Regulatory institutions and practices

Summary Version

June 2014

The New Zealand Productivity Commission

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Foreword

Regulation is a pervasive feature of modern life. Its coverage stretches from the workplace to the sports field, the home to the shopping mall, and from the city to the great outdoors. When it works well, it underpins our everyday transactions and interactions, allowing us to do such things as travel within and outside of New Zealand safely, buy and sell goods and services and invest with confidence, and start businesses with ease.

Despite its extensive reach and impact, in many ways regulation is the poor cousin of government. In comparison with taxation, spending or monetary policy, little attention is paid to regulation. There is no annual review of regulation, as there is with government spending (the Budget). We do not know how much of our income is taken up by complying with regulations, as we do with our tax bills. And unlike spending, tax or monetary policy, there is no one minister or agency in charge of regulation. This lack of attention has real consequences. Although the 'price' of regulation in general may often be invisible, the costs of poor regulation are all too clear, as the events of the Global Financial Crisis, Pike River and leaky buildings have demonstrated. Rapid changes in technology and markets make the need for good regulation ever more pressing. Better regulation may be the best opportunity to reduce the pressure for more regulation.

This inquiry has looked at the various institutions, practices and elements that affect how regulation is designed and implemented in New Zealand. This report provides guidance, and is intended to serve as a resource, for officials and elected representatives designing new regulatory regimes in future and others with an interest in regulatory matters. It also makes recommendations for both ministers and government departments on how to make existing institutions and practices work better.

The picture which emerged from the inquiry was that, while New Zealand's "regulatory system" is often compared favourably with those in other countries, there are a number of areas of weakness and the current system is falling behind. A number of important quality checks are under strain, regulators often have to manage with outdated legislation, more attention should be paid to finding the right people to govern regulatory organisations, and greater effort needs to be put into developing a professional regulatory workforce. Too much of our system relies on the goodwill and commitment of dedicated individuals. We can do much better. Without improvements on these and other fronts, New Zealanders may not receive the protections they expect and deserve from regulation.

The Commission has consulted widely, receiving 104 submissions and holding 113 meetings with participants. We also surveyed businesses and chief executives of regulatory agencies, interviewed members of regulator boards, and sought the advice of international experts. This has contributed enormously to our understanding of the issues and to our recommendations. I would like thank all those who provided this valuable information.

Professor Sally Davenport, Dr Graham Scott and I oversaw the preparation of this report. We acknowledge the work and commitment of the inquiry team: Steven Bailey (inquiry director), Judy Kavanagh, James Soligo, Kevin Moar, Nicholas Green, Dennis MacManus, Rosara Joseph and Richard Clarke, and the other Commission staff and external providers who made important contributions.

MURRAY SHERWIN

Chair

June 2014

Terms of reference

IMPROVING THE DESIGN AND OPERATION OF REGULATORY REGIMES

Purpose

1. The purpose of this inquiry is to develop recommendations on how to improve the design of new regulatory regimes and make system-wide improvements to the operation of existing regulatory regimes in New Zealand. The inquiry is not a review of individual regulators, specific regulations or the objectives of regimes.

2. The aim is to improve the design and operation of regulatory regimes over time and ultimately improve regulatory outcomes.

Context

3. This Government is focused on delivering better regulation. We have improved the processes around introducing new regulation, increased our understanding of the stock of existing regulation, and conducted a number of significant regulatory reviews. There is more that can be done to improve the design and operation of regulatory regimes in light of the recent need to develop new or amended regulatory regimes and regulators to manage instances where regulation has not achieved its intended outcomes.

4. The demands on regulatory regimes are often more complex than in the past. The range of regulatory regimes, the nature of the risks involved, the expectations of the community, and the regulatory tools available to achieve regulatory objectives, are wide and varied. It is crucial that government has a good understanding across regulatory regimes of their issues, challenges, similarities and differences and how to improve their design and operation.

Scope

5. Having regard to the above purpose and context, the Commission is requested to undertake an inquiry that addresses the parameters set out below.

An overview of regulatory regimes and their regulators

6. Develop a high-level map of regulatory regimes and regulators across central government, including their organisational form.

7. Develop a set of thematic groupings which can be used to broadly categorise regulatory regimes by their objectives, roles or functions. For example core objectives might include health and safety, environmental protection, or economic efficiency.

Understanding influences and incentives on regulatory regimes

8. Outline and explain key factors which act as incentives or barriers to regulatory regimes and regulators producing the outcomes stated in legislation. For example these factors may include:

    - institutional form of the regulator
    - quality of the regulatory design and clarity of mandate, functions and duties
    - resourcing and funding
    - capability
    - approach to consultation and engagement with stakeholders
    - accountability mechanisms, including the ability to challenge regulatory decisions
    - performance measurement and reporting
    - external monitoring
    - approach to risk management and innovation

9. Undertake a series of case studies to compare and contrast the approaches taken to these factors across different regulatory regimes. A key part of this analysis would be to identify strengths and weaknesses of different approaches taken to these factors to support broader insights into the design and operation of regulatory regimes.

10. This analysis should be undertaken in the context of existing guidance about good practice for the performance of different regulatory functions.

Recommendations

11. Develop guidance that can be used to inform the design and establishment of new regulatory regimes and regulatory institutions, and the allocation of new regulatory functions to existing institutions. The guidance should take into account other existing work in this area to avoid duplication, such as the State Services Commission's *Reviewing the Machinery of Government.*

12. Develop system-wide recommendations on how to improve the operation of regulatory regimes over time. The recommendations may include how to both build on strengths and address weaknesses in current practices and may lead to general comments about key differences between regimes within thematic groupings. The recommendations will not be specific to particular regulations or regulators.

13. The Commission should also specifically consider how improvements can be made to the monitoring of regulator performance across central government.

14. In developing the recommendations, the Commission should take account of any key features or characteristics of New Zealand's regulatory environment that differ from other jurisdictions. For example, these may include differences in scale, resourcing, or the need to coordinate with overseas regulatory regimes.

Other matters

15. The Commission should prioritise its effort by using judgement as to the degree of depth and sophistication of analysis it applies to satisfy each part of the Terms of Reference.

Consultation requirements

16. In undertaking this inquiry the Commission should consult with key interest groups and affected parties, including on the selection of case studies in paragraph 9 above. Consultation should include both regulators and those subject to regulation.

Timeframe

17. The Commission must publish a draft report and/or discussion paper(s) on the inquiry for public comment, followed by a final report, which must be submitted to each of the referring Ministers by 30 June 2014.

Referring Ministers

Hon Bill English, Minister of Finance
Hon John Banks, Minister for Regulatory Reform

About the summary version

This "summary version" provides the key points, questions, findings and recommendations from the Productivity Commission's final report of its inquiry into *Regulatory Institutions and Practices*.

The report contains the Commission's guidance that can be used to inform the design and establishment of new regulatory regimes and regulators. The report also makes system-wide recommendations on how to improve the operation of regulatory regimes in New Zealand over time. The inquiry is not a review of individual regulators, specific regulations or the objectives of regimes.

The report follows the release of an issues paper in August 2013; consideration of submissions; a large number of meetings with interested parties; the release of a draft report in March 2014; and the Commission undertaking its own research and analysis.

To see the full version of the report please visit our website www.productivity.govt.nz.

Key inquiry dates

Submissions due on the draft report	8 May 2014
Engagement with interested parties on the draft report	March – May 2014
Final report to the Government	30 June 2014

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Overview

The Government has asked the Commission to examine how the design and operation of regulatory regimes and their regulators can be improved – ultimately to improve regulatory outcomes. Specifically, the Commission has been asked to develop guidance that can be used to inform the design and establishment of new regulatory regimes and regulators. It has also been asked to develop system-wide recommendations on how to improve the operation of regulatory regimes in New Zealand over time.

Why this inquiry is important

Regulation touches the lives of New Zealanders in many ways. It is indispensable to the proper functioning of economies and societies. Regulation, when implemented well, underpins markets, protects the rights and safety of citizens, and their property, and assists the efficient and equitable delivery of goods and services (Organisation for Economic Co-operation and Development [OECD], 2011). In this way, regulation is an important tool for preserving and advancing the public interest.

New Zealand has a large and complex regulatory sector, made up of 200 or so regulatory regimes. More than 10,000 people work in regulatory roles. The regulatory system is a major piece of government infrastructure, and is as significant as the tax and spending systems in terms of its impact on the lives of New Zealanders. Yet surprisingly little information exists about regulation and its effects or about the wider regulatory system and its performance.

There is also a question of whether New Zealand's regulatory regimes are unnecessarily complex and whether they could be simplified, recognising that capability and expertise, for regulators and regulated alike, is likely to be an ongoing issue.

There is a growing interest in regulation in New Zealand. This stems from a number of important developments:

- individual freedoms and human rights taking on greater importance in New Zealand society, for example the passing of a Bill of Rights Act in 1990 and a Human Rights Act in 1993;
- a growing awareness of the role that good-quality regulation and institutions can play in promoting economic growth, and that bad regulation can impede productivity and growth;
- reforms over the last quarter of the 20th century that have changed the way government organises itself, provides services and implements policy (often at arms-length from government); and
- society has become more diverse, with a broader range of attitudes to risk and expectations about what government can and should do.

These changes have made regulation a more visible and important government activity. They have also underlined the importance of making sure that the design of regulatory institutions and their operation achieves government's public policy goals.

If regulation has misplaced objectives, is used when it is not needed, or is poorly designed and executed, then it can fail to achieve policy objectives and have unintended consequences that harm the wellbeing of New Zealanders. The two main ways regulation can fail are failures of design and failures of operation.

Poorly conceived and implemented regulatory arrangements can also impose significant costs. Such costs affect business productivity and profitability, and the wealth of individuals and families. Ultimately this will harm the country's economic performance and wellbeing.

Good design of regulatory institutions and good regulatory practice can reduce the likelihood of regulatory failure. The institutional arrangements that make up the architecture of regulatory regimes shape how regulators and those regulated behave, the quality of decision making, and ultimately the success of regulatory regimes in achieving the desired outcomes.

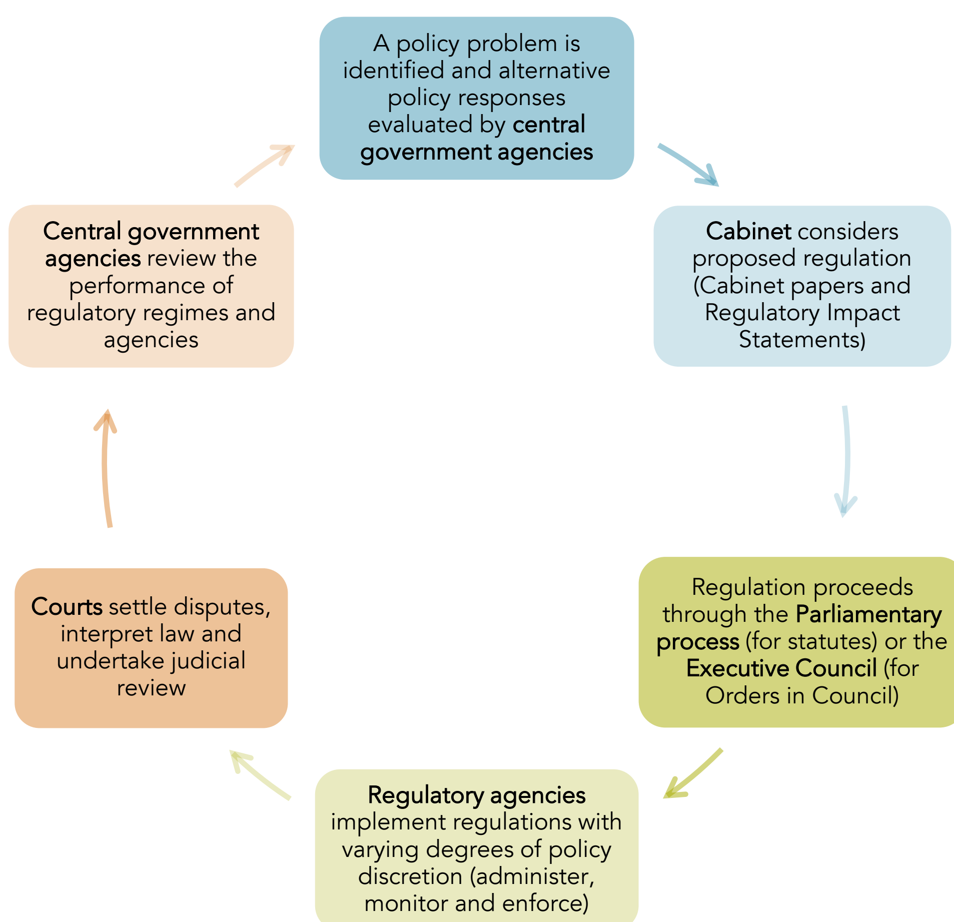
This inquiry seeks to better understand what regulatory institutions and practices look like in New Zealand and how they can be improved. Getting these right not only means the objectives of regulation will more likely be achieved; it builds legitimacy and trust in New Zealand's regulators and regulatory regimes and, with that, a higher level of trust by society.

New Zealand's regulatory system

New Zealand's regulatory system includes the institutions, principles and processes through which regulations are made, implemented, enforced and reviewed. It involves all three arms of government – the Executive, Parliament and the Judiciary (Figure 0.1).

The performance of the regulatory system is determined by internal and external factors, including pressures from the public and industry for or against new regulation, internal quality control processes (such as Regulatory Impact Analysis and select committee review of bills), judicial oversight of regulator behaviour, and processes for reviewing the currency of regulatory regimes. What emerges from an analysis of the dynamics of the New Zealand regulatory system is that, while a number of checks, constraints and rules are in place to test that a proposed new regulation is in the public interest and of a high standard, few of these controls are binding. Most controls are self-imposed by the Executive and depend upon collective self-enforcement or can be overridden. With the exception of the courts, the constraints that are less easily overcome – especially limited resources and Parliamentary time – tend to undermine the production and implementation of effective regulation.

Figure 0.1 The regulatory system



The performance of New Zealand's regulatory system is in need of improvement – in particular around developing and maintaining the capability needed to effectively implement regulation and the need to oversee and manage the overall system.

Successful regulation

The Commission examined 18 official reports of disasters from New Zealand and around the world. The reports covered such diverse topics as leaky buildings, mining tragedies and the mis-selling of financial products. Notably, regulatory failure was a central theme identified in all official reports. Insights gleaned from these reports, together with the other evidence assembled for this inquiry (p. **Error! Bookmark not defined.**), have provided the Commission with a rich picture of what aspects of the regulatory architecture, institutional design and practice need to be present, and working well, to be effective and achieve important regulatory objectives.

To be successful, regulators need to have:

- an approach to regulatory practice that is based on a sophisticated understanding of the nature of the risk, the nature of regulated parties and changes in the regulated environment (Chapter 3);
- leaders who foster a culture that values operational flexibility and adaptation to changes in the regulatory environment, continuous learning and a culture of challenge and "speaking up" (Chapter 4);
- capability across all levels of the organisation and a purposeful, structured and integrated approach to achieving a professional workforce (Chapter 5);
- communication and engagement processes that promote the legitimacy of the regulatory regime (Chapter 6); and
- the ability to fulfil their regulatory objectives within constitutional and statutory requirements – such as ensuring the principles of Treaty of Waitangi are appropriately taken into account in regulatory practice (Chapter 7).

Regulatory institutions need to be designed to provide:

- clarity of role, as clear regulatory roles and objectives are critical to regulator accountability and focus; for compliance by regulated parties and the legitimacy of the regulatory regime (Chapter 8);
- an appropriate institutional form and degree of independence to enable them to function as intended (Chapter 9);
- good governance and decision-making arrangements, and appropriate allocation of decision rights, including where and how discretion is exercised (Chapter 10);
- appropriate mechanisms for reviewing regulatory decisions (Chapter 11);
- adequate funding, according to good principles for the recovery of the costs of regulatory activities – and where the funding mechanism does not create perverse incentives for either the regulator or regulated parties (Chapter 12); and
- strong monitoring and oversight arrangements to ensure that regulatory agencies are effective, efficient and accountable and that regimes are working as intended (Chapter 13).

Management of the overall regulatory system needs to have:

- systematic and cost-effective approaches to keeping the stock of regulation up to date, so ensuring that outcomes are still achieved and unnecessary or inefficient rules are removed (Chapter 14);
- information and tools to enable the centre to understand and better manage the whole-of-system (Chapter 15); and
- strong institutions and leadership, particularly from the centre of government but also in the legislature and judiciary (Chapter 16).

Improving regulatory institutions and practices

Together, these institutional, practice and system features determine the incentives that regulators face and, ultimately, their capability to achieve mandated public interest goals. Importantly, these design features are inextricably linked and can be thought of as a mutually reinforcing system. For example, developments in regulatory practice will have implications for the skills and competencies required of the regulatory workforce. Likewise, the level of regulatory independence will determine the most appropriate accountability, performance and monitoring framework. Also, if the regulatory system fails to update and refresh regulation to ensure that it continues to achieve its goals, given the continual change in the regulatory environment, then this will hamper the ability of the regulator to achieve both compliance and the intent of the regulatory regime.

Regulatory practice

Many factors support effective regulation; none more so than the practices of the agency charged with implementing the regulatory regime. The regulator is at the "sharp end" when it comes to delivering the objectives that Parliament intended.

Both traditional "responsive" and newer "risk-based" approaches are evident in the strategies of New Zealand regulators, although agencies differ on how far they prioritise reducing harm or maximising compliance and to what extent the two objectives are integrated or treated separately. Implementation of either approach presents considerable challenges: regulators can face barriers to using high-powered tools, such as prosecutions, and there can be a lot of uncertainty about the nature of the risk and at what point the regulator should intervene.

It is important to note that there is no single superior regulatory strategy. Different strategies and approaches have different strengths and weaknesses, with different levels of effectiveness, in different contexts. The key lies in understanding and adapting regulatory strategies to take account of the influences and dynamics of the many different contexts in which they are deployed.

Irrespective of whether regulators practice responsive regulation (including variants such as "smart" regulation) or risk-based (including "regulatory craft") approaches, or a mix of approaches, regulators still face considerable challenges. The regulator may be operating in an environment where they only have a partial view of the activities of regulated parties and that view is continually changing. The regulator may have limited scope to influence the behaviour of regulated parties or be hampered by the institutional environment in which it operates.

Modern regulatory practice requires a deep and nuanced institutional analysis of the motivations, interactions and institutional environments of the regulatory actors in regulatory regimes. Being *really responsive* (Baldwin & Black, 2008) means recognising that a range of organisational and institutional factors influence the effectiveness of regulation. Attentiveness to these factors is also important when designing new regulatory regimes and new regulatory institutions.

Regulatory culture and leadership

The Commission has found near universal agreement from inquiry participants of the importance of organisational culture to the performance of regulators.

Regulator culture refers to the shared norms, values and beliefs that influence the behaviour of the organisation's staff. These norms, values and beliefs are heavily influenced by:

- the beliefs, values, assumptions and behaviours of the *founding leaders* of the organisation;
- the *learning experiences* of staff in the performance of their duties; and
- new beliefs, values, and assumptions brought in by *new staff, particularly new leaders.*

It is important to distinguish the impact of culture from the numerous other factors that motivate regulator behaviour. It is often too easy to attribute organisational dysfunction to "culture" issues rather than wider regulatory practices, structures and institutional issues.

While generic conclusions are difficult, the Commission's analysis of New Zealand regulators suggests some themes.

- The culture of regulators places significant weight on managing *risks to the organisation*, at the expense of the efficient management of social harm. Such cultures can resist innovation in regulatory practices.
- Poor internal communication exists within some regulators. Workers feel unable to challenge poor practices, contributing to the perception that regulatory bodies are unable to learn from their mistakes and successes.
- Previous restructuring of regulatory organisations has required significant cultural shifts. These shifts have not always been well understood or managed.
- Stakeholders often perceive the quality of engagement as a "window" to the culture of a regulator. In making this connection, it is important to assess whether the regulator's approach to engagement is driven by its values and beliefs, or whether it is driven by some other factor – such as the legislative framework or available resources.
- A common understanding of the purpose and mission of a regulatory body is the first step in developing culture. Yet, generally, regulatory workers in central government do not perceive that senior managers communicate a clear organisational mission. Those workers that do perceive clear communication of the mission are more likely to feel emotionally attached to the organisation, be more loyal to the organisation, and be more committed to the organisation.

While legislation can codify certain actions (such as consultation), it does not guarantee that a regulatory body will develop deeply held values around the importance of the behaviours. The culture of the organisation will evolve as its members discover what works and what does not. The culture of a new regulator can be shaped in two main ways.

- Government can seed a "desirable" culture by appointing founding leaders who have values, beliefs and experiences compatible with those it believes are most conducive to achieving the desired regulatory outcomes. However, selecting the "right people" does not guarantee that the "right culture" will emerge. Rather, it is the *actions* of founding leaders that are critical to embedding culture.
- Monitoring bodies and central agencies can use formal and informal mechanisms to reinforce favourable cultures in new regulatory bodies.

The Commission identifies the attributes of regulatory culture, suggests practical strategies and actions that promote favourable regulator culture and provides principles for effectively managing cultural change.

Workforce capability

Workforce capability matters for the successful achievement of regulatory outcomes. Between 10,000 and 14,000 people work in regulatory roles in New Zealand. Gaps in capability can undermine the credibility of regulation and the achievement of regulatory outcomes. While only 5 of the 23 chief executives of regulatory agencies that the Commission surveyed agreed there are significant skill gaps among regulatory staff, the Public Service Association survey and the Commission's business survey both indicated considerable concern around the level of skill, knowledge and training of central government regulatory workers.

The environment that regulators operate in is constantly changing, requiring that they are flexible and able to adapt. New technologies, new risks and new risk creators may require new skills and the upskilling of regulatory staff. Changing regulatory practices can also require different sets of skills or mixes of skills. The growing sophistication of regulatory regimes requires an increasingly professionalised regulatory workforce.

Professionalisation involves creating a workforce where staff:

- possess a core set of theoretical, practical and contextual knowledge;
- are recognised and respected by others in the profession and by the broader community for the knowledge they hold;
- have opportunities to meet, network with and learn from others undertaking similar tasks;
- are continually challenged to stay up to date with the latest developments in their field;
- share a world view about the role and purpose of their profession and are guided by a common code of professional conduct; and
- share a "professional language" and culture that instils a sense of "belonging to the regulatory profession".

Individual regulatory agencies are responsible for identifying the required mix of skills and developing strategies and programmes to boost capability. But a more active role by central agencies appears warranted, such as strengthening the responsibility on regulators to focus on workforce capability and increasing the emphasis on workforce capability through performance reviews. Other system-wide responses are also needed to professionalise and boost the capability of the regulatory workforce, such as developing and promoting system-wide guidance material, supporting knowledge sharing across the system, and providing intellectual leadership.

To meet the capability challenges facing regulatory agencies requires a purposeful, structured and integrated approach to professionalising New Zealand's regulatory workforce.

Effective consultation and engagement

Effective engagement can help to reassure stakeholders and the wider community that good regulatory processes are being followed, and that the decisions of regulators are robust, well-informed and well-reasoned. This promotes confidence that the decisions of regulators are in the public interest and are evidence-based and impartial. This in turn builds trust in the regulatory system and in the regulator. It also helps strengthen the legitimacy of the regime and improve the durability of regulator decisions.

The choice of engagement mechanism is influenced by the goal of the interaction, and by the relative efficiency of alternative mechanisms. Goals can range from merely *informing* stakeholders of their regulatory obligations, to *involving* them in regulatory decisions, to *empowering* them to make decisions. The greater the level of public participation, the more critical it becomes to ensure a common understanding of the goals of the engagement process. Failure to do so can result in unrealistic expectations around how much participants can affect the decisions of regulators.

When designing a regulatory regime, a key consideration is whether engagement strategies should be left to the discretion of the regulator, or whether statutory provisions are required to promote the regulatory objectives of Parliament or protect fundamental principles of natural justice. (Of the more than 50 statutes that the Commission examined, more than half contain some form of statutory consultation requirement).

This decision should be made in the context of other features of the regulatory regime – particularly the extent of discretionary powers assigned to the regulator, the level of regulator independence, and the strength of accountability mechanisms.

Inquiry participants raised concerns around the current engagement practices of some New Zealand regulators. These include insufficient time for engagement, a perception that regulators enter engagement processes with predetermined views, and concerns that some regulators lack the capacity to engage affectively. The Commission has also heard positive feedback around the approaches adopted by some regulators – notably the New Zealand Transport Agency and the Environmental Protection Authority (EPA).

Inquiry participants also advocated more extensive use of advisory groups and greater involvement of consumers in decision making (that is, through mechanisms such as "constructive engagement" and

"negotiated settlements"). Such approaches change the very nature of the regulatory decision-making process and the role of the regulator, and are not without drawbacks. These include that stakeholders can lack the expertise, resources or time to effectively engage in technical decisions, it can be hard to ensure that the views of the broader community are represented, and it can generate unrealistic expectations around the extent to which stakeholders can affect the decisions of regulators.

Five factors that are central to the success of any collaborative process are examined:

- a shared understanding of the boundaries of influence of the group;
- commitment to implementing the outcomes of the collaborative process;
- understanding the information needs of all parties and reducing information imbalance;
- selecting participants that represent the wider interests of the community; and
- establishing clear and transparent processes.

Regulation and the Treaty of Waitangi

Regulators work within a constitutional, statutory and legal context that can change and evolve over time. An important issue in establishing regulatory regimes in New Zealand is ensuring that the principles of the Treaty of Waitangi are appropriately taken into account in both regulatory design and practice.

The Commission provides guidance for officials considering whether to recommend the inclusion of Treaty clauses in statutes that establish regulatory regimes or regulatory agencies.

Excellence in regulatory practice, however, cannot be legislated for. Good practice in upholding Treaty principles of partnership, mutual respect and good faith depends on senior leadership, good internal policies and processes, and guidance for staff and stakeholders.

The Commission has reviewed examples from government agencies of guidance for applying Treaty principles. The overall quality of guidance material can be improved. The assessment framework used in reviewing the guidance material could be used as a tool to help regulatory agencies develop guidance about the application of Treaty principles.

Sharing good regulatory practice is one way to raise the standard of practice among regulators. Lessons from the experience of the EPA have been identified. An important lesson for other regulators is that investing in good relationships to develop trust can pay off in reduced costs and better regulatory decision making.

Role clarity

Clear regulatory roles are critical to regulator accountability and focus, compliance by regulated firms, predictable decisions and enforcement, and regime legitimacy. Poor role clarity can lead to a regulator's scope expanding beyond its original mandate; duplicative or contradictory regimes; gaps in regulation, monitoring or enforcement; and inconsistent enforcement.

Achieving "clarity" is not a simple or straightforward task due to the complex issues regulation often deals with, the multiple stakeholders in any regulatory regime, and the large amount of existing regulation.

Regulatory regimes may lack clarity because:

- the standards used do not fit the industry or activity being controlled;
- policymakers give insufficient guidance about the desired objectives;
- regulators have functions that create conflicts of interest; or
- the regime does not recognise the role of other regulators or the interaction of different regimes on regulated firms.

There are a number of ways to improve the clarity of regulator roles. If a range of capability levels exists within a regulated industry, "deemed-to-comply" models can be useful. Deemed-to-comply models allow more capable firms to develop their own compliance strategies, while also providing detailed guidance for other firms on how to comply. Legislative frameworks that minimise the number of objectives and conflicts and provide a clear hierarchy of objectives help to support consistent and predictable decision making by regulators.

To promote better engagement with industry about the definition and interpretation of regulatory objectives, the Commission recommends that the Cabinet Manual be amended to encourage more use of exposure drafts, before significant regulatory legislation is introduced. New regulators, or agencies implementing new regimes, should publish statements outlining how they will give effect to their new mandates, and consult on these statements.

Before allocating new regulatory functions to an existing agency, policymakers should assess whether its mission is compatible with the objective of the new regime, and whether it is likely to give sufficient resources and attention to the new functions.

Exemptions and memoranda of understanding between agencies can help manage issues with overlapping regimes.

Regulatory independence and institutional form

The institutional form of the regulator, and the degree of independence with which it is expected to undertake its regulatory functions, are important considerations in the design of a regulatory regime.

There is widespread agreement of the importance of regulation being undertaken by independent regulators. It will usually be appropriate for regulatory powers to be exercised independently of political control so they are not used for partisan purposes where the risks are long term, where powerful private interests are at stake, and where a substantial degree of technical expertise is required.

Designers of regulatory regimes need to carefully appraise the arguments for and against regulator independence. Arguments for political control must be weighed carefully against the benefits of providing a credible long-term commitment to an impartial and stable regulatory environment.

Independence is multi-faceted and is more than a matter of legally designating an agency as "independent" or at "arm's length". In practice, choices about institutional form are more important for what they signal about expected independence, rather than the legal constraints and freedoms associated with particular agency forms. As such, careful attention must be paid to establishing clear expectations, norms and cultures in new independent regulators.

The Commission has found that regulators often have to work with legislation that is outdated or not fit for purpose. Regulator independence could be enhanced by the greater use of secondary legislation and ensuring greater care (and consistency) in the allocation of legislative material between primary legislation and types of secondary legislation.

Submitters had mixed views on who should be delegated authority to make secondary legislation. Regulations made by the Governor-General in Council have more checks, but this still relies on policy departments and Cabinet giving higher priority to the routine maintenance of often highly technical matters. The Legislation Advisory Committee (LAC) could expand its guidance on this issue.

Political imperatives will inevitably diverge sometimes from the objectives of independent regulators. While political interference in independent regulatory regimes is undesirable, providing transparent mechanisms for political intervention is preferable to undertaking more fundamental and ad hoc regulatory reform to solve political problems. Providing such mechanisms can actually enhance the independence of regulators. This also allows for ministers to be properly held to account for their actions.

Government has signalled an intention to consider reallocating some functions currently undertaken by Crown entities (which are operationally independent) into a new type of institutional form known as

departmental agencies. The Commission has a number of concerns with this proposed new institutional arrangement for regulators.

Governance, decision rights and discretion

The internal governance of a regulator (the systems of direction and control), where decision rights sit within the organisational structure (who makes decisions and how they are made), and the discretion available to the regulator in making decisions, all affect the quality of regulator decision making. The variety of internal governance arrangements and allocation of decision-making rights in New Zealand regulators appears to be ad hoc rather than based on sound governance principles.

Governors of regulatory Crown entities are accountable to ministers for the performance of the regulator, and need to be empowered to govern. Their strategic leadership is important to the success of the regulator. Having a capable board with the right mix of skills is critical to good governance. But appointment and reappointment processes are of variable quality. More central support to departments would improve the quality of appointment processes and, in turn, the quality of governance.

Sector or industry experience can be an important voice in governance. There is some confusion about the role that Crown entity board members nominated by industry are expected to play as governors. Board members owe a duty to the public interest and their minister as outlined in the Crown Entities Act 2004, regardless of any background in the regulated industry.

Multi-member decision-making bodies offer the potential to produce better quality decisions than individuals. Whether they do depends on the quality of members and decision-making processes, highlighting the importance of robust appointment processes.

In any system of authority there is tension between certainty and flexibility: between having definite rules and applying them consistently and in an even-handed way, enabling decisions to be made according to the specific circumstances of the case and within a broader framework of goals and values.

The exercise of discretion is constrained by legal and non-legal methods of control, including judicial review and the common law principles of administrative law, guidance and policy that the decision maker adopts to guide the exercise of discretion, cultural and institutional constraints and transparency. In particular, there are strong protections where those decisions intrude on the civil and political rights enshrined in the New Zealand Bill of Rights Act 1990. Despite the statutory and common law arrangements that require regulator transparency, several submissions raised concerns about inadequate access to information about regulatory approaches and reasons for decisions.

Many regulatory agencies also develop policies and guidelines for decision makers who exercise discretion, and publish information about their decision-making processes. These policies and guidance help to ensure that decisions with similar circumstances are made consistently and fairly.

Decision review

New Zealand is fortunate to have a judiciary that its citizens have confidence in – the second highest regarded in the Organisation for Economic Co-operation and Development (OECD, 2013a). In New Zealand, the courts have a constitutionally important role to ensure that the Executive acts reasonably, fairly, and within the bounds of the laws established by Parliament. Unlike in other countries, New Zealand courts have no role in supervising Parliament. Courts cannot strike down or invalidate legislation passed by Parliament.

Judicial scrutiny of the exercise of Executive power is particularly important in the area of regulation, given the coercive nature of those powers. Where Parliament provides for appeals, courts also provide a forum for parties to test that regulators have made "correct" decisions.

"Appeals" of regulatory decisions involve the courts scrutinising the merits and correctness of those decisions. In contrast, "judicial review" involves the courts scrutinising the process and legality of decision making. These are distinct processes. "Merits review" is an appeal that looks at the correctness of decisions.

Appeal rights of administrative decisions exist only where Parliament expressly provides for them. There is a perception that New Zealand statutes provide limited access to appeal of regulatory decisions, but this is not supported by research undertaken by the Commission. Most regulatory regimes provide for appeals, and only a small minority of regimes provide limited or no access to appeals.

Judicial review is an inherent power of the High Court, and so does not need to be provided for in statute. The Commission found no evidence that judicial review is ineffective in ensuring the lawfulness and reasonableness of the Executive's actions. It is an important constitutional check on the exercise of state power, and protects the right of New Zealanders to be treated fairly and in accordance with the law. Attempts in legislation to exclude judicial review of the Executive are wholly undesirable.

In New Zealand the scope of judicial review is comparatively broad and can sometimes include scrutinising the substantive merits of the Executive's decisions. The overlap between judicial review and appeal in New Zealand means that judicial review already adequately provides many of the advantages that submitters ascribed to merits review or appeals in many areas of regulation. This includes sharpening the incentives on decision makers to come to the correct decisions.

In scrutinising the decisions of expert regulators, the courts will examine the legality and process of decisions via judicial review. But they will typically defer to expert regulators about the substantive merits of the decision, requiring a higher threshold to establish unreasonableness. This means the availability of merits review may provide some stronger performance incentives for regulators in highly complex or technical fields.

Appeal rights should be provided where the designers of regimes are confident the appeals will improve regulatory outcomes and support the objectives of the regulatory regime. This requires taking into account the costs and uncertainty that appeal rights create. In deciding whether to provide for appeal rights of complex or highly technical regulatory regimes, designers need to critically assess the institutional capability and expertise of the court or tribunal reviewing the decision, relative to the decision maker at first instance.

A range of mechanisms are available to support the institutional capability of the appellate body to deal with appeals of complex and highly technical decisions – for example, using technical experts as lay judges and providing for more inquisitorial processes.

The LAC guidelines on review and appeal provide a good list of considerations to take into account when designing review and appeal provisions in regulatory regimes. The LAC notes that appeals:

- scrutinise and correct individual decisions, with the aim of providing redress, and
- maintain a high standard of public administration and public confidence in the legal system.

Even so, the LAC notes that the value of appeals needs to be balanced against the considerations of cost, delay, significance of the subject matter, competence and expertise of the decision maker at first instance, and the need for finality.

Approaches to funding regulators

Regulators can be funded from various sources, including Crown contributions, levies on the regulated industry, or through fees imposed either on the beneficiaries of regulation or on those who cause the "problem" that needs to be regulated. The way that regulators are funded can affect the efficiency of resource use, equity and the achievement of policy outcomes.

The Commission's survey of businesses and submissions to the inquiry reveal concern in the business community about the quality of the consultation before regulatory fees or levies are introduced, the weak constraints on the level of charges, and the structure of charges.

While there can be benefits in regulators recovering some costs through fees or levies, a case-by-case assessment of proposals for funding regulators is required. Frameworks for choosing between sources of funding in New Zealand and elsewhere, generally:

- set out efficiency and sometimes equity as the main objectives of cost recovery;
- require consent, usually of a minister or Parliament, before a fee or levy is introduced; and
- are based on a distinction between cost recovery and taxation.

But in other jurisdictions it is also typical to find:

- more rigorous consultation and impact assessment before fees are introduced;
- more detailed advice about how to implement cost recovery;
- stricter requirements for performance standards and reporting against those standards; and
- penalties for failing to achieve the standards.

Improvements in New Zealand's approach to cost recovery can be made through strengthening the governance and accountability framework. Specifically:

- publishing the Government's cost recovery policy;
- requiring agencies proposing a new or amended fee or levy to publish a statement explaining, for example, why they are doing so and the expected effects;
- strengthening performance reporting;
- introducing regular reviews of regulators' cost recovery practices; and
- improving the implementation of cost recovery by refreshing and rationalising the guidance material, and ensuring adequate departmental advice is available to regulatory agencies about how to approach cost recovery.

Monitoring and oversight

Monitoring of regulators helps ensure that they are effective, efficient and accountable and that regimes are working as intended. Although ministers are accountable for the performance of regulatory regimes, decisions about the implementation of regimes are generally delegated to departments or Crown entities. Monitoring helps ministers assess whether the objectives of the regimes are being achieved, and whether changes should be made to legislation or the regulator's behaviour.

The effectiveness of current monitoring practice varies. Interviews conducted for the Commission with regulator board members and their departmental monitors highlighted issues around:

- insufficient support from departments for regulator Crown entities, especially around progressing legislative amendments;
- role confusion, where some departments attempted to influence how a Crown entity was run or "second guess" the regulator's actions;
- inadequate capability and high turnover in departmental monitoring staff; and
- too much reporting sought from regulators, and insufficient focus in reporting on the regulator's performance and strategy.

Monitoring practices can be improved by providing greater stability in monitoring staff, making stronger links between monitoring staff and policy staff who provide advice on the relevant regime, adopting a more risk-based monitoring approach, and re-focusing departmental and ministerial engagement on the boards of regulatory Crown entities.

Current monitoring practices do not pay enough attention to the detail and effectiveness of a regulator's strategies and practices. The best judges of regulatory practices are other practitioners. The Commission

therefore recommends establishing a peer review process, through which panels of senior regulatory leaders would review the practices and performance of individual agencies.

The logical home for this new peer review function is the existing Performance Improvement Framework (PIF) process run by the State Services Commission (SSC). The SSC should identify current and former regulatory leaders to join PIF review teams, and to assist in developing regulator-specific questions for the reviews.

The priority for the PIF peer reviews should be the larger regulatory Crown entities, those entities that implement regimes managing significant potential harms, and departments that implement regulatory regimes. Small regulatory Crown entities should be able to volunteer for a peer review, but not obliged to undertake one.

Better regulatory management

The regulatory system is vast and distributed across departments, agencies and ministerial portfolios. By and large, this developed model makes sense. The knowledge needed to run individual regimes lies in the individual departments and agencies. But for the model to work well there needs to be oversight, supervision, coordination, prioritisation and continual improvement of the overall regulatory system. This is regulatory management.

The Commission has identified improvements to regulatory management: through better system-wide regulatory review, better information, and stronger institutions.

System–wide regulatory review

New Zealand's stock of legislation is large, growing rapidly and complex. Parliament has enacted between 100 and 150 Acts and about 350 Legislative Instruments each year since the mid-1990s, although the net increase after revocations is less than this. Keeping it up to date – ensuring that outcomes are still being achieved and unnecessary and inefficient rules removed – is an important task for the Government.

As the OECD notes, "one of the most important tasks facing governments today is updating of the accumulated regulations and formalities that have gone unexamined over years or decades. National regulatory systems require periodic maintenance. Periodic and systematic review of existing regulations is needed to ensure that outcomes are assessed, unneeded or inefficient rules are weeded out, and needed rules are adapted to new economic and social conditions" (OECD, 1997, p. 224).

In New Zealand, in-depth reviews of regulatory regimes have often followed a crisis, rather than a systematic and strategic approach to review. Notably, New Zealand does not use many of the approaches to system-wide evaluation of regulatory regimes used in other countries. Currently, the Government is implementing a suite of initiatives to improve how the stock of regulation is managed. Cabinet has articulated a set of expectations of what departments need to do to keep the regulatory systems they are responsible for up to date.

To improve the effectiveness of these proposed measures for system-wide evaluation of regulatory regimes, the Government should:

- publish the regulatory system reports prepared by departments;
- require departments to articulate in their Statements of Intent their strategies for keeping their regulatory regimes up to date;
- within three years, commission a review of each department's progress and seek advice from that review about whether it is necessary to create a legislative framework or other obligations for managing the stock of regulation;
- articulate a set of principles to encourage departments to focus effort on reviews of regulatory regimes that have the largest anticipated benefits (these could be supported by capping annual expenditure, or

setting a target number of reviews, to force identification of the reviews with the largest potential benefits); and

- direct the Treasury to articulate in more detail its overall strategy for improving how the stock of regulation is managed, indicating how the initiatives it is implementing fit within the strategy and how success will be measured.

Information to understand and manage the system

The volume and complexity of the regulatory stock in New Zealand poses challenges to people wanting to understand their regulatory obligations, and for the centre of government (ministers and central agencies) to manage the system. Tools are needed to help people navigate the stock and for the centre to effectively govern the system.

The absence of a central electronic repository of Other Instruments (also known as "tertiary" or "deemed" regulation) constrains the ability of firms and individuals to understand their regulatory rights and obligations. The Parliamentary Counsel Office should expand its New Zealand Legislation website to provide a single, comprehensive source of these regulations.

The centre does not need to develop or maintain a deep understanding of the institutional arrangements and regulatory environment for 200 different regimes to govern the system. Instead it should look to identify areas where central organisations have a comparative advantage (eg, provision of public goods, coordination and facilitation between agencies) and ensure that the key actors in the regulatory system – especially policy departments and the boards of Crown entities – properly carry out their duties and obligations.

The Commission considered creating maps or typologies of regulators and regimes, standardised reporting obligations and a framework for assessing the health of the system overall. Of these options, the last has the greatest potential, in that it would allow the centre to assess how well the regulatory system is delivering proportionate and necessary regulation, prioritised regulatory effort, adequate resourcing of implementation, fair and effective implementation and self-aware and adaptive regulatory organisations. The Treasury has already begun to collect information from departments on the performance of the system. This work would be strengthened by making greater use of information from external and independent sources, and by focusing more on the outputs and outcomes of departmental processes.

Strengthening institutions

The Commission found weaknesses in the institutions responsible for oversight and management of the regulatory system. There is no overarching government strategy for regulation, no clear programme for its improvement, and no clear "owner" of the system. There are also long-standing concerns about the quality of some policy and legislative processes, and about the ability of Parliament to ensure legislative regimes are of a high quality and remain current. While some improvements have been made in recent years, other quality checks have eroded. The Government should commission a review of these quality checks and processes, to promote higher-quality legislation in future and ensure legislation remains current over time.

Moving regulatory management to the next level of performance requires:

- energetic and focused leadership from within the Cabinet, as the "owners" of the system;
- paying more attention to organisational design, implementation, monitoring and review;
- stronger encouragement and support for regulators to fulfil their stewardship obligations; and
- better understanding by departmental monitors of regulators about the monitoring role, and increased importance attached to the monitoring role.

Ministerial leadership of the regulatory system should be strengthened. The responsibilities of the Minister responsible for regulatory management should be clarified and expanded to include:

- defining the overall objective of the system and bringing focus and attention to it;

- strategic prioritisation of effort across the system;
- specifying and allocating tasks for improving the system; and
- promoting continuous improvement in regulatory design and practice.

Effective institutional support for the Minister is needed, through an expanded team within the Treasury that has a published charter setting out its objectives and functions, its own website, and the authority to identify itself as a separate unit within the Treasury. The proposed position for providing intellectual leadership on regulatory practice should be located in this team.

Conclusion

The regulatory system is a large and important part of New Zealand's policy infrastructure. This report has reviewed the components of the system and has found deficiencies in each of them alongside a surprising complacency about how the system as a whole is performing. Insufficient, and in some cases declining, resources are being committed to matters of regulatory design and review. The designers and implementers of regulation face escalating expectations, complexity and challenge.

This report shows many areas where the capability and performance of the regulatory system in designing and regularly upgrading regulatory regimes falls well short of what it should and can be. There has been some progress through recent initiatives, including the creation of a ministerial portfolio for regulations, the 'Better Regulation, Less Regulation' package, the Regulatory Standards Bill, and the regulatory stewardship requirements. But while efforts to improve the regulatory system can be identified, these are fragmented and follow-through has been inadequate in some initiatives. Focus, continuity and a system-wide view of performance weaknesses and potential improvements are required. There is considerable scope to get much better performance out of the system, with a real imperative to do so in support of the greater wellbeing of New Zealanders, and reduced risk of regulatory failure.

This inquiry has concentrated on the role and contribution of the regulatory system to the wellbeing of New Zealanders. The Commission recommends a more strategic approach to the regulatory system, and suggests initiatives aimed at:

- sharpening the accountabilities of those who have important roles to perform in improving the system;
- redirecting effort to improve the system to where it can yield the highest dividends;
- increasing the attention devoted to improving organisational and workforce capability; and
- building in mechanisms to encourage continuous improvement of the system, to keep it current.

New Zealand is not so well off that it can afford to settle for second best in its foundational systems. Indeed, given the disadvantages of small scale and isolation, New Zealand needs to excel in such matters if it is to meet its aspiration to deliver first-class living standards to all New Zealanders. Achieving this will require focus, enthusiasm, professional capability and active political support.

Findings and recommendations

The full set of findings and recommendations from the report are below.

Chapter 2 – New Zealand's regulatory system

Findings

F2.1	Frequent changes to the underlying regulatory frameworks have contributed to New Zealand utilities being assessed as having a higher risk profile than equivalent sectors overseas.
F2.2	The balance of pressures from industry and the community, and New Zealand's very centralised constitutional system, create a bias in favour of more regulation.
F2.3	New Zealand appears to make more use of primary legislation in its regulatory regimes than other jurisdictions, and statutes often address matters in considerable detail.
F2.4	It can be difficult to find time on the Parliamentary calendar for "repairs and maintenance" of existing legislation. As a result, regulatory agencies often have to work with legislation that is out of date or not fit for purpose. This creates unnecessary costs for regulators and regulated parties, and means that regimes may not keep up with public or political expectations.
F2.5	The ability of the courts to review the behaviour of regulators and, in many cases, the merits of their decisions, is one of the most significant constraints on the exercise of regulatory power in the system.
F2.6	New Zealand does not have strong processes for reviewing regulatory regimes, leading frequently to a "set and forget" mindset to regulation.

Chapter 3 – Regulatory practice

Findings

F3.1	Responsive regulation has been an important influence in the thinking about effective regulatory compliance worldwide over the last two decades and is widely used as a compliance strategy by New Zealand regulators.
F3.2	The literature points to a number of impediments to successfully implementing responsive regulation. There may be instances where implementing a graduated compliance approach is not in the interest of the overall objectives of the regulatory regime and there can be significant constraints on the regulator in being able to use the responsive/enforcement pyramid as intended.
F3.3	Risk-based regulation has become increasingly influential and Cabinet expects that "departments, in exercising their stewardship role over government regulation, will maintain a transparent, risk-based compliance and enforcement strategy" (Offices of the Ministers of Finance and Regulatory Reform, 2013b, p. 15).

F3.4 There has been widespread endorsement of risk-based approaches to regulation because risk-based approaches directly relate the activities of the regulator – targeting risk – to the objectives of the regulatory regime – reducing the risk of harm. But risk-based approaches pose a number of challenges in implementation. There can be a lot of uncertainty about the nature of the risk and at what point the regulator should intervene.

F3.5 Regulators adopt a range of responses to reconciling responsive and risk-based approaches to regulation.

F3.6 An integrated approach to risk-based and responsive regulation can help the regulator choose the best intervention to meet the objectives of the regulation, based on both the nature of the risk and the nature of the regulated party.

F3.7 There is no single, superior regulatory strategy. The key lies in understanding and adapting regulatory strategies to take account of the influences and dynamics of the many different contexts in which they are deployed.

Chapter 4 – Regulator culture and leadership

Findings

F4.1 The espoused values of new regulators may be "aspirational" rather than deeply ingrained and widely accepted. This means such values may not actually reflect the beliefs of those working within the organisation or be reflected in their actions.

F4.2 The culture that emerges within a new regulatory agency will be influenced by:

- the beliefs, values, assumptions and behaviour of its founding leaders;
- the experiences of members of the organisation as it matures; and
- the injection of new beliefs, values and assumptions through new members.

F4.3 Good internal communication is a catalyst for developing a culture of organisational learning. Yet central government regulatory workers are significantly less likely than non-regulatory workers to believe that there is good communication within their organisation.

F4.4 With some exceptions, New Zealand regulators do not appear to have a strong culture of learning from experience.

F4.5 The culture of some New Zealand regulatory bodies appear to place significant weight on managing risks to the organisation, at the expense of the efficient management of social harm. Such cultures can resist innovation in regulatory practices.

F4.6 Clarifying how regulators are expected to perform and reshaping their views of success are important steps to addressing institutional risk-aversion within regulatory bodies.

F4.7 Adopting new approaches to monitoring and enforcement can result in tension between the cultures of "traditional" enforcement staff and organisational leaders. This tension can act as a barrier to regulators improving how they operate.

F4.8 When implementing new regulatory practices, leaders within regulatory agencies should assess the extent to which advocates of existing practices will resist any new practices. Strategies to manage cultural changes should be factored into the broader change management process.

F4.9 The likelihood that systemic failures in regulatory regimes will go unchecked is higher when regulators have poor internal communication, lack the ability to learn from experience and have professional subcultures that resist change.

F4.10 It is important for regulatory bodies, as far as possible, to gain an understanding of the culture and motivations of regulated parties, and for regulated parties to gain an understanding of the culture and motivations of the regulatory body.

F4.11 Evidence suggests that previous changes to the functions and structure of regulatory agencies have been made without a sophisticated understanding of the cultural implication of change.

F4.12 Prior to contemplating changes to the structure and functions of regulatory bodies, the Government should undertake a substantive assessment of the cultural issues associated with change. Strategies for managing potential cultural issues should be explicitly included in change management plans.

F4.13 The way in which a regulator engages with stakeholders is often perceived as a "window" to the organisation's culture. It is important to assess whether the quality of engagement is driven by the regulator's deeply held values and beliefs, or whether it is driven by some other factor – such as the legislative framework or available resources.

F4.14 Regulatory workers who perceive their managers clearly communicated the organisational mission are more likely to feel emotionally attached to the organisation, be more loyal to the organisation, and be more committed to the organisation. However, generally central government regulatory workers do not perceive that senior managers communicate a clear organisational mission.

F4.15 When looking to improve the performance of a regulator, it is vital to understand whether what is required is a *change in regulatory practice within a given culture,* or a change in culture. This requires specific assessment of the culture within a regulatory agency and the institutional factors that impact the way it operates.

F4.16 Government can "seed" the culture of a new regulatory agency by appointing founding leaders who have values, beliefs and experiences that are consistent with its vision of the "ideal" culture. However, selecting the "right people" does not guarantee that the "right" culture will emerge – the actions of founding leaders are the key embedding mechanism.

F4.17 When establishing a new regulator, it is important to have founding leaders in place from the start of the organisation. This will provide the leader with the opportunity to influence the cultural foundations of the organisation. The use of "interim leaders" should be avoided where possible.

F4.18 While legislative provision can codify required actions, they do not guarantee that a regulator will develop deeply held values around the importance of those actions.

F4.19 Monitoring bodies and central agencies can use formal and informal mechanisms to reinforce favourable cultures in new regulatory bodies.

F4.20 There is disagreement in the academic literature around the extent and pace at which embedded cultures can actually change. This debate reaffirms the importance of promoting an "appropriate" culture from the inception of a regulatory body.

Recommendations

R4.1 The State Services Commission should develop guidelines to assist regulatory bodies to manage cultural changes associated with restructures and changes in functions. Monitoring agencies should uses this guidance as the basis for assessing whether cultural issues are adequately reflected in broader change management strategies.

Chapter 5 – Workforce capability

Findings

F5.1 The regulated environment is constantly changing, requiring regulators to be flexible and able to adapt. New technologies, new risks and new risk creators may require new skills and upskilling of regulatory staff.

F5.2 Most regulators share a set of core functions, and these functions create demand for a set of foundational capabilities. However, specialist knowledge of the subject matter is often required to perform these core functions in a manner that is appropriate to the regulatory task at hand.

F5.3 Regulatory agencies face challenges in training people with specialist industry knowledge and technical skills (and who may bring with them their own professional cultures and attitudes) to become regulatory professionals with a core set of generic skills and competencies required of the role.

F5.4 Only 5 of the 23 regulator chief executives surveyed agreed there are significant skill gaps among regulatory staff. This is in contrast to the results of a PSA survey and the Productivity Commission's business survey which both indicated considerable concern around the level of skill, knowledge and training of central government regulatory workers. These results may indicate that some regulator chief executives do not fully appreciate the skill gaps within their organisation.

F5.5 Compared to the size of the regulatory workforce, the number of people completing qualifications within the compliance sector (excluding Police trainees) is very low.

F5.6 A range of training opportunities seem to be available but some evidence indicates that those opportunities do not meet the needs of regulatory agencies or their staff. This could be because the training is insufficiently tailored to the specific needs of regulatory agencies or that generic training in core competencies is not required of staff working in regulatory roles. In any event, the completion rates for compliance and regulatory control qualifications appear to be low.

Recommendations

R5.1 The State Services Commission should develop a set of minimum expectations around the promotion of regulatory capability, and require Crown entity statements of intent to demonstrate how the Crown entity will meet those expectations.

R5.2 Guidance on regulatory practice should be updated to provide additional information on:

- how to define and target risks;
- how to select compliance tools that reflect both the risk and compliance attitudes of regulated parties;
- how to establish strong internal feedback loops for gathering and assessment of how well enforcement strategies are working; and
- tools and strategies to enable the regulator to understand the wider influences that shape the response of regulated parties to the regulatory regime.

R5.3 The government should provide partial direct funding of regulator communities of practice (subject to a suitable business case and performance measures) and strengthen its expectations about regulatory agencies participating in these networks (for example through revising Cabinet's *Expectations for Regulatory Stewardship*).

R5.4 A position should be created to provide intellectual leadership in the area of regulatory practice. The position would be responsible for:

- disseminating information on the latest developments in regulatory theory and practice;
- coordinating the development of professional development pathways and accredited qualifications;
- working with chief executives of regulatory bodies to identify common capability gaps and strategies for filling these gaps across the system;
- working with research organisations to investigate regulatory issues of importance to New Zealand agencies;
- developing and maintaining good practice guidance;
- promoting a common "professional language" throughout New Zealand regulatory agencies;
- coordinate study tours and visits by international experts and leading academics in the field of regulatory studies; and
- leading and managing professional forums of regulators.

Chapter 6 – Consultation and engagement

Findings

F6.1 The "regulatory relationship" is influenced by both the nature of the regulation and the characteristics of regulated parties and beneficiaries. When designing new regulatory regimes, careful thought must be given to the relationships that should exist between the regulator, regulated parties and those who are the beneficiaries of regulation.

F6.2 In general, the greater the level of public participation, the more critical it becomes that there is a common understanding of the scope for stakeholders to influence regulatory decisions. Failure to do so can undermine public confidence in engagement processes and in the competence of the regulator.

F6.3 When developing engagement strategies, regulators need to examine both the fairness and proficiency of alternative mechanisms. Both proficiency and fairness are influenced by the manner in which mechanisms are implemented.

F6.4 New Zealand common law, such as case law, contains a number of important principles that affect how and when regulators have an obligation to consult and what constitutes proper consultation.

F6.5 Inquiry participants have raised concerns around the current engagement practices of some New Zealand regulators. These include insufficient time for engagement, a perception that regulators enter engagement with predetermined views and concerns that some regulators lack the capacity to engage effectively. The Commission has also heard positive feedback around the approaches adopted by some regulators – notably NZTA and the EPA.

F6.6 Statutory consultation requirements are potentially most useful:

- when there is a likelihood that failure to consult would breach natural justice principles – for example regulation that involves a significant use of the state's coercive powers that could impact the civil liberty, livelihood or property rights of individuals;
- when regulators have wide, discretionary rule-making powers that involve making judgements about what is in the public interest;
- when there are social equity reasons for specifying the consultation processes that should be followed for a specific group – for example where the affected group may not have the resources or capacity to effectively participate in a conventional consultation process; and
- where the affected community holds information on trade-offs and technical issues necessary for the regulator to make sound decisions.

F6.7 The structure of statutory consultation requirements can have a significant impact on the cost and speed of regulatory decisions, the weight a regulator gives to the views of specific stakeholders and how the regulator allocates its budget (and the budget flexibility the regulator has). As such, it is important that officials give considerable thought to the likely trade-offs associated with an alternative wording of the provision.

F6.8 Collaborative approaches have the potential to improve the decisions of regulators. Factors central to the success of any collaborative process include:

- a shared understanding of the boundaries of influence of the group;
- commitment to implementing the outcomes of the collaborative process;
- understanding the information needs of all parties and reducing information imbalance;
- selecting participants that represent the wider interests of the community; and
- establishing clear and transparent processes.

F6.9 Failure to adequately explain the rationale behind regulator decisions can create the impression that consultation processes are insincere and that regulators are simply "going through the motions". It is important that regulators make every effort practicable to clearly explain the logic of their decisions.

Chapter 7 – The Treaty of Waitangi in regulatory design and practice

Findings

F7.1 While a precise definition of the Crown is lacking, it is generally accepted as encapsulating the key machinery of executive government.

F7.2 Statutes with references to the Treaty of Waitangi or to Treaty principles often contain regulatory provisions and create obligations on a range of parties that are not the Crown.

F7.3 When drafting legislation, greater care to ensure that differences in wording are both intended and justified, with respect to Treaty principles, would reduce the complexity and cost of regulatory processes.

F7.4 Overall the quality of guidance to help apply Treaty principles could be improved. Some guidance was misleading or inaccurate.

F7.5 The framework for assessing guidance material proposed by the Commission could be used as a tool to help regulatory agencies develop guidance about applying Treaty principles in their area of regulation.

F7.6 The EPA does not limit its role to ensuring that applicants comply with regulatory standards before an application is approved. Applicants are helped in preparing their applications and the EPA also helps those affected by applications. Conflicts of interest are minimised because the application process is open, transparent and public.

F7.7 Māori have additional steps and costs to incur when developing submissions, but care is needed when considering funding, having regard to the capability of respective stakeholders and the importance of their perspectives, and ensuring funding is directly related to gaining those perspectives. Regulators need to monitor these expenses carefully.

F7.8 Providing guidance for applicants and other stakeholders about navigating the process is considered a core part of the EPA's role as a regulator.

F7.9 Open and timely communication, accessibility, a balanced approach, pro-activity and a culture of respect and understanding, comes from the leadership of the organisation, through to its staff, and is demonstrated in the behaviour and actions of the EPA.

F7.10 In designing institutional arrangements, processes and practices to incorporate Treaty principles into their work, regulators should focus on their own regulatory responsibilities and functions, and the capabilities, capacity and incentives of their stakeholders.

F7.11 An important lesson from the EPA's experience for other regulators is that the investment in developing good relationships pays off in the form of reduced cost on all parties involved in the application process, while improving the quality of engagement and the resulting decisions. Such investment has achieved buy-in to the success of the EPA approach and a shared commitment to making it work. When decisions go against stakeholders, those decisions are now more readily accepted and are less likely to be contested.

Chapter 8 – Role clarity

Findings

F8.1 Many firms that the Commission surveyed saw contradictory or incompatible regimes, and regulators poorly managing duplicated compliance requirements, as issues in New Zealand.

F8.2 "Deemed-to-comply" systems can let regulatory regimes adapt to changes in technology or shocks. They also permit different firms to find the compliance approach that best suits them. This lets regimes more effectively cover industries where the capability among regulated firms varies.

F8.3 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.

F8.4 New regulators, and regulators implementing new regimes, should publish statements outlining how they will interpret and give effect to the regime's objectives, and engage with regulated parties on these statements.

F8.5 Before new regulatory functions are allocated to an existing agency, policymakers should assess that the mission of the agency is compatible with the objectives of the new regime, and whether the new functions will get sufficient resource and attention.

F8.6 Regulator involvement in providing strategic policy advice is important for effective regulatory outcomes. Strategic policy should be developed so that it taps the experience of regulators and provides a dispassionate assessment of the issue. To ensure this balanced assessment, regulators should not have the sole or main responsibility for reviewing underpinning frameworks.

F8.7 Creating separate bodies so that one body is responsible for making rules and the other for enforcing them can have benefits, such as greater transparency, probity and good decisions. Even so, whether structural separation creates net benefits will depend very much on the details of the regulatory regime. Combinations of other regulatory design options (such as clearer regulatory objectives, stronger reporting and consultation obligations) may provide equivalent benefits, with lower costs and less disruption.

F8.8 Cooperative arrangements like Memoranda of Understanding play an important role in managing regulatory overlaps. To be most effective, they should be reviewed regularly, be publicly available, provide clear guidance to regulated firms and individuals, and be empowered by legislation.

F8.9 Exemptions can help a regulatory regime adapt to changing circumstances and manage overlaps. They may be appropriate where:

- unforeseeable circumstances may undermine the effectiveness of primary legislation;
- there is a need for urgent action;
- regulated activities change frequently;
- regulated parties are subject to overlapping or inconsistent requirements; or
- there is a need for technical or trivial changes to the law.

F8.10 Exemption powers in new regimes should be specified in primary legislation, including purposes for the granting of exemptions, criteria for their issue, requirements for regulators to give reasons for an exemption, and sunset clauses. Where exemptions are granted by regulators, they (and the reasons for the decision) should generally be published.

Recommendations

R8.1 The Cabinet Manual should be amended to set a general expectation that exposure drafts will be published and consulted on before introducing into Parliament legislation that creates a new regulatory regime or significantly amends existing regimes.

Chapter 9 – Regulatory independence and institutional form

Findings

F9.1 Designers of regulatory regimes must carefully assess the arguments for and against regulator independence. Arguments for political control must be weighed against the benefits of providing a credible long-term commitment to an impartial and stable regulatory environment.

F9.2 There are a number of situations when it is likely to be appropriate for regulatory regimes to be established independently of political control, including:

- where the costs are long term, and likely to be undervalued due to a focus on electoral cycles;
- where powerful private interests are weighed against a dispersed public interest;
- where a substantial degree of technical expertise, or expert judgement of complex analysis is required; or
- where the causal relationship between the policy instrument and the desired outcome is complex or uncertain.

F9.3 To be effective, an expert regulator must operate within institutional arrangements that let it assess risks objectively and manage risks.

F9.4 "Independence" is multi-faceted and covers significantly more than formal legal designation, including:

- the ability to adjust the regulatory settings and rules (regulation independence);
- the ability to undertake functions without interference (operational independence);
- funding arrangements that protect the regulator from external pressure (budgetary independence); and
- formal distance from the Executive and security of tenure for governors and senior management (institutional independence).

F9.5 The independence of regulators needs to be balanced with commensurate obligations to consult and operate transparently. Independent regulators require strong governance, and should be subject to robust and proportionate performance monitoring and accountability arrangements.

F9.6 As regulatory legislation is reviewed, designers should consider how the regime can be flexible enough to take account of ongoing technological developments.

F9.7 There is inconsistent allocation of legislative provisions between primary legislation and types of secondary legislation in regulatory regimes. There is evidence that existing mechanisms to promote greater consistency are ineffective.

F9.8 Overseas guidance acknowledges that a need to regularly adjust legislative provisions can support placing those provisions in secondary legislation.

F9.9 There is scope for the greater use of delegated legislation, subject to stronger controls discussed in this report, to ensure regulation can keep pace with technological and other developments. Designers of regulatory regimes need to consider whether delegation could help future-proof the regime, particularly in areas subject to technological or other changes.

F9.10 Political pressures to intervene in the decisions of independent regulators are inevitable from time to time. Providing transparent mechanisms for political intervention in the decisions of independent regulators is preferable to wholesale regulatory reform designed to resolve short term political frustrations. It can also strengthen a regulator's ability to withstand informal political pressure.

F9.11 Designers need to plan for how to manage the political imperatives to intervene in regulatory decisions. Where direct powers of intervention are provided, they should be infrequent and there should be transparency obligations around their use. The design and exercise of any powers of intervention should seek to mitigate the risks that:

- precedent is set for future intervention;
- the regulator's authority is undermined;
- regulated parties are encouraged to work around the regulator.

F9.12 Designers of regulatory regimes to assure quality in public services need to consider how they expect the funding and regulatory levers will be exercised to manage performance issues across the whole system. They also need to ensure that regulatory requirements are appropriate for publicly-funded and privately-funded services.

F9.13 The expectation that departmental agencies will operate with a high degree of autonomy is dependent on agreements between ministers and between chief executives and any provisions for statutory independence, rather than any legal protections associated with this institutional form.

F9.14 Government has indicated that departmental agencies offer a means to incorporate regulatory functions currently carried out in Crown entities into the legal Crown. 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.

F9.15 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.

F9.16 The three types of statutory Crown entity are distinguished by the ease with which board members can be appointed and removed, and whether the entity is obliged to "have regard to" or "give effect to" ministerial policy directions made under the Crown Entities Act 2004. However, it is very rare for ministers to issue policy directions or remove members of regulatory Crown entities.

F9.17 The choice of institutional form will be important as much in terms of what it signals around expected levels of agency independence, as for the legal protections associated with particular agency forms.

F9.18 Ministers and the founding governors and leaders of new agencies need to pay particular attention to the norms and cultures established around independence, in terms of the relationships between them, and the agency's operations.

F9.19 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.

F9.20 Coherence problems between executive functions cannot be resolved by co-locating those functions alone. Designers of regulatory regimes need to identify what functional, personal and professional relationships are key to the effective operation of a regulatory regime, and assess which of those relationships are best managed within an organisation and which are amenable to management between separate organisations. This should inform decisions around the location of regulatory functions.

F9.21 While structural changes in regulatory agencies can be necessary from time to time, the benefits of change can take time to emerge, and the operation of regulatory regimes may be disrupted in the interim.

F9.22 Chief executives of regulatory agencies undergoing structural change should ensure that change management strategies discuss how the effective operation of regulatory functions will be maintained during the change.

Recommendations

R9.1 The minister with responsibility for regulatory management should coordinate a principle-based review of regulatory legislation to ensure greater consistency in allocation of legislation material between primary legislation and types of secondary legislation.

R9.2 The Legislation Advisory Committee should expand its guidelines to describe the situations where different types of delegated legislation are appropriate, including delegating authority to the Governor-General in Council and to regulators.

R9.3 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 and, where appropriate, in statute.

R9.4 The State Services Commissioner should approve agreements between the chief executives of host departments and departmental agencies to ensure that respective roles, responsibilities and accountabilities are clear, and that there are appropriate formalities in place to preserve the independent exercise of statutorily independent powers.

R9.5 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.

Chapter 10 – Governance, decision rights and discretion

Findings

F10.1 Boards of Crown entities, not departmental monitors, are accountable to ministers for the performance and effectiveness of the organisation.

F10.2 A high degree of interaction between a minister and the chief executive of a regulatory Crown entity, without the participation of the board chair, can be a signal that the governance, oversight or form of the entity may need to be reviewed.

F10.3 The quality of strategic leadership from the board of a regulatory Crown entity strongly influences the effectiveness of the organisation.

F10.4 Boards of regulatory Crown entities report difficulties in developing and gaining agreement on meaningful performance indicators. Activity measures by themselves are not effective indicators of regulatory performance.

F10.5 There is a wide degree of unjustified variation in the processes used to appoint, re-appoint, induct and support the development of board members of regulatory Crown entities.

F10.6 Opportunities exist to enhance the capability of boards overseeing regulatory Crown entities by leveraging the regulatory expertise developed by board members in other fields of regulation. This could be done by cross-appointing members of regulatory Crown entities, and by exploring further opportunities for international cross-appointments.

F10.7 There is evidence of confusion around the role that some members of Crown entity boards with industry backgrounds are expected to play.

F10.8 There is good SSC guidance on managing conflicts of interest for members of Crown entity boards.

F10.9 No board member of a Crown entity should be appointed to act as a representative of any external group. Regardless of their background, experience and prior or ongoing association that make them valuable as a board member, their duty should always be to ensure the entity acts in a manner consistent with its statutory objectives and functions, and not as the representative or agent of any external group. The exception is where co-management arrangements are expressly intended.

F10.10 The variety of internal governance arrangements and allocation of decision-making rights in regulators appears to be ad hoc rather than based on sound governance principles.

F10.11 Ministerial decision making is likely to be appropriate where decisions involve:

- significant value judgements, where trade-offs are not readily amenable to analysis; or
- significant fiscal implications, or which are integral to a government's economic strategy.

F10.12 In practice, the distinction between single-member and multi-member decision making is not always sharp. Overarching policies can control, and colleagues/staff are likely to inform, the actions of individual decision makers.

F10.13 Multi-member bodies offer the potential to produce higher-quality decisions than individuals because of the wider range of skills and perspectives. Whether they do deliver better decisions depends on the quality of members and the quality of the body's decision-making processes.

F10.14 There is extensive delegation of regulatory decisions within New Zealand regulatory regimes. In practice, decisions are taken by a range of compliance staff, managers, chief executives, boards and ministers.

F10.15 Internal governance manuals should describe how a board will recognise the distinction between the exercise of regulatory functions (including taking regulatory decisions) and internal governance (including oversight and assurance) functions in its operation.

F10.16 Administrative discretion is a feature of many regulatory regimes. Principle-based or outcome-based regulatory regimes inherently involve the exercise of discretion, as do risk-based approaches to implementing regulation.

F10.17 There is a range of legal constraints on the exercise of discretionary decisions. Decisions must be taken in accordance with principles derived from the common law, and not unjustifiably infringe the civil and political rights enshrined in the New Zealand Bill of Rights Act 1990. The courts can enforce these constraints.

F10.18 Institutional and cultural constraints on the exercise of discretionary power support legal constraints by promoting ethical decision making.

Recommendations

R10.1 The centre supporting the minister for regulatory management should actively support departments in managing appointments and reappointments to regulatory Crown entities. It should particularly assist departments in analysing the knowledge, skills and experiences required on the board of each regulatory Crown entity, and work with the department and the board chair to analyse the current skills on the board.

R10.2 The Cabinet Office should require that agencies consult with the centre supporting the minister with responsibility for regulatory management, before submitting papers proposing the appointment of members to regulatory Crown entities. The centre should be able to insert a comment in appointment papers about the quality of appointment processes undertaken.

R10.3 The State Services Commission and the Treasury should evaluate the effectiveness of more active support of regulator board appointments, and advise the Government on whether a similar process should apply to non-regulatory board appointments.

R10.4 Regulators should make their conflict of interest policies available on their website.

R10.5 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 a member is neither appointed nor should act as the representative or agent of any external group.

R10.6 All regulators should publish and maintain up-to-date information about their regulatory decision-making processes, including timelines and the information or principles that inform their regulatory decisions.

Chapter 11 – Decision review

Findings

F11.1 In New Zealand there is significant overlap between the scope of judicial review and appeal in practice.

F11.2 Judicial review in New Zealand is much wider in scope than in Australia, and can include greater scrutiny of the merits of decisions.

F11.3 Courts will generally defer to the decisions of expert regulators of highly complex or technical areas. In these areas of regulation, there is still a clear distinction between judicial review and appeals, and judicial review is less likely to scrutinise the substantive merits of decisions.

F11.4 Designers of new regulatory regimes should consider providing for the internal review of day-to-day administrative decisions taken by individuals.

F11.5 In general, legislation establishing regulatory regimes does provide access to merits review of regulatory decisions.

F11.6 In areas of complex or highly technical regulation, access to merits review or the scope of appeal provided is often limited or non-existent.

F11.7 It will generally be inappropriate to provide for appeals of ministerial decisions.

F11.8 Access to judicial review should be approached in a non-instrumental way. Judicial review is an important constitutional check on the power of the Executive, and is available to citizens as of right.

F11.9 Designers of regulatory regimes should provide for access to appeal where it is likely to improve the quality of regulation, taking into account the costs of providing it.

F11.10 The Commission has found no evidence to suggest that judicial review is an ineffective method of challenging the decisions of regulators, or that decision makers routinely reach the same decision after a successful judicial review.

F11.11 An absence of merits review increases the likelihood that aggrieved parties will seek recourse outside the legal system. In particular, it will encourage special pleading to politicians.

F11.12 Merits review does not offer additional safeguards to ensure decision makers follow good processes, beyond those offered by judicial review.

F11.13 The broad scope of judicial review in New Zealand means that the availability of merits review would not provide significantly stronger incentives on regulators to make correct decisions than is provided by access to judicial review alone in most areas of administrative decision making.

F11.14 In highly complex or technical fields, where judicial review is less likely to scrutinise the substantive merits of decisions, merits review may strengthen the incentive on regulators to take good decisions.

F11.15 Providing access to merits review may not always promote the objectives of a regulatory regime.

F11.16 Designers of new regulatory regimes need to consider whether to provide access to merits review. In areas of highly complex, technical regulation, designers need to critically assess whether the appellate body has the institutional capability, compared to the decision maker at first instance, to improve the quality of decisions in terms of Parliament's objectives for the regulatory regime. Designers of regulatory regimes also need to take into account the costs, delay and uncertainty created by providing access to merits review.

F11.17 Designers of regulatory regimes in highly complex or technical fields should not assume that the incidence or complexity of appeals will inevitably decline over time, particularly where the cost of regulated parties appealing is small compared to the potential gain.

F11.18 Providing access to appeal rights can promote confidence in the quality of a regulatory regime, particularly for international investors.

F11.19 In appeals of highly complex or technical regulation, providing the court with opportunities to directly question experts, in a non-adversarial setting, can assist in understanding the issues under appeal.

F11.20 Providing courts or tribunals discretion about the admissibility of new evidence may in some circumstances be more efficient than providing for appeals based on a frozen record.

F11.21 Foreign expertise can play a valuable role in bringing expertise to merits review of highly complex and technical regulatory regimes.

Recommendations

R11.1 The Officers of Parliament Committee should review the adequacy of funding for the Office of the Ombudsman to undertake its statutory functions to a high standard.

Chapter 12 – Approaches to funding regulators

Findings

F12.1 Organisational responsibility for advising on, implementing and scrutinising funding arrangements has been established, and guidelines offer regulators and advisors guidance on how to approach funding issues. However, the two sets of guidelines cover similar issues in different ways. There is no general requirement for ex post evaluation of the impact of cost recovery and little published evidence about how well funding arrangements are working.

F12.2 While there can be benefits from regulators being at least partially funded through cost recovery, case-by-case assessment of proposals for funding regulators is required to secure these benefits in practice.

F12.3 The Commission's survey of businesses, and submissions to the inquiry, indicate concern in the business community about:

- the quality of the consultation that takes place before regulatory fees or levies are introduced;
- weak constraints on the level of charges, including limited transparency about how they are determined; and
- the structure of charges.

F12.4 The funding frameworks in other selected countries are similar to New Zealand in that they:

- set out efficiency and, to a lesser extent, equity as the main objectives of cost recovery;
- require consent, usually of a minister or Parliament, before a fee or levy is introduced;
- are based on a distinction between cost recovery and taxation; and
- provide guidance material.

However, other jurisdictions have examples of:

- more rigorous consultation and impact assessment requirements before fees are introduced;
- stricter requirements for performance standards and reporting against those standards when new fees are introduced;
- penalties for failing to achieve the standards; and
- more detailed advice about how to implement cost recovery.

F12.5 It is desirable that regulators, as they develop improved performance reporting frameworks, use these frameworks to measure the cost of delivering regulatory services and report this information publicly.

Recommendations

R12.1 The Government should publish its cost recovery policy, outlining its policy objectives, and setting out guiding principles relating to:

- how to make trade-offs should objectives conflict;
- when cost recovery may be appropriate;
- consultation requirements before implementation;
- how and when arrangements are to be reviewed and by whom; and
- responsibility for ensuring compliance with the policy.

R12.2 Agencies proposing a new or amended fee or levy for regulatory services should publish a statement outlining, for example:

- the reasons why they are introducing/amending a fee or levy;
- their legal authorisation for doing so;
- the consultation undertaken;
- the expected effects of the fee or levy; and
- the process for monitoring these effects and reviewing the policy.

R12.3 Agencies responsible for cost recovery arrangements should make sure that the arrangements are reviewed periodically to ensure that they remain justifiable in principle, efficient and effective.

R12.4 The Government and the Auditor-General should review the Treasury's *Guidelines for setting charges in the public sector* (2002) and the Auditor-General's *Charging fees for public sector goods and services* (2008), to ensure that the guidelines reflect current knowledge about when and how to implement cost recovery.

Users of the guidelines (whether the two sets of guidelines continue or are combined) should:

- only have to go to one place for advice on any issue;
- not receive conflicting advice from the guidelines; and
- be clearly informed about the scope of the entities and charges that the guidelines cover.

R12.5 The Government, when it reviews New Zealand's cost recovery guidelines, should seek to collaborate with the review of the cost recovery guidelines currently being undertaken in Australia.

R12.6 The Government should consider whether those agencies that set or amend fees or levies can access adequate advice and experience from other agencies and departments.

Chapter 13 – Monitoring and oversight

Findings

F13.1 Assessing the performance of regulators can be a challenging task. Regulatory practice can often be opaque or involve highly specialised knowledge, and attribution of success to a regulator's actions can be difficult.

F13.2 Members of regulatory boards interviewed for the Commission were less satisfied with monitoring arrangements than their departmental monitors. Key problems identified with current monitoring practices were:

- insufficient support from departments;
- departments who did not understand their roles;
- inadequate capability and high turnover in monitoring staff; and
- too much reporting, and not enough focus on the regulator's performance and strategy.

F13.3 High levels of turnover in departmental monitoring staff are not conducive to effective relationships with regulatory Crown entities.

F13.4 Strong links between monitoring and policy functions within departments are important for effective engagement with regulators and quality advice to ministers. Formally allocating monitoring responsibilities to relevant policy teams within departments may help provide these strong links.

F13.5 The Commission is not convinced that the potential merits of moving monitoring functions from policy departments to a central organisation outweighed the likely costs.

F13.6 Current monitoring processes do not pay enough attention to the detail or effectiveness of a regulator's strategies and practices. This limits the ability of policy departments or ministers to form accurate views about the performance of a regulator.

Recommendations

R13.1 Departments should appoint staff into monitoring roles for terms that support good working relationships with regulatory Crown entities.

R13.2 Departments should move towards risk-based monitoring and reporting, with higher-performing regulatory Crown entities subject to less frequent reporting obligations.

R13.3 Department–regulator relationships that involve very regular and close contact should be revisited, with a view to moving to more formal interactions, based on clearly-defined roles and responsibilities.

R13.4 Some form of peer review, drawing on the expertise of other regulatory leaders, should be established to help fill the gap in current monitoring processes.

R13.5 The regulator peer reviews should be conducted as part of the Performance Improvement Framework process.

R13.6 The State Services Commission should convene a panel of current and former senior regulatory leaders to develop a set of regulator-specific questions for the Performance Improvement Framework reviews.

R13.7 If resource constraints mean that progress on rolling PIF out to the wider set of Crown entities will be slow, central agencies should explore the feasibility of introducing a streamlined PIF process for regulators, focusing on regulatory practice, engagement and culture.

R13.8 The State Services Commission should identify current and former regulatory leaders to join PIF review teams.

R13.9 The priority for the PIF peer reviews should be the larger regulatory Crown entities, those entities that implement regimes managing significant potential harms, and departments that implement regulatory regimes. Smaller Crown entities (eg, with a total budget of less than $5 million) should be able to volunteer for a peer review, but not be required to undertake one.

Chapter 14 – System-wide regulatory review

Findings

F14.1 The New Zealand Government is implementing a suite of initiatives to improve the management of the stock of legislation and regulation. It does not use many of the approaches to system-wide evaluation of regulatory regimes that are used in other countries, some of which have been identified as involving low effort and potentially low/high return in those countries.

F14.2 Developing charters or Statements of Intent for individual regulatory regimes could be beneficial, especially if the process:

- actively involves all the agencies involved in the administration and implementation of the regime;
- clearly outlines the relative roles and responsibilities of each agency;
- identifies measures of success and risk factors to be monitored; and
- considers the environment within which regulation takes place, especially the regulated community and the costs imposed on them.

Recommendations

R14.1

The Government should:

- publish the regulatory system reports prepared by departments;
- require departments to articulate in their Statements of Intent their strategies for keeping their regulatory regimes up to date;
- within three years, commission a review of each department's progress and seek advice from that review about whether it is necessary to create a legislative framework or new mechanisms for managing the stock of regulation.

R14.2

The Treasury should:

- articulate a set of principles to encourage departments to focus effort on reviews that have the largest anticipated benefits;
- set up an ongoing preliminary assessment process to identify areas requiring attention (these assessments could be undertaken by the responsible departments, or by a central department or even by a new agency); and
- specify targets such as overall yearly expenditure, or a target number of reviews, to force identification of the reviews with the largest potential benefits.

R14.3

Once the Ministry of Business, Innovation and Employment (MBIE) has completed the development of Statements of Intent/charters for the workplace health and safety and employment relations regimes, the Treasury and MBIE should evaluate the process, with a view to:

- identifying any areas for improvement; and
- providing guidance about the model to other policy ministries.

R14.4

The Government should publish an overarching strategy that sets out how it will improve the management of the stock of regulation. The strategy should explain how specific initiatives fit within it, and should describe how successful implementation of the strategy will be measured and how it will benefit the community.

Chapter 15 – Information to understand and manage the system

Findings

F15.1

The absence of a central electronic repository of Other Instruments constrains the ability of firms and individuals to access and understand their regulatory rights and obligations.

F15.2

Maps and typologies of regulatory regimes and agencies may not be of much use in assisting central agencies to understand the relationships and differences between regulatory regimes. In some circumstances, they may oversimplify regimes or lead to inaccurate or inappropriate conclusions.

F15.3 There is a need for greater comparative analysis of regulator practices and behaviour. However, system-wide standardised reporting is unlikely to be the most effective tool for identifying risks or performance issues across the system, as it would be very difficult to fairly reflect the diversity of regimes and regulators in a single set of indicators.

F15.4 Central agencies should monitor the performance of the regulatory system as a whole; in particular, its ability to provide proportionate and necessary regulation; prioritised regulatory effort; adequate resourcing of implementation; fair and effective implementation; and self-aware and adaptive regulatory organisations. The Commission notes that the Treasury has already begun this process.

F15.5 The fact that some departments are not fully participating in the Treasury's regulatory management and oversight processes limits the ability of ministers to make informed judgements about priorities and the performance of the system.

F15.6 Central monitoring of the regulatory system's performance should be based on both a mix of information generated by departments and regulatory agencies, and data from external or independent sources.

Recommendations

R15.1 The Parliamentary Counsel Office should expand the New Zealand Legislation website (www.legislation.govt.nz) to provide a central and comprehensive source of Other Instruments.

R15.2 As the Regulatory Systems Report (or equivalent monitoring processes) evolves, the Treasury should collect more information about the outputs and outcomes from departmental regulatory management systems.

Chapter 16 – Strengthening institutions

Findings

F16.1 Quality checks on legislation and regulation appear to be reducing. They are fragmented, of varying effectiveness, and in some cases under strain.

F16.2 The availability of parliamentary time remains a significant bottleneck to the maintenance, repair and, where appropriate, repeal of the stock of regulatory legislation.

F16.3 A range of options exist to improve the quality of legislation, and to enable Parliament to better understand the quality of the legislation it has created or authorised.

Recommendations

R16.1 Government should commission a review into improving and maintaining the quality of new and existing legislation, including:

- processes for producing and vetting the quality of legislative proposals and draft legislation;
- the respective roles of the Parliamentary Counsel Office, the Law Commission, Legislation Advisory Committee, and Legislation Design Committee; and
- relevant parliamentary processes.

R16.2 The Government should publish the responsibilities of the minister for regulatory management. These responsibilities could include:

- defining the overall objective of the regulatory system;
- prioritising effort across the system;
- specifying and allocating tasks for improving the system; and
- promoting regulatory policy and the case for continuous improvement in regulatory design and practice.

R16.3 The minister for regulatory management should publish a strategy report that sets out the medium-term objectives that the Government is seeking to achieve through the regulatory system, its strategic prioritisation of effort for achieving these objectives, and its work programme. The minister should report regularly on progress towards delivering this work programme, and update the statement as necessary.

R16.4 The Treasury should provide support for the minister for regulatory management, through an expanded team, with a published charter setting out its objectives and functions, its own website, and the authority to identify itself as a separate unit within the Treasury.

R16.5 The Government should locate the proposed role for providing intellectual leadership on regulatory issues within the Treasury team that provides advice to the minister for regulatory management. It should review the effectiveness of the new arrangements no later than three years after they are established.