



## A QUICK GUIDE TO REGULATION

### WHAT IS REGULATION?

Regulation has been defined as the “range of legal instruments by which governing institutions...impose obligations or constraints on private sector behaviour”<sup>1</sup>. To many people, the term means the ‘laws that they have to comply with’. In the New Zealand context the main forms of regulation include:

- Statutes or Acts of Parliament (also called primary legislation)
- Statutory regulations, statutory rules, standards, codes, bylaws, and orders that can be made under Acts of Parliament (also called delegated legislation).

Acts of Parliament contain the fundamental principles and policies of the law. However, Parliament can delegate the ability to pass some types of laws to other bodies including the Executive Council, Ministers of particular portfolios, certain departmental officials, independent bodies, and local authorities. Such delegated legislation can only be made where an Act of Parliament expressly allows it to occur.

Delegated legislation usually only deals with matters of detail or implementation (rather than fundamental policy), matters of a technical nature, or matters likely to require frequent alteration or updating. Regulations should not, in general, deal with matters of substantive policy, have retrospective operation, seek to levy taxes, or contain provisions that seek to amend primary legislation.<sup>2</sup>

<sup>1</sup> Refer to reference 9.

<sup>2</sup> This paragraph was adapted from the Cabinet Manual (2008). Refer to reference 1.

### WHY USE REGULATION?

Regulation is usually justified on the basis that a market or sector alone is not able to achieve certain desired policy objectives unless there is a form of intervention. In some cases, an argument is made for the Government to intervene to help achieve policy objectives – whether they be social, health, environmental, economic or any other objective.

### ALTERNATIVES TO PASSING NEW REGULATION

Passing regulation is only one way of achieving policy objectives. There is a range of other regulatory and non-regulatory approaches that can be used – either in their own right or as a collective package. Common examples include:

- Having no government intervention (regulatory or non-regulatory)
- Industry self-regulation
- Information, awareness-raising, or education campaigns
- Partnership and networking agreements
- Capacity building
- Public ownership
- Strengthening enforcement of existing legislation
- Voluntary codes of practice or standards
- Economic or market-based instruments, such as taxes or subsidies.

### REGULATORY MODELS <sup>3</sup>

There is a range of different regulatory models, which can be distinguished by the level of government intervention involved.

#### Full Government Regulation (high level of government intervention)

This model involves the Government making the rules (e.g., by passing legislation). Regulatory responsibility is generally vested in government agencies which can prohibit or control certain activities. It is often used when the risks of market or regulatory failure are significant, and an independent government agency is best suited to undertake the regulatory role.

In some situations there can be joint government regulation. For example:

- Sharing regulatory responsibility between central, regional, and local layers of government, or
- Having shared regulatory roles between a number of central government agencies.

#### Co-regulation (medium level of government intervention)

This is where rules governing market behaviour are developed, administered and enforced by a combination of government agencies and people whose behaviour is to be governed. A co-regulatory model can be seen as a middle ground with aspects of both full government regulation and self-regulation (described below). It can range from a simple endorsement of industry self-regulation by the government to the government passing law to support and clearly define the rules. Co-regulation is often used to regulate professions where there is a need to restrict market entry and apply binding rules on all members of a group – e.g., lawyers, medical practitioners, or accountants.

#### Self-regulation (medium-low level of government intervention)

This is where the rules that govern market behaviour are developed, administered and enforced by the people whose behaviour is to be governed. It is sometimes called industry-led regulation. It does not always mean there is a total absence of government involvement. For example, in many countries there is additional legislation (e.g., consumer protection, health and safety, contract, competition, and company legislation) imposing generic rules across many industries, professions, or sectors.

Self-regulation requires the industry to have the incentive and ability to influence the behaviours of people and organisations within the sector. It also requires the trust and confidence of the government and the public. Some feel it may not always be appropriate if the consequences of regulatory failure are significant (for example, a risk of death, serious injury, significant financial loss) or if there is a need for independence and impartiality in the regulatory role.

<sup>3</sup> This section was adapted from the Legislation Advisory Committee’s Guidelines on Process and Content of Legislation. Refer to reference 6.



## ATTRIBUTES OF GOOD REGULATION



There are a number of key design attributes that commentators have used to define best practice regulation – once the need for regulation has been justified. Good regulations are generally:<sup>4</sup>

- **Proportionate:** Any burden or costs from the regulations need to be proportionate to the benefits expected from the regulations. Regulatory solutions need to be appropriate to the actual risk or problem posed.
- **Efficient:** All options to achieve policy outcomes should be considered including regulatory and non-regulatory interventions. If government intervention is justified, the minimum intervention to achieve the policy objective should be implemented. Proposals with the greatest net benefit to society should be preferred.
- **Transparent:** The process of making regulations should be open and transparent to the regulators and those affected by the regulations. This includes the nature and size of the policy problem and the objectives of the regulations. Appropriate and open consultation should occur before policy proposals are finalised and regulations made. Implementation and enforcement of regulations also need to be transparent. Parties need to clearly understand the purpose and content of regulations, their rights and obligations, and the consequences of failing to comply with regulations. Regulators must also be able to justify their decisions and be subject to public scrutiny.

- **Effective:** Regulations should achieve their intended objectives. They need to be able to be complied with, properly enforced, and subject to periodic review to check they continue to meet their fundamental objectives, especially if circumstances change. Regulations should be focused on the policy problem and avoid a scattergun approach.
- **Consistent and predictable:** Regulations need to be applied and interpreted in a consistent way and different regulators need to be consistent with each other and work together in a co-ordinated way. The regulatory regime should provide predictability over time, with like actions, behaviours or omissions being treated consistently during enforcement action. This helps empower people to fully understand what is expected of them. Clear guidance should be provided to better enable voluntary compliance.
- **Flexible and durable:** Where appropriate, a goals-based or performance-based approach should be considered, which sets clear and unambiguous targets. This gives those being regulated flexibility as to how they meet such targets and fulfil their obligations and responsibilities. This may help reduce compliance costs and allow innovative approaches to achieving compliance. It is also important that any regulatory system has the capacity to evolve to meet changing circumstances.

<sup>4</sup> These principles have been drawn from across the literature on best practice regulation. Selected primary sources include references 5, 8, 14, and 15.

## HOW DO YOU DECIDE IF A REGULATORY OR NON-REGULATORY SOLUTION IS APPROPRIATE?

Selecting the most appropriate means of implementing policy is critical to the likely success of the policy. In recent years, there has been considerable reform within the government sector to establish a sound decision-making framework for choosing the best way to implement policy decisions.

Having an open mind as to whether regulation is actually required and undertaking a sound regulatory impact analysis during the policy-making process are critical factors to inform good policy development and ensure good decisions are made.

The Organisation for Economic Co-operation and Development's (OECD's) *Reference Checklist for Regulatory Decision-Making*<sup>5</sup> outlines some fundamental questions that policy-makers should consider when deciding whether a policy intervention is needed and whether regulation is the best way to implement it. These questions ask:

- Is the problem correctly defined?
- Is government action justified?
- Is regulation the best form of government action?
- Is there a legal basis for regulation?
- What is the appropriate level (or levels) of government for this action (e.g., central or local government)?
- Do the benefits of regulation justify the costs?
- Is the distribution of effects across society transparent?
- Is the regulation clear, consistent, comprehensible and accessible to users?
- Have all interested parties had the opportunity to present their views?
- How will compliance be achieved?

### Regulatory impact analysis and its place in the policy-making cycle

Regulatory impact analysis has been defined as “a systemic approach to critically assessing the positive and negative effects of proposed and existing regulations and non-regulatory alternatives”.<sup>6</sup> It is “a fundamental tool to help governments to assess the impacts of regulation, [which] is used to examine and measure the likely benefits, costs and effects of new or existing regulation.”<sup>7</sup>

The New Zealand Government requires that sound regulatory impact analysis informs and actively contributes to policy development. Regulatory impact analysis is required for policy-work involving regulatory options that may result in a paper being submitted to Cabinet. This includes proposals that involve the potential introduction of new legislation (e.g., bills or regulations) or changes to, or the repeal of, existing legislation. Such proposals must consider whether the problem can be adequately addressed through non-regulatory or private arrangements and that any proposed regulatory solutions are in the public interest.

If undertaken properly, regulatory impact analysis forms an integral part of good policy making. It is factored in from the outset and is undertaken during the policy development process. It is not a procedural ‘tack on’ or last step to be undertaken during the policy approval process.

The Government’s regulatory impact analysis framework encourages an evidence-based approach to policy development. This approach requires that the full range of feasible options for addressing policy problems are identified, the different impacts of each option are considered, and the benefits of the preferred option not only exceed the costs, but also deliver the highest level of net benefit.

<sup>5</sup> See reference 10.

<sup>6</sup> See reference 13.

<sup>7</sup> See reference 12.

## UNDERTAKING REGULATORY IMPACT ANALYSIS



The key steps to follow when undertaking a regulatory impact analysis are<sup>8</sup>:

Step	Key things to consider
1. Describe the status quo	<ul style="list-style-type: none"> <li>Describe key features of the current situation.</li> <li>Identify existing legislation or regulations.</li> <li>Describe other existing interventions or programmes.</li> <li>Describe any recent government decisions made.</li> <li>Describe the prevailing market conditions.</li> </ul>
2. Identify the nature and scale of the problem	<ul style="list-style-type: none"> <li>The problem is from society's point of view.</li> <li>Assess the nature and size of the problem and outcomes if there is no further government intervention.</li> <li>Identify the costs and benefits of the status quo.</li> <li>Quantify costs and benefits as far as possible.</li> <li>Who is likely to be affected by the adverse outcomes and how widespread could the outcomes be?</li> <li>What is the root cause of the problem (not just the symptoms)?</li> <li>Why has the problem not been addressed by non-regulatory means?</li> </ul>
3. Define the objectives sought	<ul style="list-style-type: none"> <li>What outcomes and objectives are being sought in relation to the problem identified?</li> <li>Specify the objectives broadly enough to allow consideration of all relevant solutions.</li> <li>Are the objectives subject to constraints (e.g., timing or budgetary)?</li> <li>Objectives should focus on the outcome sought – not the means of achieving it.</li> <li>There may be more than one policy objective, or a conflict between two objectives, or one objective could be weighted more heavily than others – if so, spell these issues out.</li> </ul>
4. Identify feasible options	<ul style="list-style-type: none"> <li>Identify the range of options or approaches available to achieve the objectives and address the problem (both regulatory and non-regulatory).</li> </ul>
5. Analyse the options	<ul style="list-style-type: none"> <li>Analyse the costs, benefits, and risks of each option.</li> <li>How would each option alter the status quo?</li> <li>Identify the full range of impacts for each option – provide a qualitative description. This will include potential economic, health and social, compliance, environmental, cultural, and regulatory impacts. There will be direct and indirect (flow on) impacts.</li> <li>Quantify the impacts as best as possible. Try to put a dollar value on the impacts to the extent practical. If you can't quantify the impacts, be open about this. Describe them qualitatively, and cite any evidence or assumptions you have made.</li> <li>The net benefit/cost should be stated for each option.</li> <li>Analyse the incidence of impacts – who bears the costs and benefits? Are there disproportionate impacts and how do these fall?</li> <li>Identify and analyse the risks for each option. Explain how you have weighted different risks. How probable is it that risks could occur and what is the likely magnitude of the risks?</li> </ul>

Once developed, a sound regulatory impact analysis can be used as a foundation document for government agencies to prepare policy papers, regulatory impact statements (RIS), and Cabinet papers. A RIS should summarise the regulatory impact analysis for decision makers and accompany Cabinet papers that seek Ministerial decisions on policy proposals that have regulatory implications.

These steps and factors are drawn from the Treasury's Regulatory Impact Analysis Handbook (2009). See reference 3.



## IMPLEMENTATION

No matter how well designed any regulatory intervention is, it could still fail unless properly implemented. The following factors are important to help ensure effective implementation.

- **Plan your implementation.** Successful implementation doesn't just happen; it needs to be properly planned for. Consider implementation issues during your consultation and ask people what you can do to enable people to comply as easily as possible. Agencies should include an implementation phase in their core work programmes.
- **Good prior consultation and publicity.** If the policy development process is done in the right way, with sound stakeholder engagement, then new regulation should not be a surprise to stakeholders. Good stakeholder communications and publicity when regulations are made or come into force also ensure that key affected groups know what is happening, why, and when.
- **Reasonable timing.** Introducing new regulation often involves setting a transition period before it comes into force to allow affected groups a period to adapt and prepare for new requirements, adjust their systems and processes, and sell or dispose of existing stock.
- **Enabling voluntary compliance.** Agencies responsible for regulations often publish guidance, tools, or other resources or hold roadshows or training workshops to help stakeholders come up to speed and to assist voluntary compliance. This helps explain the purpose of the regulations and why they are needed, sets out people's obligations and responsibilities and the consequences of non-compliance, and outlines the expectations of the regulator.
- **Agency enforcement and co-ordination.** Agencies should have a clear enforcement policy for regulations they administer. Enforcement needs to be consistent, follow due process, be visible, and target the key risks or non-compliances. Enforcement roles and responsibilities need to be clear. Sometimes operational agreements between agencies can clarify jurisdiction and responsibilities. Enforcement officers need to be well trained and supported in the use of their powers.
- **Monitoring and evaluation.** Regulations, like any intervention, should be reviewed to check they are still fit for purpose and achieve their objectives. For your evaluation to provide optimal benefits you should factor it in during policy development and implementation. For more on best practice evaluation, refer to *Allen + Clarke's Quick Guide to Evaluation*, which is available free of charge in hard copy or on our website.

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We are a New Zealand consultancy, and proud of our Wellington roots. This is reflected in the way we work – always as your partner – whether it is locally or globally. We have proven expertise in:

- Developing regulatory and non-regulatory solutions for policy problems
- Developing legislation and regulations in a number of countries
- Undertaking regulatory impact analysis and drafting regulatory impact statements
- Legal analysis and the design of regulatory instruments
- Project management
- Producing Cabinet papers and Drafting Instructions
- Consultation and engagement with sectors
- Evaluations and reviews of legislation, programmes, processes and agencies
- Enforcement of legislation and regulations
- Developing best practice guidance, training and capacity building.

For more information, visit our website: [www.allenandclarke.co.nz](http://www.allenandclarke.co.nz)

### References

This Guide has been informed by a range of sources.

#### New Zealand references

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2. *The CabGuide*. A Cabinet Office resource, written primarily for departmental officials and staff in Ministers' offices, containing detailed procedural guidance. Available at: [www.cabguide.cabinetoffice.govt.nz/procedures/legislation#regulations](http://www.cabguide.cabinetoffice.govt.nz/procedures/legislation#regulations)
3. The Treasury's *Regulatory Impact Analysis Handbook (2009)* provides guidance on how and when to undertake regulatory impact analysis, the quality assurance process for regulatory proposals, developing regulatory impact statements, and other key Cabinet requirements. Available at: [www.treasury.govt.nz/publications/guidance/regulatory/impactanalysis](http://www.treasury.govt.nz/publications/guidance/regulatory/impactanalysis)
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#### Selected international resources

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