NZPC Inquiry into Regulatory Institutions and Practices

Joint Treasury/SSC Submission on NZPC Draft Report of March 2014

Introduction

Our roles

The State Services Commission (SSC) and the Treasury are two of three central agencies that, along with the Department of Prime Minister and Cabinet, are jointly responsible for providing leadership, coordination and monitoring across the state sector.

SSC provides leadership to the state services to help them perform strongly and with high levels of integrity. SSC appoints departmental chief executives, reviews and reports on departmental performance; promotes and develops senior leadership and management capability, and personnel policies and standards, in the public service; and reviews and advises on the integration, governance and organisation of the state sector. Currently, SSC has a particular focus on driving improvement and change across the system, which includes implementing State Sector Act reforms, and is accountable for ensuring the success of the Better Public Services programme.

The Treasury is the government's lead advisor on economic, financial and regulatory policy. It provides strategic policy advice on the New Zealand economy, produce a range of publications and economic data; monitor and manage the financial affairs of the government, and assess public sector proposals that have economic and financial implications.

Treasury's strategic oversight role for supporting regulatory quality

In 2008, the Treasury was given a new role to provide strategic oversight and coordination of the government's regulatory quality assurance systems, such as the regulatory impact analysis regime. This includes a responsibility to recommend improvements in those systems. This work is undertaken by the Regulatory Quality Team based in the Treasury.

Since it assumed this role, Treasury's approach to the development and extension of the regulatory management system has been one of cautious experimentation and learning – trying new tools and then seeking to adjust or adapt them as we go. With the recent introduction of the government expectations for regulatory stewardship, our aim is to increase our engagement with departments on discharging their role as stewards of regulatory regimes, and work more closely with them to further develop our current regulatory management tools in ways that are better tailored to departmental circumstances.

The structure of our submission

This submission is in three parts:

- The nature of our interest in this Inquiry topic and in the final report;
- General comments on some of the big themes we see in the draft report;
- A few specific comments on selected matters in the draft report.

We look forward to receiving the NZPC's final report.

We would be happy to discuss any aspect of this submission with you.

15 May 2014.

Treasury and the State Services Commission

Part 1: Our Interest in this Inquiry

Both the State Services Commission and the Treasury have significant interests in the NZPC's inquiry into regulatory institutions and practices in New Zealand.

- We share with the NZPC:
    - the view of the ubiquity of regulation in the lives of New Zealanders and hence the importance of good regulation for the wellbeing of New Zealanders
    - a concern that New Zealand is not paying enough attention to how its regulatory regimes are performing over time, and also that there is limited information available to inform discussion on the state or performance of New Zealand regulation, in stark contrast to the amount of information available about fiscal matters
    - the desire to see improvements in the design and operation of New Zealand's regulatory institutions and practices.
- We acknowledge that a number of the NZPC's draft recommendations are directed to us specifically, in light of our existing oversight roles and responsibilities.
- We are conscious of having a likely responsibility to support and co-ordinate the development of a government response to the NZPC's final report.

Prioritisation, packaging and sequencing of recommended actions

With this last responsibility in mind, we are very aware of the complex nature and wide range of the matters canvassed in the draft report, and the number of findings and recommendations it contains.

It will be difficult for the government to make progress on all these fronts simultaneously. Implementation of appropriate system changes will inevitably take time to work through, even if responsibility for leading different bits of work is able to be shared among different agencies.

We therefore think it would be of significant help to the government, when considering its response to the recommendations, if the NZPC was able to indicate:

- where it thinks the priorities for early action should be
- where it thinks proposed measures need to be developed/progressed together as a package, and
- how proposed measures might be sequenced to give the best chance of success.

It would further help the government to understand what lies behind any NZPC thinking on these "ordering" questions, which might, for example, cover considerations such as:

- urgency of need, or limited window of opportunity
- size or certainty of expected impact
- co-dependence or need for close alignment between measures
- being a prerequisite or enabler for the success of other measures
- the need for further work before the case for, or details of, the recommended measures can be confirmed
- expected timeframes for the robust development and implementation of measures
- the capacity of system participants to introduce, absorb and sustain change without significant compromise to existing regulatory performance or the level of desired improvement.

The strength of the case for system changes

We were pleased to note that the NZPC plans to provide more information about the cost of its recommendations in the final report. More broadly, it will help us enormously in developing a response to the report if the NZPC is, where possible, able to indicate:

- the nature and scope of the likely benefits and costs of recommended actions
- the evidence, assumptions and uncertainties that underlie those assessments
- how risks of unintended effects might be managed, and
- what further work might be required.

We are very conscious that the rules and expectations we apply to the design and operation of our regulatory institutions and practices are themselves a form of regulation. To make a strong case for system changes, therefore, we will be expected to consider the potential impacts and risks of proposed alternative arrangements against the performance trajectory reasonably implied by our existing arrangements (noting that some system developments are very new). It will be important to make realistic projections or assumptions about these impacts, risks and timeframes.

We know such analysis isn't easy. Regulatory management arrangements, like those of many regulatory regimes, operate within a complex, adaptive system. In such systems, it is inherently difficult to predict the behavioural responses to, and outcomes of, any proposed reform. Unintended consequences are also "normal" and to be expected. This is what has pushed us to view changes to regulatory management arrangements as "experiments", with the implied need for continuous system monitoring for rapid learning and scope for ongoing adaptation to emerging results.

Part 2: Comments on Key Themes

We think there are important tensions and issues underlying some key conclusions being signalled in the draft report. We want to encourage further discussion and reconciliation of these issues in the final report, if at all possible.

No maps or thematic groupings: what might this imply for the role of the centre?

In Chapter 3, the NZPC addresses the requests in the inquiry terms of reference for a "high-level map of regulatory regimes and regulators across central government" and a "set of thematic groupings which can be used to broadly categorise regulatory regimes".

We note the reasons given by the NZPC for not providing any indicative maps or thematic groupings in the draft report. These were that such maps and groupings involve significant degrees of aggregation or simplification, which sacrifice important nuance, explanatory power and hence usefulness, and that no single map or grouping will support all avenues of analysis of regime performance.

This may be an appropriate conclusion. But it does have some wider implications. If it is important to have a good understanding of the dynamics, relationships and differences between regulatory regimes, then this implies some significant limits on the range of roles the centre can sensibly play in the development of better regulatory institutions and practices. Even if there was a lift in resourcing for regulatory management at the centre, we cannot hope to develop or maintain a deep understanding of the institutional arrangements and regulatory environment for 200 different regimes. If regime differences really matter, it must call into question the merits of, or scope for, standardised reporting, as recommended in Chapter 3. More generally, it leads us to ask when it will be appropriate to pursue improvements at a whole-of-system level, and to question the extent to which system-wide improvement can be effectively led, prioritised and driven by a single Minister and central supporting agency, as recommended in Chapter 16. Further thoughts on this would be welcome.

We can also turn the argument around, however. If the NZPC thinks it is feasible to identify good regulatory practices with reasonably generic application, then it should be possible to identify appropriate thematic groupings or ways to categorise different regulators or their activities that will be useful from a system-wide perspective. The trick may be not to try to allocate regulators or regimes to one group for all purposes, but just recognise when they may share common features to which some generic good practices may apply. For instance, we wonder if a classification scheme based on an expansion and further breakdown of types of regulatory functions in Table 3.2 would serve to meet the underlying objectives of the terms of reference. Some of the chapters of the draft report already focus on particular functions that a range of regulators may have. This inquiry will prove very useful if it can identify good operational practices with reasonably generic features for at least some regulatory functions.

Reporting on regulatory performance: what sort of dialogue do we really want?

As noted above, the apparent diversity of regulatory regimes and regulators calls into question the merits of pursuing standardised reporting measures. Consistent with that, we seriously doubt that any particularly meaningful dialogue about comparative

regulatory performance is likely to emerge from formal reporting on the sorts of measures discussed in Box 3.1, or Table 3.1, of the draft report.

We think a different approach could have merit. On page 60 of its draft report, the NZPC asks whether reporting should take place at the level of the regulatory agency or the regulatory regime, and concludes that it is not convinced that the benefits of reporting at a regime level would outweigh the additional compliance costs of disaggregating performance data. We wonder if this is the right conclusion to draw.

First, we doubt that the primary concern is the cost of disaggregating data. Even where one regulator operates across multiple regimes, it is unlikely that relevant data is collected and held internally in aggregate form. If aggregation is then required for entity reporting, it is actually aggregation that will create compliance costs, as well as giving rise to an inevitable loss of information. Further, it is just as likely that a reporting entity will be one of several agencies performing a role within a single regulatory regime. Consequently, we think a better starting point would be to ask; what type of information, and at what level of aggregation, is most likely to facilitate meaningful discussion of regulatory performance?

With this question in mind, we think that reporting on an entity basis and reporting on regimes are likely to produce very different performance conversations. Reporting done on an entity basis, even when we acknowledge that this entity is a regulator, will tend to encourage a focus on the regulator's costs, the regulator's management systems and capabilities, and the regulator's actions. It is much less likely to prompt a look at the costs imposed on those being regulated, the nature of the regulated population and its capability and willingness to comply, the nature of the regulatory strategy being pursued, the regulatory outcomes achieved or experienced (including unintended effects); or the potential need to revise the regulatory approach.

We don't underestimate the challenge involved in developing a reporting framework focussed on the performance of regulatory regimes (including the need in some cases to bring together information from multiple agencies). But if it can be done, we think such a framework is far more likely to bring attention to this broader set of regulatory performance issues – a conversation that is currently missing in many areas of regulation. This more broad-based look at regulatory performance seems to us to be a more meaningful performance conversation to pursue than the narrow focus offered by a traditional accountability lens.

Finally, we wonder if such a performance conversation might be better not just because of its broader regulatory content, but also because of who participates. While there will no doubt remain a need for some entity-focussed reporting that will suit a dialogue between a regulator and its monitoring agency (as contemplated in Chapter 14 of the draft report), a more regime-oriented reporting requirement will provide better support for a performance dialogue:

- between a regulator and the relevant regulatory policy agency (and relevant portfolio Minister)
- with other regulators with overlapping or complementary regulatory roles, and/or
- with the regulated population.

To the extent that the monitoring agency and the regulatory policy agency are one and the same, we suggest that it is the "policy hat" rather than the "monitoring hat" (as identified in Figure 14.2 of the draft report) that allows the richer performance conversation. We tend to view the monitoring hat as representing a narrower performance perspective – basically just a subset of the matters of interest from a policy point of view – rather than an alternative or conflicting performance perspective to that provided by the policy hat.

We hope the NZPC could give further consideration to reporting options that could support frank, meaningful dialogue about regulatory performance between the parties with key responsibilities or interests in a regulatory regime. Those reporting options may not have to be comprehensive (cover all regimes), or annual, or aimed at a general public readership, as is the case with entity annual reports. Without such discussions, the government is far more likely to experience regulatory surprises and failures, with reputational fallout and the corresponding pressure for hasty regulatory responses, which increases the risk of further regulatory mistakes and unintended regulatory outcomes.

Regulator practice: the challenge of "really responsive risk-based regulation"

While we are not front-line regulators, we tentatively think that the work of Black and Baldwin provides very useful insights into the nature of the operational challenges that many regulators must confront (as discussed in Chapter 11). The reality of limited resources means that all regulators are forced to make prioritisation decisions, and this will almost inevitably require a risk-based response. Further, any regulator that takes a serious interest in how well the regime's regulatory objectives are being met will be drawn to attend to the factors that define the really responsive approach described by Black and Baldwin.

The choices a regulator makes about how to respond might be called its regulatory strategy. As already indicated above, we think the regulatory strategy should be an important part of the performance conversation between a regulator and the regulatory policy agency and relevant portfolio Minister. At present we worry that many Ministers and regulatory policy agencies are not sufficiently aware of the potential implications of the regulatory strategy adopted by the regulator, and may have different perceptions or expectations of, for example, funding adequacy, regulator capacity, the prioritisation of different risks, what constitutes regulatory success and failure, etc. A misalignment of perceptions or expectations potentially leaves all parties exposed.

At present we think the initial expectations for regulatory stewardship agreed by Cabinet in 2013 provide a reasonably useful starting point for a performance conversation between central agencies and regulatory policy agencies, based around the agency system reports described in Box 3.2 of the draft report, and the regulatory element of Performance Improvement Framework (PIF) assessments. However, we acknowledge that these expectations may not work quite as well as a starting point for a performance conversation between a regulator and the regulatory policy agency or portfolio Minister. The value of the Black and Baldwin work on really responsive risk-based regulation is that it might provide a better supporting framework for this different kind of performance conversation, concerning regime performance and the regulatory strategy being pursued. We would welcome NZPC views on this point.

Performance Improvement Framework

Chapter 14 presents useful findings. The NZPC has suggested monitoring and accountability is weak, and, where practical and reasonable we should be looking to leverage more from the PIF. We agree.

Up until now we have not attempted hard and fast rules for Crown entities and PIF. While PIF was designed with and for Crown entities, only the large footprint Crown entities have either completed or will complete a PIF review in the next year, such as NZTA, NZTE, ACC and HCNZ. That is because our focus to date has been on supporting constructive engagement between Responsible Ministers and Boards. This has been done via Ministerial expectations that every Crown entity should be using PIF, or some other form of continuous improvement. We have supported that expectation via Self-review guidance, workshops, a range of resource material (all available from the PIF website) and individual assistance from the PIF team.

The recent upgrade to the PIF Agency model will also assist. The upgrade places importance on stewardship of regulatory regimes and improving the quality of Crown entity monitoring advice. The upgrades and lines of inquiry were developed with the major regulatory footprint agencies, several regulators and good practice Crown entity monitors. You will recall being consulted in the design of those upgrades.

That said, all of this is insufficient. That is why work is already underway to unbundle several PIF products from the PIF review process, and make them available to Crown entities. For example, the Four-year Excellence Horizon will be made available to all Crown entity boards. This will lift the quality of system thinking at the board level. In addition, the Self-review guidance is currently being redesigned to reflect the needs of Crown entities. This change reflects feedback from State servants. Also, a bespoke PIF product is being designed for District Health Boards. This product will assist with issues relating to health system governance. Finally, in time, a good-practice note on regulatory stewardship and Crown entity monitoring will be published.

In summary, we are preparing to ramp-up PIF support for the Ministerial expectation of Crown entities. However, if we take care of the supply side, what is your view about driving the demand side? Said differently, how do you think we can encourage or incentivise Crown entities to use PIF (and its component parts) without building an expensive planning and reporting regime, adding unnecessary compliance costs, and not compromising the value at the heart of PIF?

How can we affect the drivers of capability improvement?

While the draft report suggests that “accountability is a necessary but insufficient condition for better performance” (finding 14.2), we think the report may underplay the importance of other drivers for improving capability, as well as the interrelationship between those drivers, including leadership, culture, networks and forums, and workforce capability.

Chapter 7 presents useful findings on leadership and culture, but no recommendations. If leadership quality, internal communication, risk aversion and unwillingness to adapt are systemic problems, then their impact on the system’s performance may well be significant. The final report, therefore, could usefully recommend ways that existing mechanisms could better address these issues, including Chief Executive and board member appointment processes, and relevant performance monitoring and assurance

mechanisms. It could also clarify the potential of other recommendations to address these issues, including formally recognising networks and forums, and utilising the PIF.

The NZPC recommends the formal recognition of regulator forums and networks (recommendation 11.1). If their settings are optimised these could yield broad benefits, including improved practices and workforce capability. The final report, however, could usefully provide more detail on how forums and networks could best operate. For example, what should they have as their focus – different regulatory functions,[1] phases of the regulatory cycle, regulatory tools,[2] or regulatory approaches (like really responsive or risk-based regulation)? How could they best prioritise their structures, including groupings, categories, sectors and forms of regulatory institutions (such as monitors and Crown entities)? And how might they facilitate meaningful dialogue about regulatory performance between regulators and their policy agencies, monitors, other regulators with overlapping or complementary roles, and perhaps other interested parties?

It would also be beneficial if the final report summarised the pros and cons of relevant models of networks and forums.[3]

The NZPC's views would be particularly welcomed on whether a regulatory "Centre of Excellence" should be established. What level of reach across the system is desirable, what model would best achieve that? Should a "Centre of Excellence" be facilitated by a prominent regulator or the Centre? Should there be just one (i.e. that builds on and absorbs the CCCP) or should it compliment the CCCP and others? And would this be a priority? Trying to guide the production of practical guidance for regulators from the centre of government may be problematic, given how far central agencies are from the regulatory front line, and because such guidance may not be appropriate for all regulators given the different contexts in which they operate. There may be benefits to this approach, however, given the centre's system view and reach.

Chapter 12 presents useful findings, including on generic workforce competency requirements. We would welcome, however, the NZPC's views on more strategic workforce capability issues, including what high-level workforce capability objectives might facilitate discussion of relevant priorities and interventions. For example, we accept finding 12.1 (i.e. that it is management's responsibility to ensure the right mix of generic and specific competencies are in place), but note that individuals, industry and training organisations also have important roles. The soon to be established Capability Working Group for dairy processing and regulation is an example of how government, industry and training organisations can collaboratively map future capability needs, undertake a 'gap analysis' and agree a strategic action plan. Does the NZPC consider that this strategic, sector-wide, 'pipeline' approach to workforce capability development could be applied more broadly across the system? How could this be facilitated by formally recognised networks and forums, including the "Centre of Excellence" (and perhaps the Skills Organisation)?

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1 For example, consultation, standards-setting, education, audit/verification, inspection and enforcement etc.

2 Including transactional, economic, authorisation (licensing, certifying, accrediting and registering), structural technological, physical, environmental and process design), informational (disclosure and performance indicators) and legal (primary, delegated and quasi/soft law), refer Freiburg (2010), *The Tools of Regulation*.

3 Including the Australasian Environmental Law Enforcement and Regulators Network, the United Kingdom's Regulatory Excellence Forum, and New Zealand's Productivity Hub, Government Economics Network, Common Compliance Capability Programme (CCCP), and Monitoring, Appointments & Governance Network (MAGNet).

Delegating regulation-making powers and the accountability of regulators

We are obviously concerned by, but have no reason to doubt, the NZPC's finding that many regulators feel they are working with regulatory regimes that are outdated or not fit-for-purpose. It is certainly our perception that parliamentary time to progress changes to primary legislation is at a premium and represents a real constraint on the ability to use primary legislation to keep existing regimes in good condition. There are always more legislative bids than can be accommodated in the government's legislative programme.

That does suggest it is sensible to look again at both the current norms applying to the allocation of material between primary and delegated legislation, and the consistency with which these are followed. Addressing the consistency question should not be controversial, but other bodies, such as the Legislation Advisory Committee or the Parliamentary Counsel Office, are probably better placed to comment on whether current advice on the allocation of material between primary and delegated legislation should be amended or clarified.

Nonetheless, we would like to make the point that greater use of delegated legislation does not have to mean greater delegation of legislative powers to regulators themselves. Legislative instruments made by Order in Council are not subject to the same bottlenecks as primary legislation, but are generally subject to more disciplines (e.g. regulatory impact analysis, Cabinet consultation requirements, legislative drafting by Parliamentary Counsel) than is normally the case with instruments made by regulators.

We do think there is some benefit in encouraging regulators to feel more responsibility for the quality of the regulatory regimes they operate within. That sense of responsibility can be reduced when other agencies have the policy lead, and we need to find ways to combat this. Nonetheless we think that it is important to have checks and balances in place for regulatory policy making. We therefore wish to endorse the point made in the NZPC draft report that:

> "…if rule-making is to be further delegated, checks on regulators will need to be strengthened" (Overview, page 5).

Other parts of the draft report suggest we have some way to go in that respect. Does the NZPC have views on the sorts of checks that should apply to the exercise of delegated rule-making powers by regulators?

System-wide regulatory review: why don't we use common approaches found in other countries?

In Chapter 15, the NZPC notes that "New Zealand has not adopted general red tape targets, regulatory budgets, or "one-in, one-out" rules, and has made little use of embedded reviews, or of sunsetting, principle-based reviews, and public stocktakes", which are approaches commonly used in other countries.

Treasury's Regulatory Quality Team has in the past looked at the potential of these different tools and has generally concluded that they are relatively unattractive options, for several reasons.

The first is that most involve imposing arbitrary rules concerning target levels, scope, timing, or trade-offs. They are usually centrally imposed, and make little use of existing information about relative performance in different regulatory areas. Their arbitrary nature also sits uncomfortably with both our efforts to promote the virtues of consistently doing good regulatory impact analysis, which assesses regulatory initiatives on their individual merits and counts all sources of cost and benefit, and with our current focus on encouraging responsible regulatory stewardship. Consequently, we are currently reluctant to adopt many of these tools because their adoption would send a signal that we don't believe regulatory policy agencies will do the job expected of them, and hence they do not need to try.

The second is that we believe, based on the experience of other countries, that applying these tools can impose considerable administrative costs. None of these tools we would regard as inherently low cost, and their administration would impose a very significant opportunity cost on the resources of the small Regulatory Quality Team. They would also impose significant direct and opportunity costs on departments.

Finally, these tools tend to have a limited life - because the rules are arbitrary and centrally imposed, they are viewed as a compliance exercise from the start, and any opportunities for short cuts or gaming are quickly exploited. The claimed benefits are also frequently disputed – see, for example, Lodge and Wegrich, 2012, "The 'Californication' of Government? Crowdsourcing and the Red Tape Challenge", Discussion Paper 72, Centre for Analysis of Risk and Regulation, LSE.

For these reasons we are instead trying to build a stock management system that is consistent with our focus on encouraging responsible regulatory stewardship. Some aspects of this system are:

- Provision for regulatory reform bills (2008) and a regulatory review programme (2009)
- Annual regulatory plans of expected new regulation, or review of existing regulation (2010)
- A requirement to scan existing legislative instruments on a systematic and ongoing basis (2010)
- Best Practice Regulation assessments of key regulatory regimes (2012),
- Expectations for regulatory stewardship and Regulatory system reports (2013).

We expect the system to continue to evolve over time, as we develop our tools in ways that are better tailored to departmental circumstances.

Part 3: Comments from the Treasury and the State Services Commission on certain specific findings, recommendations and questions

Aspects of report	Comments
Recommendation 4.2: The next version of the State Services Commission's guidance on machinery of government issues should set an expectation that, where a new regulatory regime is established, the entity responsible for implementing the regime should have a legislative obligation to publish a statement that explains its interpretation of its mandate, to consult on that statement, and keep it up to date.	SSC guidance cannot set expectations for legislative obligations as it is within Parliament's sovereign jurisdiction to impose legislative obligations. Further, mechanisms already exist to clarify, consult and make transparent entities' mandates, irrespective of whether an entity administers part of, a whole, or multiple regulatory regimes. For instance: • SSC considers mandates to include statutory roles, functions and powers which, again, are for Parliament to determine, following the Cabinet process of analysis and consideration of options and recommendations • obligations already exist for reporting to Ministers and Parliament, and therefore the public through the development and publishing of Statements of Intent and Annual Reports • where there are competing and/or un-prioritised objectives (mandates) prescribed in law, case law often clarifies matters, and regulated parties (and monitors) are free to ask regulators for additional information.
Finding 4.3: Legislative frameworks that keep the number of objectives and conflicts to the lowest possible number and provide a clear hierarchy of objectives help to support regulators in making consistent and predictable decisions.	Does the NZPC consider current mechanisms are insufficient, and if so why? It would be useful for the NZPC to also explore the use of Guidance notes to clarify how regulators should interpret or balance the objectives they are set under their legislation (as an example, the UK has guidance on the duty of certain regulators to have regard to growth: https://www.gov.uk/government/publications/growth-duty-draft-guidance).

Finding 5.12: Government has indicated a desire to relocate some regulatory functions from Crown entities to departmental agencies. By itself, this would serve to reduce the formal operational independence with which those functions are undertaken. As a result, government will need to review any functions that are transferred to consider whether they should be undertaken in a statutorily independent way.	We agree with the NZPC's general thrust of transparency mechanisms being important. Our public management system enables this to be met, as well as the twin objectives of safeguarding independence from Ministerial influence and having functions performed within an agency subject to Ministerial influence. Independence of decision making (as for many regulators) is generally achieved through legislation i.e. many statutorily independent functions are held in departments. Statutory functions are carried out independently by agencies at varying distances from Ministerial influence (including departments and Crown entities), such as police and customs enforcement, immigration, social welfare, child protection etc. However, we do not recognise the statement that Government has indicated a desire to relocate some regulatory functions from Crown entities to departmental agencies. Officials have offered (including to Select Committee) some hypothetical examples of this tool's potential use, including for non-regulatory functions, but Government has not decided to use this tool yet. Neither is it necessarily true that using this tool would serve to reduce the formal operational independence with which functions are undertaken. Some of the most independent functions are currently performed by Departments, and in other cases regulatory activities currently undertaken within a department could have enhanced autonomy or independence if transferred to a departmental agency. Objectives of the departmental agency model include enabling: • operational functions to be undertaken autonomously while located within and working to the policy and funding of a 'host' department' • a strong service delivery focus and therefore operate with a high degree of autonomy over its day-to-day operations from both the host department and Ministers • economies of scale and stronger connections between policy and operations than is possible with alternative arrangements. Shifting functions to a departmental agency may also support transparency of operations and resourcing. The departmental agency model provides us with a flexible model with the potential to achieve all of the above objectives (safeguarding independence, increased transparency of the decision and the decision making process), while enabling other functions to remain subject to a degree of Ministerial influence and providing for economies of scale (e.g. through a shared back-office). It is a valuable addition to the possible range of governance and accountability arrangements for the delivery of executive government functions. Are there any regulatory roles which the NZPC considers are more amenable to the departmental agency form, or for which this would be more problematic?

Finding 5.13: There is the potential for confusion about the accountability arrangements of departmental agencies, and the respective roles and responsibilities of: • the minister responsible for the departmental agency • the minister responsible for the host department • the chief executive of the departmental agency, and • the chief executive of the host department.	The State Sector Act and the Public Finance Act now provide for certainty in institutional accountability arrangements between Ministers and chief executives involved in departmental agencies. Further, the legislation provides for clarity of operating arrangements to be agreed by the respective chief executives, approved by responsible Ministers, and for these operating arrangements to be public and transparent through the relationship agreement.
Recommendation 5.4: The Minister of State Services should review agreements between ministers to establish and allocate functions to departmental agencies to ensure that respective roles, responsibilities and accountabilities are clear.	In practice, the Minister of State Services will review Ministers' agreements, as it is a Cabinet Manual requirement that the Minister be consulted on machinery of government issues. The Cabinet process is the practical avenue for the Minister of State Services involvement.
Finding 5.14: The legal differences between the types of Crown entities – the appointment and removal of board members, and ministerial powers of direction – do not in practice differentiate them, because the removal of board members and the issuing of formal ministerial directions to boards has almost never occurred.	The legal differences do differentiate them. Whilst the removal of members and issuance of directions have been rare in practice, these interventions could be needed and should be available.
Finding 5.17: Regulation designed to prevent low-frequency, high-consequence (catastrophic) events is less likely to suffer from loss of focus or institutional support over time if located in stand-alone agencies.	We would invite the NZPC to develop and substantiate the operational costs and benefits to locating activities in stand-alone agencies. For example, there could be other downsides to being stand-alone, such as capability, capacity and sustainability, as evidenced by examples in the adventure tourism sector.
Recommendation 5.6: Updated State Services Commission guidance on machinery of government choices should discuss the practical benefits, costs and risks associated with allocating functions to a department or stand-alone agency, as well as the accountability and governance considerations.	SSC will consider this when it next updates its guidance on reviewing the machinery of government. The NZPC's report provides some useful commentary that policy makers can be referred to in the interim.

Finding 6.1: There is evidence of confusion around the role that some members of Crown entity boards with industry backgrounds are expected to play.	The Crown Entities Act, and relevant guidance, is clear on the role of board members. Inductions for, and monitoring of, Board members should assist with understanding.
Recommendation 6.1: The effectiveness of a part-time board comprised of participants in the regulated sector (as in the Financial Markets Authority) should be reviewed by the State Services Commission before its wider application to other sectors of regulation.	We would note that all boards' members are essentially part-time. In the specific case of the Financial Markets Authority: • The FMA board requires technical skills that, given New Zealand's size, need to be drawn from the industry. • Safeguards are in place, through its large size (12 members) and decision-making parameters to prevent conflicts of interest. SSC would always assess the appropriateness of this, and other models, on a case by case basis.
Recommendation 6.2: The State Services Commission's guidance about appointing board members to Crown entities and its induction material for new board members provide good information on the duties of members. But it should update these documents to emphasise that members are not appointed and should not act as the representative or agent of any external group.	In some cases, legislation provides that board members are appointed on the basis of being (at that time) representatives of particular groups (and the Board Appointment and Induction Guidelines set out what should happen in the appointment process in this case). Individual and collective duties of board members, as the governing body of the entity, are stressed in both the SSC's *Crown Entity Induction* modules (www.ssc.govt.nz/crown-entity-induction-material) and *Resource for Preparing Governance Manuals* (www.ssc.govt.nz/governance-manuals-guidance-statutorycrownentities). However, there is an opportunity to add some wording about not acting as the representative or agent of any external group when exercising their board member duties.
Chapter 7: Regulator culture and leadership	SSC is supporting the efforts of departments through the development and implementation of the State Sector Leadership Strategy which emphasises and reinforces effective behaviours which are critical to building a strong leadership culture. A strong and supportive leadership culture is key to facilitating strong engagement, building learning and continuous improvement (CI) as a foundation of work. In the regulatory context, the purpose of CI is to ensure that when regulation is being considered (i.e. at the policy stage) then the impact on the customer should be considered (including compliance costs) with careful liaison throughout the development of the operational design and delivery of the regulation (i.e. the end to end process). SSC and six public service agencies are currently working together to test a common approach to building their 'customer' focus and CI capability. If successful this common approach would then be the model for building this CI culture and capability across the system.

Chapter 9: The Treaty of Waitangi in regulatory design and practice	We note the NZPC's question as to whether an overarching Treaty clause in an appropriate statute "... that signals the Crown's intent with respect to the principles of the Treaty", would improve the operation of regulatory regimes in NZ; and the NZPC's view that guidance should be provided on how to apply Treaty principles and share excellent practice as a means of improving the practices of regulators, as appropriate to each area of regulation. Treasury would be supportive of the case by case approach, on the basis that it is necessary to consider what the clause means in each regulatory context and it is better to determine this before creating legal obligations under particular regulatory regimes. A generic clause sets up obligations that the government can be held legally accountable for, before they know what they mean for an individual piece of legislation.
Recommendation 10.2: Where courts interpret legislation in ways that significantly alter a regulator's understanding of their mandate, the department responsible for the regime should review that aspect of the legislation. Its review should ascertain whether the courts' interpretation undermines Parliament's objectives in establishing the regulatory regime, and whether legislative amendment is desirable.	We note the NZPC's comments on the courts' approach to assessing cases under section 36 of the Commerce Act and its recommendation that where courts interpret legislation in ways that significantly alter a regulator's understanding of their mandate, the legislation should be reviewed. As regards this particular case, we regard the conclusion that the courts have undermined the objectives of the competition policy regime as overly definitive and would encourage consideration of a more cautious and balanced view. More generally, we would agree that such an event would be a very strong signal of the need for a review, and provide much of the basis and evidence for it. However, such cases are not frequent and as such there is no basis to assume that departments would do anything else.
Chapter 12: Workforce capability	SSC is currently developing a platform to underpin the development of a Workforce Capability Strategy for Public Services. Part of the strategy action plan will be looking across the system at particular workforces with issues e.g. policy and ICT workforces. The regulatory workforce may well be another future contender. The final report could therefore help the system work out the capability skills required for the regulatory workforce. As suggested in the body of the response, this chapter may benefit from proposing some high-level 'workforce capability' objectives, such as, as an example: "A public service that: a) can effectively develop and deploy its regulatory workforce b) values the high levels of integrity and trust required of regulators c) promotes a sustainable way to grow and retain the workforce required to deliver regulatory functions d) values the benefits of having a diverse workforce." The NZPC may wish to refer to SSC's guidance on developing workforce strategies: https://www.ssc.govt.nz/sites/all/files/workforce-strategy-notes-agencies-aug2013.pdf

Recommendation 12.6: Regulators' performance in developing staff should be reviewed, either as part of the Performance Improvement Framework process or through commissioned reviews modelled on that process.	Performance in developing staff is a key aspect of each and every PIF review. In addition, the recent upgrade to the regulatory element of PIF makes explicit reference to improving capacity and capability. For public service departments, SSC and Treasury also seek assurance on this via other means too, including that agencies have considered their strategic workforce capability needs in their four year plans (how to deliver on their four year excellence horizons). SSC also seeks assurance that chief executives have considered their strategic workforce capability needs when reviewing their own performance, on an annual basis. These assurances, however, only apply to core agencies. Does the NZPC think monitors should have a bigger role in providing such assurances for Crown entities (rather than relying on boards to do so)?
Recommendations 13.2 and 13.6: Portfolio ministers should be responsible for ensuring that agencies within their portfolio have complied with the Government's cost recovery policy. Chief executives of agencies proposing a new or amended fee or levy for regulatory services should be required to certify through an appropriate mechanism that their agency has made adequate use of the Treasury guidelines. The Government and Auditor-General should review the Treasury's Guidelines for Setting Charges in the Public Sector and the Auditor-General's Charging Fees for public sector goods and services, to ensure that the guidelines reflect current knowledge about when and how to implement cost recovery.	While we would certainly agree on the desirability of agencies following good practice in the matter of cost recovery policy development, it may seem disproportionate to require portfolio ministers and chief executives to prioritise this among all the other agency activities that they are responsible for. Neither is it clear that an update of the Treasury's and the Auditor-General's guidelines in this matter is the most urgent use of central agency resources.
Question 13.3: Do surpluses and deficits on memorandum accounts signify a problem? If so, are there worthwhile options to address the problem?	Memorandum accounts exist precisely in order to record surpluses or deficits. The focus should be on how these balances are managed so that they trend to zero over time (consistent with policy objectives of the regulatory regime). These accounts are already reported ex ante (Estimates) and ex post (Annual reports) so any concerns should be about how this information is used rather than whether we have sufficient information.
Finding 14.5 and Key Point 5 (pg 337) Departmental monitoring of regulators is weak and departments are not contributing enough to regulatory quality and performance	Key Point 5 (monitoring "is the weakest link in the current accountability system") is much stronger than Finding 14.5, and perhaps overlooks the point that the primary accountability for regulatory performance must rest with the regulator itself, not the monitoring agency. The subsequent recommendations for updated central agency guidance won't address any problems with monitoring agency resourcing, incentives or authority, which are also important.

Finding 14.6: Existing guidance for departments and ministers on monitoring Crown entities underplays the importance of the monitoring relationship and risks sending the signal that a monitoring department does not need to have a detailed understanding of a Crown entity's operations.	SSC is currently part-way through updating and republishing a range of guidance for Crown entities to reflect the 2013 changes to State sector legislation. We expect to finish publishing the updated guidance later this year. The current draft *"It Takes Three: Operating expectations framework for statutory Crown entities"* puts a very strong emphasis on the three-way relationship between the Minister, entity and monitor. In addition, the updated draft *"Guide for Departments"* stresses both that the primary responsibility for monitoring entity performance rests with the board, and that a core aspect of the monitor's responsibility is to provide Ministers with an independent view of the performance of the entity, based on a foundation of good relationships and a shared understanding between entity and monitor of each other's business. It notes the importance of the monitor having a good level of knowledge of entity operations, and also adds that in large entities, in particular, entity management and staff often have the best access to the understanding, detailed knowledge and performance data underpinning a good monitoring relationship.
Recommendation 14.1: The State Services Commission and the Treasury should update guidance for ministers and departments on monitoring Crown entities to: • provide more detail on the issues that monitoring departments and ministers should look for in reviewing the performance of Crown entity regulators • clearly express the importance of monitoring departments having the deep sectoral knowledge necessary to understand the regulator's operating environment, and • place more emphasis on vigilance and free and frank advice from monitoring departments.	Following changes to the State Sector and Crown Entities Acts, the importance of both boards and monitoring departments having sectoral knowledge, and of free and frank advice, are being emphasised in SSC's updated guidance. The updated guidance will also address possible agreements with Ministers around their monitoring relationships and approach, particularly where a department has significant monitoring responsibilities. For instance, it includes suggested good practice where a department monitors a group of entities in a sector. What "detail on the issues that monitoring departments and ministers should look for" does the NZPC have in mind? Providing such detail seems to accord with the NZPC's terms of reference. As discussed in the body of our response, and looking beyond the current update to the guidance, we are interested in how to facilitate a more meaningful performance dialogue. SSC's guidance covers generic issues for monitoring all types of entities, rather than for particular types of entities. Does the NZPC see merit in guidance specifically focusing on the monitoring of regulators? As also discussed in the body of our response, we are interested in how the 'regulatory performance' element of the PIF could be utilised more on the demand side for this purpose, and by Crown entity regulators for self reviews.

Recommendation 14.2: The Treasury and the State Services Commission should work with monitoring departments to: • define common and richer performance measures for regulator Crown entity monitoring • update performance information in accountability documents around monitoring in time for the 2015/16 financial year, and • reflect the new measures in the performance agreements and reviews of departmental chief executives.	Recent changes to chief executive performance agreements and assessments have led to expectations being: • Pitched at a high-level, across all key performance aspects • Flexible enough to reflect specific contexts, including the significance of regulatory or monitoring roles • Supported by better ways of measuring and demonstrating assurance of performance priorities. This new process also links to the PIF (including the upgraded regulatory performance element), where possible, to clarify what really matters for chief executive performance, including any monitoring roles. As discussed in the body of our response, we would welcome further suggestions from the NZPC around what performance indicators may be common across all monitors and Crown entity regulators, even if only on a functional (not system-wide) basis. With respect to accountability documents, we note the recent move to focus Parliament on less clutter of detail and more meaningful reporting information.
Recommendation 14.3: Departments responsible for monitoring regulator Crown entities should develop and maintain explicit statements of their monitoring roles and responsibilities. In doing so, departments should regularly review whether the monitoring relationship: • gives ministers the assurance they need about risk identification and management • allows departments to accurately assess the performance of regulators, and • promotes substantive dialogue with entities about the fitness-for-purpose of the regime.	Recent legislative amendments to the Crown Entities Acts set out the monitoring roles and responsibilities, so that additional explicit statements may not be required. These matters could be included, however, in the next update of the relevant guidance material.
Table 15.1: New Zealand regulatory stock	We note that the figures relating to the repeal of Acts and revocation of legislative instruments in Table 15.1 in the NZPC's draft report are incorrect and substantially understate the level of actual repeals. Attached in the **Appendix** to this submission is an analysis of the nature and volume of legislative activity, including changes to public Acts and changes to Legislative Instruments over the last three years, using corrected figures.

Recommendation 15.2: The performance of departments, in satisfying Cabinet's expectations that they keep current the regulatory regimes they are responsible for, should be strengthened by: • the Treasury publishing the findings from the Regulatory System Report about departmental stewardship activities • the State Services Commission (SSC) developing explicit measures for regulatory performance in chief executive performance agreements and annual expectations letters, and • the SSC using both the Performance Improvement Framework and Treasury surveillance information about departmental regulatory performance in reviewing how chief executives perform.	See above information on changes to chief executive performance agreements and assessments. The recent upgrade to the regulatory performance elements of the PIF will assist SSC to make decisions about whether regulatory measures should or should not be part of a chief executive's performance expectations. SSC currently uses both the PIF and Treasury information about departmental regulatory performance in reviewing how chief executives perform, as well as information from other means and stakeholders.

APPENDIX: NZPC draft report on regulatory institutions and practices Joint SSC/Treasury Submission

The number of Acts and Legislative Instruments (Statutory Regulations) made and repealed since 1980

Table 15.1 of the NZPC's draft report understates the number of Acts and Legislative Instruments repealed/revoked in 2013.

To provide a fuller picture of the nature and volume of legislative activity, the Treasury has calculated the total number of public Acts[4] and Legislative Instruments enacted between 1980-2013 (Figure 1 below) using data the Parliamentary Library and the Parliamentary Counsel Office compiled for the Treasury in 2010, which we have updated.

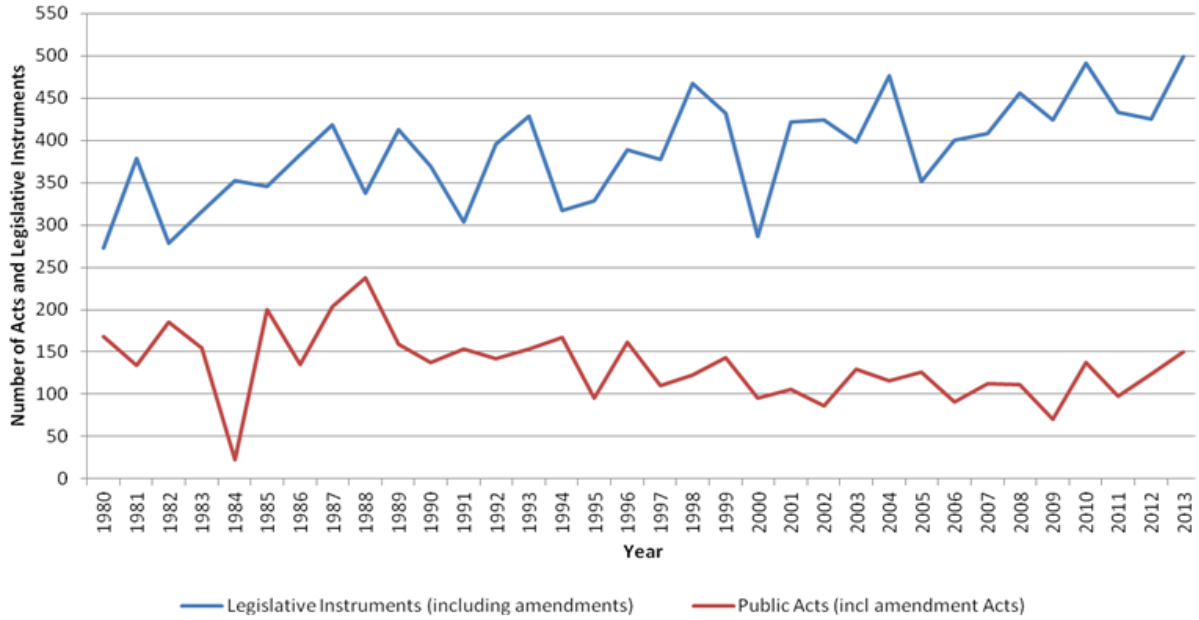
- Figure 1 shows on average 157 Acts were enacted each year in the period 1980-1994. This has declined to an average of 115 Acts per year since the mid 1990's. The number of Acts enacted has fairly consistently been between 100 and 150 a year since the mid 1990s.

- On the other hand the number of Legislative Instruments made each year has gradually increased since the 1980s. On average 354 Legislative Instruments were made each year 1980-1994, compared to an average of 415 Instruments per year from 1995.

- Figures 2 and 3 show that there is also a steady flow of Acts and Legislative Instruments repealed or expired in each year. The significant increase in the number of Acts repealed in 2012 reflects the passing of the Regulatory Reform (Repeals) Act 2012, providing a vehicle for the repeal of 31 Acts and 3 Legislative Instruments.

[4] Includes both principal and amendment acts.

Figure 1: Treasury graph of the number of Acts enacted[5] and Legislative Instruments (Statutory Regulations) made 1980-2013



Source: Data on the number of Acts compiled by the Parliamentary Library, 2010, updated by the Treasury 2014. Data on the number of Legislative Instruments (Regulations) compiled by the Parliamentary Counsel Office, 2010, updated and extended by the Treasury 2014.

Breakdown between principal and amendment Acts

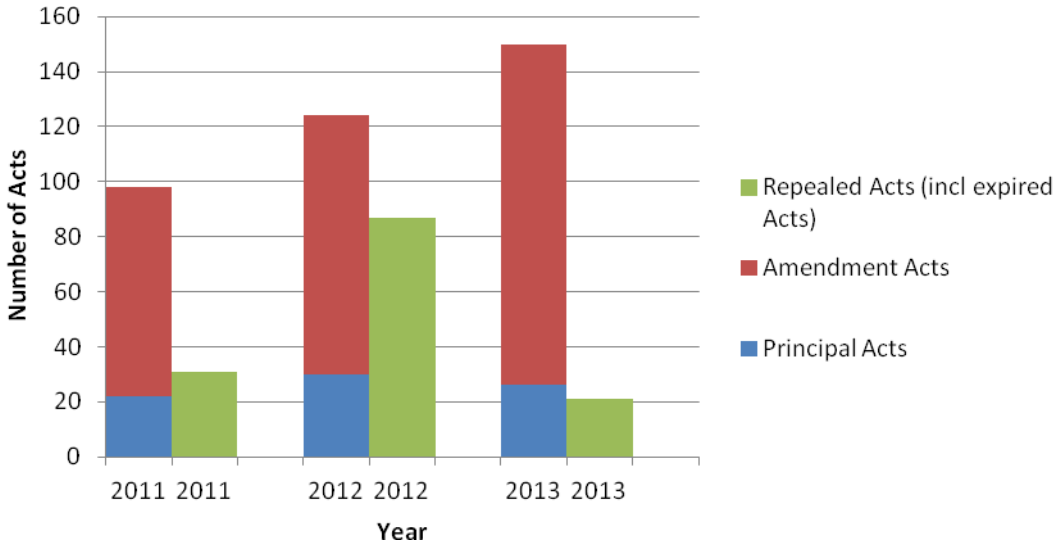
Figures 2 and 3 show the total number of public Acts enacted over the last three years, broken down into principal Acts and amendment Acts, and the total number of Acts repealed each year.

- In each of these three years, more than 75% of Acts enacted were amendment Acts. This is consistent with our understanding from annual portfolio regulatory plans.

- Legislative Instruments are more evenly split between principal and amendment instruments, and a significant number of regulations are revoked each year. This seems consistent with the more straightforward process to make and revoke regulations.

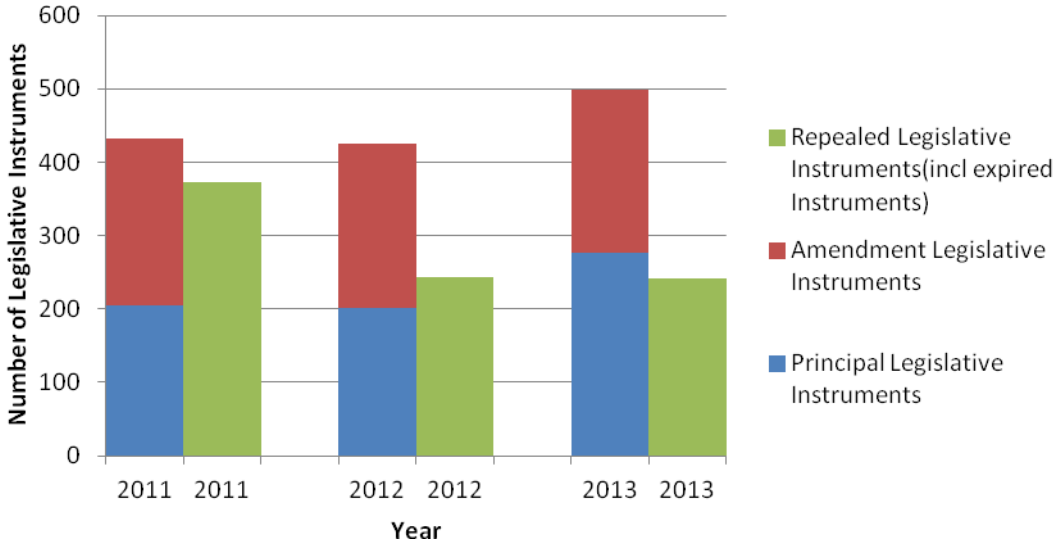
[5] The number of public Acts and the number of Legislative Instruments enacted and made in each year includes those that are in force, those that are not yet in force and those that have subsequently been repealed, revoked or expired.

Figure 2: Number of Public acts enacted and repealed 2011-2013



Source: The New Zealand Legislation website, compiled by the Treasury 18 March 2014

Figure 3: Number of Legislative Instruments (Statutory Regulations) made and repealed 2011-2013



Source: The New Zealand Legislation website, compiled by the Treasury 18 March 2014

The drivers of legislative activity over this period

The legislation enacted in the period 2011-2013 covers a very wide subject range. Some of the Government's priorities over this time have resulted in several pieces of legislation. For example:

- In 2012 one third of the principal Acts related to Treaty of Waitangi claim settlements. The 2013/14 Regulatory Plans showed that 15% of agencies' proposals to amend, repeal or introduce primary legislation related to the Treaty of Waitangi.

- In 2011 more than 7 Acts related to the reform of financial market regulation.

- Over this period 50 regulatory instruments related to the Government's response to the Canterbury Earthquakes.

The regular flow of Legislative Instruments also reflects the fact that for some regulatory regimes, such as those operated by the Ministry of Primary Industries, and the Ministry of Business, Innovation and Employment, Orders and Exemptions for specific transactions, products or entities are required to be made and repealed regularly as part of the operation of the regulatory regime, rather than providing detailed technical rules.

Drivers of nature and volume of legislative activity

It is important to note that the level and nature of legislative activity in a year is not an accurate measure of a government's approach to regulation for a number of reasons.

- Not all Acts are regulatory in nature, for example, over the period 2011-2013 there were nine Appropriation Acts and six Imprest Supply Acts.

- The total number of Acts also includes some repeal Acts, for example the Military Manoeuvres Act Repeal Act 2012, and the Regulatory Reform (Repeals) Act 2012.

- The repeal of Acts may have little practical effect in terms of removing regulatory burden if those Acts are already redundant.

- Whether an Act is a principal Act or an amending Act does not necessarily reflect the extent to which new requirements are being introduced.

    - Amendment Acts can introduce significant new regulatory requirements. For example, the Social Security (Benefit Categories and Work Focus) Amendment Act 2013 introduced new benefit categories and new obligations for beneficiaries.

    - Conversely, a principal Act may substantially re-enact and update existing regulatory requirements. For example, the Legislation Act 2012 brought forward and combined the law on legislation that was contained in 3 earlier Acts.

- The limited amount of House time to consider legislation constrains the amount of regulatory reform that can be progressed by Act.