



Submission to the Productivity Commission – Regulatory Institutions and Practices Inquiry

Introduction

I am making this submission on behalf of the Compliance Common Capability Programme (the Programme), and drawing on experience in a range of regulation and compliance roles. A number of agencies involved in the Programme are separately engaged directly with the Productivity Commission and/or will no doubt be making their own submissions.

It includes comments on the text of the Issues Paper, and responses to the Questions posed in it – following the order of the Issues Paper. Not all elements on the paper are subject to comment, and not all Questions have been responded to.

Prior to commenting specifically on the Issues Paper, it is useful to set out the inter-related issues that the Programme has identified recently as part of work it has been going through to refresh its approach. Note these comments refer to the “regulatory compliance sector” – this term refers to the group(s) of organisations, divisions, groups, branches, teams and people in central and local government organisations involved in what might be variously referred to as compliance activity; operational regulatory activity; regulatory practice; regulatory implementation, or similar terms. The Programme has sought to bring a specific focus to this part of the regulatory system on the basis that there is much system wide activity occurring in government to improve the body of regulation, but little focused on the implementation of regulation.

People capability across the regulatory compliance sector is variable

There are at least 12 – 14,000 people working in the regulatory compliance sector in various roles (ranging through intelligence, information, education, advice, licensing, monitoring, investigations, enforcement, prosecutions, etc) that are intended to influence behaviour to achieve policy outcomes that are expressed through legislation in the form of legal requirements to do or not do certain things that would create risks and poor individual or collective societal outcomes.

There is no requirement for people working in regulatory compliance roles to be trained or qualified to any kind of accepted sector wide standard, even though these people often work in high risk environments, and/or have statutory powers and carry out activities that deeply affect people and businesses.

The sector as a whole lacks mechanisms for: growing capability, enabling people to move easily between regulatory compliance functions within and between organisations, and sharing and optimising investment in training.

There is a considerable body of shared knowledge, practice, policy and process relating to regulatory compliance. Each agency invests (or can't afford to invest) in its own training regarding this. Consequently, there is duplication of effort, potential waste, inconsistent standards of people development and missed opportunities for cross-sector knowledge sharing.

Standards of performance vary across similar regulatory activities. In some cases people are not prepared or supported to carry out their roles adequately.

In terms of resourcing, many agencies do their best on limited budgets. When financial resources get strained, training is often the first area to be cut or deferred. Fundamentally, people capability development is not always supported as a necessary and important long term investment to ensure good organisational performance.

Some training providers describe their experience of working in the sector as risky, as the sector swings between requiring their services to up-skill staff, then cutting budgets for external training and making do with in-house resources. Consequently, the sector is not serviced with comprehensive external training provision.

The Programme has achieved some good results in defining capability standards for some aspects of regulatory compliance. This has been achieved through the agreement and efforts of a collective of agencies but those efforts are patchy and do not demonstrate that the system as a whole "gets it" in terms of the importance of operational regulatory capability. Recent changes to the Public Finance Act and the State Sector Act that strengthen the focus on stewardship should provide a stronger foundation and mandate for effective system wide effort in this area.

Organisational capability across the regulatory compliance sector is variable

Many central and local government agencies have a regulatory compliance function. Some organisations (such as Inland Revenue, the New Zealand Customs Service, a number of crown entities) are almost entirely focused on carrying out a regulatory compliance function. Others (such as MBIE, the Department of Internal Affairs, and local authorities) have regulatory compliance functions as one of many areas of activity. In these latter agencies the regulatory compliance business can sometimes fail to get leadership attention amidst a range of competing priorities. Generally, regulatory compliance activity is seen as being about “service delivery” which tends to confuse the focus of regulatory compliance activity which is usually about delivering *obligations* not delivering *services*¹.

Currently, some agencies have a regulatory compliance strategy, others don't. Of those that do, there is variation, which in and of itself is not a bad thing as long as it's from a base/common understanding of what good compliance practice looks like – which doesn't exist across the sector.

Reviews and performance audits across local authorities reveal there are different compliance strategies, funding arrangements, structures and leadership. This includes different philosophies around how compliance is best achieved. This is also evidently the case across the public sector.

Regulatory compliance is not well understood, valued or resourced

There is a general lack of understanding (by the public, those regulated, and those involved in carrying out regulatory compliance activities) of regulatory compliance as a professional activity that needs a strong theoretical and scientific base, particularly around the complexity and subtlety of changing people's behaviour.

This lack of understanding that regulatory compliance is a professional activity (requiring experience, knowledge and skill) drives poor decision-making regarding resourcing and capability development.

The regulatory compliance sector is not recognised as a community of professionals

Even those who work in the regulatory compliance sector do not necessarily appreciate that they are part of a sizeable (12,000+ member) community of professionals. Equivalent industries (real estate agents, building practitioners, accountants, lawyers) are recognised professions with associations or networks to support the industry. The regulatory compliance sector does not have that same level of professional identity and support.

¹ Refer to Chapter 4, The Regulatory Craft, Malcolm K Sparrow, The Brookings Institution, 2000.

This has an impact on attracting and retaining people in regulatory compliance roles. It also impacts on the level of public and political interest in understanding and resolving problems affecting the sector and those who work in it.

The issues outlined above:

- Create integrity and reputation risks for the regulatory compliance sector and individuals agencies
- Mean activities are not always performed to an acceptable standard, resulting in poor compliance outcomes/regulatory failure
- Create inefficiencies through poor use of resources as work is not performed efficiently and effectively
- Can add to the cost of compliance, because of the high cost of system failures compared with effective performance
- Can contribute to harm, including serious harm to people, the environment, and the economy
- Indicate missed opportunities to share innovative ideas and best practice solutions
- Lead to inconsistent approaches to carrying out regulatory compliance functions that create public confusion about the purpose of regulatory compliance and the role of regulation

The following table was developed as part of the Programme to set out its “value proposition”. It suggests that the value created by the Programme will address many of the issues identified above.

Compliance Common Capability Programme – Value proposition: The common capability programme is about improving the quality, effectiveness and efficiency of compliance work across central and local government agencies by building the capability of organisations and people involved in compliance work. It does this by identifying and sharing knowledge and insights about regulatory practice and compliance management to support organisational improvements; and by creating commonly agreed qualifications that will help to attract, develop and retain people in the compliance sector. The programme has two main initiatives:

Achieving Compliance: A Guide for Compliance Agencies in New Zealand: Achieving Compliance: A Guide for Compliance Agencies in New Zealand is a resource that brings together good practice organisational and operational design, strategy and practice for operational regulation and compliance work. The Guide draws on both theory and practice, and aims to inform and improve the implementation of operational regulation and compliance functions across central and local government.

National Compliance Qualifications: The National Compliance Qualifications are designed to develop the capability of New Zealand’s compliance sector by creating nationally recognised tertiary qualifications for people involved in public sector operational regulation and compliance work. These qualifications are the first of their kind in New Zealand, and are designed to support common career pathways for public sector employees working in the compliance area. The qualifications range from an entry-level foundation qualification through to specialised operations, audit, intelligence, investigations and prosecutions qualifications. Qualifications are also planned for people in management roles in the compliance sector.

Combined, these two projects will help ensure that New Zealand compliance agencies are effective, efficient and deliver real benefits to both business and the community.

Value is created at 4 levels by	the Guide	and the Qualifications	Total Programme
Overall Societal Regulatory Outcomes	Better practice is shared and used to implement regulatory regimes in cost effective and efficient ways. Business comes to know and understand how different agencies they engage with will operate, reduces uncertainty and builds confidence in the government’s regulatory implementation. Trust in government/compliance increases	People involved in implementing regulatory regimes are better trained and qualified to a consistent standard	Better and less regulation agenda supported by improved quality of implementation
Government System	Investments in information, knowledge and innovation in one agency benefit others at low cost supporting the on-going development of better practice at individual organisation level. Lower total costs to government	Efficiency, effectiveness and improved standards for training and qualification across the government system: build once use many times. Lower total costs to government	Better, smarter public services for less agenda supported by information sharing and economies of scale in people and organisational capability development
Organisations	Low cost resource to keep abreast of better practice	Pool of qualified people to draw from; lower risks involved in recruitment; ability to engage in bigger scale and more cost effective training activities; better performance faster; better ability to engage with others as people work to common standards and processes	On-going development of the programme creates professional compliance community
Employees	Guide provides a rich resource to support training and development	Investment in training provides for transferable skills and better career prospects	Better skilled and informed staff who understand the strategic, tactical and operational requirements of their work better

Comments on the Issues Paper

Page 1, Box 2 refers to “Defining regulatory regimes” – noting that any regulatory regime has three working components: standards setting, monitoring and enforcement.

While this may have been used as a “high level” description in effect it over simplifies how regulatory regimes are developed and operated in practice.

- They do involve **standard setting** (used in the sense of “outcomes sought”) by a range of means:
 - Parliament/Government creating the mandatory laws, regulation, or rules that identify the behaviours not allowed, or the behaviour required
 - Regulators providing non mandatory guidelines that may be “read” as required standards of behaviour
 - Regulators and industry working together to develop voluntary codes of practice, or
 - Industry taking the initiative to establish a code or guideline.
- They also can involve **Entry control** which may be part of a regulatory regime through licensing or certification
- They can involve mechanisms such as **exemptions and authorisations** to allow practices that may otherwise breach the law, but provide net benefits
- **Monitoring compliance** occurs through activities such as audit, inspection and complaint handling (effective regulators consider both the individual complaints and whether they need direct action and the collective range of complaints that are received to identify systemic issues)
- **Encouraging compliance** (missing from the Box 2 definition) includes activities such as informing, educating and advising how to comply, and
- **Enforcing compliance** has three main purposes – stopping errant behaviour (or requiring compliant behaviour); holding to account; and signalling to a wider audience that non-compliance won’t be tolerated.

These comments are relevant to the section on “What regulation is in scope” on pages 2 and 3 also. See attachment – Glossary of Compliance definitions and activities.

On **Page 1** it is noted that the Commission has been asked to give particular attention to, amongst other things, how improvements can be made to the monitoring of regulator performance across central government. The Commission is aware of the Compliance Common Capability Programme (referred to in Box 6, page 34 of its Issues Paper). That Programme developed in 2011 the document *'Achieving Compliance: A Guide for Compliance Agencies in New Zealand'*. That document can be used as something of a “standard” in that it describes the kinds of things you would expect to see in a competent regulatory compliance organisation. Many of its sections contain best practice check lists that can be used as an assessment framework.

On **Page 2** it is noted that the inquiry is not about improving the policy-making process for developing new regulation or regulators. This raises an issue about definitions. The reason the Programme refers to compliance and compliance organisations is to distinguish the main focus of its work on improving the implementation of regulation (i.e. the work of achieving compliance) from the developing of regulations (using the term regulator can imply either or both activities). In respect to **Question One**, having operated as a regulator in a variety of different institutional arrangements (different forms of Crown entity, Ministry and Departmental structures) it seems to me that significant gains are to be made from focusing on the issues of clarity of role, functions and duties; consistency of regulatory regimes; decision making structures, processes and approaches; funding and resourcing and regulator work force capabilities from Figure 1.1. The basis of the Programme is that there is significant benefit to be gained from addressing the capability of people who work at the “front line” of compliance activity; and the capability of the organisations they work in, in terms of understanding best practice compliance operating models. At the highest level, it would be useful for the Commission to encourage an understanding across government that there are broadly three types of government activity – Policy Development; Regulatory Compliance Activity and Service Delivery. Too often Regulatory Compliance Activity is seen as a component of Service Delivery - the effect of which is that the special characteristics of people and organisational capability that are required to deliver *obligations* as opposed to *services*, are not recognised and developed (as above).

In respect to **Question two**, it would be helpful for policy makers to have guidelines that assist them in: understanding the differences between outcome or goal based regimes and prescriptive regimes and in which circumstances they are appropriate; understanding the kinds of tools and activities that are required at the operational level to achieve compliance, and; understanding what good operational compliance practice looks like so that the laws, regulations and rules etc that are put in place are more likely to be implemented effectively.

On **Page 9** it is noted that complexity is an overarching theme in relation to both design failure and operational failure as part of regulatory failure generally. One of the contributors to operational failure can be the failure of the overall government system to deliver the right level of capable front line people to operate regulatory systems. Where a system is also complex the problem is compounded. Another component of operational failure is under-resourcing of compliance functions (which contributes to poor capability and poor capacity to effectively apply a regulatory system). One of the drivers of this is a

commonly held view that regulation is “bad”, and compliance is a cost – and both should be reduced where ever possible; rather than effective regulation and compliance activity being acknowledged as an investment in good business practice and positive societal outcomes.

On **page 13** there is a table setting out examples of regulatory coordination, following a discussion about New Zealand being part of a global regulatory system. This does not include reference to regulation driven by international bodies such as the International Maritime Organisation which may best be described as adopting domestically rules made internationally, which can include international cooperation around compliance activity (for example Port State Control – see http://www.imo.org/blast/mainframe.asp?topic_id=159).

In terms of **Question 5** it may be useful to categorise regulatory regimes according to the domestic, bi lateral or multilateral/international nature of the drivers of regulation. This would be helpful as in areas such as maritime law, where NZ is “signed up” to the IMO decision making process, having a situation where a full policy process is required to turn internationally agreed mandatory requirements into NZ law is inefficient and costly. Categorisation in this way might highlight opportunities for efficiencies across a category of regulators.

Pages 19 and 20 refer to the clarity of role, functions and duties of regulators. The point made above regarding the way regulatory compliance activity is regarded as generic operational or service delivery activity is relevant to this part of the discussion in the Issues Paper. Where a regulatory function does sit in the same agency as other functions, the kinds of problems identified in this section can be mitigated by understanding what the business of regulation is about and how best to achieve desired outcomes. This can only come when the people involved in leadership, organisational design and decision making about the “what and how” of effective regulatory activity have a deep understanding of regulation and regulatory practice.

Page 21 deals with overlapping and consistent regulatory regimes. In respect to **Question 12** in particular, the way the new health and safety regime is developing is – or should be – a good example/opportunity to create an effective multi agency model to deal with overlapping and consistent regulatory regimes. The Productivity Commission may find it beneficial to engage closely with the group at MBIE that is responsible for Worksafe NZ’s establishment to observe the kinds of things being worked through. Another example (more advanced) of overlapping and consistent regulatory regimes worthy of some study may be the Anti-Money Laundering Regulatory regime – see <http://www.justice.govt.nz/policy/criminal-justice/aml-cft> .

Pages 22 to 26 address regulatory independence and institutional form and seem to cover the relevant issues. At the operational/implementation level (noting that the Programme has involvement of people from most of the regulatory forms that exist) the issues identified in respect to people and organisational capability are general to all institutional forms.

Pages 33 to 35 refer to regulator workforce capabilities. The basis of this submission is that this is an area that requires considerable further development in New Zealand. The Programme (referred to in Box 6 on page 34) is we believe a sound foundation for further development.

In terms of **Question 35** a key issue is the lack of focus on capability building on a system wide level driven by the clear understanding that NZ needs a professional compliance workforce. Left to individual organisations, investment in capability development is patchy and inconsistent.

In terms of **Question 36**, the gaps in workforce capability are described in the opening comments to this submission.

In terms of **Question 37**, the experience of the Programme to date is that at the practitioner level there is a strong appetite for a collective cross agency approach – creating a sense of a professional community. Experience shows that combining regulators with similar functions is unlikely to achieve anything (and will certainly impose significant costs) that a more joined up approach between agencies in this important area can't deliver. In agencies with multiple similar regulatory functions, organisational design choices will by their very nature lead to different groups and “silos” developing that are no more or less likely to engage around capability development on a system wide basis than the current overall institutional arrangements. And even more importantly the defining factor in strong system wide regulatory capability isn't the similarity of regulatory regimes, but the common skills, experience and knowledge required to implement regulatory regimes per se.

Pages 35 and 36 refer to compliance monitoring and enforcement. The key issue here is the need for a more comprehensive understanding of the business of compliance in the sense that it's about changing behaviour. Modern compliance thinking suggests this is about problem solving and risk management – involving the use of soft and hard interventions with the right tool needing to be chosen at the right time to address the right problem. The key to risk based approaches is in having effective information management (intelligence) systems to collect, collate and analyse information. This involves investment in people and technology beyond that used to undertake individual regulatory transactions.

In terms of **Question 44** the key challenge to adopting risk based approaches is investment in the necessary people and technology capability, and in the general capability of the operational regulator that would enable the kind of thinking that needs to occur to take place.

Page 37 deals with engagement. It may be useful to consider separately issues around engagement in the design of regulatory regimes and in the implementation of them. It is important to ensure that the relationship between a regulatory organisation and the industry it regulates is effectively calibrated. This goes to the issue of regulatory capture also.

Pages 38 to 41 deal with Organisational Culture. In respect to **Question 49** influences on culture are many and varied - whether it's operated by a Department, Ministry or Crown Entity of one form or another has an influence; the nature of the Board in a Crown Entity – expert, or governance; the decision making processes; the need for those with direct industry experience which means certain professional or industry cultures can “clash” with state sector values and cultures, are all relevant factors. It's not so much a question of which ones have most influence as to how to ensure that all regulators have a culture that is appropriate to the task of regulation. The key issue is strong adherence to the values of public service; and appropriate levels of competency to execute regulatory activities effectively – these need to be focussed on in a way that they can overcome the differences created by different regime designs. In respect to the discussion about Risk aversion and customer service – please refer to comment above about delivering obligations compared to services! In respect to risk aversion in particular, being mainly concerned about risk to the regulator can either create a heavy handed approach (to avoid being seen not to do enough); or a light handed approach – to avoid being seen to be heavy handed and risk the possibility of “losing cases”. While there is a risk of a slightly self-serving theme here from the perspective of the Programme, the way to overcome this is to ensure that regulators are competent, well trained and professional in their approach – and that organisations that have, for example, heavy reliance on industry personnel, are “balanced” by having professional regulators in their midst as well. This also deals with the issue of professional capture.

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Glossary of compliance definitions and activities

KEY
 Green [?] Definition
 Blue [?] Activity
 White - reference
 Grey [?] Put of scope for
 National Compliance
 Qualifications Project

Read from top to bottom and left to right

[?] Information [?] based approach → [?] Enforcement [?] based approach

Regulation is
 The process of making the rules
 i.e. Laws
 Regulations
 Gazette Notices
 Mandatory Standards
 Voluntary Standards

Self-regulation and co-regulation are terms used to describe approaches to making rules, and to ensuring compliance, that usually involve those who are required to comply in either being responsible for determining the rules/compliance or doing so in partnership (beyond [?] consultation [?]) with Government

Licensing and Certification are processes to ensure that participants in a sector have the competency/probity/attitude etc to comply with the rules [?] usually *before* they are entitled to operate in that sector

Compliance is
 The process of ensuring people comply with or exceed the rules

Detection relates to how possible non-compliance is identified [?] for example: through receipt of complaints, intelligence, auditing, monitoring, surveillance

Auditing, monitoring and surveillance are processes or tools generally used to assess compliance with the rules/detect non-compliance. Apparent non-compliance identified through these processes can lead to **enforcement** or **information based approaches** to encourage compliance.

Community Engagement is a reference to providing and receiving community input to improve compliance approaches

[?] **Information [?]** based approach (incorporating education, persuasion and assistance activities) is a reference to approaches designed to encourage compliance based around the idea that if people know what they have to do they will comply

[?] **Enforcement [?]** based approach is a reference to one of the approaches to achieving compliance usually involving investigation/sanctions of some kind

Typical continuum of approaches →

Information
 education and persuasion
 assistance to comply
Enforcement

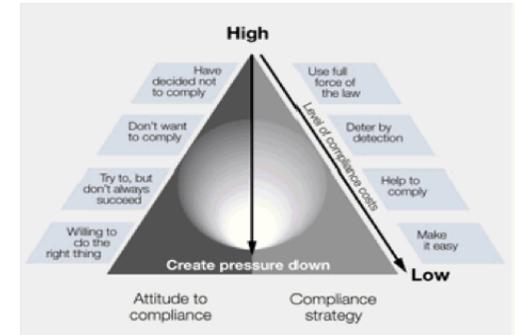
Generally, the approach chosen depends on the attitude to compliance, i.e.:
 - Motivated to comply = information
 - Resistant to compliance = enforcement.

Investigations are processes/activities designed to determine the facts of a matter [?] usually whether a rule has been broken or not. **Investigations** may lead to sanctions, or **information approaches**, to encourage compliance

Sanctions are actions taken against non-compliant people for the purpose of encouraging future compliance, sometimes achieving compensation, penalising non-compliance, and deterring others from non-compliance. The severity of the sanction is usually based on the seriousness of the non-compliance, and need for punishment and deterrence.

Prevention and deterrence are terms that describe actions intended to stop people from engaging in non-compliant behaviour. In keeping with the continuum of approaches (above), information approaches help to prevent non-compliance and assist motivated people to comply, enforcement processes punish and deter through demonstrating consequences of non-compliance.

Intelligence is the direction, collection, processing and dissemination of information for the purposes of identifying relationships, predicting trends and setting strategic direction. It operates at three levels [?] actual, operational and strategic. It contributes to regulation, compliance, enforcement-based and information-based activities



TEN THINGS YOU NEED TO KNOW ABOUT REGULATION BUT NEVER WANTED TO ASK
 Valerie Braithwaite ISBN 978-0-9803302-2-9, RegNet Occasional Paper No. 8 December 2006
<http://demgov.anu.edu.au/papers/Braithwaite2006OP10.pdf>

Administrative Action is the process of entering a settlement or imposing a sanction that usually doesn't [?] involve court proceedings

Warnings, infringement notices etc are types of administrative sanctions intended to encourage compliance. **Settlements** are administrative agreements to change behaviour, pay compensation etc; **Licence suspensions and cancellations** are severe sanctions that remove the privilege to operate

Criminal Prosecution/Civil Action is the process of taking court action against someone who has (allegedly) not complied

Pecuniary penalties, orders for compensation, fines, home detention, community service, incarceration are types of sanctions that can result from civil actions or criminal prosecutions

Voluntary Compliance is a reference to the desired end state (compliance) achieved through information approaches and incentivised by cases where enforcement action has been taken.

Refer to the regulatory pyramid concept used by many agencies.
 The Department of Internal Affairs example is at:
[http://www.gazette.govt.nz/Pubforms.nsf/URL/Fact_Sheet_Four.pdf/\\$file/Fact_Sheet_Four.pdf](http://www.gazette.govt.nz/Pubforms.nsf/URL/Fact_Sheet_Four.pdf/$file/Fact_Sheet_Four.pdf)