

REGULATORY STEWARDSHIP

Voice of the Regulator

In 2014 the New Zealand Productivity Commission inquiry on regulatory institutions and practices concluded that ‘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’ (Productivity Commission, 2014, p.2). Since then there has been much talk of regulatory stewardship. This article considers what it is and the importance of the role of the regulator in achieving it.

Regulatory stewardship

Regulatory stewardship is the adoption of a whole-of-system view, and a proactive, collaborative approach to the care of the

regulatory system(s) within which an agency works (New Zealand Government, 2017a). It looks at systems as assets that need to be well managed to deliver

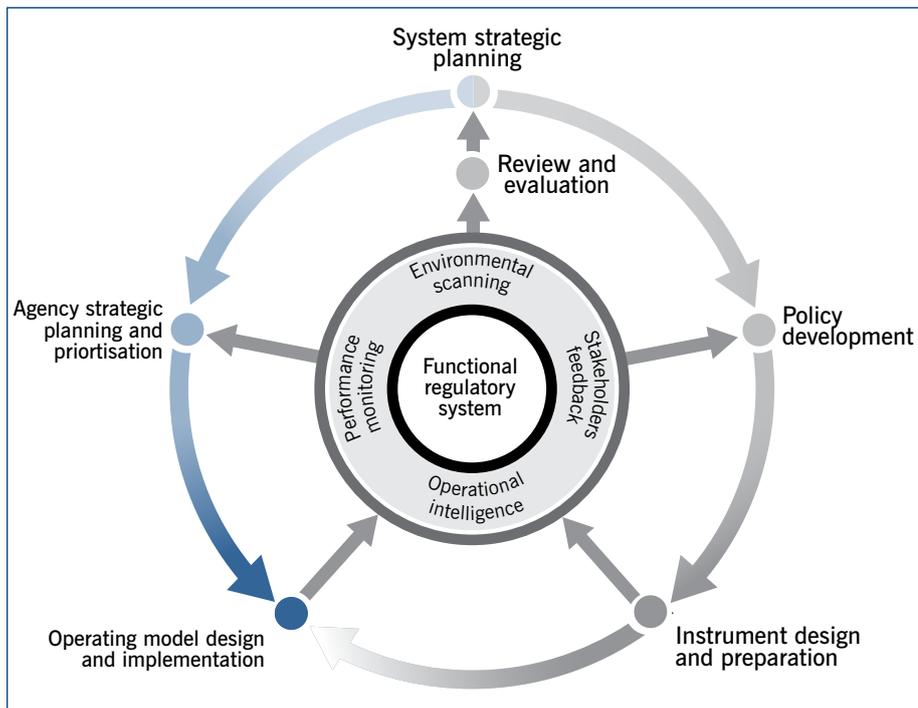
effectively over time. In his 2014 article ‘Why departments need to be regulatory stewards’, Jonathan Ayto said the then initial government expectations for regulatory stewardship ‘can be viewed as introducing some very basic asset management concepts to the regulatory environment’ (Ayto, 2014, p.27).

The government issued updated expectations for regulatory stewardship when it recently published *Government Expectations for Good Regulatory Practice*, from which the above definition of regulatory stewardship is lifted. The updated expectations describe the regulatory stewardship role as including responsibility for:

- monitoring, review and reporting on existing regulatory systems;
- robust analysis and implementation support for changes to regulatory systems; and
- good regulatory practice (New Zealand Government, 2017a, p.3).

The updated expectations differ from the earlier iterations because they now contain a part B which explicitly includes a section on good regulator practice. This reflects a growing awareness that

Figure 1: The regulatory cycle



Source: New Zealand Government, 2017b, p.5

stewardship extends beyond design and review of regulatory regimes. Regulators will welcome this shift in focus because the role played by them in the success or failure of regulatory systems is well known. Julia Black’s analysis of past regulatory failures makes this point very clear:

a striking feature of all the regulatory disasters analysed here is the central role played by failures of governance and leadership within organisations, in both regulators and regulated firms ... Also striking are the consistent failures of organisations, particularly regulatory organisations, to coordinate in the operation of the regulatory system, failures which are exacerbated the more complex the system. (Black, 2014, pp.6-7)

It is notable that part B of the updated expectations captures all the key elements that have featured in past regulatory failures, including:

- the need to adopt a whole-of-system view;
- active collaboration between different government agencies;
- a focus on improving the quality of legislation;

- good regulatory practice and regulator competence;
- the need for ongoing monitoring of the regulatory system; and
- the need for transparent and effective engagement with stakeholders and affected parties.

At its heart, regulatory stewardship means that all parties involved in the regulatory system need to work together to ensure that the system remains fit for purpose. The key point is that regulatory systems are created to serve a defined public interest and policy agencies and regulators must collaborate to deliver the defined public interest outcomes, with due regard to the views of the public and regulated parties. This is a continuous and evolving situation which requires ongoing management and cooperation. The government’s regulatory management strategy includes a diagrammatic representation of the regulatory cycle (see Figure 1) to illustrate how this should occur in a functioning regulatory system that changes and evolves.

What is a regulatory system?

Departmental regulatory strategies describe regulatory systems at regime level (such as the financial markets regulatory system or the workplace safety regulatory system). This is important because it

encompasses different sets of legislation that seek to achieve a commonly defined public interest objective. Defining the system in this way helps clarify that various agencies may have regulatory roles within the same system, which, once identified, assists with establishing who contributes to system performance.

However, it is also important to consider regulatory systems in a wider context, such as that identified by the Productivity Commission, which described it as including ‘the institutions, principles and processes through which regulations are made, implemented, enforced and reviewed’ (Productivity Commission, 2014, p.28). These things influence how agencies participate and engage with each other in pursuit of the defined regulatory objectives. Both perspectives support a more holistic view of the ‘system’ which underpins regulatory stewardship.

The missing link – the regulator

A careful review of the updated expectations and the government’s regulatory management strategy reveals that they capture best practice concepts and tools to consistently manage, maintain and improve regulatory systems over time. Many existing instruments and guidelines, such as the impact analysis requirements (Cabinet Office Circular, 2017) or the Legislation Design and Advisory Committee guidelines (Legislation Design and Advisory Committee, 2014), reflect similar standards and expectations, particularly in relation to the design and review stages of regulation. In fact, most agencies should be able to easily identify practices and processes they adopt to meet these expectations.

Despite this, there is general consensus that regulatory stewardship has not yet been collectively demonstrated or achieved. Why is this, and what is missing? To answer these questions it is useful to consider the approach taken by departments in preparing their regulatory stewardship strategies and reflect on how they recognise and integrate the regulator in meeting the described stewardship role in the updated expectations.

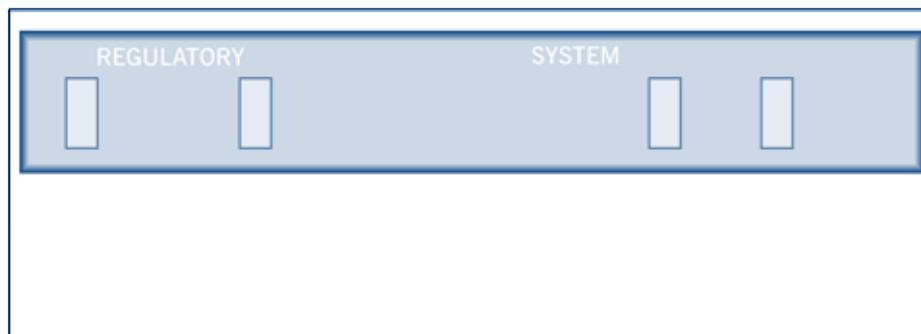
Current regulatory system oversight is generally led by policy agencies that are

structured as distinct departments. However, regulatory systems often exist across departments or agencies. A simple diagram (see Figure 2) illustrates how this arises.

There are two issues that this presents. The first is that system oversight requires a clear cross-agency approach, and the second is that it also requires direct involvement of regulators with functions in that regulatory system, irrespective of which agencies they are in. This is important because it is well known that regulatory outcomes depend almost entirely on regulators. The OECD has concluded: ‘Regulators are playing an increasingly important role in delivering economic and societal objectives as well as being tasked with *regulating* more complex situations ... As such regulators are key state actors with responsibilities and therefore are accountable for the delivery of policy outcomes’ (OECD, 2014, p.15).

Where regulatory design, monitoring and review is treated as a policy exercise that seeks ‘feedback’ from regulators and regulated entities, it does not recognise the pivotal role played by regulators. There is often a cavernous divide between these parties. Policy analysts generally rely on theoretically objective and logical constructs to develop the policy solutions that underpin regulatory frameworks. The challenge is that these are intended to be deployed by practical technicians to influence or change the often subjectively driven behaviours of people. The dynamic and complex problems that are often faced on the ‘front line’ by regulators are not always susceptible to singularly clear and objective responses and may be significantly influenced by drivers and beliefs that policy analysts may simply dismiss or not appreciate.

Searancke and others have noted that ‘Current thinking locates the regulator at the pivot of a complex system that requires many actors in many different roles to all play their part’ (Searancke et al., 2014, p.55). It is exactly this system complexity which requires regulators to be intimately involved, not least because they are best placed to report on the system, and identify what is needed when changes are required.



Steps to achieving regulatory stewardship

It could be argued that the fact that the updated expectations include a section on good regulator practice addresses the need to include regulators in the stewardship effort. However, this alone will not be enough. Even where regulatory functions exist within the same agency, the current approach to regulatory stewardship is often quite ineffective in ensuring that there is a true understanding and meeting of minds in the regulatory management cycle. This issue has been recognised by some agencies. The Department of Internal Affairs has made a conscious decision to adopt ‘regulatory stewardship’ as a practical approach to regulation (Department of Internal Affairs, 2017, p.12). This clearly seeks to leverage the value of regulators for stewardship purposes and illustrates that practical steps need to be taken to ensure that departments effectively engage the regulator (or regulators) within the system.

Specific steps that can be taken to improve the involvement of regulators should preferably be arranged around the four key themes that emerge from the updated expectations. They are:

- modelling leadership that promotes a whole-of-system view;
- engaging in genuine collaboration (between policy agencies, regulators and stakeholders);
- adopting good information management practices to support insight and improvement; and
- promoting regulator competence.

Leadership that promotes a whole-of-system view

The Productivity Commission concluded that improving the regulatory system

needed clearer leadership and a more active centre (Productivity Commission, 2014, p.402). If one accepts that various agencies may have a role to play in any given regulatory system, it becomes even clearer that a focus on regulatory system stewardship depends on system leadership to achieve this. This starts at the top and requires senior state sector leaders to make commitments to achieving regulatory stewardship.

The State Sector Act supports this approach in two ways. The first is that under section 4A the state services commissioner has the responsibility to ‘promote a culture of stewardship in the State services’. This provides an opportunity to establish clear state sector leadership for promoting a system view. The second is the express stewardship obligations on state sector chief executives for, among other things, ‘the legislation administered by the department or departmental agency’. Interestingly, the obligations of chief executives are not collective and their stewardship focus is primarily on ‘legislation’, not regulatory systems. The obvious difficulty with this is that it is likely to be more narrowly focused than system leadership if each department meets this obligation by only focusing on the legislative regimes that they are expressly tasked to administer. In fact, existing regulatory stewardship strategies seem to evidence exactly that, which may be because the current departmental approach doesn’t necessarily promote active involvement by the wider state sector in developing these strategies.

The 2017 regulatory strategy published by the Ministry of Business, Innovation and Employment (MBIE) notes that an all-of-system view is one of the three dimensions of regulatory stewardship and

‘means understanding how all the parts of a regulatory system work together and are performing’ (Ministry of Business, Innovation and Employment, 2017a, p.10). Despite this intention, a more detailed review of MBIE’s strategy suggests that this is still a work in progress because the regulatory systems identified do not necessarily include all the regulatory agencies that have roles in their identified regulatory systems. For example, Figure 1 on page 10 of the strategy seeks to identify who carries out each regulatory function across MBIE’s regulatory systems. For the financial markets and health and safety at work systems, key regulatory agencies such as the Reserve Bank of New Zealand,

importance of relationships between participants in a regulatory system (Ministry of Business, Innovation and Employment, 2017a, p.20). These charters set out very clearly what the objectives of the relevant regulatory system are and how all agencies within that system will work together to monitor its performance. It is crucial for effective regulatory stewardship that such frameworks are mandated and supported by senior leaders from all the agencies concerned, so that they can model the collaborative behaviours and culture needed to ensure that these charters are living documents.

Actions to provide system leadership as described above are relatively new. As

regulatory outcomes is almost always a co-operative effort: by the government, amongst regulators, the regulated, and the broader community’ (OECD, 2014, p.15). This applies to policy agencies and regulators alike. The important issue is ensuring that engagement is done in a genuinely co-operative and effective manner.

While there is much evidence of regular collaboration and engagement between parties, it is not uncommon to hear concerns about levels of consultation or engagement in the regulatory management process. Regulators often express concern that their views on policy design and review are not being sought or heard, while many of the departmental stewardship strategies would suggest that policy departments have a different view. There appears to be engagement asymmetry that results in these different perceptions.

Work by Alberto Alemanno (professor of European Union law and regulation) helps to explain the cause of this phenomenon. He has concluded that ‘public engagement has not yet become part of the policy process’ (Alemanno, 2015, p.4). He identifies three types of engagement:

- (1) *Public communication*: policymakers convey information to the public. Due to the one-way information flow, the public is not involved. Public input is neither foreseen nor expected.
- (2) *Public consultation*: Policymakers receive information from members of the public within the framework of a government-initiated process. The input gathered is perceived as representative of societal opinions on the subject.
- (3) *Public participation*: members of the public and policymakers exchange information. As a result, unlike with the previous two forms of engagement, public participation involves some form of dialogue between policymakers and stakeholders. By involving some deliberation, public participation may lead to change in the opinions of both parties. (ibid., p.10)

While Alemanno’s work focuses on engagement with the public, the concepts

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Maritime New Zealand and the Civil Aviation Authority are not included. This omission will undoubtedly reduce the reliability of the system performance view. The result is that the strategies may not identify cross-cutting regulatory interests (or agencies) and therefore cannot fully identify ‘the system’ or its performance.

Collective leadership of all the stewardship obligations (at system level) is required to achieve a proper whole-of-system approach. Each agency can contribute to this by identifying the leadership commitment it will make to regulatory stewardship. The Department of Internal Affairs has implemented a strategy that is ‘mandated and owned at a senior leadership level’ and supported by the establishment of a role responsible for the regulatory stewardship work programme (Department of Internal Affairs, 2017, p.12). This illustrates a clear recognition by the department that strong agency leadership is a crucial step.

MBIE has implemented regulatory charters, which it considers recognise the

they evolve, the key improvement will be to ensure that they truly encompass a system perspective, because collective governance and leadership that promotes a system view is likely to be the single most transformative step that can be taken to achieve effective regulatory stewardship.

Done well, it will require genuine collaboration between policy and regulatory agency leaders and their people, as discussed below. It will also require individual agencies across the wider state sector to commit resources more effectively to support stewardship endeavours. It should also result in the benefits identified by the Productivity Commission, such as shared solutions and efficiencies (Productivity Commission, 2014, p.29).

Genuine collaboration

Once the leadership framework is agreed and established, there is a need to ensure that agencies collaborate effectively. The OECD has noted that ‘Achieving good

that underpin the three types of engagement are relevant to the engagement between policymakers and regulators. All three types of engagement are important, but the partnership concept in the public participation option is likely to be the least common. Yet if deployed appropriately and genuinely it can be very effective.

Traditional views of policy advisors appear to favour input from regulators at the point of evaluation and review but not necessarily as an integral part of the policy design or regulatory strategy phase. The government regulatory management strategy expressly includes 'stakeholder feedback' as part of a functioning regulatory system. If that feedback is obtained in the same way as in the public participation engagement model, it is more likely to achieve a fully rounded system view. Front-line experience gives regulators a considerable advantage in understanding practical issues and likely behaviours or reactions to regulatory interventions. Regulators also know the limits of their own capacity and capability to execute regulatory initiatives. Policy agencies must gain a deep understanding of these issues to make durable policy decisions or inform redesign options. Establishing a genuine collaborative participation model with regulators (and other stakeholders) at the core of the regulatory cycle is more likely to improve the policy design process and ultimately regulatory management.

MBIE's 2017 regulatory stewardship strategy reveals that such mechanisms are being trialled (Ministry of Business, Innovation and Employment, 2017a, p.18), while Inland Revenue's regulatory stewardship strategy indicates that aspects of such an approach are already being applied through workshops and co-design options (Inland Revenue, 2017, p.6). Inland Revenue has described the benefits as follows: 'Having policy and service design officials working throughout the Generic Tax Policy Process creates a better outcome' (ibid., p.8).

Maritime New Zealand has gone a step further and used this model very successfully to review and redesign the New Zealand Port and Harbour Marine Safety Code (see companion article by

Keith Manch in this issue of *Policy Quarterly*). This illustrates that genuine engagement can work at different levels of regulatory design and implementation and have remarkable results. Focusing on this is likely to generate the most significant opportunity for improvement in this area.

Information management for insight and improvement

For existing regulatory systems, stewardship is aimed at ensuring that the regulation remains fit for purpose. This requires effective monitoring, evaluation and review. The Productivity Commission noted that 'In-depth reviews of regulatory

into work programmes to ensure that reviews actually take place, it is critical that regulatory agencies form a cohesive view of the kind of information that is needed to support this.

The regulatory stewardship strategies being published by various departments certainly demonstrate that progress is being made in this regard. However, many state that there is a lack of robust data and a limited evidence base, which challenges their ability to draw reliable insights on system performance. Regulators can play a significant role in changing this because they have the advantage of operational knowledge. One way of doing this is to establish effective intelligence models

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regimes have often followed a crisis, rather than being part of a systematic and strategic approach to review' (Productivity Commission, 2014, p.374). This is not specific to New Zealand. In an expert paper for the OECD, Cary Coglianese pointed out that governments around the world have 'paid remarkably little attention to analysing regulations after adoption or to evaluating the impacts of the procedures and practices that govern the regulatory process itself, so-called regulatory policy' (Coglianese, 2012).

The obvious consequence of failing to do regular evaluation and review is that there is no ability to gain a reliable insight into the effectiveness of the regulatory system. Monitoring and evaluation depends on reliable information and agreed frameworks for understanding and assessing system performance. A variety of actors play a crucial role in ensuring that information is available to undertake such a task. Policy agencies play a critical role in avoiding 'imprecise regulatory objectives' (Productivity Commission, 2014, p.380), while regulators contribute to this by collecting data and information as they implement regulations. While an agreed cycle of review needs to be built

within regulatory agencies to ensure this occurs. While many have already started this process by setting up dedicated intelligence units, it may be useful to consider this as part of a whole-of-system view to avoid duplication of effort and inefficiency. This can be achieved through information sharing and joint efforts on information collection instead of relying on individual agency efforts. The Government Regulatory Practice Initiative (G-Reg) has taken steps to address this and recently hosted a workshop on effective collection, collation and analysing of information.

Regulator competence

Effective regulator input into stewardship is not only dependent on the conduct of policy agencies; it is also conditional on sound regulator competence. The updated expectations now include the expectation for regulators to 'contribute to wider regulator capability-building initiatives within the state sector where there are common interests and benefits from collective action and leadership'.

To address the issue of regulator competence, G-Reg was set up. The initiative includes the introduction of

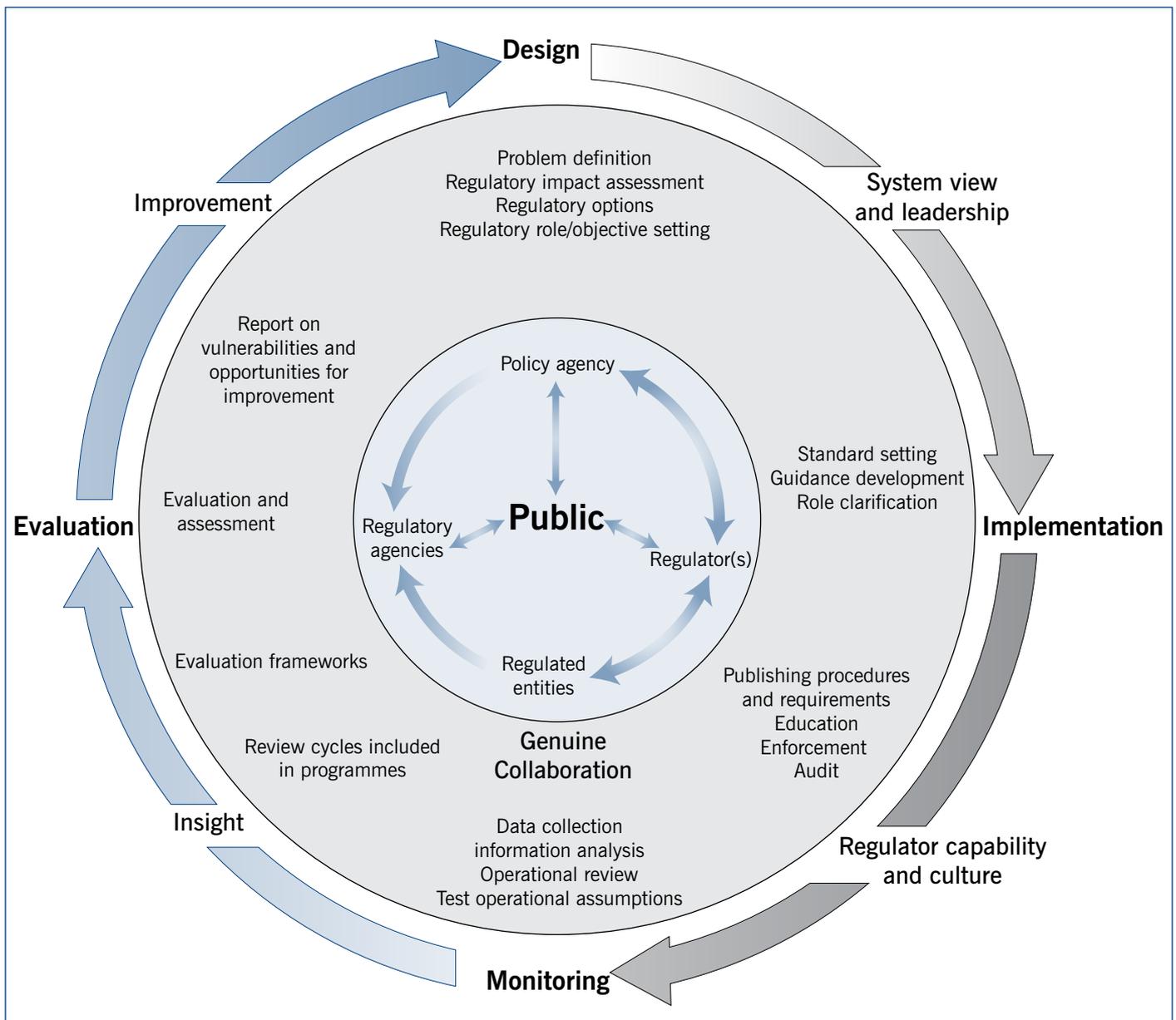
Table 1: Summary of identified attributes of regulator culture

Attributes of a functional regulator culture
A culture embracing the organisation’s role as an educator and facilitator of compliance
A culture that places a high value on robust, evidence-based regulatory decisions
A culture that values operational flexibility and adaption to changes in the regulatory environment
A culture that values continuous learning
A culture where internal debate is normal
A culture of transparency, openness and accountability
A culture that places great value on organisational independence and impartiality
A culture recognising the significance of civic responsibility that accompanies coercive powers of the state
Subcultures that align with the overarching objectives of the organisation

national qualifications for regulatory practitioners (from entry level to advanced practice), activities to share knowledge and good practice across agencies and sectors, and an arrangement with Victoria University for a chair in regulatory practice.

To ensure that regulator knowledge is effectively contributing to regulatory stewardship, it is crucial that regulators have the right capability to understand policy objectives and evaluate actions and behaviours of others in pursuit of the public interest outcomes being sought. This also requires competence to recognise patterns of behaviour that may point to more significant issues. John Braithwaite

Figure 3: Regulatory stewardship themes within the regulatory cycle



points to exactly such an example involving the American FBI not recognising the pattern of small frauds and loan arrangements which ultimately led to the 2008 global financial crisis (Braithwaite, 2016, p.25).

Historically, many regulators have recruited their employees from the sector they are charged to regulate. While such sector technical knowledge is critical, in the absence of regulatory skills they are compromised in their ability to engage with people and exercise the significant judgement required to make nuanced and complex regulatory choices. The director of the Penn Program on Regulation, Cary Coglianese, notes:

Yet as vital as it is for a regulator to possess adequate technical skill and knowledge, such expertise is only one necessary component of regulatory excellence. By itself it is not sufficient. To move from good regulation to excellent regulation, the regulator also needs to master the people side of regulation. Regulation, at its core is relational. (Coglianese, 2017, p.12)

Another dimension of regulator competence is the need to create the right culture. The Productivity Commission describes this as a 'regulator culture' (Productivity Commission, 2014, p.86), which is summarised in Table 1. These cultural elements match the updated expectations for good regulator practice very closely. The G-Reg initiative will provide opportunities for improvement across all of these. As it strengthens regulator competence at individual and organisational level, regulators will be much better positioned to participate in system leadership, genuine collaboration and providing the greater insight that is required for successful regulatory stewardship.

Conclusion

The updated government expectations for good regulator practice are a marked improvement on earlier iterations because they recognise the role of the regulator. They also clearly articulate sound 'asset management concepts' which should improve regulatory stewardship. However, it is important that in seeking to

meet these expectations, agencies focus on embedding them in a way that promotes a collaborative whole-of-system view.

To achieve this, it is suggested that efforts should be directed towards progressing the four themes mentioned above. The concrete steps that can be taken to do this are to establish a framework for the regulatory cycle in which the identified public interest objectives of the system are placed at the core, pulled together by genuine collaboration between all parties, including competent regulators, who are led from the top to promote a whole-of-system view in which good information practices allow for reliable insight and improvement over time. Figure 3 gives a diagrammatic representation of this framework.

In the meantime, a working group of the Government Regulatory Practice Initiative is developing best practice guidelines – from a regulatory practice perspective – in an effort to demonstrate how a strengthened contribution by regulators to regulatory policy can improve regulatory stewardship.

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