Nelson City Council
te kaunihera o whakatū

TOWARDS BETTER LOCAL REGULATION

Draft Report from the New Zealand Productivity Commission

SUBMISSION FROM NELSON CITY COUNCIL

To:	info@productivity.govt.nz
	Inquiry into Local Government Regulatory Performance
	New Zealand Productivity Commission
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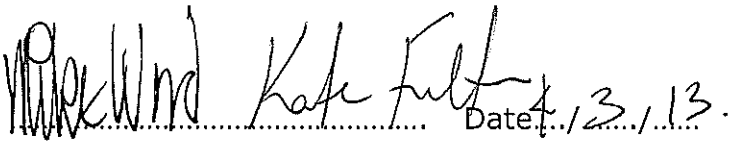
Appearances:

Nelson City Council does not wish to present its submission.

Signed



Date 4./3./13.

Councillor Kate Fulton/Councillor Mike Ward
Co-Portfolio Holders – Policy and Planning

1. Introduction

1.1. Nelson City Council (the Council) thanks the New Zealand Productivity Commission for the opportunity to make a submission on the draft report "Towards Better Local Regulation".

1.2. The Council has found the draft report to be a very good summary of the issues around the need for, preparation, and implementation of regulation. The Commission's approach of taking a whole of system view has been a most useful way of identifying practices, issues, and possible responses.

1.3. The Council supports the key finding that there is an unhealthy level of tension between central government and local government with respect to our respective roles in the development and performance of regulatory functions. While it may be convenient to talk of partnerships, the reality is that too often local government is not given the status of a partner. This commonly manifests itself in the many ways identified in the report and often to the detriment of the beneficial or necessary regulatory interventions being identified at central government level.

2. Discussion

2.1. The Council supports in principle the need to improve regulatory performance systems to better achieve the outcomes anticipated by the regulation.

2.2. The Council would like the focus of improvement to be on achieving these outcomes rather than improving systems for themselves (processes, monitoring and reporting) in isolation from the anticipated outcomes.

2.3. Specific comments to the questions on the feedback form are set out below.

3. Response to questions

Chapter 3 – Diversity across local authorities

Chapter 4 – Allocating regulatory responsibilities

Chapter 5 – The funding of regulation

Chapter 7 – Regulation making by central government

Chapter 8 – Local government cooperation

Chapter 9 – Local authorities as regulators

Chapter 10 – Local monitoring and enforcement

Chapter 12 – Making resource management decisions, and the role of appeals

Chapter 13 – Local regulation and Mäori

Chapter 14 – Assessing the regulatory performance of local government

Q3.1

To what extent should local government play an active role in pursuing regional economic development?

It is a legitimate use of regulation to promote the goals of economic development. The issue for Councils is aligning this intervention with the new purpose of local government, aligning intervention with evidence-based benefits consistent with the expectations and aspirations of local communities, and being overt about the costs and consequences of these choices. The appropriate arena for these issues is the Council's Long Term Plan and through funding and revenue policies.

There is an issue around certainty and investment decisions – regulations should not create uncertainty –there should be a clear, cost effective framework. In a resource management context investment uncertainty can be created when the investor is unclear as to final costs of a project (the costs of securing approvals) , or in the event of securing approvals, conditions of approval create costs that may not have been signalled in the planning documents.

Q4.1

Have the right elements for making decisions about the allocation of regulatory roles been included in the guidelines? Are important considerations missing?

Yes – the guidelines have most of the right elements. Two possible guidelines seem to be missing:

a) the issue of liability. Risk and accountability have been identified but liability is a different if not more important consideration.
b) Related regulation, regulatory functions, or regulatory processes. In assessing the need for, the design, the allocation and the implementation of regulation it may prove useful to identify related regulation so unwitting inefficiencies and uncertainties around better regulatory delivery are not created. e.g. Freedom Camping regulation and Reserves Act bylaws.

The guidelines in themselves will be more useful if applied with the benefit of the supporting questions for each guideline. In developing a framework for better allocation there is a danger that the headline

guidelines alone will be used to simplistically (as a compliance first order check) confirm or guide an allocation decision. As with RIS and s32 there is a need for a more substantive analysis and justification for any decision.

Q4.2

Are the guidelines practical enough to be used in designing or evaluating regulatory regimes?

Yes, although there may be cases where consideration will be needed around weighting of each guideline. Not all matters in the guidleine are equal, so some rational basis for a balanced decision or overall judgement about the nature and content of the regulation will be required. Depending on the nature and scope of the proposed regulation some guidelines may dominate a decision. The value of such guidelines lays though in a more systematic and considered approach to the design, allocation and evaluation of the regulation.

Q4.3

Are the case studies helpful as an indicative guide to the analysis that could be undertaken?

Yes they are useful in illustrating the application of the guidelines but some worked examples around bread and butter regulations would help clarify the level of analysis and help assess the need/merit of weightings.

Q4.4

Should such analysis be a requirement in Regulatory Impact Statements or be a required component of advice to Ministers when regulation is being contemplated?

An analysis of some type should be required of a scale that reflects the risk or outcome the regulation seeks to avoid or control.

Q4.5

Should the guidelines be used in evaluations of regulatory regimes?

Yes but tailored to suit.

Q5.1

Do any regulatory functions lend themselves to specific grants? If so, what is it about those functions that make them suitable for specific grants?

Some, yes.

Where local government was acting under direct delegation, and was responsible for implementing Government regulation as an agent of Government (and where there was no local discretion as to standards, fees, compliance) then grants for the delivery of that service could be argued.

Alternatively grants could be targeted at outcomes, products or processes related to any particular regulation that the Government wishes to secure metrics about and for which inadequate local funding prevents obtaining those material things.

Regulation to achieve locally important outcomes in a way, at a scale, or for specific local circumstances should be funded through local decisions around funding and fees and charges. If the outcomes, benefits or costs are realised outside the local level then grants could come in to play to secure a greater benefit.

Alternatively, if the outcomes being sought from regulation have national benefit then the costs of implementing that regulation should be borne centrally. This is a critical factor that needs to be addressed in the RMA proposals that are currently open for discussion (refer Improving our Resource Management System discussion document). If NES, NPS and national direction are to be fast-tracked councils may need financial assistance to avoid breaching rates caps.

Q5.2

If general grants were to be considered, on what basis could 'needs assessments' be undertaken? What indicators could be used to assess need?

Where costs vary between locations etc for the same service delivery. The discussion document set out some examples where costs fall unfairly in terms of regulating for broader benefit e.g. kiwi, biodiversity protection, distributed small public water supplies. The funding base of Councils is hugely variable; equally the composition of the funding base varies enormously (e.g. employment base, economic activity mixture). A core matter is how the regulation to be funded by grant sits within the new purpose of local government

It is anticipated variances will be reduced by increased use of electronic systems (once the initial set up cost is overcome).

Q5.3

What would appropriate accountability mechanisms for funding local regulation through central taxation look like? How acceptable would these be to local authorities?

Accountability is the cornerstone of LGA processes and external funding would mess with this ethos. Whether it is taxpayer or

ratepayer the value for money proposition needs to be clearly articulated and reported against. However, it is a question of scale and degree and satisfying the "whole of regulation" circle. Presumably there would be some thought given to the nature and scale of the matter to be regulated, the local need for that regulation, and the costs of monitoring the implementation of the regulation.

The biennial MfE survey of compliance with the RMA seems to be set at about the right frequency and with a fair balance in the focus of the information being sought.

Q7.1

What measures, or combination of measures, would be most effective in strengthening the quality of analysis underpinning changes to the regulatory functions of local government?

The disciplines imposed by RIS and s32 are the type of analyses needed. Those doing the analysis need to have experience in implementation and monitoring of regulation. It is not an academic exercise. There are real life consequences in regulation for those doing it, and those receiving it. Presently RIS's and s32 seem to be treated as 'must do' compliance process steps that seem to be poorly influential in taking away ill-prepared, targeted and structured regulation. Transport have long used versions of cost-benefit analysis and (right or wrong) it is used to remove from consideration projects that fail to make a specified benchmark for funding (a measure of net public benefit). Presently an RIS and an s32 can clearly show the lack of benefit but actually not stop the regulation in its tracks...they are simply side-stepped or not brought to bear on the decision to go to regulation or not go.

Q7.2

What measures, or combination of measures, would be most effective in lifting the capability of central government agencies to analyse regulations impacting on local government?

Table 7.1 does not deal well with local regulation. The measures of appropriate assessment are found in s32 of the RMA and s77 LGA. The contrast between the measures in Table 7.1 and these statutory "proving" tests are that, in essence, the former go to performance or process, while the latter focus on content, substance and consequence and alternatives.

There are learnings each way between central and local government practitioners about "proving" regulation. It is not a case that the learnings only flow one way.

Poor local or regional level data will not assist the analysis of costs and consequences of regulation.

Q8.1

What are the benefits and costs of cooperation? Are there any studies that quantify these benefits and costs?

Benefits = not reinventing the wheel, economies of scale, consistency, speed of implementation = reduced costs.

Costs = less tailored to local needs, establishment costs, being willing to adapt local systems, import new processes.

There is an abundance of co-operation, co-ordination, and sharing of resources and experiences at local government level both by sector and by management level. A lot of this flies well under the guise of shared services...

Transfer of powers do take place. Nelson City has just delegated its harbour safety functions and administration of its new Navigation Bylaw 218 to Port Nelson Ltd.

Q9.1

Are there potential pooled funding or insurance style schemes that might create a better separation between councillors and decisions to proceed with major prosecutions?

This Council's practice through its Delegations Register is that enforcement decisions are delegated to staff. The issue of separating Councillors does not arise. Many decisions can be quite technical in nature so fit well with a staff delegation.

For all prosecutions there is a need to consider the value of prosecution action.

Q9.2

Are bylaws that regulate access to council services being used to avoid incurring costs, such as the cost of new infrastructure? Is regulation therefore being used when the relationship between supplier and customer is more appropriately a contractual one?

No comment. Not an issue we are aware of.

Q9.3

What factors (other than the type of regulation most commonly experienced by different industry groupings and the size of businesses in these sectors) explain differences in the satisfaction reported by industry sectors with local authority administration of regulations?

1. Industry not understanding the work and the record keeping + compliance records (time) the local authority has to undertake

to administer any particular regulation. Even simple food premises inspections or licensed premises inspections involve more than just the actual on-site inspection
2. A poor understanding by industry about user pays/public good trade offs and the need for Councils to operate in a cost recovery model to avoid cross-subsidy by general ratepayers.
3. Probably variable performance on administration of regulation between jurisdictions.
4. Industry not accepting the national/public benefits or outcomes being sought when the industry has to meet costs of the regulation which is seen as a restriction on its operations and business judgements.

Q10.1

Are risk-based approaches to compliance monitoring widely used by LAs? If so, in which regulatory regimes is this approach most commonly applied? What barriers to the use of risk-based monitoring exist within LAs or the regulations they administer?

Most commonly with resource and building consents, health and dog licensing. Barriers to risk-based monitoring are public and political preferences as to priority matters and cost of monitoring and enforcement.

The enforcement pyramid in Fig 10.2 is consistent with this Council's approach to enforcement although we do not have a formal enforcement policy. The Council does use an assessment of significance and consequence (a scoring methodology) before higher order enforcement actions are implemented.

Q10.2

The Commission wishes to gather more evidence on the level of monitoring that LAs are undertaking. Which areas of regulation do stakeholders believe suffer from inadequate monitoring of compliance? What are the underlying causes of insufficient monitoring? What evidence is there to support these as the underlying causes?

At Nelson City Council the activities of consent processing and consent monitoring are carried out by independent teams. As a result there is almost no cross-over consequence if consent workloads are difficult to manage in a timely way. So Finding 10.1 is simply untrue for Nelson City.

The Council has a ring-fenced budget to ensure there is monitoring of permitted activities and the exercise of resource consents. The contract for environmental services (dogs, noise, liquor) is based on a guaranteed number of enforcement/monitoring hours by the

contractor. That is, there is a minimum baseline resource (staff time) devoted to monitoring, responding to non-compliance and complaints

Monitoring of permitted standards is potentially inadequate (regional council activities). That is activities that do not create a paper record from their activities...it requires Councils to identify and then monitor subject sites and activities form a record it develops itself rather than being "handed" a record from someone wishing to do something that requires consent or approval. Some permitted standards that are monitored are those that have high risks to the health and safety of people or the environment or take the form of an allocation of a public resource and there is a likelihood of non-compliance. There is obvious public benefit to do so. Otherwise there is a reliance on responding to complaints.

Q10.3

Which specific regulatory regimes could be more efficiently enforced if infringement notices were made more widely available? What evidence and data are there to substantiate the benefits and costs of doing this?

Bylaws such as Navigation Safety. An infringement regime is available but it is the process that has to be followed to get the Regulations promulgated to create the infringement regime that hangs off the end of a long-ish bylaw making process that is the issue. These regulations are drafted by Crown Law on direction from the DIA who usually has no involvement in the development of the Bylaw. DIA is reduced to a postman role here. What is the sense in that.

There is no evidence about the benefits but in small communities it becomes common knowledge pretty quickly if there are no "teeth" in bylaws either from an unwillingness to act, or there is no demonstrable consequence for breaches of , say, a bylaw. Implementing fines for Freedom Camping had an immediate effect on behaviour (after all many of these try to avoid even the cheap cost of a camp ground!)

Q10.4

Is there sufficient enforcement activity occurring for breaches of the RMA, other than noise complaints? If not, what factors are limiting the level of enforcement that is occurring?

The Council is uncertain how one would establish when there is a "sufficient level of enforcement activity". Certainly the actions that create or have the potential to create significant environmental harm (such as oil spills) are tackled appropriately. In part that is because it involves an industry that will co-operate in the knowledge of reputation harm and the fact that the Courts have reacted strongly to marine oil spills in particular. The frequency of these significant events is just so

much lower than say the noise enforcement actions that are quoted in the report.

The examples given about the use of Excessive Noise Directions is, in our experience, likely to arise from the fact that noise complaints are late night/early morning issues and are a breach of a standard fundamentally different to other breaches of standards to the extent that noise issues go to neighbour amenity, fair behaviour and a way of moderating extreme behaviours in circumstances when rational engagement is less possible. Other enforcement actions are less likely to require immediate or imminent response and correction. They are almost certainly less common.

Most enforcement comes at a cost to the general ratepayer and so Councils (right or wrong) need to balance the costs of punitive, tight enforcement regimes with the public interest and benefit in such a regime. The classic area for this tension is in parking enforcement not just for time limit parking use but stationary vehicle offences. Around 40% of all parking tickets issued in Nelson are for failure to display Warrant of Fitness or Vehicle registration. This level of ticketing is secured just in the CBD and one suburban shopping area, not from patrols of residential or industrial areas. But what is to be gained by putting more officers out on patrol outside high parking demand areas??

Effective enforcement is reliant on proper record keeping and evidence gathering with no certainty of outcome at the end. For example, the work involved in securing prosecutions around illegal discharges is significant but not necessarily recoverable to the Council.

Q10.5

Should the size of fines imposed by infringement notices be reviewed with a view to making moderate penalties more readily available?

What evidence is there to suggest that this would deliver better regulatory outcomes?

Yes – match the penalty with the scale of offending. Nelson's experience with oil spills in the harbour is that substantial fines led the marine industry to take its responsibilities seriously and to put in place practices to minimise spills and to co-operate in management of oil spills.

Enforcement action to match Nelson's Air Quality Plan burner phase-outs is a necessary tool to get the message to, and change the behaviour of, non-compliant households. Our follow-up enforcement activity shows there are some in the community who hoped the Council would not enforce its Air Quality Plan and hoped to obtain a lingering albeit non-complying beneficial use of their wood burners. To date around 45 abatement notices in Airshed A have been served on such homeowners. All these abatement notices will need further

monitoring and infringement notices and fines may yet be necessary to lock in the outcomes being sought by the Air Quality Plan. These fines need to be able to reflect the seriousness of erosion of air quality outcomes that is being pursued and to acknowledge the investment made by homeowners who did the right thing in replacing their old burners.

People are very quick to work out the financial costs and penalties of fines compared to non-compliance e.g. car parking time limits (what is the chance of being caught against days of not paying?)when a $40 ticket once a month is a "good" return on non-compliance!

Q10.6

Is sufficient monitoring of liquor licences occurring? What evidence and data exists that would provide insights into the adequacy of current monitoring effort?

More could always be done if the costs were recoverable. It would help if the penalty got tougher on recognised repeat offenders. The current liquor regime is different to the new Food Premises self-audit system and it may prove the latter is more effective in achieving the outcomes being sought...operators owning their systems and processes not waiting to have issues raised and resolved by an escalating system of consequence.

Q10.7

How high is the burden of proof for each kind of enforcement action? Is it proportional to the severity of the action?

This may be too high for enforcement orders for what the action wants to achieve. It may be better to simply have the power to step in and stop the offending rather than the offending continue while evidence is gathered.

Q10.8

Is the different 'gradient' in the use of compliance options because there are missing intermediate options?

Yes – the cost of stepping up enforcement often outweighs the gains for the ratepayer. There needs to be more intermediate options.

Q10.9

Are the more severe penalties not being used because there is insufficient monitoring activity by local authorities to build sufficient proof for their use?

Not sure. The cost of this level of monitoring may not be seen as value for ratepayers given depending on the severity of offence and outcome sought.

Q10.10

Why are relatively few licences varied?

A question for the industry.

Q12.1

Is the very low number of consents declined best explained by risky applications not being put forward, the consent process improving the applications, or too many low-risk activities needing consent?

A combination of all three reasons with the first reason being the main factor. Also the planning approach to status of activities can be an issue with more "permitted" activity classes than non-complying activities that have a higher threshold to cross for consent.

Many consents lie at the margin of compliance with plan standards so high levels of approval are not unexpected because it is not possible to establish an adverse AND a significant effect. Fundamentally the RMA is a permissive statute so the balance of approve/ decline reflects this. Many forget that a tenet of the RMA is that activities are able to have adverse effects; it is not a no adverse effects regime!

The Council notes the recent MfE discussion document on RMA reform suggests a return to dispensation provisions for minor/low risk activities to avoid the need for a full consent process including application, assessment, reporting and decision. That proposal merits a discussion.

Q12.2

Would different planning approaches lead to less revisiting of regulation? What alternative approaches might there be?

Broad baseline rules will never cover all site specific situations no matter if based on effects, performance or nature of activity. Can the market be relied on so only rules for the most important things to protect are in play?

Recent reviews and discussions around RMA reform have not looked at the fundamental structure of plans which are mostly zone and overlay based as the basis of environmental management i.e. spatial areas are assigned common qualities, outcomes, standards and escalation of consent type. The standards set are commonly maxima not genuinely performance based. This is true too of National Environment Standards.

Setting of standards rather than performance criteria are easier for the public to understand, and have the benefit of being directly measured where changes in expectations or the environment arise and so signal where mismatches occur as things change. The planning approach used is probably poorly connected to a desire for change to regulatory regimes...plans are there to deliver certain outcomes for a community; if they are overtaken then there is nothing inherently wrong with that; what is wrong is a failure by the regulator to respond to the change and a change in expectation around the outcomes desired.

Q12.3

What factors have the strongest influence on whether a District Plan or Regional Policy Statement are appealed?

When there is a major shift in the status quo. For minor changes most don't have the resources or realisation of how a change may affect them early on to be more involved in the process.

Q12.4

Overall, would it be feasible to narrow the legal scope of appeals?

Yes it is feasible. The Council's view on any narrowing would be shaped by the nature and consequences of any narrowing. This has been well canvassed in various RMA reforms but there seems a reluctance by many to trust the results of local policy decisions made by Councils. However, Minister Adam's recent speech on the reform of the RMA suggests Government has a renewed appetite to consider this.

Q12.5

Would it be feasible to narrow legal standing?

Yes it is feasible. There needs to be a fair opportunity for cases to be fully presented or for those with a genuine interest to have a part in proceedings. Again an issue well covered in previous reviews of the RMA.

The Council's view on legal standing would be shaped by the nature and potential consequences of any reform to the present generous or quite open approach to standing in RMA proceedings compared to former issues with locus standi.

Q12.6

What features of the bylaw-making process are distinct from the district plan-making process, and how might you use practice under the one to improve the process under the other?

In short the LGA bylaw making processes would significantly benefit from moving towards the rigour of RMA processes.

The bylaw making process contains no Environment Court step (independent review of contested expert evidence) , no second call for submissions (which offers transparency to issues identified by submitters and creates a agenda of possible change in proposals) , less ability to present full submissions or evidence (most LGA hearings allocate 5-10 minute hearing slots.)

The bylaw making process could be significantly improved by the adoption of some of the sound RMA practices in making regulation:

1. Clarity around the difference between expert evidence and submissions. Most matters raised at LGA hearings take the form of submissions so do not go to the evidential merit of a proposal. Therefore the analysis of options and their ability to promote named outcomes is often poorly tested.
2. Questioning and scope of jurisdiction by Commissioners – RMA training focuses decision-making on legislation and jurisdiction.
3. Decision-makers are required to understand and assess the evidential cause and effect relationship;
4. The RMA imposes stricter requirements around decisions; it is instructive to contrast the quite basic LGA requirement to consider "the views" of persons and for those "who present views to the local authority should be provided with information concerning both the relevant decisions and the reasons for thse decisions." (s82 LGA 2002) and the RMA Part 6 requirements around consents including the rigour of s113 in relation to decisions.
5. There is no equivalent requirement in making bylaws for an evaluation of the form taken by RIS or s32 RMA. The proposition advanced as a bylaw has no assessment beyond the mechanical checks provided by s155 LGA 2002.

An interesting contrast in approaches arises from the well-known LGA Environment BOP case around a Special Consultative Procedure where it was determined that Councillors did not have to attend the whole of a hearing on a matter in order to take part in deliberations and decisions provided they had read the material. That simply would not and could not happen in a RMA context where it is just not the written material that weighs in to decisions but the submissions/evidence of those appearing. The Council suggests the latter is the more robust and appropriate approach to decisions where the decision-maker has to demonstrate an open mind having considered ALL matters relevant to the issue at hand.

No equivalent of s32/RIS.

Q13.1

Are there any other ways that local authorities include Mäori in decision making that should be considered?

Delegated functions, appointed Committee/Hearing Panel members, Commissioners.

Q13.2

What are some examples of cost-effective inclusion of Mäori in decision making you are aware of?

Joint management.

Q13.3

What more intermediate options could there be for including Mäori in RMA decision-making?

Iwi representative on Hearing Panels/Maori sole Commissioners.

Q13.4

What are some examples of decision-making systems well-tailored to Mäori involvement?

Maori Ward system.

Nelson Kotahitanga hui

While neither a stand-alone decision-making mechanisms both can contribute to decisions of the local authority.

Q14.1

How have local authorities used the Society of Local Government Managers guide on performance management frameworks – or other guidance material – to assess local government regulatory performance?

A resource for best practice; identifies practitioners with knowledge.

Q14.2

Is there a sufficient focus on regulatory capabilities in local government planning and reporting under the Local Government Act?

The Council notes that the statutory reporting by Councils often just goes to data not how the function was performed, nor on the outcomes achieved by activity against the regulation eg the Sale of Liquor Act and Dog Control Act annual reports are simply tables of numbers of

licences issued or inspections carried out. There is no assessment or report against the statutory purpose and principles clauses. There is no commentary against what is the intention of the regulation or narrative around the Council's capability in discharging is regulatory functions.

The new purpose statement of the LGA provides that the performance of regulatory functions is "core" business. It would follow it would seem that some measure of the performance of those functions is necessary. This Council receives a quarterly report on activity in the regulatory space but little in the way of commentary around capability or issues around pursuing the regulatory outcomes sought by various Acts.

Equally, the LGA requirement to ensure separation of service delivery and regulation would suggest a need to report on how well that separation occurs. A lower level of capability and capacity could lead to gamekeeper/poacher situations with some staff fulfilling both roles.. There has been a move in the Building Act to formalisation of competence for those in the construction, design and consenting parts of the industry; very little, if any, of the regulatory activity under LGA is approached in this way, yet some of the community outcomes being pursued through regulation are just as important.

Q14.3

Have local authorities encountered difficulties in dealing with different performance assessment frameworks across different forms of regulation? Which forms of regulation do a good job of establishing performance assessment frameworks, in legislation or by other means?

In the resource and building consents, dog and liquor licensing aspects the performance assessment frameworks are okay. There needs to be a consistent approach to this and a re-focus on achieving outcomes not just the processing and administration of the regulation.

Q14.4

Which of the Commission's performance assessment options have the best potential to improve the efficiency and effectiveness of assessment of local government regulatory performance and improve regulatory outcomes? What are the costs and benefits of these options? Are there other options in addition to those that the Commission has identified?

The Joint Health check, increased focus on regulatory capabilities, expansion of practices to other areas for consistency, increased sharing of data and lower frequency and burden of reporting.