

4th October, 2006

Regulation Benchmarking Study
Productivity Commission
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Dear Productivity Commission

Child Care New South Wales, on behalf of its Long Day Care centre-owner members, is pleased to respond to your invitation to contribute to the Commissioned Study – “Performance Benchmarking of Australian Business Regulation”.

Our submission follows the Issues Paper format, responding to each of the eight sets of questions.

We begin with an attempt to explain our general support for the notion of benchmarking business regulation, but also to outline what we see as some general limitations.

The aims for the benchmarking project

The Productivity Commission is asked to study performance indicators and reporting frameworks across all levels of government to help the Council of Australian Governments (COAG) - “to implement its in-principle decision to adopt a common framework for benchmarking, measuring and reporting on the regulatory burden on business”.

Child Care New South Wales applauds the COAG decision to attempt to measure and report on regulatory burdens. We are nevertheless nervous about the possible breadth of that COAG decision.

In its January 2006 Report - “*Rethinking Regulation*”, the ‘Taskforce on Reducing Regulatory Burdens on Business’, noted that, while “Implementing the reforms identified in chapters 4 to 6 would bring significant relief to business, (but) unless the underlying causes of excessive and poor quality regulation are addressed, it is likely that problems will simply re-emerge, as they have in the past”. (page 145)

After setting out the six principles of good regulatory process that the Taskforce considers is essential for governments to adopt, the Taskforce then identifies “four systemic areas *within the control of governments* that are critical to giving effect to those principles in order to achieve better regulatory outcomes...including reduced compliance burdens. They are:

- introducing better processes for making regulation,
- improving administration of regulation,
- reducing overlaps, duplication and inconsistencies, and
- ensuring regulation remains appropriate over time.”

At section 7.3 of “*Rethinking Regulation*”, the Taskforce considered what we see as the key issue for present purposes – “Ensuring good performance *by regulators*”.

The Taskforce concluded:

“...there would be value in developing better measures and indicators of the regulatory burden, both within Australia generally and also in individual jurisdictions. That said, as noted in chapter 2, measuring compliance costs at the aggregate level is difficult, and it is even more difficult to determine the extent of unnecessary compliance costs. Further, it would be important to ensure that attempts to measure regulatory burdens on business, such as those entailing studies and surveys of business, did not themselves impose undue costs on business.

While this means that attempts to quantify red tape at the aggregate level are likely to be fraught, it should be possible...to benchmark *regulatory regimes* periodically across jurisdictions and develop reporting frameworks and performance indicators that *provide a guide to likely regulatory burdens*.” (our emphasis)

Child Care New South Wales agrees with that analysis. We agree that a periodic benchmarking of childcare regulatory regimes would help to address the many systemic problems with current regulatory approaches, and that such benchmarking would be a guide to likely regulatory burdens in the childcare sector.

Our concern, however, is that COAG’s in-principle decision may be about something quite different. Our concern is that COAG may be going down the road of trying to quantify regulatory burdens on business at the aggregate level. That prospect is superficially attractive, but we think it might be a dead-end street. First, it is not aimed at determining ‘unnecessary’ costs. Second, we fear it would be a project that will ultimately be starved of community and political support because it will be too easily misdescribed as an attempt by business to remove or reduce community safeguards in favour (it will be wrongly alleged) of increasing profitability or some other business benefit.

We are therefore encouraged that the Productivity Commission has adopted what we would see as a more sensible view of the COAG’s “overarching objective”. Namely, “...to benchmark regulatory performance across jurisdictions ...to identify ‘unnecessary’ burdens, given policy objectives.”

Kept within that boundary, Child Care New South Wales believes the benchmarking task is worth attempting. Within that boundary, we think the task can be described (and defended) as an attempt to improve good government. We believe that framing the benchmarking task in a way that visibly embodies ‘good government’ principles is fundamental to securing and retaining the necessary political ownership and support. Without that ownership and support, we fear a benchmarking of business regulation project will ultimately achieve nothing useful.

With those limitations in mind, we turn to the questions in the Issues Paper.

1. Other international or domestic studies that might provide useful guidance

Child Care New South Wales does not know of any attempts (other than those listed in the Issues Paper) to measure and compare regulatory regimes, either across jurisdictions, or within jurisdictions.

We nevertheless found the following resources a useful guide:

1. "Strategies for regulatory reform: forward compared to backward mapping", Daniel J. Fiorino, *Policy Studies Journal*, Summer 1997, v25, n2, p249.

This article examines strategies for regulatory reform. Are some more likely to succeed than others? Do failures of reform offer lessons on what works and what does not? Is reform more likely to succeed in small steps or with sweeping change? Does the policy literature offer insights on how to design and carry out reform strategies?

The article addresses those questions by comparing two strategies for regulatory reform. It compares top-down and bottom-up strategies.

It argues there are two problems with relying solely on a forward mapping strategy for reform. The first is that it may magnify the problems attributed to regulation. Many of the complaints about regulation – the tendency toward uniformity to the point of inflexibility, the reliance on centralised bureaucracies, the lack of incentive for firms to innovate or go beyond strict compliance, the limits in detecting and deterring non-compliance, and the unreasonableness of many regulatory requirements – are the product of a regulatory system that is grounded in a forward mapping approach to implementation. To seek to change such a system by working with the same assumptions that were used to create it may only perpetuate the problems associated with the system.

A second problem with relying only on forward mapping is that it will often fail. Imposing a top-down strategy for reforming what essentially is a fragmented, incremental policy system is an unlikely recipe for success. One set of arguments in favour of a bottom-up reform strategy is conceptual. Regulation has become so complex, with so many vested interests having a stake in the current system, with roles assigned to different authorities at multiple levels of government, it is hard to know where to start. A second set of reasons for a bottom-up strategy is political. How do we frame issues and propose changes in policy in ways that allow us to achieve consensus from the interests whose agreement is necessary? A virtue of incremental approaches (and backward mapping is firmly incremental) is that they allow for agreement in small steps, at multiple points, rather than require agreement on a comprehensive change in one big step. In the absence of political consensus on reform, backward mapping defines a structure for achieving consensus in a pragmatic series of small changes, based on experience gained at each stage.

Rather than assume that a particular policy change (e.g., public participation, executive branch reorganisation, mandatory analysis, centralised review, or market incentives) is the key to reform, a backward mapping approach works with the people whose behaviour determines or is affected by policy outcomes. It identifies the factors that promote or impede the desired behaviour, and then determines what changes are necessary to achieve that behaviour. This approach not only should lead to more workable and effective policy reforms, but it should also help to enlist the support of the people and institutions who will need to implement those reforms.

2. "Cognitive psychology and optimal government design", Jeffrey J. Rashlinski, Cynthia R. Farina, *Cornell Law Review*, Jan 2002, v87, p.549.

Good government must avoid bad decisions. Because contemporary governments tend to undertake an ambitious range of social and economic regulation, they can do tremendous damage by adopting wasteful programs. Even casual observations reveal that some political systems avoid improvident public policy choices more effectively than others. Identifying institutional structures and processes that chronically produce bad decisions would both help explain why some regulatory regimes succeed where others fail, and illuminate useful reforms.

The article contends that bad public policy can often be traced to flaws in human judgment and choice among governmental actors.

Wasteful government, the article contends, often occurs because people with good motives are in positions that facilitate, or at least fail to counteract, bad judgment. As a corollary, good public policy is most likely to result when governmental actors operate within decision-making institutions structured to reduce the incidence of judgmental errors.

A key lesson of cognitive psychology is that even people with good motives tend to make bad choices in certain, predictable circumstances. Identifying those circumstances is at least as significant to diagnosing public policy failures as is focusing on motives of the regulatory actors. Without such attention to the institutions and practices of regulatory decision-making, even programs conceived with the purest motives and executed by the most selfless and professional staffs may be plagued by inefficient and counterproductive outcomes.

3. Statement of Curtis W. Copeland, Specialist in American National Government - Congressional Research Service, Before The Committee on Government Reform, Subcommittee on Regulatory Affairs, House of Representatives, July 27, 2005 on "*The Effectiveness of Federal Regulatory Reform Initiatives*".

4. United States Government Accountability Office, Testimony Before The Subcommittee on Regulatory Affairs, Committee on Government Reform, House of Representatives – "*Regulatory Reform – Prior Reviews of Federal Regulatory Process Initiatives Reveal Opportunities for Improvements*" July 27, 2005.

5. Better Regulation Task Force, "*Regulation – Less Is More-Reducing Burdens, Improving Outcomes*", A Report to the Prime Minister, United Kingdom, March 2005.

2. Benchmarking for what purpose?

The Issues Paper invites a response to the question – 'what purposes can benchmarking most usefully serve?'

Child Care New South Wales supports the purposes identified in the Issues Paper:

- identifying best-practice for similar regulation across jurisdictions to assist in the design of improved regulatory arrangements, and

- monitoring the burden over time to assess whether it is increasing or decreasing, either generally or in specific areas.

Identifying best-practice childcare regulation across jurisdictions would be an especially relevant purpose for long day care services. Commonwealth childcare regulation, the Quality Improvement and Accreditation System (QIAS) has for many years demonstrated that more than 90% of all long day care centres across Australia operate at good levels of service-quality.

And yet the cost and efficiency burdens of State childcare regulation appears to vary widely. Only New South Wales regulatory authorities, for example, require four degree-trained teachers in a large long day care centre.

Child Care New South Wales hopes any benchmarking project would carefully consider this and similar issues. Either other state regulations are set too low, or the New South Wales regulation is set too high. On the face of the QIAS quality assessment, it seems as if the burden in New South Wales is needlessly high, thus making services more costly than they need to be, presumably therefore making them less accessible than they could be. The QIAS evidence demonstrates that less burdensome (and therefore less costly) arrangements would not result in lesser service-quality in NSW than is apparent in other jurisdictions.

Child Care New South Wales also strongly agrees with the view, at p.9 of the Issues Paper, that typical indicators would not distinguish between the sources of regulatory burdens that can arise from the *design* of the regulation, its administration or its enforcement. Ideally, these would need to be separately identified.

Likewise, we think it is important that in addition to benchmarking aimed at identifying 'best practice' outcomes, governments might wish to undertake ex post regulatory assessment by comparing the burden on business against that estimated burden in the ex ante regulatory impact assessment.

Finally in this context, Child Care New South Wales would also like to see Australian long day care regulatory standards benchmarked against international childcare regulation standards. We are confident this would demonstrate the relatively high level regulatory requirements that apply in Australia. That demonstration is not meant to seek a reduction in Australian standards but to illustrate to Australia and to the rest of the world that Australian standards are amongst the world's highest.

3. Coverage

Child Care New South Wales would prefer that coverage should seek to be more narrowly focused rather than comprehensive. Benchmarking should seek to facilitate economic and social improvement in areas of strategic significance. The major strategic targets adopted by COAG are 'participation' and 'productivity'.

Long day care centres are central to each of those targets.

It makes strategic economic and social-improvement sense to explore how improved childcare regulations can make childcare centres more accessible to child and to parents.

The Issues Paper, at p 10, identifies criteria on which regulations to be benchmarked could be selected. Long day care regulations satisfy each of those criteria:

- the duplication between Commonwealth and State regulation is already identified as needlessly burdensome,
- the cost and availability of childcare centre services impacts on nearly all businesses and industries as well as having a significant productivity impact – for the parent in the short term, and for the child in the long-term,
- many of the regulatory frustrations encountered in long day care emerge largely because of the interaction (or rather the lack of it) within or across levels of government. Early childhood and parenting services are necessarily owned by the education system, the health system, and the community services system. The lack of coordination between those various regulation makers is at the heart of unnecessary regulatory burdens,
- inconsistent application of childcare regulation on the part of enforcement agency officers is a particular problem.

4. How should regulatory burden be measured?

In the long day care sector, the costs that constitute regulatory burden are generally not the fees or administration compliance costs so much as the economic inefficiency generated by regulation that needlessly adds cost to services or needlessly wastes time for operators.

We would assume that, speaking generally, the costs associated with these effects can't easily be benchmarked. We strongly agree with the Issues Paper that such inefficiencies are best addressed by proper quality regulatory impact assessments and by subsequent regulation reviews.

Nevertheless, reporting options might include the following in respect of long day care services:

- qualitative and quantitative indicators of regulatory burden for each jurisdiction;
- composite indicators of the relative performance of jurisdictions in minimising regulatory burden on long day care centres;
- information on differences in regulatory objectives and benefits to enable 'unnecessary' burdens to be identified from differences in the raw indicators or to qualify the comparisons;
- information on differences in regulation-making processes, legislation, agency coordination and administrative and enforcement procedures by which the sources of any measured 'unnecessary' burden can be identified.

We are not sure if a benchmarking exercise will be able to capture it but the key factor that we believe needs to be identified is the extent to which particular jurisdictions do not adhere to their own professed regulatory decision-making processes.

So far as we are aware, all jurisdictions claim to have rules of good rule-making expressed either in legislative or policy form.

So far as we are aware, no jurisdiction complies properly with those principles of regulatory decision-making.

That, in a nutshell, is the root of the regulatory burden problem.

5. Limitations in data, measurement and comparability

The type of benchmarking that we envision would be useful for long day care regulations would not in our opinion generate significant problems with either data, measurement or comparability. We believe the relevant information would be available, or could be estimated; that incremental costs could be estimated; and that the relevant childcare regulations are designed to produce similar outcomes.

6. Which indicators?

In our opinion, the key criteria for selecting a meaningful set of indicators are 'significance' and 'relevance'.

We are attracted to the idea of indicators that would measure the administrative cost burdens for individual long day care businesses as calculated by:

- identifying information obligations and their component activities;
- estimating the cost of each administrative activity in terms of:
 - unit costs, wage costs plus overhead for administration activities, or hourly cost for external service providers
 - time, hours required to complete the administrative activity
 - quantity, frequency that the activity must be completed for each year.

We support the notion that the chosen indicator should measure compliance costs in detail and at the level of the individual activities.

7. Business participation

Child Care New South Wales supports the idea that the Commission's consultation would benefit from the involvement of advisory groups.

Child Care New South Wales would be pleased to contribute to the work of an advisory group in the event that long day care services are selected as a priority for benchmarking.

8. Performance indicators that long day care centres would find most useful

In summary terms, the most useful indicators in our view would be:

1. What 'rules of good regulation-making' exist in each jurisdiction.
2. How those decision-making requirements are expressed – that is, in law or in policy.
3. How each jurisdiction complies or does not comply with its own stated decision-making processes.
4. An assessment of the quality of each jurisdiction's compliance. In particular, we would want to see indicators that succeed in getting beneath the superficial appearance of compliance.

Conclusion

Child Care New South Wales appreciates this opportunity to share our ideas with the Productivity Commission. We would of course be pleased to extend on any part or answer any questions the Commission may have.

For and on behalf of Child Care New South Wales

Mrs Lyn Connolly
President