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Watching the Birth of the Regulatory Profession

Introduction

Several decisions have been taken over the past few months that aim to professionalise the regulatory community in New Zealand. A professional regulatory community is increasingly regarded as essential to achieving social, environmental and economic outcomes sought by New Zealanders, and is one of the fundamental planks in New Zealand's regulatory quality management system. It is not possible to attribute this development to a single cause; nor is it a 'revelation', as dedicated regulatory professionals from a range of agencies have built the foundations over a long period of time. Contextual factors include the impact of ideas of international experts such as Sparrow, Black and

Braithwaite, government policies that have stressed the need for better regulation and governance, and the lessons that have been learned from regulatory failures. Proximate causes include the government response to the New Zealand Productivity Commission's inquiry into regulatory institutions and practices (New Zealand Productivity Commission, 2014). This article outlines and assesses this new development.

Background

In March 2015 chief executives from a number of New Zealand regulatory agencies met and agreed to provide oversight of a regulatory practice initiative. The objective of the initiative was to lead or contribute to capability initiatives where collective action can be shown to be helpful. To progress the initiative, the chief executives established the Government Regulatory Practice Initiative (G-Reg) Steering Group, comprising senior officials from regulatory agencies and Treasury, and representatives from local government and the Combined Law Agency Group. The steering group is supported by a secretariat located in the Ministry of Business, Innovation and Employment, and a group of central and local government officials that has been formalised as the Design, Development and Delivery (3D) Network.

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Chief executives asked the steering group to: develop a business case for the adoption by agencies, as appropriate, of the compliance qualifications framework; develop and deliver one or more forums aimed at sharing best practice in relation to agency compliance plans; and develop a proposal for 2016 activities and beyond.

In 2014 the government asked the Productivity Commission to investigate how to make overall improvements in the design and operation of regulatory regimes in New Zealand. The government responded to the commission's report, *Regulatory Institutions and Practices*, in July 2015. The response acknowledged the initiative taken by chief executives

which demonstrated the relationship between the legal framework, regulator behaviours, regulatory performance and the capacity of regulatory regimes to deliver outcomes that meet societal expectations; and the three articles in the November 2014 'Focus on Regulation' issue by Ayto (stewardship), Manch (implementation) and Bailey and Kavanagh (systems, institutions and practices), which provide the background in most respects to the regulatory practice initiative.

These articles show that there has been a progressive exploration and understanding of the 'black box' that is the regulator. This has both emphasised the critical role that the regulator plays in

The diagnostic provided by the Productivity Commission in its report demonstrates that there are opportunities for improvement at all four levels.

The evolutionary context reflects recent work by Intal and Gill (forthcoming) on the evolution of regulatory management systems.¹ This work, which in turn is grounded in the practitioner literature on capability maturity models (CMM), has produced a four-stage model for regulatory management systems:

- starter or informal – ad hoc practices that are specific to the context, sector, organisation and person undertaking the regulatory quality management function;
- enabled – regulatory quality management processes have been put in place but, while the intention is there, regulatory quality management does not happen consistently;
- practiced – enacted in some sectors and often reliant on a few key people in selected institutions;
- embedded – practices are part of the public sector culture and not reliant on key institutions.

If we think about the elements of regulatory quality management as addressing the flow of regulation (regulatory impact analysis), the stock of regulation (monitoring and review) and the implementation of regulation (regulatory practice), we might consider that in New Zealand, systems associated with the flow are 'embedded', but regulatory practice is still at the 'practiced' stage.

In this regard New Zealand is not out of step with other countries. In our review of the literature and practices in other countries we have identified elements of a systematic approach to improving regulatory practice. These include the identification of good regulatory practice principles and the assessment of regulatory agencies against these.² However, with the possible exception of the AELERT network³ (albeit focused on one area of regulation, environmental), we have not seen a comprehensive and systematic approach taken to improving the capability of front-line regulators, and we are only starting to see a more systematic approach to cross-regulator

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and noted: 'Intellectual leadership of regulatory practice should come from the regulator community, so that it stays grounded in reality. Central agencies can play a supporting role' (New Zealand Government, 2015).

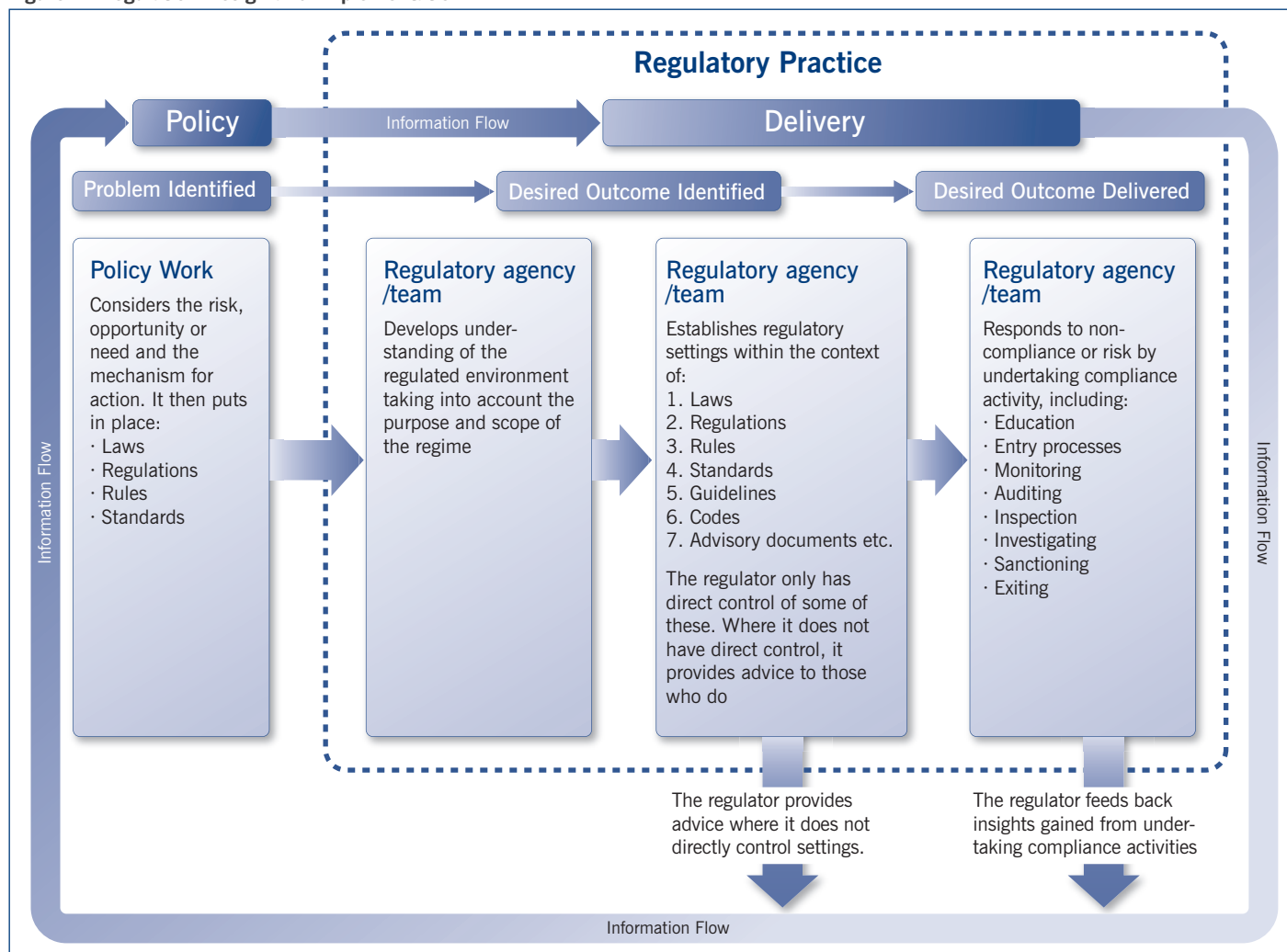
Antecedents in an evolutionary context

Policy Quarterly has published a number of articles that outline or provide insights into the antecedents for the regulatory practice initiative. These include: Mumford (2011) on 'Best practice regulation: setting targets and detecting vulnerabilities', which set out Treasury's approach to assessing regulatory regimes based on best practice principles and performance indicators drawn from New Zealand and international experience; Searancke, Mumford, Simpson and Steel (2014) on 'Governing the regulators: applying experience', which explored recent developments in statute law that aimed to strengthen the governance of regulators and their ability to operate effectively in a modern regulatory context; Black (2014) on 'Learning from regulatory disasters',

the regulatory system (that is, it is not just the rules but how they are implemented that really matters), and provided important insights, which at a high level might be summarised as follows:

- Regulatory agencies cannot be fully effective unless the regulatory framework within which they are operating gives the necessary mandate, powers, tools and resources.
- Regulatory agencies cannot be fully effective unless they have internal systems based on best regulatory practice principles.
- Front-line regulators (compliance officers) cannot be fully effective if they are not given training, experience and support by the agencies they work for.
- To complete the 'circle', ongoing improvement of the regulatory framework cannot occur effectively unless front-line regulators continually provide feedback to policy makers, who work on the regulatory frameworks, on how the regime is working in practice.

Figure 1: Regulation Design and Implementation



learning. This has been recently commented on by Black and Lodge:

Much has been written about the growing European networks of regulatory bodies and competition authorities, arrangements governing concurrency and the co-operation among those regulators tasked with utility and competition-related portfolios. However, these economic regulators are just one side of the story. There has been, as yet, hardly any endeavor to bring together those regulators in the UK whose primary responsibilities relate to the inspection of quality and safety standards. This absence is even more surprising given the considerable importance of these regulatory activities for economic and social life. (Black and Lodge, 2015, p.25)

The scope of regulatory practice

The simple answer to the question 'what

is regulatory practice?' is that it is what regulators do, and this is determined by what they are required to do by their statute. A more useful answer might be that regulators operate within a regulatory framework but discharge their responsibilities through developing principles, policies, rules, operating procedures and capability, and it is the totality of these that constitutes the 'practice'. A simplified version of what regulators do, which is then reflected in practice, is provided in Figure 1. This diagram has evolved from discussions within the steering group and a working group it established to plan a forum for sharing best practices in relation to compliance plans.

Leadership from the regulatory community

The case for intellectual leadership from the regulatory community has its foundations in the inherent character of regulatory practice: essentially, what works well in any given context is often

known within the regulatory community, and regulators have the most direct means to refine and adapt their approaches to ensure success. In this sense regulatory practice requires codified and tacit knowledge, and the exercise of judgement. The intellectual leadership element is to extract from this knowledge and judgement information and insights that have general application to the broader regulatory community, and to make this accessible to that community.

Leadership is not, however, just intellectual. Better regulatory practice comes not just from what regulators do within agencies, but from what they do across agencies. A case in point is compliance qualifications. While each agency will recognise that it needs well-qualified staff and put in place appropriate training and development programmes, the bigger gains come from cross-agency collaboration in the development of a common qualification programme, as discussed below. Leadership is required to

take agencies out of their immediate sphere of influence and activity, and recognise the common good from cooperation.

G-Reg is leadership in action, and the following sections outline what the regulatory community is doing and why.

A common qualifications framework

Chief executives considered the business case for a common qualifications framework in March 2015 and agreed that it stacked up. It is worth repeating in full what they saw as the benefits:

1. improved capability by providing organisations with a structure around which to build a coherent programme of training (if one is not presently in place);
2. the ability for organisations to recognise staff progress within their existing training and development frameworks with a formal qualification;
3. consistency across the regulatory system, promoting trust amongst regulatory workers and higher service standards;
4. professionalisation of the regulatory workforce as a result of a common qualifications framework and compliance language, and an increase in the sharing of regulatory best practice; and
5. the ability to monitor and exercise stewardship of regulatory capability at the agency and system level.

Taken as a whole, the benefits are not narrowly focused on well-trained staff, but rather on the development of a profession and the delivery of regulatory stewardship.⁴ The qualifications themselves are predicated on there being a coherent body of regulatory knowledge that can be codified (in training and assessment materials), and able to be taught or acquired through experience, and assessed. The subject-matter experts from

central and local government agencies who were involved in the development of the qualifications believed that to be the case. (For the background to the development of the qualifications framework, see Manch, 2014.)

The qualifications framework currently includes five new qualifications, which are at levels 3–6 on the New Zealand Qualifications Framework and range from core knowledge to specialist investigations practice. So far the qualifications (statements of outcomes) have been approved and published by the New Zealand Qualifications Authority. Unit standards for the qualifications have also been developed and submitted to NZQA for approval. Under way is the

development of training and assessment materials, and this will be followed by the identification of trainers and assessors. The Skills Organisation is leading this work in a strategic partnership with the G-Reg Steering Group and drawing on the resources of the 3D Network.

It is expected that the first cohort of candidates for the qualifications can be signed up in early 2016. While collectively supporting the development of the qualifications framework, individual agencies were not required to commit to implementing the qualifications, and may take a number of roles as the roll-out progresses. These could include: being an ‘early adopter’ by committing to provide the initial cohort of applicants; assisting agencies that are early adopters by sharing content for the development of course and training material; or considering being part of a phased implementation of the framework.

The current qualifications are unlikely to be the last. There will be specialised qualifications, such as the current National Certificate in Intelligence Analysis, and demand for regulatory

practice qualifications at the tertiary level can be anticipated.

Sharing best practice: agency compliance strategies

Compliance strategies are the strategies agencies put in place with a view to maximising compliance with the laws they have responsibility for implementing by efficiently deploying the resources available to them. Such resources include statutory powers, staff and funding. In establishing G-Reg, regulatory practice leaders noted that, although the core elements of such strategies are relatively well known, the state of the art continues to evolve and there would be mutual benefit in sharing practices and experiences. A compliance forum for regulators aims to address this need. Its agenda is structured around each of the key areas of regulatory practice, as identified in Figure 1. A more detailed description of the agenda provides additional insights into what is contained in the body of specialised or ‘professional’ regulatory knowledge.

Understanding the regulated environment

In the literature there has been an evolution from the concept of responsive to ‘really responsive’ regulation. Both emphasise the need to deeply understand the environment within which the regulator is operating, and to adopt compliance strategies that are most likely to work in given contexts. Really responsive regulation exponents Baldwin and Black have said that regulators need to be responsive to:

- the attitudes of regulated firms;
- operating and cognitive frameworks of firms;
- the institutional environment and performance of the regulatory regime;
- the different logics and the regulatory tools and strategies;
- changes to each of these elements. (Baldwin and Black, 2008)

Baldwin and Black go on to say that compliance strategies need to be subject to ongoing review and modification based on feedback on how they are working.

At the practical level regulatory practice leaders have agreed that what is important is that regulators develop

a picture of the regulated environment, taking into account the purpose and scope of the regulatory regime. This includes establishing the extent and nature of non-compliance, the risk and nature of harm, and the characteristics of regulated parties. More specifically, they have agreed that agencies would benefit from sharing information on how they identify non-compliance and the risks of non-compliance, and its drivers, and determine what motivates regulated entities to comply or not comply; and create a model of the regulated community based on these findings.

Establishing regulatory settings

Regulators often have a key role in developing or shaping the regulatory settings in the environment in which they operate. This includes: developing mandatory and deemed-to-comply standards, and licensing and accreditation criteria; providing guidance; and giving advice to policy advisors and ministers. There is a large body of literature that touches on these areas, from Slovic's seminal analysis of the perception of risk (which explains why we have a greater aversion to aeroplane crashes than car crashes, even though the latter represent the greater risk) (Slovic, 1987), to the experiences with different forms of regulation, from prescriptive to outcome-based, to decision-making in New Zealand's system of government.

Regulatory practice leaders have agreed that agencies would benefit from sharing information on how they carry out or input into these functions in a way that takes into account and minimises risk, including:

- methods for determining what is an 'acceptable risk' (the likelihood and consequences of risk and the costs of mitigation, having regard to risk preferences);
- consultation strategies;
- decision-making principles and processes.

Responding to non-compliance or risk

Responding to non-compliance or risk involves making a number of strategic decisions, including whether to adopt a short- or long-term focus and how to vary

the mix of regulatory tools.

Sparrow's 'regulatory craft' approach (Sparrow, 2000) is well known to the regulatory community in New Zealand. Sparrow advocates focusing on the problems to be solved. Central to this approach is the need to pick the most important tasks and then decide on the important tools, rather than decide on the tools and pick the tasks to fit (Baldwin, Cave and Lodge, 2012, p.267). Escalation of interventions, from information to prosecution, depending on the motivation and capability of regulated entities and how they respond (the Braithwaite 'triangle') is another commonly used approach (Ayres and Braithwaite, 1992).

Regulatory practice leaders have agreed that the range of strategies adopted by different regulators to maximise the level of compliance and minimise negative outcomes should be described and discussed, including approaches to:

- identifying the greatest need for intervention: for example, through taking a risk-based approach;
- selecting the right tool in the regulatory toolkit, having regard to legal, institutional or resource constraints;
- learning from doing and applying the lessons.

2016 and beyond

At the time of writing (October 2015) the G-Reg Steering Group was still developing its approach to a 2016 work programme. However, initial thinking has identified a number of themes. In most respects these are elements of the compliance framework set out above, but they represent areas of particular importance as regulators seek to develop a depth of regulatory knowledge and practice through a cooperative approach to acquiring and sharing knowledge:

- How can regulatory agencies effectively collect, collate and analyse information to both retain institutional knowledge and use it effectively on an ongoing basis to inform operational decision-making, the exercise of discretion, standards-setting and a contribution to regulatory stewardship activities?
- What are best practice decision-making systems for standards-setting and advice carried out by agencies?
- How do regulators best engage with regulated parties and/or understand their attitudes and responses?
- How can regulatory agencies ensure that compliance officers consistently

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make good decisions when exercising discretion?

These themes could be coupled with:

- What tools should a modern regulator have in its toolkit, and how should it address gaps in the toolkit?
- What are the best practice systems for ensuring that emerging and 'non-visible' risks are identified?
- How can regulatory agencies best address political and public perceptions of risk in their response to actual or prospective events, where these are not evidence-based and may require a disproportionate response?

Conclusion

This article has focused on the acquisition, codification and sharing of regulatory knowledge, both at the level of individuals (compliance qualifications) and regulatory institutions (compliance strategies). But what is the relevance of this to the concept of a regulatory profession? John Kay, general manager, policy and systems interventions at the Civil Aviation Authority and a member of the G-Reg

Steering Group, has created a connection through an analogy with other professions, such as law and accountancy: that is, a regulatory profession is a construct which draws together many strands and develops the depth of expertise required in each of these strands.

An international regulatory expert has said that we are watching the birth of the regulatory profession, and to the extent

that the systematic approach being taken by G-Reg 'draws together the strands and develops the depth of expertise', we may well be moving into the parenting phase.

- 1 The analysis undertaken by Intal and Gill included ASEAN countries, Australia and New Zealand.
- 2 For example, from the UK see the Hampton Report (2005) and subsequent reviews of agencies, and the Macrory Report (2006), and from Australia the business regulation benchmarking studies that commenced in 2008 (the 2009 study of food safety benchmarked both Australian and New Zealand regulators).

- 3 The Australasian Environmental Law Enforcement and Regulators Network (AELERT) is a collective of environmental regulators from all levels of government across Australia and New Zealand. It works to create a platform for environmental regulators to connect and collaborate in their work. Member officers connect through AELERT to exchange resources, knowledge and experience about environmental regulatory practice and work together to drive continuous improvement and new approaches to the 'regulatory craft'. G-Reg has connections with AELERT.
- 4 The State Sector Act defines stewardship as the 'active planning and management of medium- and long-term interests, along with associated advice'.

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THE SCHOOL OF GOVERNMENT WELCOMES

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Verna Smith is the newly appointed Director of the Master's Programmes and Senior Lecturer in Public Policy for the School of Government. She has qualifications in sociology, politics and

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An early focus for Dr Smith in her Programme Director role has been the development of Masters courses to be taught in Auckland during 2016. Two courses will be offered in Trimester Two (Managing for Results and Policy Analysis and Advising and three in Trimester Three (Policy methods and Practice, Leading Change in public and community organisations and Local Government). For dates, see www.victoria.ac.nz