

COMPLIANCE AND ENFORCEMENT

Chapter 22 Ways to achieve compliance and enforce legislation

Compliance with legislation is often addressed by setting out offences for breaches (that is, criminal liability). However, a range of options exist that help regulate behaviour and address non-compliance in different ways. The options include education initiatives, warnings, self-regulation, relying on or modifying existing civil remedies, pecuniary penalties, infringement offences, management bans, enforceable undertakings, and other civil orders.

Creating a fully developed compliance model that is effective in dealing with the many forms of non-compliance often requires a combination of options. The combination of options should form an effective system, and each option should be proportionate to the form of non-compliance it is intended to address. Officials should also consider who will monitor compliance with, and enforce, the legislation. In many circumstances, the role of achieving compliance and enforcement is given to an expert regulator. A regulator can take many forms.

This chapter, when read with [Chapters 24 - 26](#), will help identify which of the most common regulatory options for achieving compliance are available and in which circumstances they may be appropriately used. [Chapter 20](#) provides advice on the options for the form of the regulator.

Legal advisers and the Ministry of Justice should be consulted early in the development process if there is an intention to amend or create a new civil remedy or order, criminal offence, infringement offence, or pecuniary penalty.

Guidelines

22.1 How will the legislation be enforced?

The Government should not generally become involved in enforcing rules or otherwise regulating in an area where the rules can be reliably enforced by those who are subject to them.

Every Act has an administering department or ministry; however, consideration must be given to what role the Government will have in enforcing the legislation and whether regulation of the issues and conduct can be left to the individuals or groups concerned.

The Government's role will vary depending on what the Act sets out to do. An Act may grant legal rights or make use of existing rights that are left to the parties to a dispute to resolve (by the courts or otherwise) (see [Chapter 23](#)). At the other end of the spectrum is the criminal law, where the full weight of the government's powers are brought to bear on an individual through the investigation and prosecution of crime and the administration of sentences (see [Chapter 24](#)).

Legislation often provides for registration and discipline of professions, but the Government has little or no ongoing involvement in administering the Act—that is left to registration bodies and the profession concerned.

In general, the Government should have little involvement in areas where the reliance on private enforcement of legal rights and obligations is sufficient to address harm caused by non-compliance and provide sufficient deterrents (for example, where the legislation modifies common law rights within the existing framework, such as a sale of goods between commercial traders).

However, in many contexts, the private enforcement of legal rights and obligations will be insufficient. For example, the damages from a civil action may be an insufficient deterrent. This may be because loss is not an adequate measure of the harm caused by the conduct (eg, because the harm done is diffused) or because civil suits are not a realistic likelihood (eg, because of the costs of bring private actions or insufficient private benefit in doing so), or both. If the law will not reliably be enforced, then this can cause the regime to fail, which is worse than having no regulation at all.

In addition, if the context is complex, a wider range of compliance methods and more proactive approach may be needed. For example, a regime may involve education, guidance, licensing, authorisation, or approval functions. In this case, consideration should be given to the regulatory options needed for compliance and also to the role of a regulator, which could be the administering department or a specific entity (often a Crown entity—see [Chapter 20](#)).

22.2 If government enforcement is required, what are the most appropriate regulatory tools?

Regulatory options should be effective and efficient, workable in the circumstances that they are required to operate in, and appropriate in light of the nature of the conduct and potential harm they are intended to address.

All regulatory options included in legislation must be consistent with the purpose of that legislation. Some Acts are intended to prevent, deter, or punish certain behaviour. Other statutes are intended to protect the public or compensate those who have suffered loss. In some cases, legislation may be designed to provide a mechanism by which individuals can resolve their own disputes by granting civil rights of action or by providing for a scheme of self-regulation. In other cases, the legislation will be empowering (such as authorising local government to operate, and utilities to enter and acquire rights over private land).

If it is decided that the Government needs to monitor and enforce the legislation, the choice between enforcement options (for example criminal law, infringement offences, pecuniary penalties, injunctions, or management bans) must be based on a robust and transparent assessment of how appropriate the option is in relation to the purpose of the legislation and the particular circumstances and regulatory system in which it will operate. The relevant factors include:

- **The harm caused and the nature of the conduct involved**—The option must be appropriate in light of the conduct it relates to. For example, it will generally be inappropriate to use the criminal law to address matters relating to a simple breach of a commercial contract or a failure to pay a private debt. By contrast, conduct that involves deliberate and significant physical harm to a person should generally be subject to the criminal law.

- **Enforcement objective**—Will the option achieve the desired enforcement objective? For example, if deterrence is the primary objective, issuing a \$1,000 infringement notice to a large corporation may have little deterrent effect. If the objective is to compensate someone for loss or damage, criminal remedies will generally not be sufficient.
- **Practical considerations**—Is the option workable having regard to the circumstances in which it is intended to operate? For example, it would be impractical and not provide effective deterrence to require local authorities to pursue every instance of illegal parking through a criminal prosecution or a civil debt recovery processes. It's important here to consider the characteristics of the regulated group, what are the range of reasons for non-compliance and the incentives affecting behaviour, and design enforcement options accordingly.
- **Fairness considerations**—What are the characteristics of the regulated group—how homogenous are they? What is their ability to challenge unfair decisions? These considerations affect both what enforcement tools, or combination of tools, are likely to be appropriate (as well as effective) and the nature of the procedures and protections that are needed to ensure appropriate safeguarding of rights and interests (for example, the need for low-cost internal review processes—see [Chapter 28](#)).

22.3 If a regulator is required, what roles should it have?

The role, functions, and powers of a regulator should be linked to the purpose of the regime in which it operates.

Regulators are usually required to play different roles in complex regulatory regimes that use a number of regulatory options and require many actors.

Legislation establishing the role of a regulator should set out the regulator's functions, powers and, sometimes, objectives and how it is expected to perform them. These provisions should expressly link the roles of the regulator to the purpose of the regime it operates within.

If multiple regulators operate within a regime, the legislation needs to be designed with the relationship between the regulators in mind. This includes considering what might be required in legislation to ensure that the relationship operates effectively and to determine what can be left to non-legislative mechanisms or administrative co-operation.

A regulator may need a range of powers and tools to fulfil its role within the regime it operates within. Consideration should be given to the following matters and to the extent to which the legislation needs to provide for them:

- **Monitoring**—A regulator needs to understand the system that it operates within. This may mean it needs the ability to gather information, monitor trends and advise on changes that might be required. See [Chapter 21](#) on issues relating to monitoring regimes.

- **Compliance and enforcement**—A regulator should have available to it, and effectively deploy, a range of tools for achieving compliance in a range of situations. See the rest of the guidance in this chapter about designing enforcement systems, and [Chapters 23 to 26](#) for guidance on specific enforcement options.
- **Guidance**—A regulator may need to issue guidance to those regulated by the regime. Although this can often be done without a legislative basis, there may be reasons to make it clearly part of the regulator’s role. The nature and status of guidance should be appropriate to achieve the policy objective (for example, consideration should be given to whether it is legislative or administrative, and the consequences of reliance on, or failing to comply with, guidance).
- **Licensing, authorisations, or approval**—It may be appropriate for a regime to include an ability for the regulator to grant licences, authorisations, or approvals. See [Chapter 18](#) for guidance on statutory powers and decision making. Consideration should also be given to the practical, operational, and resourcing requirements of administering a licensing or approval scheme.
- **Transparency**—A regulator should carry out its role transparently (for example, by publishing its compliance strategy) and with regard to the costs as well as benefits of regulatory action.
- **Accountability**—There should be mechanisms to hold a regulator to account. A well-designed regulatory system will ensure that a regulator has the tools and powers it requires to fulfil its role and is accountable without disproportionately restricting the regulator in legislation. Consideration should be given to whether non-legislative or existing accountability mechanisms (for example, those in the [Crown Entities Act 2004](#)) can be relied on.