INTERNAL AFFAIRS
Te Tari Taiwhenua

Submission of the Department of Internal Affairs to the Productivity Commission Draft Report on Regulatory Institutions and Practices

Introduction

1. Thank you for the opportunity to comment on the Draft Report on Regulatory Institutions and Practices. The Department of Internal Affairs (DIA) has a significant range of regulatory functions, and a strong interest in ensuring our regulatory system is fit-for-purpose.
2. Rather than respond to every finding and recommendation in the Draft Report, we have focused our comments on four themes of particular importance to DIA:
    - accountability for regulatory frameworks;
    - the agility of the regulatory system;
    - monitoring and evaluating the regulatory system; and
    - building the capability of New Zealand's regulators.

1: Accountability for regulatory frameworks

3. Chapter 5.2 of the draft report discusses the institutional options for regulators, including the pros and cons of functions being exercised within a department, or at arms-length through a Crown Entity or other independent body.
4. DIA exercises some functions as a department, for example the issuing of passports and operational functions around gambling. The Department also has oversight for some Crown Entities and Statutory Bodies, for example the Gambling Commission, New Zealand Fire Service Commission, and Guardians Kaitiaki of the Alexander Turnbull Library.
5. While there are pros and cons of having functions within or outside of a department, our observation is that successful implementation hinges on strong governance and appropriate resourcing and capability. The perceived advantages of "arms-length" independence could be hampered by a lack of capability for effective implementation. Likewise, the perception risks of Ministerial involvement in regulatory decisions of a department can be managed through strong governance and clear protocols for engagement with the Minister.
6. A more pressing issue for DIA is that some regulatory functions have policy and operational responsibilities split across different agencies and Ministers. For example:
    - The Films, Videos, and Publications Classification Act 1993 is administered by the Ministry of Justice, but DIA (along with Police and Customs) is responsible for operational matters relating to enforcement. Classification

and labelling activities are carried out by the Office of Film & Literature Classification (OFLC) and the Film & Video Labelling Body (FVLB).

- The Unsolicited Electronic Messages Act 2007 is administered by the Ministry of Business, Innovation and Employment, though DIA's Electronic Messaging Compliance team directly enforces the Act by investigating complaints about 'spam'.

7. In the case of the Films, Videos, and Publications Classification Act, it has been largely the Department, OFLC and FVLB that have interpreted the Act in relation to new media like the Internet. References to the "Minister" and the "Secretary" in the Act refer to the Minister of Internal Affairs and the Secretary for Internal Affairs. This means that the Minister and Secretary are responsible to Parliament for operational aspects of the legislation (including monitoring of OFLC), but possess no corresponding ability to propose changes to the legislation when required, as this is the responsibility of the Ministry of Justice.
8. DIA endeavours to work closely with the Ministry of Justice to take a system-wide view of classification issues. However, the priorities of agencies and Ministers may not always align.
9. A separation of functions also raises issues of accountability, as no one agency has a full system perspective, or all the regulatory 'levers' at their disposal.
10. We acknowledge there may be valid reasons to separate functions between different agencies around particular topics. However, DIA's view is the default "system design" principle should be consolidation of policy and regulatory accountabilities as far as practicable under one agency and Minister, unless there are particular reasons that merit separation.
11. In the case of functions exercised by Crown Entities (or other agencies at 'arms-length' from Ministers), our preference is for the monitoring agency for the Crown Entity to also be the agency responsible for developing changes to their operating legislation.

2: Agility of the regulatory system

12. Chapter 5 of the Draft Report discusses the challenges of working with legislation that is outdated and not fit-for-purpose, and the appropriate allocation of material between primary and secondary legislation.
13. A number of DIA's regulatory frameworks are out of date, and it is has proven hard to secure Parliamentary time to update them in a timely fashion. This is particularly the case for administrative changes that are seldom a high political priority.
14. For example, a Gambling Amendment Bill containing minor policy and technical changes was introduced to Parliament in 2007 to resolve some issues with the Gambling Act 2003. At the time of writing the Bill has not yet passed into law, due to competing Parliamentary priorities.
15. Lack of progress with the Bill has caused difficulties for the Department of Internal Affairs as regulator. For example, one of the Bill's amendments was a clause clarifying that a gambling licence could be suspended for past breaches. A gambling operator that was suspended for a past breach by the Department (and by the Gambling Commission on appeal) challenged these decisions in the High Court, which found in the gambling operator's favour. The matter eventually went to the Court of Appeal where it was resolved in the Department's favour. The

litigation cost the Department thousands of dollars in legal costs and left the Department and the Gambling Commission without power to suspend a licence for past breaches of the Act for a year while the adverse High Court decision remained in effect.

16. Example of other DIA legislative frameworks that have not kept pace with a changing world include:
    - the Fire Service Act 1975 and Forest and Rural Fires Act 1977 (which do not reflect the wide range of non-fire functions now performed by fire services); and
    - the Unsolicited Electronic Messages Act 2007, which was not drafted to deal with non-email 'spam' (e.g. spam through social networking applications).
17. DIA's view as a regulator is that, in principle, legislation should be designed in a way that is flexible enough to accommodate changing circumstances, with matters of administration or technical detail delivered through secondary legislation whenever possible. For example, classification legislation will need in the future to deal with internet-based access to offshore content and services, rather than the traditional platforms of access envisaged by the current legislation. There also is the option of setting out technical matters without any policy content in tertiary enforceable instruments that can be issued by the regulator.
18. We note that there remains a high degree of rigour around changes to secondary legislation, including the approval of Cabinet, oversight of the Regulations Review Committee, the Regulatory Impact Assessment process, and consultation with affected parties.
19. The Statutes Amendment Bill is one potential vehicle for consolidated administrative changes to a range of legislation. The Department's experience is that the requirement for all Members of Parliament to agree to all amendments makes it unsuitable for all but the most minor matters.
20. There may be merit in Ministers and agencies working together to propose regular cross-portfolio omnibus administration Bills, that deal with matters too substantive for the Statutes Amendment Bill, but on their own not important enough to warrant standalone Bills. We acknowledge that this proposal may not align with the type of Bills envisaged under Parliament's Standing Orders, and would need to be tested with Ministers and Parliament.

3: Monitoring and evaluating the regulatory system

General reporting on regulatory systems

21. Chapter 3 of the Draft Report comments on the need for improved "system-wide" monitoring of regulation, including more formal and regular reporting to central agencies, and a clear "owner" of the regulatory system.
22. DIA agrees it is important to ensure regulatory frameworks are delivering good outcomes, are efficient and fit-for purpose, and are regularly evaluated. We agree the current framework does not generate consistent and comparable information that would enable benchmarking and comparison. However, we question the value proposition of increased standardised reporting, and the extent to which a lack of such information is a problem in practice.

23. Regulatory functions are so diverse, and specific to their context, that it may be hard to generate meaningful comparators, or make generic recommendations for improvement that factor in the specific circumstances of different frameworks.

24. For example, there are multiple regulatory frameworks concerned with the granting of licences (e.g. drivers licences, Class 4 gambling licences, firearms licences). These regimes grant licences for different purposes, and operate at different scales. It is hard to see how generalised information about licensing could have meaningful value removed from these specific policy contexts. Likewise, reporting on the number of appeals or reviews of regulatory decisions could be seen as a proxy for quality of decision making. However, in the case of some decisions under the Gambling Act, the default position of some regulated parties is to judicially review all adverse decisions from the DIA (regardless of their merits). Sometimes a large number of appeals and reviews may be a sign that a regulator is doing a good job and making tough but unpopular decisions, in other cases it may indicate poor decision making processes.

25. We acknowledge there are circumstances where good system-wide information, and networks between regulators, can be valuable. For example, an agency designing or reviewing a regulatory framework should easily be able to look at other models to avoid 'reinventing the wheel' and draw on good practice. Agencies should also be able to consider the cumulative effect of regulation on regulated parties.

26. We suggest that any additional system-wide reporting should be driven 'bottom-up' by regulators and central agencies identifying what specific information will be meaningful and helpful. This could be assisted by a more formal and in-depth approach to system evaluation (see paragraphs 27 and 28 below).

New process for in-depth evaluation of regulatory frameworks

27. DIA's view is that regulatory frameworks needed to be examined in detail to give assurance on their efficacy and efficiency. We suggest that an adapted Performance Improvement Framework (PIF)-type process, run by an expert group of regulators across government (potentially assisted by external expertise), could undertake a deep analysis of a small selection of regulatory systems every year to suggest improvements. This could be facilitated and resourced by an agency responsible for system improvement (see paragraph 30 below).

28. Evaluation could focus on indicators of good regulation, for example whether:

    - there is regular evidence-based evaluation of the regulatory framework;
    - how the regulator is considering risks, including those that might be 'just around the corner';
    - there a framework in place to evaluate outcomes; and
    - the regulator has sufficient capacity and capability to effectively deliver its functions.

29. This evaluation process could be formally set up under Cabinet mandate, and the selection of regulatory frameworks for review approved by Ministers, to ensure alignment with government priorities.

4. Building the capability of New Zealand regulators

30. Chapter 12 of the Draft Report discusses challenges with workforce capability. DIA endorses the previous submission of the Compliance Common Capability Programme regarding the need for a formal, systematic and adequately resourced programme to build capability across regulators. Regulators make best endeavours to share experiences and learn from each other, but this can be ad hoc and hard to maintain amongst day-to-day priorities.

Conclusions and next steps

31. In summary, our key points are:

- a general 'system design' principle should be the amalgamation of regulatory frameworks under as few agencies as possible, to ensure clear accountabilities and alignment of policy and operational priorities (acknowledging that there are specific circumstances where separation of functions may be ideal);
- future regulatory reforms should aim to allocate functions to primary, secondary and tertiary legislation in such a way that regulatory frameworks can more easily be kept up to date;
- agencies could work together to develop omnibus government administration Bills that deal with matters more substantive than what is possible under the Statutes Amendment Bill;
- DIA questions the value of standardised, top-down reporting on regulatory frameworks, given the information generated may not have much value outside of specific regulatory contexts;
- regulators and central agencies should be asked to identify particular matters that would assist information sharing and learning across the regulatory network;
- we propose development of a detailed PIF-type process to run deep and detailed assessments of selected regulatory regimes; and
- there would be value in some formal mandate and resourcing for cross-agency capability-building work.

32. We would appreciate the opportunity to speak to our submission, please contact Daniel Brown at 494-0688 / dan.brown@dia.govt.nz to make the necessary arrangements.

Yours sincerely

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