

Four themes from the literature about responsive regulation

Four themes can be taken from the literature about right-touch risk-based regulation. These themes are that:

- responsive regulation is about identifying risk
- responsive regulation is proportionate to risk
- formal and informal mechanisms are important tools for responsive regulators
- there are some important actions regulators must take in order to be responsive.

These four themes are discussed in further detail below.

Responsive regulation and identifying risk

Three observations can be made about responsive regulation and the identification of risk.

First, is that a responsive regulator will be collecting and analysing a range of data that informs how it deploys its resources to meet its roles and responsibilities.^{67 107} Underpinning this first observation is the assumption that the regulator already has good data collection systems (and therefore data)—although the literature also acknowledges this is not always the case. It also assumes a risk can be described and quantified and that the data relating to a risk is easily extracted and capable of being analysed.^{18 108 23 56}

Second, is that a responsive regulator is using the analysed data proactively (i.e. from the earliest possible point of engagement) to manage an individual or group of practitioners at risk of not meeting regulatory requirements, including for recertification.^{109 38 73 47 26 110}

The third observation is that responsive regulation uses both proactive and reactive (e.g. triggered by and acting on complaints or reported incidents) enforcement strategies to protect the public. In some cases, these mechanisms will detect new risks. However, it should be noted that risk-based systems tend to focus on known and familiar risk factors. They are usually retrospective because of the way data is collected and analysed and this often means they fail, or are slow to identify new and/or developing risks.⁶⁷

Responsive regulation and proportionate risk

Central to responsive regulation is that the regulator will choose the appropriate and proportionate tool (i.e. everything on the spectrum between a light and heavy-handed touch, including possible combinations of carrot and stick approaches where required) for managing a risk. This approach to regulation presupposes that as the level of risk increases (for the public and practitioners) so will the regulatory force required to manage that risk.^{25 36 22 67}

Examples of factors that influence the degree of regulatory force exerted include the frequency and extent of harm linked to a profession and the type of allegations made about practitioner competence and/or impaired fitness to practise.²²

Three other messages can be taken from the literature about responsive regulation and proportionate risk. These messages are that:

- engaging in regulatory actions (including over-regulation because there are too many groups or excessively onerous regulatory practice) that sit at the heavy-handed end of the spectrum are expensive and may generate unnecessary costs that have no additional benefit to the public^{22 40}
- regulators should put more of their focus and resources into risks that are likely to cause serious harm^{36 109 22}
- although protection of the public is the primary focus, to achieve this goal regulators also need to be responsive to the needs of practitioners.^{88 12}

Formal and informal mechanisms are important tools

Regulators have a range of formal tools and mechanisms that help them to fulfil their roles and responsibilities. Many of these tools fall on the sanction end of the regulatory spectrum and may include disciplinary tribunal hearings; undertaking audits, assessments and competence and fitness to practise reviews; and considering and acting on complaints from other organisations, practitioners and the general public.^{96 15 7 8 57}

It should be noted that researchers have a lot to say about the use and place of complaints as a regulatory tool. 2015 research by Stuart & Cunningham contained the following messages:¹¹¹

- complaints are part of a system of checks and balances that hold a profession to account for its practice
- until a practitioner is engaged in a complaints process their awareness and understanding (and often feelings of control) of this regulatory tool are limited
- ideally the complaints process leads to improvement in the standard of health care and includes practitioners and the general public in a way that is positive and constructive for all concerned
- in order for the complaints process to be effective (and some practitioners acknowledge that participation in a complaints process has little or no impact on their practise), practitioners must engage in careful, structured reflection that allows for learning and change in their behaviours, attitudes, knowledge and practise
- practitioners should be encouraged to seek help early so they receive appropriate support and have a level of understanding and awareness that will aid them through the complaints process.

On the issue of the effectiveness of standards and appraisals as good regulatory mechanisms, researchers were sceptical. They specifically cited a lack of evidence to show links between these mechanisms and positive impacts and/or improvement in practitioner skills, knowledge and behaviours.^{22 24}

Regulators also use informal mechanisms (e.g. positive feedback on achievements or acknowledgement of a practitioner's strengths) as part of a responsive approach to the maintenance of practitioner competence and fitness to practise.^{25 12 8 35 96 88}

Actions regulators must take to be responsive

Research confirms that risk comes in all shapes and sizes that, and that for some regulators, it will fit neatly into existing organisational structures and mechanisms. Baldwin and Black state that

Whether a responsive approach is optimal will depend on a number of other factors such as agency resource levels, the size of the regulated population, the kinds of standards imposed (and how these are received) the observability of non-compliance, the costs of compliance, the financial assistance available for compliance and the penalty structure.⁶⁷

However, the literature also confirms that many of these risks do not easily fit standard approaches to regulation. When the latter happens, the literature states a regulator must be flexible and fluid enough to organise itself differently for different types of risk. It must also find ways of doing this that do not cause massive disruption or reorganisation to the regulator.¹¹⁰ Regulators must also build relationships with practitioners, which are based on preventing harm and promoting good practice, rather than primarily focusing on punishment and disciplinary actions.^{56 11}

Does responsive regulation impact on the decision to retain or incorporate CPD within recertification?

Within the past three years the Dental Council has developed and implemented a new *Strategic Plan* and *Standards Framework*.² These documents represent a significant shift in how Council views its roles and responsibilities—specifically that it will be a right-touch risk-based regulator.

What is right-touch risk-based regulation and what does it have to do with the roles and responsibilities of health regulators?

The traditional role of the regulator—one that in New Zealand is set down in the Act—is that it registers a practitioner at the start of their career; periodically recertifies them; only intervenes when a transgression has been committed; prevents harm; promotes and defends standards of good practice; and seeks assurance of competence and fitness to practise. This traditional role has also been described as the exertion of public authority through a system of rules and laws in which the regulator ensures technical compliance by the regulated.⁵⁶

In the literature, the core purpose and role of regulation (and thus the regulator) is described as:

- the abatement of control of risks to society, while the essence of regulatory craft is to pick important problems and fix them¹²
- identifying and addressing the causes of a risk of harm, rather than responding after the harm has occurred⁸⁸
- identifying harms, risks, dangers or threats of one kind or another, and then either eliminating them, reducing their frequency, mitigating their effects, preventing them, or suppressing them, and, by so doing, providing citizens higher levels of safety and security¹¹⁰
- setting standards and checking whether they are met.²²

The literature confirms that this traditional view of regulation is being challenged, revised and reframed in New Zealand and around the world.

For instance, right-touch and responsive regulation is described as an approach that values trust, transparency and professionalism and aims to transcend the polarised choice between punishment and persuasion.²⁵ Moreover, the purpose of this approach to regulation is not to eliminate risk.

For the practitioner it means being assisted to obtain compliance. For the regulator it is about using a range of tools to identify and then manage practitioner risk and non-compliance. This includes the important question of when to use persuasion and when to use sanction to encourage or obtain compliance.^{109 25}

On the issue of regulatory responses, Baldwin & Black suggested compliance was more likely

... when a regulatory agency displays an explicit enforcement pyramid – a range of enforcement sanctions extending from persuasion, at its base, through warning and civil penalties up to criminal penalties, licence suspensions and then licence revocations. Regulatory approaches would begin at the bottom of the pyramid and escalate in response to compliance failures. There would be a presumption that regulation should always start at the base of the pyramid.⁶⁷

On the issue of regulation the Professional Standards Authority said

Professor Sparrow of Harvard University has made compelling arguments that the focus of regulation should move away from the efficient completion of process to a focus on the prevention of specific types of harm. He has also argued, we should think in a more sophisticated way about the nature or character of specific types of risk and therefore what is the best regulatory intervention to prevent risks from materialising into harms.²²

And on the issue of risk-based regulation. Steve Broker from Consumer Focus said

Put at its simplest terms, all it means is that you allocate your scarce resources to where you think the harm is most likely to occur and if that is to be successful that depends on having the right intelligence in place ... once you have identified your risk then you decide on the firmness of your touch. On some occasions, a feather light touch is the order of the day but at other times, a vicelike grip is what is needed.¹⁰⁷

It should also be noted that the Professional Standards Authority has described the eight elements of right-touch regulation as:⁸⁸

- identifying the problem before the solution

- quantifying and qualifying the risk
- getting as close to the problem as possible
- focusing on the outcome
- using regulation only when necessary
- keeping it simple
- checking for unintended consequences
- reviewing and responding to change.

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Please note that the majority of the references listed in this discussion document are hosted on external websites and Council cannot guarantee the links will remain current. Please contact us on comms@dcnz.org.nz if you require any of the referenced documentation.

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