

Keith Manch

Improving the Implementation of Regulation time for a systemic approach

The importance of an 'efficient and effective regulatory environment' (Offices of the Ministers of Finance and Regulatory Reform, 2013) has never been more prominent in New Zealand than it is at the present time. The New Zealand *Productivity Commission's Regulatory Institutions and Practices* report, which is both a product of and contributor to this

enhanced prominence, noted that there is growing interest in regulation in New Zealand stemming from the increased importance of individual freedoms and human rights, the growing awareness of the impacts of both good and bad regulation, the way government now organises itself to provide services and implement policy, and the diversity of society and its range of attitudes to risk and expectations about government's actions (New Zealand Productivity Commission, 2014, overview, p.1).

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There are many ways to enter into a discussion about an efficient and effective regulatory environment: for example, through the lens of boosting New Zealand's productivity growth, international competitiveness and living standards (Minister of Finance and Minister of Regulatory Reform, 2009); in relation to the increasing focus on good public sector management,¹ which includes regulatory system stewardship (Treasury, 2013); or by addressing the importance of avoiding, responding to and learning from regulatory disasters (Black, 2014). Discussions may or may

While the focus on improving the efficiency and effectiveness of the regulatory environment is prominent now, it is not new. What is new is that it is much more holistic and encompassing of the entire regulatory environment now than it has been before. Significantly, the light is now shining on implementation much more than it has in the past. Of course, the three elements – design, implementation and review – would not be separated in a comprehensive discussion about an efficient and effective regulatory environment, as each supports and drives the other. However, the primary

skill, knowledge and training of central government regulatory workers; the sheer scale of regulatory implementation activity across government as a whole should, in and of itself, suggest the need for good stewardship; and the apparent significance that the quality of regulatory implementation has played in regulatory disasters.

Effectively, implementation capability issues have been left to individual agencies, compared to, for example, the system-wide focus on leadership development through the Leadership Development Centre, and the system-wide focus on design and review³ represented by the Treasury's work in areas such as best practice regulation, the regulatory review work programme and regulatory impact analysis. However, the needs of regulatory practitioners and the organisations they work in relating to better implementation through improving regulatory practice and workforce capability have not been ignored completely from a system-wide perspective, at least since 2008.

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not include philosophical perspectives on the place or volume of regulation. But, whatever the view on more or less regulation, or the entry point to the discussion (broad economic performance, regulatory stewardship or avoiding regulatory failures), we probably all agree that regulation that is in place should provide benefits that would not accrue in its absence, at reasonable cost.

At this point it is useful to be clear about the words being used in this article. Reference to the 'regulatory environment' means the environment in which our regulatory systems operate. Reference to 'regulatory systems' means the end-to-end approach of government intending to influence or compel specific behaviour. This includes policy development and the design of instruments intended to achieve the intention; the implementation of those instruments; and identifying and understanding the outcomes achieved and assessing and reviewing the success of each of these components, and the whole.²

For the sake of convenience, it is useful to summarise the above into three main elements: *design*, *implementation* and *review*.

focus of this article is on improving the implementation component of this cycle of activity. Without question, one of the benefits of improving implementation capability is that contributions to design and review will be stronger.

Up until recently the main formal focus of implementation improvement has been through establishing best practice regulation principles (Treasury, 2012). While these principles establish what is required in terms of regulatory practice (used here to mean the operational practice of regulators, often referred to as 'compliance' work) and capability, there has been nothing formal or mandated to actually address these elements. On the one hand this is not remarkable, given that, of 23 chief executives of regulatory agencies surveyed as part of the Productivity Commission's work on the *Regulatory Institutions and Practices* report, only five agreed that there are significant skill gaps among regulatory staff. On the other hand, remarkably the commission's survey of Public Service Association members and also its business survey indicated considerable concern about the level of

The Compliance Common Capability Programme (CCCP)

In May 2008 a group of regulatory agency representatives attended a meeting hosted by the Department of Internal Affairs and Learning State (at that time the government's industry training organisation, the functions of which are now delivered through the Skills Organisation). The explicit purpose of the meeting was to create a joined-up approach to improving the competency of front-line staff involved in implementing regulation.

Agreement was reached to develop a commonly-accepted investigator qualification. As this commenced, it also seemed sensible to develop a more complete framework of qualifications relating to the typical functions undertaken in the course of the implementation of regulation, including informing, educating, advising, inspecting, monitoring, auditing, investigating and sanctioning. Additionally, there was an early decision to engage across both central and local government, and a view that improvement was required both at the front line and in areas of management and leader-

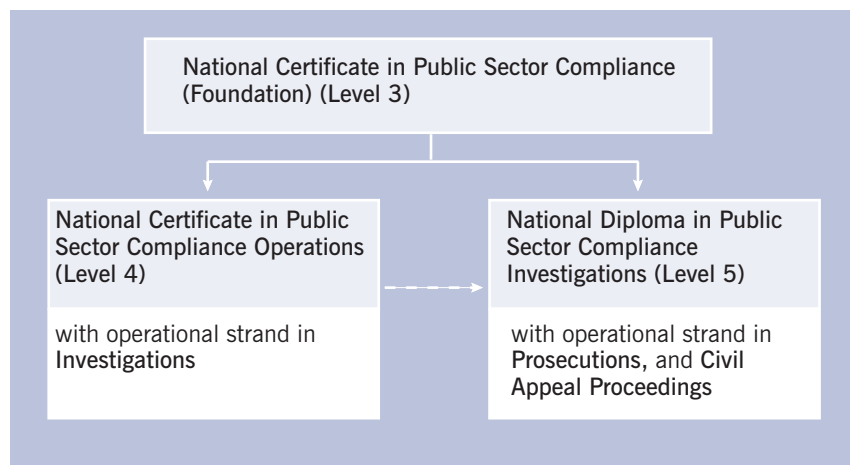
ship of regulatory functions. With strong support from 18 central and local government agencies, initial work on qualifications began with Learning State in May 2008 (see Box 1).

Operationally-focused regulators involved in the work were familiar with the challenges of being engaged in implementation of regulation as part of organisational structures that either paid this issue limited attention, or were not aware of the challenges and complexity of modern regulatory activity. It seemed logical, then, to also develop some kind of practical guide that might be useful for organisations, or functions in organisations, responsible for the implementation of regulation: something that would bring together organisational strategy and design thinking with current thinking on regulatory practice – drawing on both international and domestic experience – in a way that was useful for regulatory implementation practitioners and decision-makers. The key issue was that a focus on improving the capability of individuals needed to be supplemented with action to address organisational capability. The result was the development of *Achieving Compliance: a guide for compliance agencies in New Zealand* (CCCP, 2011) (see Box 2). This guide was described by the Productivity Commission in its report as ‘The main source of guidance on compliance and enforcement in New Zealand’ (p.128), having previously been cited as ‘best practice’ by the royal commission on the Pike River mine disaster (Royal Commission on the Pike River Coal Mine Tragedy, 2012).

The development of the qualifications and the guide inevitably brought together a wide range of people, expert in their own areas of work in the operational regulatory and compliance field, all with an inherent understanding that there is a lot of benefit to be gained from more sharing of ideas, standardisation of approaches and learning from the experience of others. It was clear to those of us who had been involved in regulatory work within and across central and local government agencies that there were significant benefits to be gained from a more joined-up approach for our organisations, our people and those we

Box 1

The initial phase of qualifications development led to three qualifications being listed on the New Zealand Qualifications Authority framework



regulate. From modest beginnings, the CCCP ended up with an overall plan that focused on professionalising and strengthening people, organisations and the community of people involved in the implementation of regulation. The vision is that professionally qualified people will bring their individual competency into business groups or agencies that have enhanced organisational competency in regulatory implementation work, with the additional benefit that they will be better placed to engage effectively with design and review activities.

The ‘value proposition’ of the CCCP was expressed in the following terms when the original qualifications and the guide were launched at Parliament:

Overall, government and its organisations have a strong interest in the quality of the body of regulation. However, getting the policy and the quality of regulation right is only half the story. If implementation is not efficient and effective, investments in improving the body of regulation won’t be realised. The CCCP supports the sharing of information and knowledge about better practice operational compliance work at low cost and in a practical way, alongside a ‘build once – use many times’ approach to improving people competency. The investment that compliance people make in

their professional development will provide transferable skills and better career prospects for them, while at the same time lowering recruitment risks and induction costs for their organisations. Overall, the compliance workforce will be better skilled, according to common standards, and more broadly aware of the strategic, tactical and operational requirements of their work. It will be easier for agencies to work together on joint problems when their people have common ways of operating.

The people and businesses we regulate will come to know and understand what to expect from the government as a whole at the operational regulatory level, rather than having to work out how to engage with different agencies, in different regions, that might have very different approaches to essentially the same thing – assisting and encouraging people to behave in ways that meet desired outcomes. (Manch, 2011)

The Minister of Internal Affairs at the time, Nathan Guy, made the following comments:

Regulation and compliance plays a big part in our society. It has a direct link to economic development, public safety, and protecting the

Box 2

Achieving Compliance provides guidance on effective strategies, practices and organisational design for compliance agencies engaged in the implementation of regulation. It covers:

- compliance models and strategies;
- governance and organisational design of compliance agencies;
- key compliance functions and activities;
- other organisational frameworks for compliance work.

This guide does not deal with the development of regulatory policy (design), although it does discuss ways in which compliance agencies' experiences in administering regulation feed back into and inform regulatory policy (review).

Box 3

The Targeted Review of Qualifications Process has identified a set of five proposed qualifications (which will ultimately replace those referred to in Box 1) to meet the needs of local and central government agencies carrying out regulatory compliance activities. These qualifications focus on the commonalities across the regulatory sector. The qualification outlines approved for development into qualifications are:

- New Zealand Certificate in Regulatory Compliance (Level 3);
- New Zealand Certificate in Regulatory Compliance (Operational Theory) (Level 4);
- New Zealand Certificate in Regulatory Compliance (Operational Practice) (Level 4);
- New Zealand Certificate in Regulatory Compliance (Level 5) with strands in Regulatory Compliance Audit, Investigation, and Operations;
- New Zealand Diploma in Regulatory Compliance (Investigations) (Level 6) with optional endorsements in Prosecutions, and Civil Proceedings.

environment. To get better outcomes, we need to lift the capability of the people and organisations that work to achieve compliance with regulation. In New Zealand, our public compliance sector is made up of around 30 central government agencies, 85 local authorities and around 12,000 individual staff members. So it's pretty sizeable. Until now, the level of collaboration by this important sector has been largely informal. Progress has been a bit piecemeal. (Guy, 2011)

Since its inception, the strength of the CCCP has been its entirely voluntary basis, which means that those who have engaged did so because they explicitly saw the benefits for their agencies, their people and the system as a whole. The strength is also a weakness, in that it is an arrangement that depends on the interest of individuals who are in positions that are relevant to the purpose of the CCCP,

and there is no lasting institutional or system-wide commitment to the success of the work it does – which, to succeed, by its nature needs to be long term. The existence of the CCCP has tended to give comfort that 'something is being done'.

Current state of the CCCP

Perhaps both because of and in spite of the voluntary nature of the CCCP, it has continued to develop in parallel with much of the growing focus on the efficiency and effectiveness of the regulatory environment. The following are among its current initiatives and offerings:

- The development of a Regulatory Compliance Learning Council (RCLC), formed in August 2012 as an operational arm of the CCCP in order to progress people capability development. It is comprised of a CCCP steering group sponsor, learning and development/human resources personnel and experienced operational staff people from central

and local government agencies, and the CCCP project manager. The RCLC's current capability development activities are based around two key topics: regulatory craftsmanship and investigations. It is also contributing actively to developing the next iteration of core compliance qualifications.

- In June 2014 the RCLC trialled effective regulator practice (core concepts) discussion workshops for managers and senior practitioners. Two sessions were run, attended by 52 participants from 15 local and central government agencies. The sessions were designed and delivered by senior practitioners employed by Maritime New Zealand and the Commerce Commission, and hosted by the Civil Aviation Authority. The workshops clearly filled a need: feedback was positive ('one of, if not the most, worthwhile meetings I've been to for a while'), and participants signalled a strong interest in staying connected and exploring the material covered at a deeper level.
- A DVD initially created to provide resource material for the above workshops, and which will be made available for little or no cost to as wide an audience as possible. Once a channel for distributing this material has been established, it is expected that other resources suitable for open-source sharing will be created and published.
- The programme has been progressing, as resources permit, the development of a draft Regulatory Practice Skills Framework. This is intended to provide a sector-wide view of common ground relating to regulatory practice, skills and knowledge. It is designed to be used in conjunction with other frameworks (where appropriate) and to be informed and improved by other similar work. Even when 'finished' it is intended as a living document that can be improved, amended and developed over time. In its current state it has proved useful in supporting the development of the latest suite of core regulatory

compliance qualifications (see below and Box 3). It has also been shared with Australian colleagues through the Australasian Environmental Law Enforcement and Regulators Network, where it has been very well received.

- The CCCP is actively involved in developing the next iteration of New Zealand qualifications for staff working in local and central government agencies that carry out regulatory compliance work.⁴ It is a member (alongside the Skills Organisation and New Zealand Police) of a consortium of qualification developers who are jointly responsible for producing compliance qualifications that meet the needs of the sector. To fulfil these duties, the CCCP is playing a key role in: drafting initial qualifications content; supporting and co-facilitating the development process; encouraging active participation from local and central government organisations; and drawing on its networks to source governance group and working group members, including from its own steering group and the RCLC. The qualifications development process is likely to require significant input until June 2015.
- The CCCP's organisational and people capability development activities have created informal knowledge-sharing networks among local and central government regulators. The CCCP communicates via an 'interested parties' database, and with compliance approved providers⁵ and the wider regulatory compliance sector.

Next steps

Although progress is being made, those of us involved in the CCCP are firmly of the view that while 'something is being done', a great deal more is required. In fact, one of the items on the CCCP's work programme for 2013 was to examine its future, with the strong sense that continuing to operate at the level it had been – albeit with some good initiatives – was not keeping pace with growing understanding and the need for improvements in the implementation

of regulation. The fact is that the nature of regulatory work is changing. While it has historically been seen as about 'simply' applying the law, it is now seen as being a discretion-laden activity. Regulators are expected to operate in a way that deals with risks and harm, and adds value, rather than 'just' addressing illegal behaviour. The depth and complexity of the task of the modern regulator is well described by Searancke et al. (2014): 'Experience, common sense and theory have combined to build a picture of a new sort of regulator, better equipped to deliver regulatory outcomes envisaged by Parliament in a complex and dynamic environment.' While they are referring specifically to building, financial and health and safety regulation as example areas, there is no reason to

the implementation of regulation today requires a level of capability up, down and across agencies that is simply not being delivered or supported comprehensively under current arrangements.

In this context, the two original 'products' of the CCCP, and its initiatives since, have been explicitly intended to focus on:

- the capability of people (through the focus on nationally-accepted qualifications and activities such as collaborative workshops and resource development and sharing);
- the capability of regulatory implementation organisations (through the development of the guide); and
- bringing people together as

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think that the same issues are not relevant to any area of regulation.

This is true in the context of the CCCP. One of the key points that enabled widespread engagement from many regulatory areas across central and local government was the fundamental understanding that the knowledge, skills and understanding required – alongside the critical technical knowledge of the subject matter – to implement regulation successfully is more similar than different across regimes. It is, after all, about delivering outcomes for the benefit of society by managing risks, solving problems, setting standards, and changing behaviour in relation to people and equipment (or the operation of a combination of those things). While those of us at the regulatory implementation front line might quibble over whether the insight about the requirement for a new sort of regulator is new, or is simply now being acknowledged by parts of the system that have not noticed it before, it is clear that

a community of practice in a way that has sown the seeds for professionalising regulatory practice.

Each of these things is necessary, and must be advanced more significantly than before if improvement in the implementation of regulation, and its role in delivering the most efficient and effective regulatory environment possible in New Zealand, is to be achieved.

The commissioning of the Productivity Commission to examine regulatory institutions and practices was welcomed by the CCCP on the basis that it might provide a thorough examination of the relevant issues. The resulting Regulatory Institutions and Practices report has done this, and brings together issues relating to regulatory practice, regulator leadership and culture and workforce capability (chapters 3, 4 and 5) that provide a strong basis not just for the CCCP in considering its future, but for government to consider how best to focus on improving implementation.

A key element of the opportunity to move forward is presented in the report's recommendation relating to the introduction of a head of profession role. The Productivity Commission recommended that such a position should be created to provide intellectual leadership in the area of regulatory practice. It was recommended that 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;
- coordinating study tours and visits by international experts and leading academics in the field of regulatory studies; and

- leading and managing professional forums of regulators.

This has galvanised action by senior regulatory practitioners – coordinated by the Department of Internal Affairs, the CCCP, and representatives from the Ministry of Business, Innovation and Employment and Worksafe New Zealand – to take the initiative (rather than waiting for others to report back to government on the report) and consider putting in place a mechanism that would address the substance of the Productivity Commission's recommendations. The design, location, funding and activities are under consideration. The initiative will ideally draw from and build on the past and current work of the CCCP, with an effective funding base, a clear mandate, and people with the ability to lead, coordinate and support system-wide improvements in regulatory practice, leadership, culture and workforce capability. This will strengthen not only the implementation element of the regulatory system cycle, but enhance the ability of those involved in implementation to add value to design and review.

In conclusion, it is apparent that the combination of the increased attention being paid to the importance of an efficient and effective regulatory

environment, the changing nature of the regulatory task, the experience of the CCCP in its voluntary form, and the findings and recommendations of the *Regulatory Institutions and Practices* report provides a clear impetus for a significant next step in the way that we focus on the implementation of regulation in New Zealand. Emphasising the critical importance of improving implementation should not be taken as suggesting that design and review are separate or less important. Rather, improved implementation should be acknowledged as requiring a special focus both for its own sake, and in order to strengthen the necessary end-to-end focus on improved design, implementation and review.

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- 1 Changes to New Zealand's State Sector Act in 2013 reinforced the importance of improving the systemic focus on agency, sector and system-wide performance, the collective interest of government and stewardship: that is, paying attention to the longer-term sustainability, organisational health and capability of agencies.
 - 2 See the diagram in Offices of the Ministers of Finance and Regulatory Reform, 2013, paragraph 19.
 - 3 Although, in terms of review, refer to the Productivity Commission *Regulatory Institutions and Practices* report, which found that New Zealand doesn't have strong processes for reviewing regulatory regimes, leading frequently to a 'set and forget' mindset (p.28).
 - 4 The original three qualifications will be replaced as a result of the NZQA-initiated cross-sector Targeted Review of Qualification process, aiming to: reduce proliferation and duplication in qualifications; identify clear qualification pathways; ensure qualifications remain useful and relevant; and ensure qualifications meet the needs of learners, industry and stakeholders.
 - 5 Compliance approved providers are a group of 11 public and private sector organisations that have been selected by the CCCP as preferred providers of training and assessment services.

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