is communicated and presented; and
- Overall quality - the overall quality of the inquiry taking into account all factors.

Note that the Commission's performance framework also contains another dimension:

- Having intended impacts - what happens as the result of the Commission's work

While it is mainly too early to judge this aspect, you should make any observations that you feel you can make.

The review should note any lessons that can be taken and make recommendations for any future improvements.

The report must also contain a 'summary assessment' (or alternate name) that summarises your perspective on each of the performance dimensions (a short paragraph on each) - this is useful for the Commission's Annual Report.

Annex B: Terms of Reference for the Inquiry

"to make recommendations for government policy to improve the design of new regulatory regimes and make system-wide improvements to the operation of existing regulatory regimes". In three parts:

1. "An overview of regulatory regimes and their regulators
 - a. Develop a high-level map of regulatory regimes and regulators across central government, including their organisational form."
 - b. "Develop a set of thematic groupings which can be used to broadly categorise regulatory regimes by their objectives, roles or functions. For example core objectives might include health and safety, environmental protection, or economic efficiency. "
2. "Understanding influences and incentives on regulatory regimes: Outline and explain key factors which act as incentives or barriers to regulatory regimes and regulators producing the outcomes stated in legislation."
3. "Recommendations":
 - a. "...guidance that can be used to inform the design and establishment of new regulatory regimes and regulatory institutions, and the allocation of new regulatory functions to existing institutions"
 - b. "...system-wide recommendations on how to improve the operation of regulatory regimes over time"
 - c. "...how improvements can be made to the monitoring of regulator performance across central government"